State of Iowa
1982

FORTY-FOURTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1982

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-

PERSONNEL
OF THE
DEPARTMENT OF JUSTICE

MAIN OFFICE

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
MARK E. SCHANTZ, 1/79-12/82 ..... Solicitor General
L.L.B., Yale University, 1968
BRENT R. APPEL, 1/79-2/82 ..... First Assistant Attorney General
J.D., University of California, 1977

WILLIAM C. ROACH, 1/79- ..... Administrator
ANN BAUSSERMAN, 1/79- ..... Administrative Ass't
KATHRYN R. FOREMAN, 6/80-10/81 ..... Administrative Ass't
KAREN A. REDMOND, 10/80- ..... Accountant
PATTI SAMPERS, 1/79-10/81 ..... Accountant
CLARENCE J. WEIHS, 1/79- ..... Administrative Ass't
SHELLEY C. JOHNSON, 11/81- ..... Administrative Ass't
JANICE K. PARKER, 9/82- ..... Legal Secretary
CYNTHIA GARNER, 10/81- ..... Receptionist

ADMINISTRATIVE LAW

HOWARD O. HAGEN, 2/79- ..... Division Head
J.D., University of Chicago, 1973
DAVID FORTNEY, 2/79-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1975
ALICE HYDE, 7/79-1/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
FRANK J. STORK, 5/80-8/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
LYNN M. WALDING, 7/81- ..... Ass't Attorney General
M.A., J.D., University of Iowa, 1981
MERLE W. FLEMING, 7/80- ..... Ass't Attorney General
J.D., University of Iowa, 1980
THERESA O. WEEG, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
JULIE F. POTTORFF, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
PATRICIA J. MC FARLAND, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
PHILIP E. STOFFREGEN, 8/82- ..... Ass't Attorney General
J.D., University of Iowa, 1977
SALLY HIGGINBOTTOM, 1/79- ..... Legal Secretary

AREA PROSECUTIONS

HAROLD A YOUNG, 7/75- ..... Division Head
J.D., Drake University, 1967
ROBERT J. BLINK, 8/79-8/81 ..... Ass't Attorney General
J.D., Drake University, 1975

SELWYN L. DALLYN, 3/80- ..... Ass't Attorney General
J.D., w/honors, University of Iowa, 1978
JAMES E. KIVI, 2/80- ..... Ass't Attorney General
J.D., University of Iowa, 1975
PAUL D. MILLER, 3/80- ..... Ass't Attorney General
J.D., University of Iowa, 1976
RICHARD L. RICHARDS, 6/77-8/82 ..... Ass't Attorney General
J.D., Drake University, 1977
RICHARD A. WILLIAMS, 7/75- ..... Spec. Ass't Attorney General
J.D., University of Iowa, 1971
MICHAEL E. SHEEHY, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1973
JAMES W. RAMEY, 10/81- ..... Ass't Attorney General
J.D., Drake University, 1975
ALFRED C. GRIER, 9/72- ..... Investigator/Pilot
SCOTT D. NEWHARD, 3/79- ..... Investigator
BILLIE J. EVANS, 11/79- ..... Legal Secretary

CIVIL RIGHTS

VICTORIA L. HERRING, 1/79- ..... Ass't Attorney General
J.D., Drake University, 1976
SUSAN JACOBS, 7/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SCOTT H. NICHOLS, 1/80- ..... Ass't Attorney General
J.D., University of Iowa, 1979

CONSUMER PROTECTION

DOUGLAS R. CARLSON, 6/67- ..... Division Head
J.D., Drake University, 1968
KATHRYN L. GRAF, 2/78- ..... Ass't Attorney General
J.D., Drake University, 1977
LINDA T. LOWE, 8/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CRAIG BRENNEISE, 8/79-12/82 ..... Ass't Attorney General
J.D., Drake University, 1979
FRANK E. THOMAS, 3/79- ..... Ass't Attorney General
J.D., Indiana University, 1974
TERESA D. ABBOTT, 5/78- ..... Investigator
CATHLEEN L. ANTILL, 8/78- ..... Investigator
EUGENE R. BATTANI, 5/77- ..... Investigator
ONITA S. MOHR, 4/80- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
ELIZABETH A. STANTON, 1/79- ..... Investigator
DEBBIE A. O'LEARY, 1/82- ..... Investigator
JANICE M. BLOES, 3/78- ..... Legal Secretary
CHERYL A. FREEMAN, 4/69- ..... Legal Secretary
MARILYN W. RAND, 10/69- ..... Legal Secretary
VALERIE L. MOOR, 7/76- ..... Legal Secretary
RUTH C. WALKER, 2/79- ..... Secretary

CRIMINAL APPEALS

RICHARD L. CLELAND, 4/79- ..... Spec. Ass't Attorney General, Division Head
J.D., University of Iowa, 1978
LONA J. HANSEN, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1976
THOMAS D. MC GRANE, 6/71- ..... Ass't Attorney General
J.D., University of Iowa, 1971
THOMAS N. MARTIN, 7/80-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOHN P. MESSINA, 1/80- ..... Ass't Attorney General
J.D., Drake University, 1979
ROXANN M. RYAN, 9/80- ..... Ass't Attorney General
J.D., University of Iowa, 1980
SHIRLEY ANN STEFFE, 9/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
MARCIA E. MASON, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
MICHAEL K. JORDAN, 1/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOSEPH P. WEEG, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
MARY J. BLINK, 6/81- ..... Ass't Attorney General
J.D., Drake University, 1981
STEVEN M. FORITANO, 8/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
TERESA M. BAUSTIAN, 4/81- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CHRISTY J. FISHER, 1/67- ..... Confidential Secretary
MELANIE L. RITCHEY, 6/77-11/82 ..... Secretary
CONNIE L. ANDERSON, 12/76- ..... Secretary
DEBRA J. SASSMAN, 11/82- ..... Legal Secretary
SHONNA K. BURNS, 5/81- ..... Secretary

ENVIRONMENTAL PROTECTION

ELIZABETH M. OSENBAUGH, 1/79- ..... Division Head
J.D., University of Iowa, 1971
ELIZA J. OVROM, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CLIFFORD E. PETERSON, 10/68- ..... Spec. Ass't Attorney General
J.D., State University of Iowa, 1951
JOHN P. SARCONE, 3/79- ..... Ass't Attorney General
J.D., Drake University, 1975
MICHAEL P. VALDE, 6/77-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1976
STEVEN G. NORBY, 11/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979

W. ALLAN KNIEP, 8/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
ROXANNE C. PETERSEN, 5/79- ..... Legal Secretary
DIANA TRIGGS, 9/79-4/81 ..... Legal Secretary
DONNA M. SUMMERS, 8/81- ..... Legal Secretary

FARM

TAM B. ORMISTON, 1/79- ..... Division Head
J.D., University of Iowa, 1974
TIMOTHY D. BENTON, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1977
NEIL D. HAMILTON, 6/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
KIM M. OLSON, 7/82- ..... Ass't Attorney General
J.D., Drake University, 1982
CHARLES G. RUTENBECK, 12/74- ..... Investigator
NANCY A. MILLER, 9/73- ..... Legal Secretary

HEALTH

BARBARA BENNETT, 10/78-7/81 ..... Ass't Attorney General
J.D., Creighton University, 1978
JEANINE FREEMAN, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
SUSAN B. BRAMMER, 7/81- ..... Ass't Attorney General
J.D., Wm. and Mary, 1978

INSURANCE

FRED M. HASKINS, 6/72- ..... Ass't Attorney General
J.D., University of Iowa, 1972

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coord.
J.D., University of Iowa, 1976
BRENDA K. JOHNSON, 12/79-3/82 ..... Legal Secretary
KAYE MILLER, 3/82-5/82 ..... Legal Secretary
CINDY S. WRIGHT, 5/82- ..... Legal Secretary

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- ..... Ass't Attorney General
J.D., University of Iowa, 1976

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- ..... Division Head
J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- ..... Ass't Attorney General
J.D., Drake University, 1974
GERALD A. KUEHN, 9/71- ..... Ass't Attorney General
J.D., Drake University, 1967
MARK R. SCHULING, 10/80- ..... Ass't Attorney General
J.D., University of Iowa, 1980

SOCIAL SERVICES

JOHN G. BLACK, 9/79-6/82 ..... Spec. Ass't Attorney General,
J.D., Northwestern University, 1969 Division Head
GORDON E. ALLEN, 8/82- ..... Spec. Ass't Attorney General,
J.D., University of Iowa, 1972 Division Head
JEAN DUNKLE, 10/75- ..... Ass't Attorney General
J.D., University of Iowa, 1975
JONATHAN GOLDEN, 7/79-1/83 ..... Ass't Attorney General
J.D., University of Iowa, 1979
MARK HAVERKAMP, 6/78- ..... Ass't Attorney General
J.D., Creighton, 1976
BRENT D. HEGE, 9/80- ..... Ass't Attorney General
J.D., Drake University, 1973
MARK HUNACEK, 7/82- ..... Ass't Attorney General
J.D., Drake University, 1981
ROBERT R. HUIBREGTSE, 6/75- ..... Ass't Attorney General
L.L.B., Drake University, 1963
PATRICIA M. HULTING, 1/81- ..... Ass't Attorney General
J.D., University of Iowa, 1975
ROBERT KEITH, 12/75-3/82 ..... Ass't Attorney General
J.D., University of Iowa
LAYNE M. LINDEBAK, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1979
BRUCE C. MC DONALD, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS J. MANN, JR., 1/80-12/82 ..... Ass't Attorney General
J.D., University of Iowa, 1974
JOHN R. MARTIN, 4/79- ..... Ass't General Attorney
J.D., University of Iowa, 1972
E. Dean Metz, 5/78- ..... Ass't General Attorney
L.L.B., Drake University, 1955
CANDY S. MORGAN, 9/79- ..... Ass't General Attorney
J.D., University of Iowa, 1973
DIANE C. MUNNS, 7/82- ..... Ass't General Attorney
J.D., Drake University, 1982
STEPHEN C. ROBINSON, 8/73- ..... Ass't General Attorney
L.L.B., Drake University, 1962
THOMAS E. HUDSON, 9/82-1/83 ..... Administrative Assistant
JANE A. ARTHUR, 10/76- ..... Legal Secretary

SPECIAL PROSECUTIONS

JOHN R. PERKINS, 12/72- ..... Division Head
J.D., University of Iowa, 1968
WILLIAM F. RAISCH, 7/74- ..... Ass't Attorney General
J.D., Drake University, 1974
GARY H. SWANSON, 4/72-1/83 ..... Ass't Attorney General
J.D., Drake University, 1964
WILLIAM T. NASSIF, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
DAVID H. MORSE, 3/78- ..... Investigator/Paralegal
ROBERT P. BRAMMER, 11/78- ..... Administrative Assistant
MAUREEN E. LARSON, 11/77- ..... Legal Secretary
MARSHA A. RAISCH, 5/79- ..... Legal Secretary

TORT CLAIMS

JOHN R. SCOTT, 9/80- ..... Spec. Ass't Attorney General, Division Head
J.D., University of Iowa, 1969
LARRY M. BLUMBERG, 6/71-7/81 ..... Ass't Attorney General
J.D., Drake University, 1971
THOMAS A. EVANS, JR., 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
PATRICK J. MC NULTY, 9/77-5/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
JAMES P. MUELLER, 7/79-2/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
JON K. SWANSON, 10/79-9/82 ..... Ass't Attorney General
J.D., University of Iowa, 1979
PATRICK J. HOPKINS, 3/82- ..... Ass't Attorney General
J.D., Creighton, 1975
ROBERT J. HUBER, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
KREG A. KAUFFMAN, 11/82- ..... Ass't Attorney General
J.D., University of Iowa, 1977
IRIS J. POST, 6/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
ULRICH "RICK" GROTH, 11/80-1/82 ..... Investigator
KAREN M. LIKENS, 8/77- ..... Investigator
CATHLEEN M. CREGER, 11/79-8/81 ..... Legal Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Secretary
KERI K. MILLER, 2/81-7/82 ..... Legal Secretary
MARCIA A. JACOBS, 8/82- ..... Legal Secretary
DANELIA I. ROBINSON, 8/82- ..... Legal Secretary

TRANSPORTATION

J. ERIC HEINTZ, 12/78- ..... Division Head
J.D., University of Iowa, 1971
ROBERT W. GOODWIN, 12/70-9/81 ..... Division Head
J.D., Drake University, 1967
JOHN W. BATY, 9/72- ..... Ass't Attorney General
J.D., Drake University, 1967
STEPHEN P. DUNDIS, 1/77- ..... Ass't Attorney General
J.D., University of Iowa, 1976
DAVID FERREE, 4/79-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
CRAIG M. GREGERSEN, 2/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
JAMES D. MILLER, 12/79-4/82 ..... Ass't Attorney General
J.D., Drake University, 1976
RICHARD E. MULL, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1977
LESTER A. PAFF, 1/78- ..... Ass't Attorney General
J.D., St. Louis University, 1973
ROBERT P. EWALD, 2/81- ..... Ass't Attorney General
J.D., Washburn University, 1980
MICHAEL C. FITZGERALD, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
SUSAN E. LAMB, 10/81- ..... Ass't Attorney General
J.D., Gonzaga University, 1981
MARJORIE A. LEEPER, 7/82- ..... Paralegal
MARY S. MC CONNELL, 7/82- ..... Paralegal
CARMEN C. MILLS, 7/82- ..... Paralegal

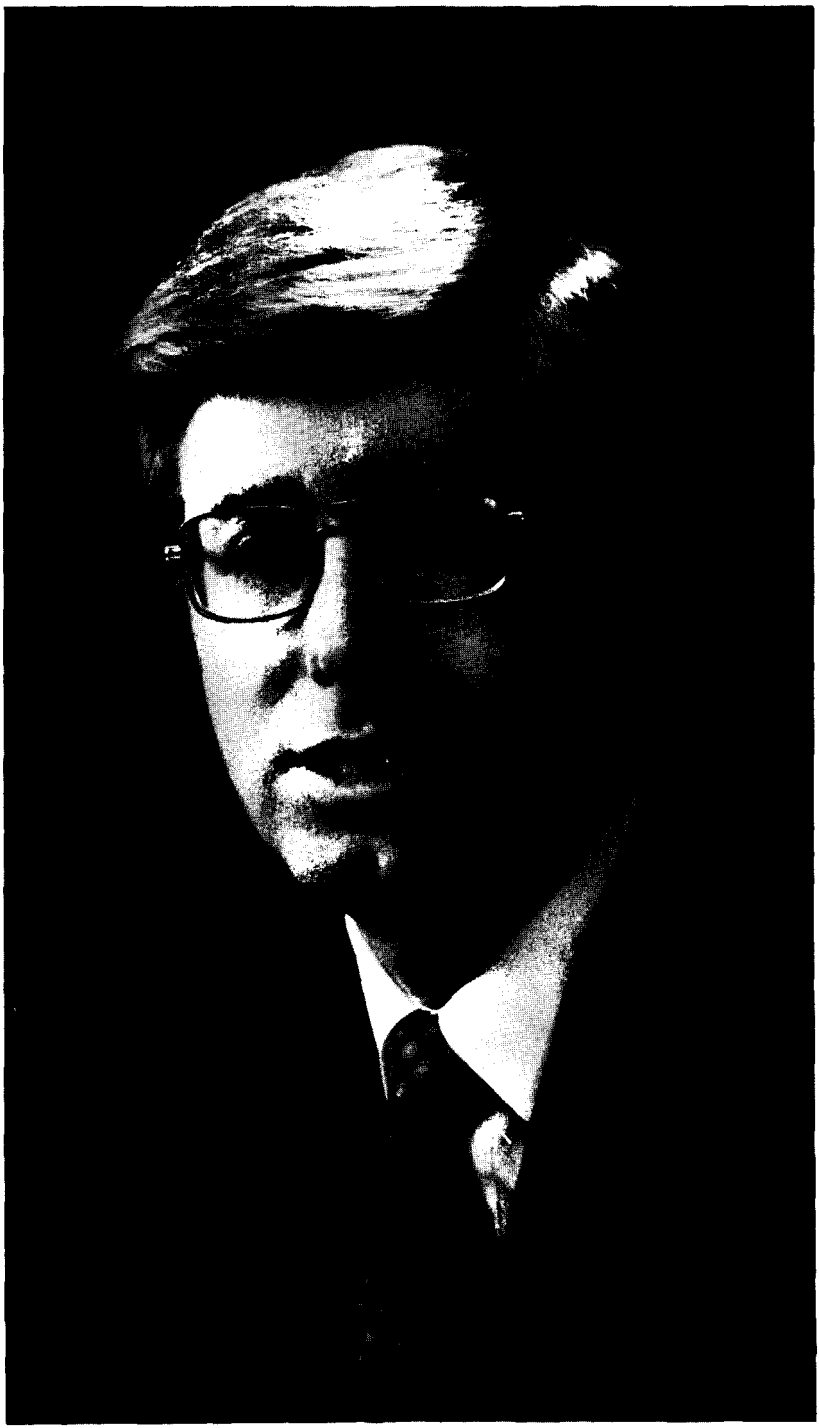
REPORT OF THE ATTORNEY GENERAL

November 23, 1983

The Honorable Terry E. Branstad
Governor of Iowa

Dear Governor Branstad:

In accordance with §§13.2(6) and 17.6, Code of Iowa, 1983, I am privileged to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.



ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS

Administrative Law Division

The Administrative Law Division of the Iowa Department of Justice was created in 1979. Responsibilities which had been undertaken by various staff members throughout the office and by the Finance, Education and Government sections were consolidated under the aegis of the new Administrative Law Division. This enables the Department of Justice to more effectively and efficiently represent its numerous and diverse state clients in similar areas of concern with procedural consistency. In particular, increasing awareness and impact of the Iowa Administrative Procedure Act, Iowa Code chapter 17A (1983), upon all agency action has resulted in a need for expertise in the rapidly expanding area of administrative law.

Thus, the Administrative Law Division provides legal services which include rendering legal advice, preparing formal and informal opinions, preparing and reviewing legal documents, participating in administrative hearings, rule drafting and defending or prosecuting litigated matters on behalf of 55 state agencies, including such agencies as the Auditor, the Department of Banking, the Department of Public Instruction, Iowa Public Television, the State Board of Accountancy, the State Board of Medical Examiners, the State Board of Regents and the Treasurer.

In addition to agency representation, inquiries to the Attorney General's office regarding county and city government operations, estate and escheat matters, bankruptcies, charitable trust and private foundations are referred to the Division for response. Responsibility for inquiries and interpretations concerning the state election laws and campaign finance are also assumed by the Division. Finally, the Division Director supervises generally the activities of the assistant attorneys general in the Health Division.

At the close of the 1981-82 biennium, there were 176 cases in litigation pending before the Iowa and United States District Courts and 12 cases on appeal before the Iowa Supreme Court (or Court of Appeals) and the Eighth Circuit Court of Appeals. During 1981-82, 102 cases were settled or reached judgment. Litigation has arisen in almost every area of the Division's responsibilities, although the majority of cases arise as a result of a petition for judicial review of state agency action.

The Administrative Law Division is responsible for preparation of formal and informal responses to requests for many Attorney General's opinions. While the majority of requests concern questions arising in the areas of banking and financial law, education and county government operations, and the effect of county home rule, opinions have been issued touching on such varied topics as the courts, public hospitals, open meetings, state officers and departments, official publications and municipalities and election issues.

During the 1981-82 biennium 135 formal opinions were issued from the Administrative Law Division. Over 1,000 informal opinion requests were responded to by letter or oral advice in 1981-82.

During 1981-82, attorneys from the Administrative Law Division were involved in representation of agencies conducting 193 administrative hearings, with legal advice being rendered almost daily on issues involving agency action. Depending on the needs of the particular agency, such representation ranged from advice on open meetings and administrative procedures to full participation in all stages of the hearing process.

Throughout 1981-82, as the Administrative Law Division increased its representation of clients, informal agency inquiries also increased. Although the inquiries are usually by informal telephone call, they require research, consultation and rapid response. Often the inquiry will require a more formal response, and a letter dispensing informal legal advice is prepared.

Approximately two hundred and fifty charitable trusts and private foundations file annual reports with the Department of Justice pursuant to federal regulations and those reports are processed and maintained by the Administrative Law Division. Pursuant to the Attorney General's supervisory powers over charitable trusts, *see* Iowa Code §633.303 (1981), the Division has been involved in several cases attempting to modify trust instruments. Escheat matters, and cases involving unclaimed property turned over to the State Treasurer's office, are handled by the Division. In addition, inquiries from the general public regarding charitable solicitations and estate and trust law are referred to the Division. During 1981-82, there were approximately eight inquiries monthly.

Area Prosecutions Division

The primary purpose of the Area Prosecutions Division is to assist county attorneys in especially difficult or technical cases, and in those cases where a conflict of interests precludes the county attorney from handling a prosecution.

The division is staffed by six general trial attorneys, three specialist attorneys, one investigator and one secretary. The specialists include one attorney assigned to prosecute crimes in penal institutions, one assigned to state tax prosecutions and a training/legal advisor for the Department of Public Safety. The specialist positions are funded by the departments of Social Services, Revenue and Public Safety, respectfully.

The case load of the division has steadily increased from the 94 cases opened in 1971-72. In 1973-74, 210 cases were opened; 357 in 1975-76; 426 in 1977-78; 462 in 1979-80 and 432 in 1981-82. The slight decrease in the number of cases handled in the last biennium reflects a policy change during the biennium which transferred responsibility for handling some prison-related matters to the Social Services Division in the office in order to adjust the case load of the specialist assigned to penal institutions.

While general requests for assistance from county attorneys continued to provide the majority of cases, the most notable accomplishment of the division has been in connection with the state penitentiary. Eleven convictions were secured in connection with two related murders which occurred at the Iowa State Penitentiary in 1981, and one member of the division has devoted over four months to conducting a grand jury investigation into allegations of corruption at that institution. This investigation was still in progress at the end of the biennium.

Civil Rights Division

The Civil Rights Division of the Attorney General's office is staffed with two Assistant Attorneys General. Their primary duties are to provide legal advice and assistance to the staff of the Commission, to litigate on the behalf of complainants in contested case proceedings before the Commission's hearing officers, and to litigate for the Commission in judicial review proceedings in the district court and upon appeal to the Iowa Supreme Court and Court of Appeals. In addition, they provide informal and formal Attorney General's opinions, participate in training sessions held by the Commission for its staff and throughout the state, and serve as general resource personnel for citizens of Iowa who are concerned about a possible deprivation of their civil rights.

Over the past two years, the Assistant Attorneys General have been greatly involved in the lessening of the backlog, contributing significantly to the closures of numerous civil rights complaints. In 1981 and 1982, 41 of the cases pending public hearing were settled in the course of pre-trial preparation. At the same time, the litigation activity of the Division was steady, with 13 cases taken to public hearing, of which 8 (61.5%) were successful. At the end of 1982, 16 cases remain in the Division's public hearing inventory.

The activity in the district and appellate courts was constant, as a result of the number of appeals on both procedural and substantive points arising out of the division's efforts in the public hearing arena. At the present time, 17 cases are pending in the district court, and over the past two years 9 have been settled or closed at that level. Forty-one cases have been decided in the district courts throughout the state with the Commission succeeding in 28 (68.3%) of these cases. The cases in the district court include original actions for injunctions pursuant to chapter 601A as well as appeals from the administrative processes of the Commission. An increasing amount of time at the district court level is being devoted to cases involving housing discrimination, as the Commission has the power to seek an *ex parte* injunction in that area. Further, despite the case of *Estabrook v. Iowa Civil Rights Commission*, 283 N.W.2d 306 (Iowa 1979), a significant portion of our district court appeals have been appealed from no probable cause or other administrative closure findings. In virtually all of these cases, the Commission's attorneys have been successful in defending the Commission's exercise of its discretion to close these cases.

The most significant activity with the respect to the continuing law of Iowa has been at the appellate court level. For the past two years, an increasing number of cases have been appealed by complainants, respondents and the Commission to the Supreme Court for its review of the case in light of the law of Iowa. Of these cases, 3 have been settled or dismissed prior to any decision, 16 cases have been decided and 9 cases remain pending before the appellate courts. Of the cases decided, a great number of them concerned the interface between the Iowa Administrative Procedure Act and chapter 601A and constructions by the court of the meaning of various procedural requirements. The remaining cases involve primarily matters of substantive import, calling for the court to construe chapter 601A and render its opinion as to significant matter of civil rights law.

Consumer Protection Division

The Consumer Protection Division of the Attorney General's Office enforces the *Iowa Consumer Fraud Act*, the *Iowa Business Opportunity Sales Act*, the *Iowa Subdivided Land Sales Act*, the *Iowa Trade School Act*, the *Iowa Door-to-Door Sales Act*, and other statutes designed for the protection of the consumer buying public of the state. Also, the provisions of the *Iowa Consumer Credit Code*, appoint the Attorney General as the Code's administrator and establishes a Consumer Credit Protection Bureau in the Attorney General's Office. The activities of this bureau are carried out by the staff of the Consumer Protection Division with assistance from the Administrative Law Division.

Currently, the Consumer Protection staff is composed of 17 full-time employees and one part-time employee. These 18 individuals consist of five attorneys, seven investigators, four secretaries, and two receptionists. The Division, through its volunteer program, usually has between three and five volunteer or intern "complaint handlers" working for the Division handling "nonfraud" types of consumer complaints.

The years 1981 and 1982 were very busy years for the Consumer Protection Division. The division's statistical figures for the 1981 and 1982 calendar years are:

1.	New Complaints Received	20,294
2.	Total Number of Complaints Worked On (Includes Some Complaints Carried Over from 1980)	24,735
3.	Complaints Closed	17,182
4.	Complaints Pending at End of 1982	7,553
5.	New Lawsuits Filed	23
6.	Total Lawsuits Worked On (Includes Lawsuits Carried Over from 1980)	51
7.	Lawsuits Closed	39
8.	Lawsuits Pending at End of 1982	22
9.	Monies Saved & Recovered for Complaints	$2,652,944.34
10.	Costs & Expenses Recovered for State	$ 47,408.95
11.	Attorney General Opinions Issued	17
12.	Investigative Subpoenas Issued	125
13.	Official Demands for Information Issued	27
14.	Formal Assurances of Voluntary Compliance Filed	21

In addition to statistical figures such as the above, the Consumer Protection Division engages in many programs of "preventive consumer protection," the impact of which cannot be readily measured. The fact that the Iowa Attorney General's Office has a very active Consumer Protection Division which will

mediate consumer problems, investigate complaints of deceptive advertising and sale practices, and file lawsuits where necessary undoubtedly has a great deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both the specific and the common schemes of fraud and the available remedies.

During 1981, the division's project to combat "business opportunity frauds" bore fruit when the Iowa Legislature passed the *Iowa Business Opportunity Sales Act*. This statute, which went into effect on July 1, 1981, requires companies seeking to engage in the sale of business opportunities to make a filing with the Securities Division of the Iowa Insurance Commission, to post a protective bond, if required; to obtain an advertising identification number before they advertise, solicit or sell in Iowa; and to provide prospective customers with a detailed "prospectus" type of disclosure statement. During the first year and one-half of the existence of this statute, the number of hard-core fraudulent business opportunity schemes sold in Iowa has dropped dramatically because of the efforts of the Securities Division and the Attorney General's Consumer Protection Division enforcing this statute.

In the area of interpreting and enforcing the *Iowa Consumer Credit Code*, the division has had a busy two years. During 1981 and 1982, the division handled 1,740 written complaints in the consumer credit code area as well as several lawsuits.

During the calendar years 1981 and 1982, the top ten areas that Iowans complained about were:

1.	Automobile Sales & Repair Problems	3,304
2.	Consumer Credit Code Complaints	1,740
3.	Mail Order Purchase & Refund Disputes	1,269
4.	Deceptive Advertising Complaints	1,129
5.	Heating & Air Conditioning Problems	1,072
6.	Health Spa & Weight Salon Complaints	1,037
7.	Magazine Sales & Service Disputes	769
8.	Fraudulent Business Opportunity Schemes	577
9.	Invoice & Billing Schemes	543
10.	Advance Fee Loan Finding Complaints	355

In 1981, the division was able to assist those Iowans that complained to it, 83.0% of the time, while in 1982 the division was able to assist 73.6% of complainants.

Criminal Appeals Division

The primary responsibility of the Criminal Appeals and Research Division is to represent the State of Iowa in (1) direct appeals in criminal cases; (2) certiorari proceedings related to criminal cases; (3) appeals in postconviction relief cases under chapter 663A; (4) applications for discretionary review; and (5) federal habeas corpus cases. This division is responsible also for advising the governor's office on extradition matters. During 1981-82, a staff member represented the Board of Parole, Board of Pharmacy Examiners, and the Bureau of Labor. The Criminal Appeals and Research Division supplies one attorney to sit on the Iowa Liquor Control Hearing Board. In addition, this division provides advice and research to county attorneys in criminal matters. There are twelve Assistant Attorneys General who do the work of this division.

In the years 1981-82, 1,224 criminal appeals were taken to the Iowa Supreme Court from Iowa District Courts. This represents an increase of 15.7% over the years 1979-80. Six hundred twenty-three (623) defendant-appellants' briefs were filed during 1981-82. This is an increase of 17% over the two previous years. This office filed 675 briefs, an increase of 43% over 1979-1980. The work of this division represents a significant portion of the workload of the Supreme Court. During this biennium 530 cases were disposed of without briefs as compared to 450 cases for two previous years.

Environmental Law Division

The Environmental Law Division represents the State in issues affecting the environment. The division represents the Department of Environmental Quality, Natural Resources Council, State Conservation Commission, Department of Soil Conservation and Energy Policy Council.

As of January 1, 1981, the division had 98 cases pending. During 1981 38 cases were opened and 62 were closed leaving 74 cases pending as of January 1, 1982. In 1982, 23 cases were opened and 33 were closed leaving 64 cases pending at the end of the biennium. During the biennium the division issued five formal Attorney General's Opinions and 18 letter opinions regarding state environmental and energy issues. In addition, the division has also provided advice concerning real property and administrative law.

During 1981 and 1982, the division handled 52 lawsuits for the Conservation Commission. Twenty-seven cases were officially closed during the biennium leaving 25 cases pending including two in the Iowa Supreme Court. The division also issued 60 title opinions and 44 title vesting certificates.

The division was involved in 63 lawsuits during the biennium concerning enforcement of chapter 455B, Water, Air and Waste Management. Among these, 29 involved water quality, 12 were air quality matters, 17 concerned solid waste matters, and five cases involved related matters. Forty-seven cases were closed leaving 16 cases pending. Some of the pending cases have been resolved by court decree but remain open while monitoring of compliance schedules and injunctive provisions continue.

At the start of the biennium there were 19 cases pending which involved the Natural Resources Council. Nine cases were filed in 1981 and 1982 and 15 were closed during the period. These cases involve judicial review of council orders and actions brought to enforce Council orders.

Fourteen cases involving the Department of Soil Conservation were handled during the biennium. There were eight cases pending including one before the Iowa Supreme Court. With the increasing emphasis on soil conservation measures in Iowa, we expect requests for legal advice from this agency to increase.

The Energy Policy Council was involved in one litigation matter during the biennium. The division reviews, as we do with all client agencies, all proposed rules, and provides legal assistance as needed.

The division also is working with Attorneys General from the States of Missouri and Nebraska in a lawsuit against various federal defendants in an action entitled *Missouri et al v. Andrews et al.* This case is pending in the United States District Court of Nebraska and involves complex questions concerning the role of federal officials in the marketing of water from the Oahe Reservoir on the Missouri River. The division has also filed comments on the United States Army Corps of Engineers Mitigation Plan for Fish and Wildlife losses along the Missouri River resulting from extensive channelization of the river.

Farm Division

The Farm Division, formed in the summer of 1979, has a staff of three attorneys, one investigator, and one secretary/investigator.

A major portion of the Farm Division's responsibility involves the enforcement of the Iowa Consumer Fraud Act as it relates to agricultural transactions. In 1981, a major suit charging Allied Mills with knowingly selling diseased swine was settled with cash recoveries to farmers of $250,000. Several other lawsuits have been filed totalling nearly one million dollars and involving two hundred investors against companies offering metal buildings and metal building distributorships.

The Farm Division has been involved in investigations and litigation concerning persons holding themselves out as loan brokers to farmers for advance fee ranging up to $10,000. An action was filed against a manufacturer of faulty grain drying equipment with claims of $504,000 for over 140 farmers. Fraud by livestock order buyers and dealers have resulted in two lawsuits.

The Farm Division and the Minnesota Attorney General's Office are currently involved in an investigation under consumer fraud laws which may be the largest ever negotiated under the state consumer fraud laws. Iowa farmers paid up to $3 million to the Minnesota company for seed stock to plant Jerusalem Artichokes. The Farm Division's investigation comes at a time when the company's plans call for selling farmers seed stock for 100,000 acres, or total sales of $20 million for the 1983 crop year. Negotiations are proceeding on that matter.

749 new complaint files, 511 closed complaint files, 423 pending complaint files.

Monies Saved and Recovered $999,330.16.

Fifteen Attorney General opinions were requested and issued during the biennium. These included significant opinions on the constitutionality of H.F. 874, the railroad bonding bill, the interpretations of chapter 172C, on corporate farming and the exceptions for non-farm use. An opinion was issued concerning the authority of the Iowa Department of Agriculture to regulate the storage and distribution of surplus cheese that was given away by the United States Department of Agriculture. Other opinions included areas with questions regarding drainage districts, fence laws and the agricultural exemptions in Iowa Code chapter 85.

In addition to these consumer fraud functions, the division is legal counsel to the Iowa Department of Agriculture, the Iowa Family Farm Development Authority, and the Fair Board. The division also works in conjunction with the Iowa Secretary of State in regulation under the Corporate or Partnership Farming Act and the Non-Resident Aliens Land Ownership Act.

The Farm Division plans to focus on and undertake litigation which will have an impact on illegal practices in agriculture. One of the primary problems in combating farm fraud has been the isolation of individual states. This past year Iowa was instrumental in organizing the Ag-Alert Network, a consortium of 32 states dedicated to concentrating on agricultural fraud. The organization provides a warning system, a flow of information and coordination on multi-state enforcement actions.

Health Division

Two Assistant Attorneys General are assigned to represent the Iowa State Department of Health. One assistant is primarily assigned to the Division of Health Facilities and the other to the Office for Health Planning and Development. These assistants provide daily advice and counsel, meet in conferences to resolve disputes between the Department and aggrieved persons, represent the Department in administrative hearings and litigation, prepare orders and decisions for division heads and the Commissioner of Public Health where appropriate, and render assistance and advice in the drafting of administrative rules and legislation.

In particular, the Assistant Attorney General assigned to the Division of Health Facilities is responsible for representing this division in disputes arising out of the division's regulatory authority. Iowa Code chapter 135C vests the Health Department with the responsibility for licensing and investigating complaints against health care facilities in the state. These facilities include residential care, intermediate care and skilled nursing facilities. There are 766 such facilities in the state with a combined licensed bed capacity of 42,826. The Health Facilities Division performs annual inspection of these facilities as well as complaint investigations. The assistant assigned to this division renders advice concerning these activities and represents the department at informal and formal administrative hearings which may occur as a result of the department's power to issue citations and levy civil fines whenever facilities are found to be in noncompliance with statutory or regulatory provisions.

In 1981 and 1982, over 850 complaints were received by the division concerning health care facilities, 71 formal citations were issued, and $21,600 in fines were assessed. Twenty-one informal hearings were conducted and four formal hearings were held; two petitions for judicial review arising from these hearings were filed.

The Assistant Attorney General assigned to the Office for Health Planning and Development primarily handles all legal problems concerned with the implementation and enforcement of Iowa's Certificate of Need Law and the department's administration of the federal 1122 program (Section 1122 of Title XI of the Social Security Act). In this capacity, the Assistant Attorney General serves as legal counsel to the Iowa Health Facilities Council, the five member body which makes initial certificate of need and §1122 reimbursement decisions. The Health Facilities Council meets monthly and hears anywhere from approximately five to twenty project requests for certificates of need and §1122 reimbursement. In 1981 and 1982, a total of 243 projects were reviewed involving total costs of $233,335,876; seven rehearings were heard before the Council, four appeals were taken to the Commissioner, and four requests for §1122 fair hearings were made. The assistant assigned to this division represents the Department in §1122 fair hearings as well as any court actions arising from these two programs. During the 1981-82 period, five cases in this area were closed either through settlement, dismissal or final court determination.

The assistants assigned to the Health Department also render advice to and represent other divisions of the Health Department, including but not limited to the Iowa Women, Infants and Children program, Emergency Medical Services, Public Health Nursing and Iowa's Homemaker Aid Program, and Central Administration. In addition these assistants in 1981-82 served as legal counsel to the Iowa Department of Substance Abuse and ten health licensing boards, providing general advice and representing IDSA and the boards in administrative hearings and court litigation. Furthermore, these assistants prepare formal opinions as assigned by the Attorney General and give frequent informal written and oral advice to members to the public. The assistants also speak at conferences and participate in panel discussions on appropriate topics as requested by their own agencies as well as outside groups and organizations.

Insurance Division

The insurance division is composed of one Assistant Attorney General. The division's most important function is rendering legal advice to the Insurance Department of Iowa. This function consumes at least seventy percent of the division's time. The legal questions presented are of a wide range but mostly involve construction of the statutes in Title XX of the Iowa Code dealing with insurance. Assistance is also given the Insurance Department in the preparation and drafting of administrative rules. The insurance division likewise handles litigation in which the Department is a party. In the biennium, the eight cases carried over from the previous biennium were resolved on terms favorable to the Department, while seven new cases were filed in the biennium. Three of those are still pending, with three of the four that were disposed of having resulted in victory in court.

A further function of the Assistant Attorney General assigned to the Insurance Department is fulfilling the time-consuming, but important, statutorily prescribed role of reviewing documents of insurance companies such as articles of incorporation and reinsurance treaties. The Assistant Attorney General reviewed at least sixty of these documents in the biennium. While not statutorily mandated, he also advises the Commissioner of Insurance on legal questions relating to insurance company mergers and acquisitions.

Public Safety Division

The Attorney General provides legal counsel to the Iowa Department of Public Safety pursuant to §80.1, The Code (1981), which requires that one employee of the Department be an attorney appointed by the Attorney General as an Assistant Attorney General. The Public Safety Division is housed within the Department of Public Safety.

The Public Safety Division is involved in a wide range of activities providing the Department with counsel and representation in civil matters. It reviews Department policies and practices and advises the Department as to the legality of and potential liability arising from such policies and practices. It assists the Department in the drafting of administrative rules. It reviews contracts and leases entered into by the Department and gives advice as to their legality and practicability. It represents the Department in suits seeking injunctive relief or which are in federal court. It assists the Tort Claims Division by preparing a report on all claims against the Department. It gives day-to-day advice in civil matters to line officers and cooperates with the Area Prosecutions Division and the various county attorneys in providing them with advice in criminal matters. The Public Safety Division also prosecutes the Department's complaints against liquor control licensees and retail beer permittees before the Iowa Beer and Liquor Control Department. It is also counsel to the Peace Officers Retirement, Accident and Disability System, and assists local authorities and citizens with inquiries on law enforcement issues.

Revenue Division

The Revenue Division advises and represents the Department of Revenue for the various taxes which are administered by the Department and which include income taxes, cigarette and tobacco taxes, motor fuel taxes, inheritance taxes, property taxes, hotel and motel local option taxes, freight line and equipment care taxes, real estate transfer taxes, railroad vehicle fuel taxes, and grain-handling taxes. The division also represents the Department in matters associated with gambling licenses. In addition, the Division drafts tax opinions of the Attorney General.

For the 1981-1982 biennium, the division participated in the resolution of informal proceedings, pursuant to Department of Revenue Rule 730 I.A.C. §7.11, for 284 protests filed by audited taxpayers. Also, the division handled 81 contested case proceedings before a Department hearing officer or the Director of Revenue. Of these 49 were won, 9 were lost, and 23 were settled.

In the biennium, 39 contested cases were disposed of before the State Board of Tax Review in which 31 were won, 2 were lost, and 6 were settled.

During this time period, 74 Iowa District Court cases were resolved by this division. Of these, 22 were won, 10 were lost, and 42 were settled. In addition, one federal district court case was disposed of favorably to the Department.

In March, 1981, a litigation agreement, approved by the Executive Council, was entered into between the Director of Revenue and the Attorney General. This agreement allowed inhouse Revenue Department attorneys to handle less complex and monetarily small court cases under the supervision of this division. For the biennium, 49 such cases were disposed of.

On the appellate court level, this division received decisions in 5 cases from the Iowa Supreme Court and one case from the Iowa Court of Appeals. Of these, 3 cases were won and 3 were lost. The most important of these cases were *American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140 (Iowa 1981) and *Fleur de Lis Motor Inns v. Bair*, 301 N.W.2d 685 (Iowa 1981). *American Home Products* involved the interpretation of the corporate income tax statutory language associated with the Iowa single factor sales apportionment formula as the formal affected foreign corporations shipping goods to Iowa destinations. The successful decision in this case resulted in the largest tax judgment (over $1.6 million) ever obtained in an Iowa court. In addition, millions of dollars in potential tax refunds were saved and millions more in additional tax revenue have been collected. *Fleur de Lis Motor Inns* upheld the validity of the local option hotel and motel tax imposed by Iowa Code chapter 422A (1981).

A total of 30 formal and letter opinions of the Attorney General were drafted and released. An additional 11 informal letters disposing of opinion requests were drafted and released. Also, this Division drafted or assisted the Department of Revenue in disposing of 20 petitions for declaratory rulings.

In addition to the above activities, countless hours were spent rendering advice to Department of Revenue personnel and responding to questions from other state officials and the public concerning the tax laws of this state.

As a result of this division's activities on behalf of the Department of Revenue during the biennium, $46,988,926 of tax revenue was collected, which is a record for a two-year period. In addition, the activities of this division have an indirect impact upon the collection of other tax revenue by the Department.

Social Services Division

The Attorney General performs legal services for the Department of Social Services pursuant to §13.6, Code of Iowa, requiring a Special Assistant Attorney General to serve in such capacity. In addition, there are eight full-time and two half-time Assistant Attorneys General assigned to the work of this department.

Among the services which these attorneys provide to the Department of Social Services are (1) defending suits brought against the Department of Social Services, commissioner or employees of the department in state and federal courts, including prisoner litigation; (2) representing the State of Iowa and Iowa Department of Social Services before the Iowa Supreme Court in matters such as juvenile court cases which had been handled by the county attorneys at the district court levels; (3) representing the department in all matters involving the mental health and correctional state institutions; (4) representing the department in appeals to the district courts from administrative hearings; (5) consultations on a daily basis with respect to statutes, judicial decisions, policy and state and federal regulations; (6) advising with regard to proposed legislation, manual materials, and regulations; (7) inspecting and approving contracts and leases, and handling real estate matters involving the department; (8) researching and preparing drafts of proposed Attorney General opinions; and (9) representing the claimant, Department of Social Services, in all estates of decedents and conservatorships in which claims have been filed seeking reimbursement of medical assistance and in connection with winding up the trust division of the department.

Following is a list of the number of cases closed on this office's docket over the last two years (excluding Child Support Recovery cases):

Eighth Circuit Court of Appeals	14
United States District Courts	165
Iowa District Courts	271
Iowa Supreme Court	93
Miscellaneous Tribunals	6

Monies in which this office assisted in recovering for the State of Iowa during the last biennium (excluding Child Support Recovery) are:

Medical Subrogation	$ 713,948
Probate	18,715
Miscellaneous	174,559
TOTAL	907,222

Authority is vested in chapter 252B, Code of Iowa, for the Attorney General to perform legal services for the Child Support Recovery Unit, a division of the Department of Social Services. The Attorney General assists in training the county attorneys and assistant county attorneys charged with prosecuting child support cases. This work includes: (1) conducting training seminars; (2) drafting form pleadings; (3) handling all appeals; and (4) prosecuting special cases. Five Assistant Attorneys General located throughout the state carry a child support case load. State child support collections by the Department of Social Services, principally from the absent parents of welfare recipients, were 30.9 million dollars.

Special Prosecutions Division

The Special Prosecution Division's primary activities are enforcing chapter 553, Code of Iowa (Iowa Competition Law) and prosecuting violations of chapter 502, Code of Iowa (Iowa Uniform Securities Act). Occasionally, the section will assist other divisions in the office with unique cases which may involve some other type of economic crime.

The section investigates and prosecutes civil and criminal violations of the Iowa Competition Law, as well as certain types of civil actions for violations of federal antitrust laws.

Substantive areas of antitrust investigation include price fixing, tie-ins, requirement contracts, resale price maintenance, customer or territorial allocations, and bid rigging.

A variety of methods are available in this antitrust enforcement effort. These include criminal prosecutions and actions for injunctions, civil penalties, damages incurred by the state in its proprietary capacity or *parens patriae* actions in federal court for violations of federal antitrust laws on behalf of the citizens of Iowa. The section has also gone to specific state regulatory agencies and asked for

the adoption of pro-competitive administrative rules, or to seek a halt to anticompetitive practices of the industry regulated.

The section's enforcement of the securities effort involves investigating securities violations in cooperation with the Securities Division of the Iowa Insurance Commissioner's office. The investigation may lead to the Special Prosecutions section filing and prosecuting criminal charges, or bringing a civil action seeking an injunction and/or receiver on behalf of the Superintendent of Securities.

In addition to these enforcement efforts, the Special Prosecutions Section writes opinions on antitrust matters and consults with other state agencies concerning anticompetitive problems they may be facing.

Tort Claims Division

The Tort Claims Division is staffed with five attorneys, two secretaries and one investigator. The division provides the State with legal representation in tort litigation. In addition, the division is charged with the investigation of all Administrative Claims made to the State Appeal Board, lends legal advice to state agencies, and represents state agencies in administrative and court hearings.

Claims handled by the division fall into three basic categories: general, tort and county indemnification fund. In calendar year 1982, the division investigated and made recommendations to the Appeals Board concerning 990 claims with an aggregate value of over $400,000,000.

During the same year, the Tort Claims Division was engaged in defending 140 tort lawsuits from the administrative level through the Supreme Court. The spectrum of litigation ranged from small claims to claims involving several million dollars. Approximately forty percent of the case load involved the representation of agencies and institutions providing medical care and services. In addition, the division defended 122 workers compensation cases and represented the State of Iowa in connection with litigation involving the Second Injury Fund.

The division also provides legal counsel to the State Appeal Board, the Iowa Industrial Commissioner, as well as other agencies so as to assist the agencies in the provision of public services.

Department of Transportation Division

The Attorney General provides legal services to the Iowa Department of Transportation. The current legal staff includes nine attorneys, five legal assistants, and seven clerical staff persons. The legal staff represents the department in all litigation involving the department. This includes condemnation appeals, tort claims, contract disputes, drivers license appeals, declaratory rulings and injunctions. The legal staff also represents the department at administrative hearings, including drivers license, dealers license and inspection station hearings.

The legal staff also provides various types of legal advice to the department. The staff provides legal opinions to the Department of Transportation Commissioners, the Director of Transportation, and all divisions of the department. The staff reviews proposed legislative programs and aids in the preparation of rules and regulations. The staff also examines and approves all contracts, agreements, assessments, and miscellaneous documents for proper legal requirements. The staff also prepares Attorney General Opinions dealing with transportation-related matters.

The legal staff's current case load is in four areas; tort claims, condemnation appeals, drivers license, and miscellaneous. The current pending case load involves three hundred twenty-six cases in the Iowa State and Federal Courts. In calendar year 1982, twenty-seven new tort claims were filed against the department, and eighteen were disposed of, representing a savings of approximately $13,000,000. Sixteen condemnation appeals were filed and eighteen cases disposed of representing a savings of nearly $12,000,000. The staff also disposed of fifty-six miscellaneous cases at a savings of approximately $750,000. In addition, the legal staff also represented the department at nearly nine hundred administrative hearings.

State of Iowa
1982

FORTY-FOURTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1982

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-

PERSONNEL
OF THE
DEPARTMENT OF JUSTICE

MAIN OFFICE

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
MARK E. SCHANTZ, 1/79-12/82 ..... Solicitor General
L.L.B., Yale University, 1968
BRENT R. APPEL, 1/79-2/82 ..... First Assistant Attorney General
J.D., University of California, 1977

WILLIAM C. ROACH, 1/79- ..... Administrator
ANN BAUSSERMAN, 1/79- ..... Administrative Ass't
KATHRYN R. FOREMAN, 6/80-10/81 ..... Administrative Ass't
KAREN A. REDMOND, 10/80- ..... Accountant
PATTI SAMPERS, 1/79-10/81 ..... Accountant
CLARENCE J. WEIHS, 1/79- ..... Administrative Ass't
SHELLEY C. JOHNSON, 11/81- ..... Administrative Ass't
JANICE K. PARKER, 9/82- ..... Legal Secretary
CYNTHIA GARNER, 10/81- ..... Receptionist

ADMINISTRATIVE LAW

HOWARD O. HAGEN, 2/79- ..... Division Head
J.D., University of Chicago, 1973
DAVID FORTNEY, 2/79-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1975
ALICE HYDE, 7/79-1/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
FRANK J. STORK, 5/80-8/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
LYNN M. WALDING, 7/81- ..... Ass't Attorney General
M.A., J.D., University of Iowa, 1981
MERLE W. FLEMING, 7/80- ..... Ass't Attorney General
J.D., University of Iowa, 1980
THERESA O. WEEG, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
JULIE F. POTTORFF, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
PATRICIA J. MC FARLAND, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
PHILIP E. STOFFREGEN, 8/82- ..... Ass't Attorney General
J.D., University of Iowa, 1977
SALLY HIGGINBOTTOM, 1/79- ..... Legal Secretary

AREA PROSECUTIONS

HAROLD A YOUNG, 7/75- ..... Division Head
J.D., Drake University, 1967
ROBERT J. BLINK, 8/79-8/81 ..... Ass't Attorney General
J.D., Drake University, 1975

SELWYN L. DALLYN, 3/80- ..... Ass't Attorney General
J.D., w/honors, University of Iowa, 1978
JAMES E. KIVI, 2/80- ..... Ass't Attorney General
J.D., University of Iowa, 1975
PAUL D. MILLER, 3/80- ..... Ass't Attorney General
J.D., University of Iowa, 1976
RICHARD L. RICHARDS, 6/77-8/82 ..... Ass't Attorney General
J.D., Drake University, 1977
RICHARD A. WILLIAMS, 7/75- ..... Spec. Ass't Attorney General
J.D., University of Iowa, 1971
MICHAEL E. SHEEHY, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1973
JAMES W. RAMEY, 10/81- ..... Ass't Attorney General
J.D., Drake University, 1975
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SCOTT D. NEWHARD, 3/79- ..... Investigator
BILLIE J. EVANS, 11/79- ..... Legal Secretary

CIVIL RIGHTS

VICTORIA L. HERRING, 1/79- ..... Ass't Attorney General
J.D., Drake University, 1976
SUSAN JACOBS, 7/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SCOTT H. NICHOLS, 1/80- ..... Ass't Attorney General
J.D., University of Iowa, 1979

CONSUMER PROTECTION

DOUGLAS R. CARLSON, 6/67- ..... Division Head
J.D., Drake University, 1968
KATHRYN L. GRAF, 2/78- ..... Ass't Attorney General
J.D., Drake University, 1977
LINDA T. LOWE, 8/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CRAIG BRENNEISE, 8/79-12/82 ..... Ass't Attorney General
J.D., Drake University, 1979
FRANK E. THOMAS, 3/79- ..... Ass't Attorney General
J.D., Indiana University, 1974
TERESA D. ABBOTT, 5/78- ..... Investigator
CATHLEEN L. ANTILL, 8/78- ..... Investigator
EUGENE R. BATTANI, 5/77- ..... Investigator
ONITA S. MOHR, 4/80- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
ELIZABETH A. STANTON, 1/79- ..... Investigator
DEBBIE A. O'LEARY, 1/82- ..... Investigator
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CHERYL A. FREEMAN, 4/69- ..... Legal Secretary
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VALERIE L. MOOR, 7/76- ..... Legal Secretary
RUTH C. WALKER, 2/79- ..... Secretary

CRIMINAL APPEALS

RICHARD L. CLELAND, 4/79- ..... Spec. Ass't Attorney General, Division Head
J.D., University of Iowa, 1978
LONA J. HANSEN, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1976
THOMAS D. MC GRANE, 6/71- ..... Ass't Attorney General
J.D., University of Iowa, 1971
THOMAS N. MARTIN, 7/80-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOHN P. MESSINA, 1/80- ..... Ass't Attorney General
J.D., Drake University, 1979
ROXANN M. RYAN, 9/80- ..... Ass't Attorney General
J.D., University of Iowa, 1980
SHIRLEY ANN STEFFE, 9/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
MARCIA E. MASON, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
MICHAEL K. JORDAN, 1/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOSEPH P. WEEG, 10/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
MARY J. BLINK, 6/81- ..... Ass't Attorney General
J.D., Drake University, 1981
STEVEN M. FORITANO, 8/81- ..... Ass't Attorney General
J.D., University of Iowa, 1981
TERESA M. BAUSTIAN, 4/81- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CHRISTY J. FISHER, 1/67- ..... Confidential Secretary
MELANIE L. RITCHEY, 6/77-11/82 ..... Secretary
CONNIE L. ANDERSON, 12/76- ..... Secretary
DEBRA J. SASSMAN, 11/82- ..... Legal Secretary
SHONNA K. BURNS, 5/81- ..... Secretary

ENVIRONMENTAL PROTECTION

ELIZABETH M. OSENBAUGH, 1/79- ..... Division Head
J.D., University of Iowa, 1971
ELIZA J. OVROM, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CLIFFORD E. PETERSON, 10/68- ..... Spec. Ass't Attorney General
J.D., State University of Iowa, 1951
JOHN P. SARCONE, 3/79- ..... Ass't Attorney General
J.D., Drake University, 1975
MICHAEL P. VALDE, 6/77-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1976
STEVEN G. NORBY, 11/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979

W. ALLAN KNIEP, 8/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
ROXANNE C. PETERSEN, 5/79- ..... Legal Secretary
DIANA TRIGGS, 9/79-4/81 ..... Legal Secretary
DONNA M. SUMMERS, 8/81- ..... Legal Secretary

FARM

TAM B. ORMISTON, 1/79- ..... Division Head
J.D., University of Iowa, 1974
TIMOTHY D. BENTON, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1977
NEIL D. HAMILTON, 6/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
KIM M. OLSON, 7/82- ..... Ass't Attorney General
J.D., Drake University, 1982
CHARLES G. RUTENBECK, 12/74- ..... Investigator
NANCY A. MILLER, 9/73- ..... Legal Secretary

HEALTH

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J.D., Creighton University, 1978
JEANINE FREEMAN, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
SUSAN B. BRAMMER, 7/81- ..... Ass't Attorney General
J.D., Wm. and Mary, 1978

INSURANCE

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J.D., University of Iowa, 1972

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J.D., University of Iowa, 1976
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J.D., Drake University, 1967
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J.D., University of Iowa, 1980

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J.D., Northwestern University, 1969 Division Head
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J.D., University of Iowa, 1972 Division Head
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J.D., University of Iowa, 1975
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J.D., University of Iowa, 1979
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J.D., Creighton, 1976
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J.D., Drake University, 1973
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J.D., Drake University, 1981
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J.D., University of Iowa
LAYNE M. LINDEBAK, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1979
BRUCE C. MC DONALD, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS J. MANN, JR., 1/80-12/82 ..... Ass't Attorney General
J.D., University of Iowa, 1974
JOHN R. MARTIN, 4/79- ..... Ass't General Attorney
J.D., University of Iowa, 1972
E. Dean Metz, 5/78- ..... Ass't General Attorney
L.L.B., Drake University, 1955
CANDY S. MORGAN, 9/79- ..... Ass't General Attorney
J.D., University of Iowa, 1973
DIANE C. MUNNS, 7/82- ..... Ass't General Attorney
J.D., Drake University, 1982
STEPHEN C. ROBINSON, 8/73- ..... Ass't General Attorney
L.L.B., Drake University, 1962
THOMAS E. HUDSON, 9/82-1/83 ..... Administrative Assistant
JANE A. ARTHUR, 10/76- ..... Legal Secretary

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J.D., Drake University, 1974
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J.D., Drake University, 1964
WILLIAM T. NASSIF, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
DAVID H. MORSE, 3/78- ..... Investigator/Paralegal
ROBERT P. BRAMMER, 11/78- ..... Administrative Assistant
MAUREEN E. LARSON, 11/77- ..... Legal Secretary
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TORT CLAIMS

JOHN R. SCOTT, 9/80- ..... Spec. Ass't Attorney General, Division Head
J.D., University of Iowa, 1969
LARRY M. BLUMBERG, 6/71-7/81 ..... Ass't Attorney General
J.D., Drake University, 1971
THOMAS A. EVANS, JR., 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
PATRICK J. MC NULTY, 9/77-5/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
JAMES P. MUELLER, 7/79-2/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
JON K. SWANSON, 10/79-9/82 ..... Ass't Attorney General
J.D., University of Iowa, 1979
PATRICK J. HOPKINS, 3/82- ..... Ass't Attorney General
J.D., Creighton, 1975
ROBERT J. HUBER, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
KREG A. KAUFFMAN, 11/82- ..... Ass't Attorney General
J.D., University of Iowa, 1977
IRIS J. POST, 6/81- ..... Ass't Attorney General
J.D., University of Iowa, 1980
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KAREN M. LIKENS, 8/77- ..... Investigator
CATHLEEN M. CREGER, 11/79-8/81 ..... Legal Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Secretary
KERI K. MILLER, 2/81-7/82 ..... Legal Secretary
MARCIA A. JACOBS, 8/82- ..... Legal Secretary
DANELIA I. ROBINSON, 8/82- ..... Legal Secretary

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J.D., Drake University, 1967
JOHN W. BATY, 9/72- ..... Ass't Attorney General
J.D., Drake University, 1967
STEPHEN P. DUNDIS, 1/77- ..... Ass't Attorney General
J.D., University of Iowa, 1976
DAVID FERREE, 4/79-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
CRAIG M. GREGERSEN, 2/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
JAMES D. MILLER, 12/79-4/82 ..... Ass't Attorney General
J.D., Drake University, 1976
RICHARD E. MULL, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1977
LESTER A. PAFF, 1/78- ..... Ass't Attorney General
J.D., St. Louis University, 1973
ROBERT P. EWALD, 2/81- ..... Ass't Attorney General
J.D., Washburn University, 1980
MICHAEL C. FITZGERALD, 7/82- ..... Ass't Attorney General
J.D., University of Iowa, 1982
SUSAN E. LAMB, 10/81- ..... Ass't Attorney General
J.D., Gonzaga University, 1981
MARJORIE A. LEEPER, 7/82- ..... Paralegal
MARY S. MC CONNELL, 7/82- ..... Paralegal
CARMEN C. MILLS, 7/82- ..... Paralegal

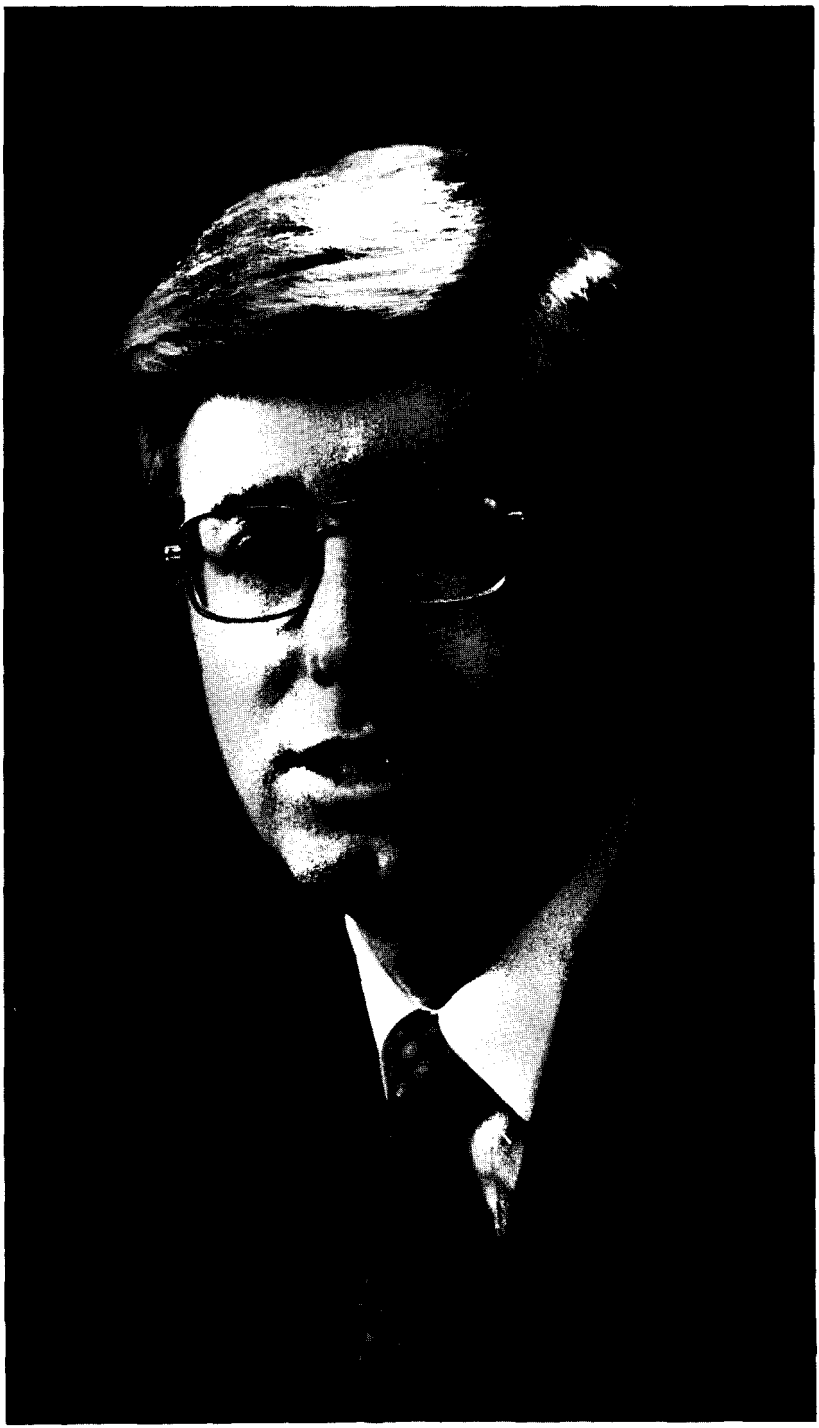
REPORT OF THE ATTORNEY GENERAL

November 23, 1983

The Honorable Terry E. Branstad
Governor of Iowa

Dear Governor Branstad:

In accordance with §§13.2(6) and 17.6, Code of Iowa, 1983, I am privileged to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.



ATTORNEY GENERAL OPINIONS

JANUARY 1981
TO
DECEMBER 1982

JANUARY 1981

January 8, 1981

JUVENILE LAW: The authority of the juvenile court referee. Ch. 231, §§231.2, 231.3, The Code 1979; chs 232 and 600A, The Code 1979. The authority of the juvenile court referee is limited to fact-finding in cases or class of cases arising under chs. 232 or 600A as directed by the juvenile judge. A telephonic procedure would allow the issuance of orders by a judge to carry into effect the juvenile court referee's findings of fact. (Hege to Mullins, State Representative, 1/8/81) #81-1-1

The Honorable Sue Mullins, State Representative: You have requested an opinion concerning the authority of a juvenile referee to hear and adjudicate certain procedures required under ch. 232, The Code 1979.

Specifically, you have asked if a juvenile referee may:

1. Hear and adjudicate questions on shelter care and detention, Section 232.44, The Code 1979, and

2. Hear and adjudicate questions on modification of dispositional orders, Section 232.54, The Code 1979.

The juvenile court referee is a creation of statute and is provided for in ch. 231, The Code 1979.

Section 231.2 sets forth the make-up of the juvenile court. It provides:

> 231.2 How constituted. The juvenile court of each county shall be constituted as follows:
>
> 1. Of the judges of the district court.
>
> 2. Of the district associate judges if and as long as so designated by the chief judge of the district.

It should be noted that the position of the referee is not included in this provision. The reasonable conclusion is that the referee, though statutorily provided for in §231.3, does not constitute the juvenile court. Further, the definition of juvenile court as established under ch 231. Sections 232.2(8) and 600A.2(15), The Code 1979.

The creation of the position of juvenile court referee is found in §231.3, The Code 1979. The position is appointive, as set out in the second unnumbered paragraph of that section.

> The judge of the juvenile court may appoint a referee in juvenile court proceedings. The referee shall be qualified for his or her duties by training which includes being a licensed attorney and by experience and shall hold office at the pleasure of the judge. The compensation of the referee shall be fixed by the judge.

As a creation of statute, the referee has only that power and authority provided for by the statute. Section 231.3, unnumbered paragraph two, limits the referee's power to those cases wherein:

> The judge may direct that any case or class of cases arising under chapter 232 or chapter 600A shall be heard in the first instance by the referee in the manner provided for the hearing of cases by the court.

This grant of authority encompasses two limitations. First, the referee may only hear matters arising under chs. 232 and 600A. Secondly, the referee may hear only those "cases or class of cases" as the judge may direct.

This statutory scheme limits the referee not only to the types of cases that may be heard, but also as to the action the referee may take in a specific proceeding. Section 231.3, unnumbered paragraph three, states:

> Upon the conclusion of a hearing held as provided herein, the referee shall transmit to the judge findings of fact. Notice of the findings of fact of the referee, together with a statement concerning the right to a rehearing, shall be given to the parties to the proceeding heard by the referee, including the parents, guardian or custodian of a minor, and to any other interested person as the court may direct. This notice may be given orally at the hearing, or by certified mail or other service as directed by the court.

This provision mandates the referee to "transmit to the judge findings of fact". There is no authority granted for the referee to issue orders or judgments and decrees.

Finally, §231.3 allows a hearing procedure of the referee's findings of fact before the juvenile judge.

> The parties to a proceeding heard before the referee shall be entitled to a rehearing by the judge of the juvenile court if requested within seven days after receiving notice of the findings of fact of the referee. In the interest of justice, the court may allow a rehearing at any time. If a rehearing is not requested, the court may enter any appropriate order based upon the referee's findings of fact.

Section 231.3, unnumbered paragraph four, The Code 1979.

This paragraph further emphasizes that only "the court" may issue an order based upon the referee's findings of fact.

The foregoing analysis of the power of the referee dictates several ramifications for your question of "the feasibility of transferring responsibility for shelter and detention hearings and for emergency modifications or temporary removal to juvenile referees... "

Section 231.3, The Code 1979, would allow the referee to conduct any hearing or procedure under chs 232 or 600A as long as directed by the juvenile judge to do so. The statute, by its own terms, would preclude the referee from issuing an order based upon the hearing. For instance, the referee could conduct the detention hearing, §232.44, but any order mandating detention must be issued by the court, i.e., district court judge, juvenile judge or district associate judge so designated. Similarly, a referee could conduct hearings for temporary removal, §232.95, or emergency modification of dispositional orders, §§232.54, 232.103, but could not issue orders pursuant to the findings of fact arising out of the hearing.

Recognizing the impact of the foregoing upon your concern for the unavailability of juvenile judges in rural areas, we would propose the following process to satisfy the statutory language and realities of juvenile court practice in rural areas.

Initially, the juvenile court judge should direct which cases or types of proceedings the referee is authorized to conduct under chs. 232 and 600A. Any proceeding sought to be initiated should follow the requirements of chs 232 or 600A, with the referee conducting the hearing in lieu of the juvenile judge. After the hearing, the referee should determine the findings of fact, although the findings may not be immediately reduced to writing. If the referee's findings indicate the need for an order to carry out its terms (detention order, temporary removal order, order modifying disposition), the referee shall immediately initiate a telephone conference with the juvenile judge. In this conference, the referee shall transmit the findings of fact and may request the judge to issue an order based upon those findings. The order from the judge may be verbally issued to the referee or transcribed over the phone by the judges to the court reporter. In the case in which either the referee's findings are verbally issued or the judge's order is verbally issued, either or both should be reduced to writing and filed the next business day.

If any of the parties to the proceeding desire a rehearing of the findings of fact or the order issued, they have a right to said rehearing by the judge if requested within seven days of receiving notice of the findings of fact. Section 231.3, unnumbered paragraph four, The Code 1979.

While this telephonic procedure is neither mandated nor precluded by ch. 231, it should comply with the restrictions on the referee's authority and meet the needs of rural areas occasioned by the unavailability of the juvenile judge.

In summary, §231.3 provides for the appointment of a referee to preside over certain cases or class of cases arising under chs. 232 and 600A as directed by the juvenile judge. The referee may hear and make findings of fact in the first instance, with a right to rehearing by the juvenile judge upon request of a party within seven days of notice of the referee's findings. The referee is limited in authority to adjudicating facts and may not issue orders or judgments and decrees in cases. However, the telephonic procedure outlined above should allow for the issuance of orders by the juvenile court when they are necessary to carry into effect the terms of the referee's findings of fact.

January 19, 1981

AGING COMMISSION: Care Review Committees; §135C.25, The Code 1979; The Iowa Commission on Aging may appoint members of care review committees for health care facilities within thirty days of notification of a vacancy within a facility's committee. The care review committee is not a governing body and is not subject to the Iowa open meetings law. (Morgan to Bowles, Commission on the Aging, 1/19/81) #81-1-2(L)

January 19, 1981

IOWA DEPARTMENT OF TRANSPORTATION: Enforcement Officers; §§324.76, 80.18, 321.477, The Code 1979. The law does not require DOT enforcement officers to be provided with handguns or side arms rather than shotguns. (Goodwin to Connors, 1/19/81) #81-1-3(L)

January 19, 1981

PUBLIC RECORDS: Merit Employment Department. Sections 19A.15, 68A.2, 68A.7(11), The Code 1979. Pursuant to §68A.2, all records in the possession of the Merit Employment Department are available for public examination and

copying, *unless* some other provision in the Code expressly limits such right or requires a record to be kept secret or confidential. Sections 19A.15 and 68A.7(11) do provide exemptions from the provisions of §68A.2. Even if §§19A.15 and 68A.7(11) do not apply to a specific record in the possession of the Department, §68A.8 sets forth a procedure by which examination (including copying) of the record may be restrained. Employment applications are not personnel records under §68A.7(11). Personal information in employee personnel records generally does not include information concerning the employee's name, address, previous employers, education, training, and experience. (Stork to Keating, Director, Iowa Merit Employment Department, 1/19/81) #81-1-4

W. L. Keating, Director, Iowa Merit Employment Department: You have requested an opinion concerning the confidentiality of employee personnel records under §§19A.15, 68A.2 and 68A.7(11), The Code 1979. Particularly in light of the Iowa Supreme Court's recent decision in *City of Dubuque v. Telegraph Herald, Inc.*, No. 157-63800 (Iowa, October 15, 1980), you seek advice regarding the appropriate treatment of the information in such records.

Section 68A.2 provides in relevant part:

> "... Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential..."

This language establishes the basic statutory authority of every citizen in Iowa to gain access to any and all information contained in public records, which are defined in §68A.1. The Iowa Supreme Court has determined that Chapter 68A is to be liberally interpreted and applied to provide broad public access to public records. *City of Dubuque*, No. 157 at 5; *Howard v. Des Moines Register and Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979), *cert. denied*, U.S., 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

An exemption from §68A.2 may occur only when some other provision in the Code either expressly limits the provisions of §68A.2 or requires public records to be kept secret or confidential. An example of a statute that limits §68A.2 is §68A.8, which authorizes a district court to grant an injunction restraining the examination (including copying) of a specific public record upon a finding that "such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons." With respect to provisions that require public records to be kept secret or confidential, you have cited two statutes that apply to the "employee and applicant personnel files" of the Merit Employment Department, i.e. §§68A.7(11) and 19A.15.

Section 68A.7 enumerates certain categories of public records that must be kept confidential *unless* otherwise ordered by a court, the lawful custodian of the records, or another person duly authorized to release information. The exemption in §68A.7(11) is:

* * *

> Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

* * *

The Iowa Supreme Court, in the *Telegraph Herald* case, discussed both this exemption and the relief available under §68A.8. Certain facts about the case are instructive to an understanding of the court's reasoning. The case developed as a result of the newspaper's unsuccessful attempts to secure, from the City of Dubuque, certain information about each of 41 applicants for the vacancy existing in the position of city manager. [1] The City of Dubuque sought both injunctive relief under §68A.8 and a declaration that applicant information constituted confidential personnel records within the meaning of §68A.7(11). The trial court rejected these claims of the city except with respect to five applicants who had specifically requested that their applications remain confidential. The court determined that an implied contract of confidentiality had derived from the city's failure to advise these applicants that their requests could not be honored. Accordingly, the court concluded that "the need [of] the government not only [to] be fair but appear to be fair" outweighed the public's right to know the information requested by Telegraph Herald, Inc. The Iowa Supreme Court affirmed the trial court's decision insofas as it rejected the city's claims of confidentiality but also determined that the trial court had not properly exercised its equitable power under §68A.8 to excluded from disclosure the five applicants who had specifically requested confidentiality. On this latter point, the court reasoned that, first, the city had made no "pledge" of confidentiality upon which the applicants had relied to their detriment and, second, no evidence had been introduced to show disclosure would "substantially and irreparably injure" any applicant. Additionally, the Supreme Court explained to some extent the limited nature of the exemption in §68A.7(11):

> Whether an application for an appointive city office is 'personal information in confidential personnel records' is a question of first impression in Iowa. The language employed by the legislature in this section 68A.7(11) exception weighs heavily against the city's position. The records that may be withheld from the public obviously do not include all personnel records—only *confidential* personnel records. In addition, even when confidential personnel records are involved, not all information contained therein is exempt from public scrutiny — only *personal* information in such records. Bypassing for the moment the issue whether an application for public employment is a confidential personnel record, or even a personnel record, we fail to discern, absent specific evidence, how the limited information requested by the *Herald* can be classified as *personal* information that the right of privacy would protect.

City of Dubuque v. Telegraph Herald, Inc., No. 157-63800 (Iowa October 15, 1980) at 5. This language suggests that the following generalizations may be made regarding employee personnel records of the Merit Employment Department. First, a public record is exempted from disclosure under §68A.7(11) only to the extent that three distinct elements are present. The record must (1) be designated and treated as confidential, (2) involve personnel matters, and (3) contain personal information on such matters. Second, "absent specific evidence", the court will not consider the following information about employees or employee applicants to be personal under §68A.7(11): names, addresses, employers, education, training, and experience. The court did not, however, provide any explanation or example as to what type of information in an employee's personnel record is

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[1] The specific information sought included the name, address, employers, education, training, and experience of each applicant. Five applicants specifically requested that their applications remain completely confidential.

personal. Accordingly, the lawful custodian of the record must exercise reasonable discretion in deciding what type of information about an employee is personal. In making a decision concerning confidentiality, the lawful custodian should remember that Chapter 68A establishes a liberal policy of access to public records from which departures are to be made only under discrete circumstances. *City of Dubuque*, No. 157 at 5. Third, an employment application is not itself a confidential personnel record and therefore is not protected under §68A.7(11). In this regard, the court recognized the adverse consequences that may result from disclosure of such applications:

> The legislature could have exempted employment applications from disclosure. Its failure to do so, coupled with its plain intent that we construe the exemptions narrowly, persuades us that the disputed applications do not fall within the section 68A.7(11) exemption. In so holding, we do not reject Dubuque's argument that disclosure of such applications may deter qualified persons holding responsible positions from applying. But it is not this court's role to pass on the wisdom of legislation. *Richards v. City of Muscatine*, 237 N.W.2d 48, 58 (Iowa 1975). In failing to provide for nondisclosure of such applications, the legislature may have determined the advantages of attracting more applicants were outweighed by the disadvantages of secrecy relating to the applicants.

City of Dubuque, No. 157 at 7-8.

Section 19A.15 provides in relevant part as follows:

> The records of the department, except personal information in an employee's file if the publication of such information would serve no proper public purpose, shall be public records and shall be open to public inspection, subject to reasonable rules as to the time and manner of inspection which may be prescribed by the director. Each employee shall have access to his personal file.

* * *

This language, which does expressly limit the right established in §68A.2, also contains three independent elements that must be present in order to qualify a record as confidential. First, like the exemption in §68A.7(11), only "personal information" in the record would be exempt. In light of the Supreme Court's rationale in the *Telegraph Herald* case, such information apparently would not include names, addresses, employers, education, training, and experience of employees. Second, the personal information must in fact be contained in an "employee's file" to be exempt under §19A.15. Finally, the exemption applies only if publication of such information "would serve no proper public purpose." Unlike §68A.8, this section neither explains who should make this determination nor provides any other guidelines for making the determination. By implication, the custodian of the record in question would make an initial decision as to whether publication would serve any proper public purpose. This decision could then be appealed to a district court under the judicial review procedures of the Administrative Procedure Act. §17A.19, The Code 1979. The term "publication" is not otherwise defined in chapter 19A and therefore must be construed according to the context and approved usage of the language. §4.1(2). *Webster's New Collegiate Dictionary* defines "publication" as the "act or process of publishing." The dictionary then states that "publish" means "to make generally known" or "to place before the public." Consequently, within the context of public records, the term "publication" in §68A.2, i.e. the right of every citizen of Iowa to examine and copy public records and the right of the news media to "publish" such records.

It should be stressed that §19A.15 contains a considerably less burdensome standard for obtaining an exemption from disclosure than that contained in §68A.8. The former requires only a finding that publication of information would serve no *proper public purpose* while the latter requires a judicial finding that examination of the record would "clearly not" be in the public interest and would "substantially and irreparably injure any person or persons." Section 68A.8 is a statute allowing injunctive relief from disclosure for all public records whereas §19A.15 is a specific statute applying only to records of the Merit Employment Department. While related statutes are read in *para materia*, if there is a conflict between a general and a specific statute, the specific provision controls. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977); *see also Llewellyn v. Iowa State Commerce Commission*, 200 N.W.2d 881 (Iowa 1972). Accordingly, the standard set forth in §19A.15 should be applied to determine whether certain personal information in an employee file of the Merit Employment Department should be made public.

With respect to the Merit Employment Commission's policy of permitting examination of employee personnel records at appeal hearings, we advise that §19A.15 does permit the employee to have full access to his or her "personal file". Any other person would have limited access to information is such a file pursuant to the precise language of the exemption in §19A.15. We have located no other statutory provision that would otherwise restrict such access to the file.

In summary response to your inquiry concerning proper compliance by the Merit Employment Department with §§19A.15, 68A.2, and 68A.7, we make the following conclusions:

1. Pursuant to §68A.2, all records in the possession of the Merit Employment Department are available for public examination and copying, *unless* some other provision in the Code expressly limits such right or requires a record to be kept secret or confidential.

2. Sections 19A.15 and 68A.7(11) do provide exemptions from the provisions of §68A.2. Even if §§19A.15 and 68A.7(11) do not apply to a specific record in the possession of the department, §68A.8 sets forth a procedure by which examination (including copying) of the record may be restrained.

3. Employment applications are not personnel records under §68A.7(11). *See City of Dubuque v. Telegraph Herald, Inc.*, No. 157 (Iowa October 15, 1980) at 7.

4. Personal information in employee personnel records generally does not include information concerning the employee's name, address, previous employers, education, training, and experience. *Id.* at 2, 5. A person could, however, restrain the examination of such information through either judicial review of an administrative decision under §19A.15 or a separate judicial proceeding under §68A.8.

January 20, 1981

JUVENILE LAW: The definition of "unfounded" within meaning of §235A.18(2). Ch. 235A, §§235A.18(2), 235A.12, 235A.12—.21; ch. 232, §232.71; §4.1(36), The Code 1979. "Unfounded" means a child abuse report or complaint "that is not supported by some credible evidence". (Hege to Reagen, Commissioner, Department of Social Services, 1/20/81) #81-1-5

Michael V. Reagen, Ph.D., Commissioner, Iowa Department of Social Services: You have requested an opinion of the attorney general on the following question:

In section 235A.18(2) of the Iowa Code, what is the meaning of the word "unfounded" in the statement, "child abuse information shall be expunged if it is determined to be unfounded..."?

As the Supreme Court of Iowa has not passed upon this question, we must look to the rules of statutory construction. The supreme court has given an instructive analysis of the principles in *Doe v. Ray*, 251 N.W.2d 496, 500—501 (Iowa 1977):

> [3—6] In interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. *Iowa Dept. of Rev. v. Iowa Merit Employ. Com'n.*, Iowa, 243 N.W.2d 610, 614; *Cassady v. Wheeler*, Iowa, 224 N.W.2d 649, 651. Our goal is to ascertain that intent and if possible, give it effect. *State v. Prybil*, Iowa, 211 N.W.2d 308, 311; *Isaacson v. Iowa State Tax Commission*, Iowa, 183 N.W.2d 693, 695. Thus, intent is shown by construing the statute as a whole. In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Peters v. Iowa Emp. Security Com'n.*, Iowa, 235 N.W.2d 306, 310; *Iowa Nat. Indus. Loan Co. v. Iowa State, Etc.*, Iowa, 224 N.W.2d 437, 440. However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Cedar Mem. Park Cem. Ass'n. v. Personnel Assoc., Inc.*, Iowa, 1978 N.W.2d 343, 347.
>
> [7] Finally, we note that in construing a statute we must be mindful to the state of the law when it was enacted and seek to harmonize it, if possible, with other statutues relating to the same subject. *Egan v. Naylor*, 208 N.W.2d 915, 918 and citations.

At the outset, it should be noted that neither ch. 232 nor ch. 235A statutorily define "unfounded". Section 232.2, section 235A.13; The Code 1979. Therefore, the application of the analysis of the court in *Doe* is important.

The legislative intent in establishing the Child Abuse Information Registry is delineated in §235A.12, The Code 1979, as follows:

> 235A.12 Legislative findings and purposes. The General Assembly finds and declares that a central registry is required to provide a single source for the state-wide collection, maintenance and dissemination of child abuse information. Such a registry is imperative for increased effectiveness in dealing with the problem of child abuse. The General Assembly also finds that vigorous protection of rights of individual privacy is an indispensable element of a fair and effective system of collecting, maintaining and disseminating child abuse information.
>
> The purposes of this section and sections 235A.13 to 235A.24 are to facilitate the identification of victims or potential victims of child abuse by making available a single, state-wide source of child abuse data; to facilitate research on child abuse by making available a single, state-wide source of child abuse data; and to provide maximum safeguards against the unwarranted invasions of privacy which such a registry might otherwise entail. [C75, 77, §235A.12]

Moreover, various legal commentators have reviewed the histories of central registries and identified original goals to be accomplished.

> A central registry is a respository for reports of suspected child abuse. Reports in central registries are listed alphabetically and chronologically. Central registries were originally conceived to provide accurate statistics and help determine the proper diagnosis.

54 Chicago-Kent Law Review 641, 672 (1978).

Further, through fifteen years of experience, realistic modern-day goals for the utilization of central registries have been identified.

> A central registry which is properly conceived and properly structured can provide four functions: (1) it can provide statistics on a monthly or a yearly basis; (2) it can provide raw data for research purposes; (3) it can be used as a diagnostic tool; and (4) it can be used to measure the effectiveness of an agency mandated to receive and investigate reports of suspected child abuse.

Id. at 672.

The function of a central registry as a diagnostic tool, or in the wording of the Iowa statute, "identification of victims or potential victims of child abuse", is mandated by the very nature of child abuse.

> Because child abuse is a pattern of behavior, it is not easy to diagnose. It is not unusual for parents to switch doctors and hospitals as injuries progress. Unless the physician (or the social worker, nurse or court) has some indication of the other injuries, only a one-dimensional picture of the child will emerge. If access to a respository of reports of suspected child abuse were available, it is possible that a pattern will be discernable. The central registry is that repository of reports and it is used by the physician to help determine the proper diagnosis.

Id. at 672.

This functional use of the central registry as a diagnostic tool is clearly indicated in the language of §235A.12.

The characteristic of child abuse as a pattern of behavior has been recognized by the courts in this state. An adjudication of child in need of assistance and resultant change in legal custody was found warranted in *In Interest of Osborn*, 220 N.W.2d 632 (Iowa 1974), when the child had a series of four injuries over a two year period. Although there was no evidence that the mother was responsible for the actual injuries, the adjudication was founded upon the child "living under conditions injurious to his mental or physical health or welfare".

A related issue which arises in abuse cases is whether the court will admit medical opinion evidence of the existence of the "battered child syndrome". In 1973, the supreme court of Minnesota nationally initiated a trend to admit such evidence in the case of *State v. Loss*, 204 N.W.2d 404 (Minn. 1973). In discussing the issue of first impression, the court said:

> [1, 2) 1. This case presents to our court for the first time the use of the medical terminology "battered child syndrome" and "battering parent syndrome" in a case involving substantial injuries and resulting death to a minor child. Medical authorities have recently expanded their investigation into this field, which has developed from a series of conferences beginning in the late 1950s and early 1960s to the present state of medical research and analysis of the phenomena peculiar to the field. As a result of

this investigation, legislation has been proposed in numerous states. Minnesota adopted such legislation in 1965 regarding the reporting of maltreatment of minors. This section appears at Minn.St. 626.554. Subd. 1 thereof declares the purpose of the statute as follows:

> "The purpose of this section is to provide for the protection of minor children who have had physical injury inflicted upon them, by other than accidental means, where the injury appears to have been caused as a result of physical abuse or neglect."

The previously quoted definition by Dr. Venters of the battered child syndrome fits with our statutory scheme of reporting such injuries. (Footnote omitted.)

Loss, at 408.

In allowing the medical testimony on the "battered child syndrome", the court explained its evidentiary value.

> We hold that the establishment of the existence of a battered child, together with the reasonable inference of a battering parent, is sufficient to convict defendant herein in light of the other circumstantial evidence presented by the prosecution. It is very difficult in these prosecutions for injuries and death to minor children to establish the guilt of a defendant other than by circumstantial evidence. Normally, as was the case here, there are no eyewitnesses. The establishment of the fact that the deceased child was a battered child was proper, and adequate foundation was laid for the introduction of the evidence which conclusively established a battered child syndrome.

Id., at 409.

The courts in both California and South Dakota have similarly allowed the introduction of medical opinion testimony of "battered child syndrome" in criminal prosecutions. *People v. Jackson*, 18 Cal.App.3d 504, 95 Cal.Rptr. 919 (1971); *State v. Best*, 232 N.W.2d 447 (S.D. 1975).

In two termination of parental rights cases, the Iowa Supreme Court, on *de novo* review, has considered medical opinion testimony as to the existence of the "battered child syndrome". *Long v. Long*, 255 N.W.2d 140 (Iowa 1977); *In Interest of Vanderbeek*, 231 N.W.2d 859 (Iowa 1975). The court was unequivocal in its consideration of the medical evidence based on a series of injuries in an eighteen month period:

> As did the trial court, we rely strongly upon the testimony of Dr. Gerald Solomons, a professor of pediatrics at the University of Iowa College of Medicine, who is also chairman of the child abuse committee of the University Hospitals at Iowa City and has specialized for the past six or seven years in child abuse cases.

Vanderbeek, at 861.

While the use of the central registry as a diagnostic tool fosters the identification and prevention of pattern child abuse, it is not without its critics for its potential "big brother" infringement upon familial privacy and confidentiality.

> In effect, the central registry contains a list of suspected parties, who are listed without notification, without representation and without a formal hearing. The fact that some central registries are housed in computers

> magnifies the possibility of unauthorized access and unauthorized disclosure of such names.
>
> The issue pertaining to central registries is relatively straightforward: does the demonstrated value of a central registry for the purpose of statistics, research, diagnosis and quality control outweigh the possibility of unauthorized access and disclosure? The answer is yes, but with a caveat. Legislation creating central registries must be drafted in such a way as to minimize the possibility of such abuses.

54 Chicago-Kent Law Review 641, 673 (1978).

The Iowa statute likewise evidences a concern for confidentiality. Section 235A.12, The Code 1979.

The statutes provide an extensive list of protections to prevent the misuse of the central registry. An extensive investigation and follow-up reporting scheme is intended to identify and eliminate malicious or unfounded reports. Section 232.711(1), (6), The Code 1979. Access to the registry is limited both as to persons authorized and for certain purposes. Section 235A.15, .16, .17, The Code 1979. Registry information is subject to correction, expungement and sealing and an appeal process is provided. Sections 235A.18, .19, The Code 1979. Finally, there are criminal penalties for unauthorized disclosure and a civil remedy for a person aggrieved by violations of the act. Sections 235A.20, .21, The Code 1979.

It is with this "balancing" of interests in mind, that the specific definition of "unfounded" is addressed.

Section 235A.18(2) contemplates at least two levels of proof for child abuse information received.

> 2. Child abuse information may be expunged where the probative value of the information is so doubtful as to outweigh its validity. Child abuse information shall be expunged if it is determined to be unfounded as a result of any of the following:
>
> a. The investigation of a report of suspected child abuse by the department.
>
> b. A successful appeal as provided in section 235A.19.
>
> c. A court adjudication.

On the one hand, this provision confers a power upon the registry to expunge information when the probative value of the information is so limited that it makes its validity doubtful. Section 4.1(36), The Code 1979. A requirement to expunge information is mandated when the information is unfounded. Section 4.1(36), The Code 1979. The distinction between "unfounded" or "other" then, will determine whether the information is required to be expunged or can be maintained in the registry for future use in a diagnostic function.

Webster's Dictionary defines:

> un · found · ed (-foun' did) adj. 1. not founded on fact or truth; baseless 2. not established

In a legal context, "'unfounded' means unstable, untried, not founded, not built or established, having no foundation, baseless, vain, idle, as, unfounded expecta-

tions." *Donald v. Davis*, 163 P.2d 270, 271, 49 N.M. 313 (1945). Further, an "'unfounded' claim is one without foundation in fact or law." *Id.* at 272.

While our law provides little guidance, at least one state has defined the term statutorily to mean "... any report... which is not supported by some credible evidence." Colo.Rev. Stat. §19-10-103(11) (Cum.Supp. 1976). Further, "credible evidence" has been characterized as follows:

> It has been termed as "the quality or power of inspiring belief." Webster's Third New International Dictionary (1966). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be "credible" in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it. *Taylor v. Taylor*, 90 A. 746, 751 (R.I. 1914). Credible testimony is that which meets the test of plausibility. *Lester v. State*, 212 Tenn. 338, 370 S.W.2d 405, 408 (1963).

Indiana Metal Products v. N.L.R.B., 442 F.2d 46, 51—52 (7th Cir. 1971).

Under this definition, "unfounded" would include reports proven to be false, as well as, those reports in which there is no evidence tending to substantiate abuse. This information must be expunged by the Department on its own initiative.

While it is impossible to transform every grey factual situation into black and white, a few examples may assist in explaining this legerdemain of legalese.

Situation 1: Unfounded Report

A mother reports to the hospital emergency room with a four-year-old who has sustained what is apparently a broken wrist. She explains that the child was in the front yard playing with friends and fell out of a small tree. X-rays are taken and reveal a straight line fracture of a long bone in the forearm. Other bruises and scrapes are noted which would be consistent with a fall of three or four feet.

At approximately the same time a report is received by the Department's Protective Service Division. The caller remains unidentified but states that a neighbor has been beating up on their child in the front yard. The caller relates that the mother pushed the child out of a tree.

The protective service worker contacts the mother and indicates a child abuse complaint has been lodged. The mother explains a history that the child fell out of the small tree in the front yard. The mother furnishes the name of the hospital and treating physician. She further relates that the unidentified caller was probably "old Mrs. Busybody" with whom she has had several neighborhood confrontations within the past several months.

The worker contacts the hospital and obtains the medical report. The treating physician relates that the child appeared healthy with the exception of the fracture, x-rays reveal no previous fractures and the fracture, bruises and scrapes are consistent with history given by the mother.

Interviews with two of the child's playmates reveals they were all playing in the front yard. They both say that the child fell out of the tree and that the mother was

in the house at the time. Interviews with other neighbors confirms that the mother and "old Mrs. Busybody" have been at odds for the past several months.

Under the hypothetical facts given, this report "is not supported by some credible evidence". The history given by the mother is of an accidental injury. The circumstantial medical evidence is consistent with the history given. The fracture is of the straight-line type and not spiral, which is indicative of abuse cases. *State v. Loss*, 204 N.W.2d 404, 408 (Minn. 1973). The bruises and scrapes are consistent with a fall of three to four feet. Finally, the eyewitness testimony of playmates confirms a fall of accidental causation. This report must be expunged as "unfounded".

Situation 2. Founded Report

The converse of the unfounded report is one that is supported by some credible evidence. In the case of physical abuse, it may most frequently come in the form of circumstantial medical evidence tending to show nonaccidental injuries and at variance with the history given.

Parents of an eighteen-month-old child appear at a hospital emergency room with the baby. They complain that the child has been crying and irritable. They can give no explanation. They also indicate that immediately prior to coming to the hospital, the baby was found in her room, having fallen out of her crib with her leg still stuck between the slats.

Upon physical observation, the treating physician notes a diaper rash, scalp condition and several bruises in various states of healing noted by differing coloration. X-rays are ordered and indicate the child's leg is fractured, a spiral-type of the long bone. The break evidences some healing and the physician notes it is not of immediate origin. Full body x-rays are ordered. They indicate two previous fractures, one to ribs on the child's left side and a second on the baby's forearm. From the x-ray, the physician notes they occurred at different points in time.

From further discussion with the parents, they can only surmise that the injuries occurred in falls from the crib. They relate that the baby is very active, clumsy and seems to fall frequently.

The physician, as a mandatory reporter, contacts the central registry and a protective service worker is referred. The parents give a similar history to the worker with the exception that the rib injury may have occurred six months ago when the baby's crib collapsed.

The treating physician indicates that in her opinion the present fracture occurred one to two weeks previously and not immediately prior to the child's hospitalization. She further is of the opinion that it is impossible for the injury to have been caused by a fall through the slats in the crib and catching her leg. The doctor is of the further opinion that it is highly unlikely that a six-month old, rolling out of a crib onto a carpeted floor, could have caused the previous fracture to the arm. It is also unlikely that the rib injuries were caused by a crib collapse because of their position. Finally, the doctor notes neglect by the physical evidence of diaper rash, scalp condition and bruises.

The protective services worker confronts the parents who give no other explanation. They indicate the baby has been exclusively in their custody and no one

else has seen or observed the baby. Contacts with neighbors and nearby relatives confirm that fact.

Under the definition of "unfounded" as a "report which is not supported by some credible evidence", the above facts set out a founded report justifying its maintenance and use in the central registry. The medical and opinion evidence of the physician, albeit circumstantial, is highly probative of the causation of injuries to the child. It is credible. The explanation of the parents is at variance with the medical exam and physician's opinions as to causation. This child abuse report is supported by some credible evidence.

To summarize, the definition of "unfounded", §235A.18(2), is a report which is not supported by some credible evidence. This would include reports in which causation is proved to be accidental, as well as, those in which there is not some credible evidence of a nonaccidental causation of the physical injury. Section 235A.18(2) places a duty upon the department to expunge "unfounded" reports from the central registry.

This definition appears to satisfy the two competing interests specified in the Iowa statute; to facilitate the identification of victims or potential victims of child abuse and provide maximum safeguards against the unwarranted invasions of privacy.

January 22, 1981

PREARRANGED FUNERAL PLANS: Section 523A.1, The Code 1979. Chapter 523A would apply to the sale of personal property to be used under a prearranged funeral plan if the personal property is not immediately required. A prearranged funeral plan is any agreement which provides for the purchase of funeral merchandise or a funeral service or both. "Immediately required" as specified in §523A.1 means when needed because of death of the person for whom the property was purchased. (Graf to Schwengels, State Senator, 1/22/81) #81-1-6(L)

January 27, 1981

MUNICIPALITIES: Municipal Water Systems—Constitutionality—A municipal ordinance requiring hook up to the city water system is not an unconstitutional police power regulation absent facts which show that it clearly infringes on constitutional rights and which negate every reasonable basis for it. (Blumberg to Craft, State Senator, 1/27/81) #81-1-7

The Honorable Rolf V. Craft, State Senator: We have your opinion request of September 20, 1980, regarding a mandatory hook up to a municipal water system. The city in question had an ordinance that required hook up to the municipal system if that system was reasonably available and if the structure was not furnished with pure and wholesome water from some other source. This ordinance was amended to require the residents to hook up to the municipal system. The question before us is whether such a requirement is constitutional.

Water companies are public utilities of vital importance to the health and well-being of municipalities and their inhabitants. 78 Am.Jur.2d, *Waterworks and Water Companies* §1 (1975). Thus, the creation of a municipal water system is an exercise of a municipality's police power. *Id.* at §4. When a municipality

furnishes water to its inhabitants, it has the right to make and enforce reasonable rules and regulations regarding the water system. *Id.* at §69.

The key, then, is what is reasonable. In other words, is a requirement that all property owners be hooked up to the municipal water supply reasonable? What is reasonable would depend, of course, on the individual set of facts at any point in time. It would be hard to dispute that where the non-municipal water supply to various residents becomes contaminated, and therefore unusable, that a requirement to use the municipal water supply would not be unreasonable. We do not know the reasons why the city in question has required a hookup to its water supply, and therefore, cannot pass upon its reasonableness or constitutionality.

Generally, police power is the exercise of a government's right to regulate the use of property to prevent any use thereof which would be harmful to the public interest. *Iowa National Resources Council v. Van Zee*, 158 N.W.2d 111, 116 (Iowa 1968). It is the power, inherent in the government, to prohibit or regulate certain acts or functions of the populace as may be deemed necessary to the comfort, health and welfare of society. *Davis, Brody, Wisniewski v. Barrett*, 253 Iowa 1178, 115 N.W.2d 839, 841 (1962).

The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interest. *Steinberg-Baum & Company v. Countryman*, 247 Iowa 923, 77 N.W.2d 15, 19 (1956). It is within the orbit of police power to prescribe regulations to promote the health, peace and morals of the people. *Benschoter v. Hakes*, 232 Iowa 1354, 8 N.W.2d 481, 486 (1943). In the exercise of police powers there is wide discretion in determining what conditions should be remedied and in deciding what course is best to accomplish that purpose. *Cedar Mem. Park Cem. Ass'n. v. Personnel Assoc., Inc.*, 178 N.W.2d 343, 349 (Iowa 1970). The concept of "public purpose" is permitted to have that flexibility and expansive scope required to meet the challenges of increasingly complex social, economic and technological conditions. *John R. Grubb, Inc. v. Iowa Housing Finance Auth.*, 255 N.W.2d 89, 93 (Iowa 1977).

Private rights must yield, in proper cases, to public policy, *Hiatt v. Soucek*, 240 Iowa 300, 36 N.W.2d 432, 436 (1949), and property is always held subject to the police power. *Kellar v. City of Council Bluffs, Iowa*, 246 Iowa 202, 66 N.W.2d 113, 119 (1954). In other words, the use of private property can be limited by a reasonable exercise of police powers in matters of health and welfare of the general public.

The constitutional right to life and liberty is subject to such reasonable regulations as the peace, comfort and welfare of society may demand. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations imposed in the interests of the community. When a private right is tinged with public concern, that right can be subjected to reasonable regulations by a lawful exercise of the police power. Whether such an exercise is proper depends on whether the collective benefit out weighs the specific restraint of individual liberty. *Gibb v. Hansen*, 286 N.W.2d 180, 186 (Iowa 1979).

It can easily be seen that the Courts require the exercise of the police power to be reasonable and lawful. If not, such an exercise is unconstitutional. *See Green v. Shama*, 271 N.W.2d 547 (Iowa 1974); *Pierce v. Incorporated Town of La Porte City*, 259 Iowa 1120, 146 N.W.2d 907 (1966).

It must be remembered that legislative enactments are accorded every presumption of validity. They are found to be unconstitutional only upon a showing that they clearly infringe on constitutional rights, and only if every reasonable basis for support is negated. *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 277 (Iowa 1979). A law does not become unconstitutional merely

because it works a hardship. The fact that one must make substantial expenditures to comply with a regulation does not raise constitutional barriers. *Id.* at 279. Similarly, a police regulation is not unconstitutional because it may incidentally be a revenue measure. *Steinberg-Baum & Company v. Countryman*, 247 Iowa 923, 88 N.W.2d 15, 19 (1956). Of great importance is the fact that the reasonableness of a police regulation is a question of fact. *Id.* at 20. The due process guarantee does not prohibit the exercise of the police power to pass and enforce laws which will benefit health, morals and general welfare. *Green v. Shama, supra.*, at 554. *See* also, *State ex rel. Turner v. Koskot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971).

Cities require hook up to water systems for uniformity and to ensure an adequate and wholesome supply of water to their residents, among other reasons. With that in mind, a review of the above authorities indicates that the ordinance in question is not unconstitutional on its face. We must presume its constitutionality until facts are presented which clearly show otherwise. We are not in a position, nor do we make it a practice, to render a decision on the facts. The burden to prove the unconstitutionality of a police regulation is a stringent one. Although a resident of the city in question may wish to further pursue this matter, we do not believe, from the information supplied to us with this request, that the necessary burden can be met.

We have been able to find only one case which speaks to a municipality's authority to compel all residents to use its water systems. In *City of Midway v. Midway Nursing & Con. Ctr., Inc.*, 230 Ga. 77, 195 S.E.2d 452 (1973), the city enacted an ordinance compelling all residents to use its water supply. The Court held that such authority did not exist and voided the ordinance. It did not address any constitutional issue. Rather, the Court based its decision on the fact that municipalities may only exercise powers that are derived by its charter or state law. Since, in Georgia, all municipal charters were strictly construed, and municipalities could only exercise those powers expressly, or by necessary implication, conferred upon them by statute, the Court held that unless the charter or some state statute granted the authority, a municipality was powerless to act. Finding no such specific grant of authority, the Court voided the ordinance. It is obvious that home rule was not applicable in that case.

However, municipalities in Iowa do have home rule. Thus, we do not believe that the *Midway* case is applicable. We believe that an Iowa Court would apply home rule if it was faced with a similar issue and hold that a municipality does have such authority.

Accordingly, we are of the opinion that a requirement for hook up to a municipal water system is not generally an unconstitutional use of a police power regulation.

January 28, 1981

COMPATIBILITY: City Councilman, School Board Member. Sections 298.1, 298.2, 384.16, 384.17, The Code 1979. The offices of city councilman and school board member are compatible. 1978 Op.Att'y.Gen. 875 to the contrary is overruled. (Schantz to Hutchins, State Senator, 1/28/81) #81-1-8(L)

January 30, 1981

GARNISHMENTS: Chapters 642 and 537. §642.21 places primary responsibility for observing statutory wage garnishment limitations with employers

who are garnished, by limiting the amount that an employer may withhold from an individual's earnings. §537.5105(3) and the *Consumer Credit Protection Act*, 15 U.S.C.A. §1671, prohibit courts from issuing judgments in garnishment actions condemning any amount of an employee's wages that an employer was withheld in excess of statutory garnishment limitations. Since the structure of the garnishment statutes requires that a debtor raise the issue of excessive garnishment while garnished funds are still in the hands of the employer, a creditor will rarely, if ever, be in a position to be required by a district court to reimburse a debtor for an excessive garnishment. The §642.21 limitations on the amount a judgment creditor may garnish during a calendar year is applied to each employee and is not applied with respect to each debt. Therefore, a judgment creditor may garnish up to $250 per year from the wages of each employee who is liable for a debt. (McFarland to Rush, State Senator, 1/30/81) #81-1-9

The Honorable Robert Rush, Senate — 15th District: The office of the attorney general received a letter which Serge Garrison, Director of the Iowa Legislative Service Bureau, wrote on your behalf and which requested our opinion on a series of questions relating to wage garnishments. The questions that Mr. Garrison submitted are as follows:

1. Who is responsible for determining when wage garnishment limitations have been reached, and for discontinuing further wage garnishment? Must the debtor, or the creditor, notify the sheriff or is the sheriff responsible for complying with the legal limit?

2. If garnishment in excess of the legal limits has occurred, is the creditor required to reimburse the debtor for the excess amount?

3. If a husband and wife have each signed for a debt and both are wage earners, may $250 be garnished from each, making a total of $500 for one creditor for one debt?

Section 642.21, The Code, places primary responsibility on employers for observing statutory wage garnishment limitations, by limiting the amount which an employer may withhold from an employee's earnings during any one calendar year or during any one pay period. Section 642.21(1) and (2)(a), The Code, provide as follows:

> 1. The disposable earnings of an individual shall be exempt from garnishment to the extent provided by the federal Consumer Credit Protection Act, Title III. The term "Consumer Protection Act" means the Act of Congress approved May 29, 1968, 82 Stat. 163, officially cited as the "Consumer Credit Protection Act, Title III." The maximum amount of an employee's earnings which may be garnished during any one calendar year is two hundred fifty dollars for each judgment creditor, except as provided in section 627.12.
>
> 2. *No employer shall:*
>
> a. *Withhold from the earnings of an individual an amount greater than that provided by law.* [Emphasis added.]

The *Iowa Consumer Credit Code* (ICCC) in §537.5105, The Code, incorporates by reference §642.21 and also affords additional protections to debtors whose

wages are subject to garnishment for a debt arising from a consumer credit transaction. Section 537.5105 provides in part as follows:

* * *

> 2. In addition to the provisions of section 642.21, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment to enforce payment of a judgment arising from a consumer credit transaction may not exceed the lesser of twenty-five percent of his disposable earnings for that week, or the amount by which his disposable earnings for that week exceed forty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act of 1938, United States Code, title 29, section 206, subsection "a", paragraph (1), in effect at the time the earnings are payable.

Section 537.5105(2), The Code 1979.

An employer may, in the interest of eliminating unnecessary work for a garnishing sheriff, notify the sheriff when garnishment limitations have been reached. However, chapter 642 does not charge a sheriff with independent statutory responsibility for enforcing garnishment statutes.

The answer to the issue of liability in cases of garnishments exceeding legal limitations is inherent in the procedural scheme of the garnishment statutes. An employer has no obligation to disburse funds that it has withheld from an employee's earnings pursuant to a garnishment proceeding until the creditor obtains a judgment condemning the funds.

> Judgment against garnishee. If in any of the above methods it is made to appear that the garnishee was indebted to the defendant, or had any of his property in his hands, at the time of being served with the notice of garnishment, he will be liable to the plaintiff, in case judgment is finally recovered by him, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee, and the *plaintiff may have a judgment against the garnishee for the amount of money due from the garnishee to the defendant in the main action, or for the delivery to the sheriff of any money or property in the main action within a time to be fixed by the court, and for the value of the same, as fixed in said judgment, if not delivered within the time thus fixed, unless before such judgment is entered the garnishee has delivered to the sheriff such money or property.* Property so delivered shall thereafter be treated as if levied upon under the writ of attachment in the usual manner. [Emphasis added.]

Section 642.13, The Code 1979.

Before a court may enter judgment against a garnishee/employer requiring the employer to disburse withheld funds, the debtor/employee must receive ten days notice.

> Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices.

Section 642.14, The Code 1979.

Thus a debtor may raise any objections regarding excessive withholdings during the ten day period between notice and judgment. If the court determines that an employer has withheld an amount which exceeds statutory limitations, the court will order the employer to return that amount to the employee. A

judgment condemning the property in the hands of the employer is conclusive between the employer and the debtor and further challenges regarding issues that were properly raised to the district court must be pursued through normal appellate proceedings. (§§642.18 and 642.20, The Code 1979.) Because the structure of the garnishment statutes prescribes that the issue of excessive garnishment be raised while garnished funds are still in the hands of the employer, a creditor will rarely, if ever, be in a position to be required by a district court to reimburse a debtor for an excessive garnishment.

An employer's statutory responsibility to observe wage garnishment limitations is supplemented by a similar responsibility placed on the court system by federal and state statutes. Courts are prohibited by the federal *Consumer Credit Protection Act*, 15 U.S.C.A. §1671 et. seq., which is incorporated by reference in §642.21, from enforcing any order or process in violation of the wage garnishment limitations of that Act.

> No court of the United States or any state may make, execute, or enforce any order or process in violation of this section.

15 U.S.C.A. §1673(c)

Subsection three of §537.5105 contains a similar prohibition which applies to garnishments arising from consumer credit transactions:

> No court may make, execute, or enforce an order or process in violation of this section.

Section 537.5105(3), The Code.

Thus, in addition to entertaining motions from a debtor regarding wage garnishment limitations, a court should require a creditor to show that the amount the creditor is attempting to garnish is within statutory limitations, a court should require a creditor to show that the amount the creditor is attempting to garnish is within statutory limitations before the court enters an order condemning the property in the hands of the employer. Therefore, as a practical matter, a creditor will have some obligation to observe the statutory restrictions on wage garnishments, although primary responsibility to apply the restrictions rests with the employer.

Finally, you asked whether a creditor may garnish up to $250 a year from the wages of both spouses who are liable for one debt. Section 642.21 limits the amount that a judgment creditor may garnish from an employee's earnings during any calendar year. "The maximum amount of an employee's earnings which may be garnished during any one calendar year is $250 for each judgment creditor..." (§642.21, The Code 1979.)

Section 642.21 does not limit the total amount that a judgment creditor may garnish for any one *debt*. Therefore, a judgment creditor may garnish up to $250 a year from the wages of each employee liable for a debt.

The following is a summary of your three inquiries and the responses from this office.

> 1. Who is responsible for determining when a creditor has reached wage garnishment limitations, and for discontinuing further wage garnishments?
>
> Section 642.21 places primary responsibility for observing statutory wage garnishment limitations with employers who are garnished, by limit-

ing the amount that an employer may withhold from an individual's earnings. However, a creditor should be able to show a court during a garnishment proceeding that the creditor is not attempting to garnish amounts in excess of statutory wage garnishment limitations.

2. If a garnishment in excess of the legal limitations occurs, must the creditor reimburse the debtor for the excess?

Since the structure of the garnishment statutes requires that a debtor raise the issue of excessive garnishment while garnished funds are still in the hands of the employer, a creditor will rarely, if ever, be in a position to be required by a district court to reimburse a debtor for an excessive garnishment.

3. May a creditor garnish up to $250 a year from the wages of both spouses who are liable for one debt?

The §642.21 limitations on the amount a judgment/creditor may garnish during a calendar year is applied to each employee and is not applied with respect to each debt. Therefore, a judgment/creditor may garnish up to $250 per year from the wages of each employee who is liable for a debt.

January 30, 1981

STATUTUES; SOCIAL SECURITY: Medicaid and Supplemental Security Income Eligibility Requirements. 42 U.S.C. §1381 et seq., 42 U.S.C. §1396 et. seq., 20 C.F.R. §416.1240, 42 C.F.R. §§431.300—307, 435.4, 435.100, 435.300, 435.401, §§3.7, 4.1(36)(a), 217.30, 217.30(4)(b), 249.13, 249A.14 703.3, 714.8, chapters 249 and 249A, The Code 1979, Acts of the Sixty-Eighth General Assembly, 1980 Session, House File 685. A crime is complete under H.F. 685 where a party, with intent to receive public assistance, transfers property for less than fair consideration. Success or failure in attempting to gain public assistance is immaterial to committing a crime under H.F. 685. Where the Department of Social Services has knowledge that an applicant for public assistance has transferred property one year prior to the making of such application, the department should report such transfer to appropriate law enforcement officials. Department employees are required to ask applicants for public assistance for information that will establish their eligibility or noneligibility for assistance. The county attorney is responsible for investigating or causing to be investigated suspected fraudulent practices to determine if a criminal prosecution is warranted. The disclosure of information to law enforcement officials directed towards the elimination of fraud in a public assistance benefit program will not violate state or federal nondisclosure laws. The mere passive failure to report suspected fraudulent practices does not constitute a crime. The Department of Social Services may jeopardize federal financial participation in its public assistance programs by failing to report suspected fraudulent practices to law enforcement authorities. H.F. 685 should have prospective effect only. We decline to comment on the enforceability of H.F. 685, but advise that participation in its enforcement may jeopardize federal financial participation in Medicaid and SSI programs. (Mann to Reagen, Commissioner, Department of Social Services, 1/30/81) #81-1-10(L)

January 30, 1981

COUNTY ENGINEERS: Engaging in practice of land surveying. §§111.21, 114.2, 309.17, The Code 1979. A county engineer may not engage in the practice of land surveying unless qualified as a registered land surveyor pursuant to Iowa Code requirements. (Norby to Kane, Chairman, Board of Engineering Examiners, 1/30/81) #81-1-11(L)

January 30, 1981

TAXATION: Collection of Delinquent Property Taxes Attributable to Public Property. Section 446.7, The Code 1979, as amended by 1979 Session, 68th G.A., ch.68, §14. Section 446.7, The Code, as amended, prohibits the tax sale of property of the public entities listed therein for delinquent real property taxes. Upon notice from the county treasurer, such entities should pay the taxes, but if they fail to do so, the board of supervisors must abate them. (Griger to Richter, Pottawattamie County Attorney, 1/30/81) #81-1-12(L)

FEBRUARY 1981

February 4, 1981

MOTOR VEHICLES: Maximum mechanical operation — Section 321.225, The Code 1979. City buses are considered commercial vehicles for hire under section 321.225. Consequently, city bus operators are subject to the maximum operation requirements set out in section 321.225. (Miller to Rush, State Senator, 2/4/81) #81-2-1(L)

February 2, 1981

REAL PROPERTY: Subdivision Platting/Special Assessment §§409., 409.9, 384.61, The Code 1979. A tract of land in a city which is subject to a special assessment lien cannot be subdivided into three or more parts until the special assessment is paid. (Ovrom to Kopecky, Linn County Attorney, 2/4/81) #81-2-2(L)

February 5, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Health, Emergency Medical Technicians, Categorization of Advanced Emergency Medical

Technicians Pursuant to Rules Adopted by the Board of Medical Examiners. Sections 147A.1, 147A.4, 147A.6, 147A.8, The Code 1981. The Iowa Board of Medical Examiners possess the statutory authority to adopt rules and regulations providing for the establishment of categories of advanced emergency medical care technicians (EMTs). Pursuant to this statutory authority, the board may provide by rule for a category designated as EMT-D, allowing for the training of a basic EMT to perform the advanced technique of cardiac defibrillation. (Freeman to Pawlewski, Commissioner of Public Health 2/5/81) #81-2-3(L)

February 5, 1981

MOTOR VEHICLE; LICENSING: Work permit eligibility of suspended and revoked drivers. §§321.215, 321.218, and 321B.7, The Code 1979. Section 321.215(1) proceedings to obtain a work permit are ex parte. A driver convicted of driving while under suspension or revocation is not eligible to apply for a work permit. The Department of Transportation should not issue a work permit to a driver revoked under the implied consent law. (Goodwin to Kassel, Director of D.O.T., 2/5/81) #81-2-4

Mr. Raymond L. Kassel, Director; Department of Transportation: You have asked for an attorney general's opinion on section 321.215(1), The Code 1979. That section authorizes the district court to grant a work permit to a driver whose license to drive has been suspended or revoked under certain provisions of chapter 321. Specifically, you ask:

1. Whether section 321.215(1) proceedings are ex parte;

2. Whether a driver who is eligible for a section 321.215(1) work permit remains eligible when his or her suspension or revocation is extended under section 321.218, The Code 1979.

3. Whether the Department of Transportation should issue a work permit granted by court order to a driver whose license has been revoked under the implied consent law.

Each question will be considered separately.

I. *Whether section 321.215(1) proceedings are ex parte.*

Drivers whose licenses to drive have been suspended or revoked may apply to the district court for a temporary restricted permit to operate a motor vehicle to and from work:

1. Upon conviction and the suspension or revocation of a person's motor vehicle license under sections 321. 209, subsections 6 and 7, 321.210 or 321.555, subsection 2, and upon the denial by the director of an application for a temporary restricted license, a person may apply to the district court having jurisdiction for the residence of the person for a temporary restricted permit to operate a motor vehicle to and from work. The application may be granted only if all the following criteria is satisfied:

a. The restricted temporary permit is requested only for a case of extreme hardship where alternative means of transportation does not exist.

b. The permit application has not made an application for such a permit in any other district court in the state which was denied or revoked.

c. The permit is restricted for travel to and from work at times specified in the permit.

d. Proof of financial responsibility is established as defined in chapter 321A.

2. The district court shall forward a record of each application for such temporary restricted permit to the department, together with the results of the disposition of the request by the court.

3. A temporary restricted permit shall be valid only if the department is in receipt of records required by this section. The permit shall be canceled upon conviction of a moving traffic violation as defined in section 321.181, or upon any violation of the terms of the permit.

§321.215, The Code 1979. This temporary restricted permit is commonly known as a "work permit." Though the driver must have been denied a work permit by the Department of Transportation before being eligible to apply to the court, the court is not restricted to appellate review of the department's denial of the permit and is free to make its own determination. *Compare* §17A.19(8), The Code 1979.

You ask whether the district court proceedings under section 321.215(12) are ex parte, the applicant being the only party before the court, or whether the proceedings are adversarial, the applicant and the Department of Transportation both being necessary parties to the action.

In interpreting a statute, a court must determine the intent of the legislature and construe the statute with the view of carrying out that intent. *Iowa Higher Education Association v. Public Employment Relations Board*, 269 N.W.2d 446, 447 (Iowa 1978). If reasonably possible, every part of a statute should be given meaning and effect. *State v. Berry*, 247 N.W.2d 263, 264 (Iowa 1976).

If the legislature had intended section 321.215(1) proceedings to be adversarial, it would not have enacted subsections two and three. If the proceedings were adversarial, the department, as a party, would have to be served with an original notice and copy of the application before the court could dispose of the application. *See* Iowa R.Civ.P. 50. Section 321.215(2), however, does not require the court to notify the department of the application until after its disposition, which manifests legislative intent to have the proceedings be ex parte. If the proceedings were adversarial, the department, as a party would have the opportunity to present evidence that the work permit criteria have not been satisfied, and it would be bound by the court's disposition. *See Giltner v. Stark*, 252 N.W.2d 743, 745-746 (Iowa 1977). Section 321.215(3) contemplates otherwise. The department is bound only if, after receiving a court order granting an application, it is in receipt of the required records. If the legislature had intended the department to be a party to the proceeding, it would not have made the order conditionally valid. For subsections two and three of section 321.215 to be given any meaning and effect, section 321.215(1) proceedings must be construed to be ex parte.

II. *Whether a driver who is eligible for a section 321.215(1) work permit remains eligible when his or her suspension or revocation is extended under section 321.218, The Code 1979.*

A misdemeanor conviction for driving during a period of license suspension or revocation results in the doubling of the length of that suspension or revocation:

> ... The department, upon receiving the record of the conviction of any person under this section upon a charge of driving a motor vehicle while the license of such person was suspended or revoked, shall extend the period of suspension or revocation for an additional like period, and the department shall not issue a new license during such period.

§321.218, The Code 1979.

You ask whether a driver who is eligible to apply for a section 321.215(1) work permit under the underlying suspension or revocation remains eligible for a work permit under this "like" suspension or revocation. Restated differently, your question is whether a "like" suspension or revocation for the purposes of a section 321.215(1) application or whether it is only a continuation of the original suspension or revocation. If it is the former, then the driver is not eligible to apply for the permit. If it is the latter, the driver's eligibility is unaffected.

In deciding this issue, it must be remembered that a statute should be accorded a logical, sensible construction which gives harmonious meaning to related statutes and accomplishes legislative purposes. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 188 (Iowa 1980). Drivers license suspension and revocation statutues have an obvious public safety purpose, the removal from the highways of those drivers who have demonstrated a disregard for the traffic laws and have thereby endangered the motoring public. *Krueger v. Fulton*, 169 N.W.2d 875, 878 (Iowa 1969); *Crow v. Shaeffer*, 199 N.W.2d 45, 47 (Iowa 1972); *Montrym v. Mackey*, 443 U.S. 1, 17, 99 S.Ct. 2612, 2620-21, 61 L.Ed.2d 321, 334 (1979); *Dixon v. Love*, 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172, 181 (1977). The legislature, at the same time, has recognized that a loss of driving privileges can impose extreme economic hardship on individuals unable to drive themselves to and from their place of employment. The department and the district courts, therefore, have been authorized to grant work permits under certain conditions to drivers suspended or revoked under particular statutory provisions. §§321.210, last unnumbered paragraph, and 321.215(1), The Code 1979. The legislature, however, by not making work permits available for every kind of license suspension or revocation, has effectively declared that certain offenses mandating suspension or revocation are so serious that considerations of public safety will always be paramount. *See Janssen v. Sellers*, 207 N.W.2d 746, 747 (Iowa 1973).

The state's interest in public safety demands that a driver convicted of a section 321.218 misdemeanor be denied the opportunity to apply for a work permit. The traffic violation triggering the "like" suspension or revocation, driving while a license is suspended or revoked, is distinct from the violation triggering the original suspension or revocation. One who has demonstrated enough disregard for the traffic laws to merit suspension or revocation is surely not intended to be the beneficiary of section 321.215(1). A section 321.218 suspension or revocation, therefore, is distinct from the original suspension or revocation for the purposes of section 321.215(1).

Interpreting section 321.215(1) to allow work permits for section 321.218 suspensions or revocations would authorize "double-dipping" for work permits. Driving outside the limits of the work permit not only results in the cancellation of the work permit; it also results in a section 321.218 suspension or revocation. This construction would allow a person who has had his or her work permit canceled under section 321.215(3) to apply for yet another work permit. Such a construction does not accord with the legislature's obvious intent to cancel the permit privileges of a driver who violates the terms of that permit.

In conclusion, a section 321.218 "like" suspension or revocation is distinct from the violated suspension or revocation for the purposes of eligibility for a section 321.215(1) work permit. A driver convicted of driving while under suspension or revocation, therefore, loses all eligibility to apply to the district court for a work permit.

II. *Whether the Department of Transportation should issue a work permit granted by a court to a driver whose license has been revoked under the implied consent law.*

a. Work permits ordered upon judicial review of implied consent decisions.

"Subject matter jurisdiction" is the power to hear and decide cases of the general class to which the proceeding in question belongs. *Wederath v. Brant*, 287 N.W.2d 591, 594 (Iowa 1980). That jurisdiction must be derived from a valid statute. *Chicago and Northwestern Railway Company v. Fachman*, 255 Iowa 989, 994, 125 N.W.2d 210, 213 (1963). It is given to a court solely by law and cannot be conferred by waiver, estoppel, or consent. *Wederath*, 287 N.W.2d at 595; *Lloyd v. State*, 251 N.W.2d 551, 556 (Iowa 1977). The effect of action taken by a court without jurisdiction of the subject matter is that the action is void and without effect. *Wederath*, 287 N.W.2d at 595; *In re Adoption of Gardiner*, 287 N.W.2d 555, 559 (Iowa 1980).

A party cannot be guilty of contempt for disobeying an order which the court had no authority of law to make. *Ex parte Grace*, 12 Iowa 208, 217, 79 Am. Dec. 529, 535 (1861): In other words, disobedience of a void decree does not constitute contempt. *Lynch v. Uhlenhopp*, 248 Iowa 68, 79, 78 N.W.2d 491, 498 (1956); *see generally*, 17 C.J.S., *Contempt* §42, quoted with approval in *Harvey v. Prall*, 250 Iowa 1111, 1115, 97 N.W.2d 306, 309 (1959); 17 Am.Jur.2d, *Contempt* §14 (1964); *see* 12 A.L.R.2d 1067, §§3 and 22. The court's jurisdiction may be questioned collaterally in contempt proceedings where the judgment upon which the contempt is based is void. *Geneva v. Thompson*, 200 Iowa 1173, 1176, 206 N.W. 132, 133 (1925); *see Wederath*, 287 N.W.2d at 595.

Whether the department must obey a district court order granting a work permit upon judicial review of an implied consent decision, therefore, depends upon whether the court has subject matter jurisdiction to issue such an order. If the court lacks the requisite jurisdiction of the subject matter, then the work permit need not be issued.

The Iowa district court is a court of general subject matter jurisdiction:

> ... The Iowa district court shall have exclusive, general and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate and juvenile, *except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body*, and it shall have and exercise all the power usually possessed and exercised by trial courts of general jurisdiction and shall be a court of record.

Section 602.1, The Code 1979 (emphasis added). When resolution of a controversy has been delegated to an administrative agency, the district court has no original authority to declare the rights of the parties or the applicability of any statute or rule. *Public Employment Relations Board v. Stohr*, 279 N.W.2d 286, 290 Iowa 1979).

The legislature has delegated to the Department of Transportation jurisdiction on implied consent revocations. §321B.7, The Code 1979. The only jurisdiction the district court has been granted over implied consent revocations is appellate. §§321B.9 and 17A.19, The Code 1979; *Hoffman v. Iowa Department of Transportation*, 257 N.W.2d 22, 25 (Iowa 1977). Judicial review of a department contested case decision is limited, restricted to a determination of whether "the agency action violates one of the seven §17A.19(8) criteria." *Schmitt v. Iowa Department of Social Services*, 263 N.W.2d 739, 743 (Iowa 1978).

The department lacks the authority to grant work permits to drivers whose licenses have been revoked under the implied consent law. *Janssen v. Sellers*, 207 N.W.2d 746, 747 (Iowa 1973). The department's denial of a work permit to an applicant revoked under chapter 321B, therefore, cannot violate one of the section 17A.19(8) criteria. The district court, consequently, lacks jurisdiction to grant a work permit in its review of an implied consent decision. The department, then, need not issue a work permit ordered upon judicial review of an implied consent decision.

b. A work permit granted under a section 321.215(1) application to a driver revoked under the implied consent law.

The district court's original jurisdiction to entertain the work permit application of one whose license to drive has been suspended or revoked is derived from section 321.215(1), The Code 1979. That section authorizes the district court to grant applications for work permits to those drivers suspended under specified statutory provisions, viz., §§321.209(6) and (7), 321.210, and 321.555, The Code 1979. District courts do not have the authority to grant work permit applications when the suspension or revocation is under other, non-enumerated provisions. This conclusion follows from the rule of statutory construction stated as "expressio unius est exclusio alterius" (expression of one is exclusion of another). *See Iowa Farmers Purchasing Ass'n., Inc. v. Huff*, 260 N.W.2d 824, 827 (Iowa 1977); *In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972).

Since implied consent revocations are omitted from the section 321.215(1) grant of authority, the district court has no jurisdiction to grant the work permit application of one whose license has been revoked under chapter 321B. The department, therefore, need not issue a section 321.215(1) work permit to a driver whose license has been revoked under the implied consent law.

It is unnecessary, however, to reach the contempt issue because of the conditional validity of work permits granted by district courts under the authority of section 321.215(1). Section 321.215(3) states in part that "[a] temporary restricted permit shall be valid only if the department is in receipt of records required by this section." The court, therefore, can accept as true the applicant's allegations of the existence of those records. If these records are not in the possession of the department when it is forwarded the court's disposition, then the department is not to issue the permit. This statutory scheme, while unusual, expedites the application process and obviates the necessity and expense of subpoenaing the department's record-keeper. If a suspension or revocation under one of the provisions enumerated in section 321.215(1) is a "record required by this section," then the department should not issue a work permit granted by a district court to a driver suspended or revoked under any non-enumerated provision.

Among the records the department is required to keep are the records of all license suspensions and revocations. §321.199(3), The Code 1979. Not construing these records to be one of the "records required by [section 321.215(1)]" would raise the evidentiary problems that section 321.215(3) is intended to avoid, and thereby thwarting the legislative intent to make the application inexpensive and expeditious. Since the primary rule of statutory construction is to give effect to

the intention of the legislature, *State v. Berry*, 247 N.W.2d 263, 264 (Iowa 1976), a suspension or revocation under one of the enumerated provisions is a "record required by [section 321.215(1)]."

A work permit granted by a district court to a driver suspended or revoked under any provision not specified in section 321.215(1) is thus invalidated by the terms of the very statute under which it is issued. The department, therefore, cannot be found guilty of contempt for not issuing a work permit to a driver suspended or revoked under a provision not enumerated in section 321.215(1).

Disobedience of a district court order is rarely prudent, even when lack of jurisdiction is clear. A chapter 17A district court implied consent decision ordering the department to issue a work permit should be appealed pursuant to the Iowa Rules of Appellate Procedure. A section 321.215(1) order cannot be appealed by the department because the department is not a party to the proceeding; but the department, in a certiorari action challenging the court's subject matter jurisdiction, may seek to have the order annulled. *See* Iowa R.Civ.P. 306-319. The department should consider disregarding the order only when a certiorari action is foreclosed by lack of timely notice of the order. *See* Iowa R.Civ.P. 319.

February 6, 1981

COUNTY HOME RULE; CRIMINAL LAW: Iowa Constitution, Article III, section 39A. A county cannot levy a fine or other penalty for violation of a county ordinance absent express authority from the General Assembly. The establishment of criminal laws is inherently a matter of state-wide concern and, in addition, is a matter which has been preempted by the state. The preemption accomplished by the Criminal Code is so complete and comprehensive that the entire area of criminal law is foreclosed from county legislation absent an express legislative enactment to the contrary. Should the legislature decide to grant authority to the counties in the area of criminal law, the scope of authority is set by legislative discretion. (Fortney to Briles, State Senator and Danker, State Representative, 2/6/81) #81-2-5

The Honorable James E. Briles, State Senator; The Honorable Arlyn E. Danker, State Representative; Co-chairpersons of the County Home Rule Study Committee, State Capitol: You have requested our opinion regarding the authority of counties to enact ordinances, the violation of which would result in criminal sanctions. Specifically, you have posed the following questions:

1. Under present law, can a county levy a fine or other penalty for violation of a county ordinance?

2. If so, can it levy a fine or penalty in excess of the fine and penalty provided in the criminal code for violation of a simple misdemeanor?

3. If the legislature wishes to authorize or limit the counties' power to levy fines and penalties, may it authorize county fines and penalties in excess of the fine and penalty provided in the criminal code for the violation of a simple misdemeanor?

4. Assuming that the county is authorized to levy any fine or other penalty for violation of a county ordinance, either under the present Code or by a new enactment, does the state criminal code presently preempt the area to which it applies to the extent that a county may not legislate in

regard to the offenses covered in the state criminal code, but may only legislate in regard to offenses not so covered?

I.

An analysis of your questions must logically begin with the County Home Rule Amendment, Iowa Const., Art. III, section 39A, which became a part of our organic law in 1978. The amendment states as follows:

> Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly. The General Assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The General Assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

We have previously examined the import of the 1978 amendment at considerable length. *See* Op.Atty.Gen. #79-4-7. We opined that the counties were free to exercise and determine their local affairs without the prerequisite of state enabling legislation. This was in marked contrast to the situation existing prior to the adoption of county home rule which was characterized by counties having only those powers expressly granted or clearly implied by state law.

While recognizing that Iowa Const., Art. III, section 39A grants extensive authority to counties in the matter of county affairs, we hasten to point out, as we did in our previous opinion, that there exists limitations on the scope of county authority. The amendment contains four basic limitations. First, counties have no power whatsoever to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, the municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

Obviously, the first two limitations do not bear on the questions you have posed. However, the third and fourth concerns compel us to conclude that a county cannot levy a fine or other penalty for violation of a county ordinance absent express authority from the General Assembly. It is our opinion that the establishment of criminal laws is inherently a matter of state-wide concern and, in addition, is a matter which has been preempted by the state government.

We previously stated that the prohibition on acts which are "inconsistent with the laws of the General Assembly" constituted a limitation founded on the concept of "preemption", *i.e.*, "in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate a subject matter. Where 'preemption' is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation" *See* Op.Att'y.Gen. #79-4-7, citing Scheidler, *Implementation of Constitutional Home Rule in Iowa*,

22 Drake L.Rev. 294 (1975). The conclusion that the counties may not legislate in areas which have been preempted by the state government is buttressed by the County Home Rule Amendment's express proviso that counties are authorized "to determine their *local affairs* and government." [Emphasis supplied.] Conversely, they may not legislate with regard to state affairs, absent express legislative authority. It follows that an historical demonstration of a legislative intent to preempt an area of regulation indicates a belief on the part of the legislature that the matter in question is inherently a state, and not a local matter.

If the area of criminal law was not primarily one of state concern prior to the 1970s, the legislative history of that decade evidences a clear legislative intent to preempt the area. During those years the General Assembly engaged in a comprehensive overhaul of the Iowa Criminal Code. All areas of criminal law were examined and generally updated.

Additional support for preemption is found in the authorization of municipalities to enact ordinances carrying criminal penalties. Prior to the adoption in 1968 of the Municipal Home Rule Amendment, Iowa Const., Art. III, Section 38A, the Iowa General Assembly expressly authorized municipalities and chartered cities to enact such ordinances. *See* §366.1 and §420.31, The Code 1966. The origins of these sections can be traced to §§1071-1073, 1860 Code Revision. Such legislative authorization was necessary before cities could validly make such ordinances under the authority of the "Dillon Rule" articulated in *City of Clinton v. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455 (1868). Following the adoption of Municipal Home Rule, the cities had the authority to take action relative to local affairs without any further authorization from the state; no enabling legislation was necessary to implement home rule. *Green v. City of Cascade*, 231 N.W.2d 882 (Iowa 1973). Depsite this fact, the legislature proceeded to adopt enabling legislation in the form of 1972 Session, 64th G.A., ch. 1088. Included in this enactment was what now appears as chapter 364, The Code 1981. Sections 364.1 and 364.2 recognize the broad scope of authority conferred under home rule. However, §364.3(2) expressly limits the role of cities with regard to enacting ordinances carrying criminal penalties. The section provides, in pertinent part: "A city may not provide a penalty in excess of a one hundred dollar fine or in excess of thirty days imprisonment for the violation of an ordinance." This provision represents a reenactment of the limitation which historically existed prior to home rule, a demonstration of legislative intent to continue the existing preemption. If the area of criminal law was not one primarily reserved to the state, the cities would have had authority to enact criminal ordinances without authorization from the legislature.

We are not unmindful that one could argue that §364.3(2) is not a *grant of authority* by the General Assembly, but rather is a *limitation* upon the constitutional powers of cities. Under such an analysis, cities would have authority to enact ordinances bearing criminal penalties to be determined by local authorities. Such local legislation would be premised on home rule powers. Section 364.3(2) would constitute a limitation on this constitutional municipal authority. By analogy, one would argue that counties have similar unrestrained authority under home rule, absent a similarly imposed legislative restriction. We feel, however, that such analysis ignores the historical role of the General Assembly in the enactment of criminal statutes, *i.e.*, this is not a "local affair". Furthermore, sound policy considerations advise against a conclusion that each of the state's ninety-nine counties is authorized to adopt a separate criminal code.

Because of the foregoing considerations, we feel compelled to conclude that under present law a county cannot levy a fine or other penalty for violation of a county ordinance.

II.

Because we have answered your first question in the negative, we do not need to address your second question.

III.

You have inquired whether the legislature could only authorize counties to levy fines and penalties equivalent to those which attach for violation of a simple misdemeanor, or may the legislature authorize the counties to adopt ordinances which carry more severe penalties for their violation. It is our opinion that the scope of authority which is granted to the counties is a legislative determination and the only limit on the authority granted is that which the legislature, in its sound discretion, decides to establish.

The fine and penalty for a simple misdemeanor is established by §903.1, The Code 1981. This is a legislatively set penalty. It is not specified in the Iowa Constitution. The General Assembly is free to adjust the penalties for simple misdemeanors, as this would involve only an amendment to chapter 903. Similarly, if the General Assembly determines that it is advisable to allow counties the power to establish criminal penalties, the grant of authority is limited only by the legislative will. If the legislature wanted to confer more authority to counties than it has to municipalities, the General Assembly has the power to do so.

IV.

Your final question essentially inquires whether the present criminal code represents a comprehensive preemption of the entire criminal law area, or only the specific areas of criminal law which are dealt with at the state level. You asked whether the Code presently preempts to the extent that a county may not legislate in regard to the offenses covered in the State Criminal Code, but may legislate in regard to offenses not so covered. It is our opinion that the preemption accomplished by the Criminal Code is so complete and comprehensive that the entire area of criminal law is foreclosed from county legislation absent an express legislative enactment to the contrary. This position is based on the analysis which is set forth in Division I of this opinion. It is our belief that the enactment of criminal law is inherently a matter of state concern. The fact that the legislature has elected to refrain from attaching criminal sanctions to specified conduct is no less significant than the decision to criminalize. This is most apparent when one considers that in the revision of the criminal code the General Assembly made a conscious decision to decriminalize specific conduct which was considered criminal prior to the revision. To now say that the counties are free to reimpose criminal sanctions in these areas simply because there exists no state criminal laws would fly in the face of the state legislative determination. We believe the entire area of criminal law is preempted to state control. Until the General Assembly authorizes the counties to regulate conduct by imposition of criminal sanctions, they may not enter the area.

Summary

A county cannot levy a fine or other penalty for violation of a county ordinance absent express authority from the General Assembly. The establishment of criminal laws is inherently a matter of state-wide concern and, in addition, is a

matter which has been preempted by the state. The preemption accomplished by the Criminal Code is so complete and comprehensive that the entire area of criminal law is foreclosed from county legislation absent an express legislative enactment to the contrary. Should the legislature decide to grant authority to the counties in the area of criminal law, the scope of authority is set by legislative discretion.

February 6, 1981

MOTOR VEHICLES: Railroads; Schools; §§321.343, 321.252, The Code 1979. Section 321.343 requires a school bus driver to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears that the track is not used by rail traffic, unless a police officer or a traffic signal, such as the EXEMPT sign, directs or allows vehicles to proceed. (Mull to Benton, State Superintendent of Public Instruction, 2/6/81) #81-2-6(L)

February 9, 1981

PUBLIC RECORDS: Confidentiality; Criminal Intelligence Data — Chapter 68A, The Code 1981; Chapter 692, The Code 1979. Intelligence data as defined in section 692.1(11) which is collected by a criminal justice agency through its own efforts may be legitimately disseminated subject to the confidentiality provisions of section 68A.7 and such dissemination would not be barred by chapter 692. Intelligence data collected by the Department of Public Safety, Division of Criminal Investigation, or Bureau of Identification through their own efforts may be disseminated "only to a peace officer, criminal justice agency, or state or federal regulatory agency, and only if the department is satisfied that the need to know and the intended use are reasonable," section 692.8, and such data are not public records under chapter 68A. Intelligence data received by a criminal justice agency from the Department of Public Safety, Division of Criminal Investigation, Bureau of identification, other criminal justice agencies, or state or federal regulatory agencies may be redisseminated according to section 692.3 only is "the data is for official purposes in connection with prescribed duties of a criminal justice agency, and the agency maintains a list of persons receiving the data and the date and purpose of the dissemination." A nonspecific pronouncement that an investigation is in progress is not subject to the provisions of chapters 68A or 692. The redissemination of intelligence data for purposes of seeking public assistance in a criminal investigation or warning the public of potential dangers is proper under 692.3 since such "is for official purposes in connection with prescribed duties of a criminal justice agency." (Richards to Johnston, Polk County Attorney, 2/9/81) #81-2-7

Mr. Dan L. Johnston, Polk County Attorney, Polk County Courthouse: You have requested an opinion of the Attorney General seeking clarification of chapter 692, The Code 1979. As stated in your letter, law enforcement officers have been concerned that the penalties, both criminal and civil, of that chapter may be imposed on them "if they release to the public [particularly through the media] *any* information concerning a criminal investigation" And as you note, this has been prompted in part by the recent decision of the Iowa Supreme Court in *Feeney v. Scott County*, 290 N.W.2d 885 (Iowa 1980), the first pronouncement by that body on chapter 692. Hence, the following specific questions are raised:

1. Does chapter 692 allow the release of information that a crime has occurred, including the date, location, and facts constituting the offense?

2. May names and other identifying facts concerning victims and witnesses be made public?

3. May information contained in a public record be made public by criminal justice agencies?

4. May the fact that an investigation is in progress be made public?

5. May the general scope of the investigation include a description of the offense and the identity of the victim and witnesses be made public?

6. May information necessary to allow the public to assist in apprehending a suspect or locating witnesses or other individuals be made public?

7. May information necessary to warn the public of danger be made public?

Although these questions are expressly directed at chapter 692, they also relate to chapter 68A, The Code 1981, and we, thus begin by examining the mechanics of these respective provisions.

Chapter 68A of the Code is commonly referred to as Iowa's Freedom of Information Act. *Howard v. Des Moines Register and Tribune Co.*, 283 N.W.2d 289 (Iowa 1979). Its purpose and operation have been thoroughly analyzed in Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records But Were Afraid to Ask*, 57 Iowa L.Rev. 1163 (1972). The chapter basically encompasses the view that the best watchdog over the government is the people and facilitates that end by generally permitting public access to and examination of most public records, "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." §68A.2, The Code 1981. The act itself in section 68A.7, "permits concealment of public records under circumstances where public access would cause substantial and irreparable harm to any individual and no public interest would be served." Note, *Iowa's Freedom of Information Act*, 57 Iowa L.Rev. at 1166. Pertinent to this opinion are the following provisions of section 68A.7:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian, or by another person duly authorized to release information:
>
> * * *
>
> 5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.
>
> * * *
>
> 9. Criminal identification files of law enforcement agencies. However records of current and prior arrests shall be public records.

Although such records are declared confidential, that section empowers the court to order their production and vests discretionary authority in the lawful custodian or other properly designated person to release them.

Additionally, if a record is otherwise subject to disclosure, its inspection may nonetheless be enjoined when "such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons." Section 68A.8, The Code 1981.

Chapter 692 of the Code is one such provision which "expressly limits such right [of examination] or requires such records to be kept secret or confidential." Section 68A.2, The Code 1981. Section 692.18, The Code 1979, specifies the relationship between the two chapters:

> Nothing in this chapter shall prohibit the public from examining and copying the public records of any public body or agency as authorized by chapter 68A.
>
> *Criminal history data* and *intelligence data* in the possession of the department [of public safety] or bureau [of criminal investigation and identification], or disseminated by the department or bureau, are *not public records* within the provisions of chapter 68A. [Emphasis added.]

This provision is central to the resolution of your questions as discussed below. We turn first, however, to an examination of the convoluted features of chapter 692.

This statute was enacted in 1973 and was generally referred to as the TRACIS bill (TRACIS being a central crime computer system). The bill's purpose, as proposed in Note, *The Dissemination of Arrest Records and the Iowa TRACIS Bill*, 59 Iowa L.Rev. 1162, 1172 (1974), was twofold. "The TRACIS bill was enacted both to control the dissemination of informational data centrally collected by the department and to establish standards for the use of the crime computer system by all agencies with access to that system." Upon review of the provisions outlined below, we perceive another purpose of the act in addition to the suggested purpose of protecting individual privacy rights. It appears equally clear that the act is aimed at preserving the integrity of criminal investigations by restricting public access to information gathered by law enforcement agencies. (The same may also certainly be said for the declaration of confidentiality in section 68A.7(5), The Code 1981.) Having identified the intent, we next review the specifics of the statute.

Several sections of chapter 692 are significant to this opinion. The act distinguishes between several types of information, generally categorized as criminal history data, intelligence data, and surveillance data. This opinion is concerned only with the first two categories of information which are defined respectively in sections 692.1(3) and 692.1(11) as follows:

> 'Criminal history data' means any or all of the following information *maintained by the department or bureau in a manual or automated data storage system and individually identified:*
>
> *a. Arrest data.*
> *b. Conviction data.*
> *c. Disposition data.*
> *d. Correctional data. [Emphasis added.]*
>
> *'Intelligence data' means information collected where there are reasonable grounds* to suspect involvement or participation in criminal activity *by any person.* [Emphasis added.]

We note that the definition of "criminal history data" applies only to such information "maintained by the department or bureau" whereas the definition of "intelligence data" applies to such information irrespective of who maintains it. As discussed below, the bill makes certain limitations on who may be legitimate recipients of such information. In that respect, the following definition contained in section 692.1(10), The Code 1979, is also pertinent:

> 'Criminal justice agency' means any agency or department of any level of government which performs as its principal function the apprehension,

> prosecution, adjudication, incarceration, or rehabilitation of criminal offenders.

Given these definitions, we next consider the statutory restrictions placed on the communication of such data.

The statute focuses on two forms of communication, dissemination and redissemination, but nowhere defines the terms. We note further that the Iowa Supreme Court did not attach any real significance to the distinction in terms in its opinion in *Feeney v. Scott County*, 290 N.W.2d 885 (Iowa 1980). However, the statute does treat these modes in separate provisions of the chapter and, in our view, the distinction is crucial to the workings of this law. We are reminded of our pronouncement in an earlier opinion on a similar question: "In a rhetorical sense, any communication of data, except the initial communication of the data from its original source, would be 'redissemination.' In other words, information must be 'disseminated' before it can be 'redisseminated.'" 1974 Op.Att'y.Gen. 376, 378. *Dissemination* of "criminal history data" is specifically regulated by section 692.2 which provides in part:

> *The department and bureau* may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. *The bureau* shall maintain a list showing the individual or agency to whom the data is disseminated and the date of dissemination
>
> Authorized agencies and criminal justice agencies shall request and may receive criminal history data only when:
>
> 1. The data is for official pruposes in connection with prescribed duties, and
>
> 2. The request for data is based upon name, fingerprints, or other individual identifying characteristics.
>
> The provisions of this section and section 692.3 which relate to the requiring of an individually identified request prior to the dissemination or redissemination of criminal history data shall not apply to the furnishing of criminal history data to the federal bureau of investigation or to the dissemination or redissemination of information that an arrest warrant has been or will be issued, and other relevant information including but not limited to, the offense and the date and place of alleged commission, individually identifying characteristics of the person to be arrested, and the court or jurisdiction issuing the warrant.

[Emphasis added.] The section's commands are directed only to the Department of Public Safety, the Division of Criminal Investigation, and Bureau of Identification, but *not* to other criminal justice agencies. Information other than "records of current and prior arrests" that would constitute criminal history data in the hands of other law enforcement agencies would nonetheless be subject to the discretionary confidentiality of section 68A.7(9), The Code 1981, quoted above. Moreover, the department and bureau may release certain arrest-related information according to the last unnumbered paragraph of section 692.2.

Dissemination of "intelligence data" is controlled in section 692.8 which provides in relevant part:

> Intelligence data in the files of *the department* may be disseminated only to a peace officer, criminal justice agency, or state or federal regulatory

agency, and only if *the department* is satisfied that the need to know and the intended use are reasonable. Whenever intelligence data relating to a defendant for the purpose of sentencing has been provided a court, the court shall inform the defendant or his attorney, permit examination of such data.

If the defendant disputes the accuracy of the intelligence data, he shall do so by filing an affidavit stating the substance of the disputed data and wherein it is inaccurate. If the court finds reasonable doubt as to the accuracy of such information, it may require a hearing and the examination of witnesses relating thereto on or before the time set for sentencing.

Again this section's commands apply only to the Department of Public Safety and *not* to other criminal justice agencies. The dissemination limits of sections 692.2 and 692.8 are clearly consistent with the legislative purposes suggested above.

The perplexing interpretative problem with this chapter revolves around its treatment of *redissemination* in section 692.3, The Code 1979. The first unnumbered paragraph thereof governs the *redissemination* of "criminal history data":

A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data, within or without the agency, *received from the department or bureau*, unless:

1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

[Emphasis added.] The paragraph's mandates do apply to any peace officer or stated agency but apply only to criminal history data received from the Department of Public Safety, Division of Criminal Investigation, and Bureau of Identification. It does not apply to such data generated from other sources. As such it is consistent with the provisions controlling *dissemination* of "criminal history data" in section 692.2.

The real difficulty, however, arises over the second unnumbered paragraph of section 692.3. As originally introduced, section three of Senate File 115 consisted of the one unnumbered paragraph quoted above and, thus, dealt solely with the *redissemination* of "criminal history data." The section was significantly altered by amendments in the senate (S-238, 240 and 241) and, as a result, a second unnumbered paragraph was added regulating the *redissemination* of "intelligence data":

A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate intelligence data, *within or without the agency*, received from the department or bureau *or from any other source*, [unless:

1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of persons receiving the data and the date and purpose of the dissemination.]

[Emphasis added.] This paragraph's commands also apply to any peace officer or stated agency and apply not only to intelligence data communicated by the Department of Public Safety, Division of Criminal Investigation, or Bureau of Identification, but also to intelligence data received "from any other source."

In addition, all *redissemination* of intelligence data must comport with the two requirements numbered accordingly in the quote above. These requirements were both interpreted by the Iowa Supreme Court in its *Feeney* decision. With respect to the first requirement, it was argued to the supreme court that "the act limits dissemination of data by one criminal justice agency only to another criminal justice agency." 290 N.W.2d at 889. The court flatly rejected this contention:

> By only requiring that the 'data [be used] for official purposes in connection with prescribed duties of a criminal justice agency,' §692.3(1), the statute does not limit who may receive such data. No other conclusion is reasonable in light of the explicit limitation of permissible recipients of information from the department or bureau. *Compare* §692.3 *with* §692.2 ("The department and bureau may provide copies or communicate information from criminal history data *only to* criminal justice agencies, or such other public agencies as are authorized by the confidential records council...') [emphasis added] *and* §692.8 ("Intelligence data in the files of the department may be disseminated *only to* a peace officer, criminal justice agency, or state or federal regulatory agency, *and only if* the department is satisfied that the need to know and the intended use are reasonable'). [Emphasis added.] This may appear to be a fine distinction, but we are required to draw it. Chapter 692 is a criminal statute, see §692.7, and such statutes must be strictly construed. (Citations omitted.) We can only assumed that in drawing this distinction the legislature contemplated that there could be situations where someone other than a criminal justice agency could nonetheless use such 'data... for official purposes in connection with the prescribed duties of a criminal justice agency.' §692.3(1). 290 N.W.2d at 889.

[Emphasis in original.] Thus, the supreme court concluded that the redissemination of certain intelligence data from a criminal justice agency (the Scott County Sheriff's Department) to a non-criminal justice agency (the Scott County Civil Service Commission) was nonetheless proper under section 692.3 since the latter was acting for the former and had received the data "for official purposes in connection with prescribed duties of" the former. With respect to the second requirement, the Iowa Supreme Court strictly construed the provision that the agency maintain a log of all persons who come in contact with the data:

> We reach this conclusion somewhat reluctantly because of the obvious practical problems created by it. For example, in a criminal justice agency, a record seemingly must be maintained on all data covered by the act every time it is transferred among officers, secretaries, filing clerks and typists, even when they are in the same office. However, we have often said that it is not for us to determine the wisdom of the legislation before us. 290 N.W.2d at 890.

One other aspect of the *Feeney* decision is pertinent to this opinion which is indicated by the court's handling of the second requirement discussed above. In interpreting chapter 692, the high court read the statute quite literally. The court's strict construction was applied not only to the act's directions but to its penalties as well. Those penalties, contained in sections 692.6 and 692.7, are severe. Under the former provision, violators (both disseminators and those seeking the information) are subject to civil actions "for actual damages and exemplary damages for each violation and shall be liable for court costs, expenses

and reasonable attorneys' fees." That section further sets a minimum award for damages of one hundred dollars. The criminal penalties of section 692.7 are graduated according to the type of information involved and the intent of the actor. In the case of criminal history data, violators (both disseminators and recipients) who act willfully commit aggravated misdemeanors for each offense; those acting without criminal purpose commit simple misdemeanors for each offense. Section 692.7(1), The Code 1979. In the case of intelligence data, violators who act willfully commit class "D" felonies for each offense; those acting without criminal purpose commit serious misdemeanors for each offense. Section 692.7(2), The Code 1979. Furthermore, under section 692.7(3), a peace officer convicted for violating the act may be discharged or suspended without pay, and a convicted public officer or employee may be removed from office.

The intricacies of these statutes, exemplified by the foregoing exhaustive discussion, are matched only by the several suggestions proposed in many circles for resolving the questions posed. One such suggestion focuses on the definition of intelligence data in section 692.1(11), quoted above, with particular emphasis on the last three words: "by any person." According to this argument, information collected by criminal justice agencies does not constitute intelligence data until "there are reasonable grounds to suspect involvement or participation in criminal activity" by a particular person or persons. In other words, such information becomes intelligence data subject to the restrictions of chapter 692 only after a criminal suspect or suspects have been identified. This view seeks additional support from the above suggested legislative intent in chapter 692 of protection of individual privacy rights and from the following language of a prior attorney general's opinion:

> Viewing these definitions, as well as the entire act it appears that the term 'intelligence data' refers to information about *an individual's alleged criminal activities* rather than physical evidence. We do not believe that the actual physical evidence nor any laboratory analysis thereof is 'intelligence data.' 1976 Op.Att'y.Gen. 103, 105 [emphasis added].

To rebut this position it has been argued that such reading of section 692.1(11) is too narrow and does not correspond with the generally accepted legal meaning of the word "any" as used in the phrase "by any person." The Iowa Supreme Court has often defined the word "any" to mean "one of a number," "some," or "one or more." *Kayser v. Occidental Life Insurance Co.*, 234 Iowa 316, 318-319, 12 N.W.2d 582, 587 (1944); *State v. Pierson*, 204 Iowa 837, 939, 216 N.W. 43, 44 (1927). Moreover, the argument goes, if the legislature had meant to so narrow the definition's scope it would have stated the definition in such terms as "by any specific person." However, in response to this rebuttal, it has been urged that the legislature did intend the phrase to have such meaning since crimes obviously are committed by people, thereby rendering the phrase superfluous under the rebuttal argument.

A second suggestion also focuses on the definition of intelligence data in section 692.1(11), with emphasis placed on the standard reflected in the words "reasonable grounds to suspect." It is, thus, posited that "reasonable grounds to suspect" depend on the existence of certain foundational facts which are not "intelligence data" until that standard is reached. Hence, such foundational facts are not subject to chapter 692, although they would be covered by the discretionary confidentiality of section 68A.7(5). This approach, however, is not problem-free. For example, what constitutes a foundational fact, when is the standard of "reasonable grounds to suspect" reached, and who should decide? This approach, though statutorily plausible, is perhaps too unwieldly to be a practical solution.

A third suggested approach is premised on the view that, consistent with the statute's aim of protecting the privacy of individuals, the definition of intelligence data applies only to "mere speculation, rumor, suspicion, and innuendo." Op.Att'y.Gen. #79-12-18 at page two. Reliable evidence of basic facts, according to this position, should not be subject to the limits of chapter 692 since their repression would in no way serve the underlying purposes of the act. This argument also seeks support from that portion of the opinion, quoted above, exempting physical evidence from the definition of intelligence data. 1976 Op.Att'y.Gen. 103. Such reliable evidence would, even under this theory, remain subject to the discretionary confidentiality of section 68A.7(5). This suggested reading of the terms "information collected" is, however, difficult to reconcile with the rather broad language in the remainder of section 692.1(11).

As suggested earlier in this opinion, there is yet another approach to this area which does not depend so much on what is or is not intelligence data, but rather hinges on the distinction between dissemination and redissemination, the statute's intent, and the legislature's directive in section 692.18. We noted that the truly troublesome provision is the second unnumbered paragraph of section 692.3 and the portion thereof restricting redissemination of intelligence data "received . . . from any other source." This language was reviewed in a prior opinion involving a strikingly similar question. *See* 1976 Op.Att'y.Gen. 661. As pointed out therein and above, chapter 692 does not regulate "the *dissemination* of intelligence data gathered or collected by a police department through its own efforts." 1976 Op.Att'y.Gen. at 663. This prior opinion held in effect that the act does not prohibit the *redissemination* of such information collected by a police department through its own efforts. Although the reasoning is somewhat cryptic the opinion restricts the phrase "from any other source" to other criminal justice agencies, concluding that:

Once a police department has collected or gathered intelligence data and disseminated such data to another police department or criminal justice agency, the *re*dissemination provisions of section [692.3] would appear to apply to such other department or agency. If a police department collects or gathers intelligence data from sources that do not include other peace officer agencies, the dissemination of this information would be restricted by section 68A.7, not by chapter [692] although chapter [692] would restrict its redissemination.

1976 Op.Att'y.Gen. at 663 [emphasis in original]. It is our view, however, that this proposition is strongly supported by the legislative intent discussed above and the clear direction of section 692.18, The Code 1979.

An obvious main thrust of the TRACIS bill is control over the communication of data centrally collected by the Department of Public Safety and its branches. The legislature simply never intended to so hamstring local police agencies nor to so undermine the public's access to public records. This is apparent from the very language of section 692.18 wherein it is declared that only intelligence data possessed or disseminated by the department or bureau are not public records. The converse, of course, is that intelligence data collected by a police department through its own efforts are public records, albeit subject to section 68A.7(5), The Code 1981. To the extent the second unnumbered paragraph of section 692.3 is in irreconcilable conflict with section 692.18, the latter prevails over the former Section 4.8, The Code 1981 ("If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails").

We finally turn to an examination of your specific questions. Chapter 692 does *not* prohibit the dissemination by a criminal justice agency of information that a

crime has occurred including the date, location and facts constituting the offense but *only* if such information is collected by the agency through its own efforts. Such recorded data, however, remains confidential under section 68A.7(5) subject to the agency's discretion. Chapter 692 does prohibit the *re*dissemination by a criminal justice aency of such information when it is received from the department, bureau, or another criminal justice agency. Chapter 692 restricts all disseminations by the department or bureau of such data "only to a peace office, criminal justice agency, or state or federal regulatory agency, and only if the department is satisfied that the need to know and the intended use are reasonable." Section 692.8, The Code 1979. These same principles apply to your second inquiry regarding the release of "names and other identifying facts concerning victims and witnesses." A criminal justice agency may disseminate such information only if it was collected by the agency through its own efforts, chapter 692 notwithstanding. Any dissemination would be subject, though, to the provisions of section 68A.7(5), The Code 1981. Chapter 692 expressly prohibits the redissemination by a criminal justice agency of such data when it is received from the department, bureau, or another criminal justice agency. The department or bureau may disseminate such information only to those authorized recipients under section 692.8.

Your third question is directly answered by sections 692.18, 68A.7(5), and 68A.7(9). Criminal history data and intelligence data possessed or disseminated by the department or bureau are simply *not* public records and obviously *cannot* be made public. Peace officers investigative reports and criminal identification files (except records of current and prior arrests) are public records *but* are kept confidential within the discretion of the governmental body.

Your fourth and fifth questions are interrelated. In our view, chapter 692 would not prevent any criminal justice agency, including the department or bureau, from releasing a statement that merely says an investigation is in progress. However, to the extent a further release describing "the general scope of the investigation including a description of the offense and the indentity of the victim and witnesses" discloses intelligence data, the principles discussed above as applied to your first two questions would apply equally to such a release.

Your sixth and seventh questions are also interrelated and involve those situations where police seek public assistance in a criminal investigation or need to warn the public of potential dangers. As already discussed, if the information released in furtherance of those ends was gathered by a police department through its own efforts, chapter 692 would not apply to such dissemination to the public. But even if that chapter did apply under section 692.3, it is our opinion that the release of intelligence data for those specific purposes would nonetheless be appropriate. The prescribed duties of a criminal justice agency certainly include the apprehension of suspects, the location of witnesses, and the protection of the public. Thus a redissemination of certain intelligence data to further a criminal investigation by the public's assistance or to protect the public from potential danger "is for official purposes in connection with prescribed duties of a criminal justice agency." Section 692.3(1), The Code 1979. This proposition is directly supported by the supreme court's decision in *Feeney* where, as quoted above, the court refused to limit the authorized recipients of intelligence data under section 692.3 exclusively to other criminal justice agencies.

In conclusion, we wish to emphasize that we have attempted to analyze and interpret these statutes so as to reconcile them without reaching an absurd result. Unfortunately these provisions, particularly those of chapter 692, do not lend themselves easily to such construction. However, as the Iowa Supreme Court stated in *Feeney*, "it is not for us to determine the wisdom of the legislation before us." *Feeney v. Scott County*, 290 N.W.2d at 890. We would urge the General Assembly to consider clarifying certain key provisions of chapter 692. With

several years of experience under this statute, it may be possible to articulate more precisely the delicate balance among the values of individual privacy, open government and effective law enforcement.

February 9, 1981

COURTS; COURT OF APPEALS JUDGES; SOLEMNIZATION OF MARRIAGES: §595.10, The Code 1979. A judge of the Court of Appeals may solemnize a marriage. (Bennett to Johnson, State Representative 2/9/81) #81-2-8(L)

February 11, 1981

COUNTIES AND COUNTY OFFICERS; BID LETTING: Article III, §39A, Constitution of Iowa; Sections 23.2, 332.3(6), and 332.7, The Code 1979. The Board of Supervisors is not required to follow the advertisement and bidletting procedures set forth in §332.7, The Code 1979, when contracting for services of an architect in connection with a project to construct or repair a county building. (Hagen to Polking, Carroll County Attorney, 2/11/81) #81-2-9(L)

February 11, 1981

COUNTIES AND COUNTY OFFICERS: Sections 111A.6, 137.18, 137.20, 333.2, 333.4, 333.5, 349.18 and 358B.10, The Code 1979. When the board of supervisors denies payment of a bill for which authorization prior to issuance by the auditor is required, the auditor has no authority to issue a warrant, even though the claim is for a legitimate purpose and within budget appropriations. Unless some other Code provision authorizes an auditor to issue warrants without prior supervisor approval, an elected official whose claim was denied must seek a judicial remedy to the denial by the board of payment. (Hagen to Davis, Scott County Attorney, 2/11/81) #81-2-10(L)

February 11, 1981

MUNICIPALITIES; COMPATIBILITY; JUDICIAL MAGISTRATES: §602.53(2). A part-time magistrate may serve as city attorney if the position does not involve criminal prosecution. (Schantz to Nolte, Judicial Magistrate, 2/11/81) #81-2-11(L)

February 11, 1981

MUNICIPALITIES; COMPATIBILITY; JUDICIAL MAGISTRATES: §602.53(2). A part-time magistrate may serve as city attorney if the position does not involve criminal prosecution. (Schantz to Schaefer, 2/11/81) #81-2-12(L)

February 16, 1981

OPEN MEETINGS: The Iowa Civil Rights Commission. Sections 28A.1, 28A.2(2), The Code 1981. The Iowa Civil Rights Commission conducts a meeting within the meaning of §28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates. (Stork to Reis, Executive Director, Iowa Civil Rights Commission, 2/16/81) #81-2-13(L)

February 22, 1981

MUNICIPALITIES: Residency Requirements — §§400.6(1), 400.9 and 400.17, The Code 1979. Residency requirements cannot be imposed upon civil service employees, other than police and firefighters and critical employees. (Blumberg to Welsh, State Representative, 2/16/81) #81-2-14(L)

February 17, 1981

UNIFORM COMMERCIAL CODE: Transition Continuation Filing Statements: §554.11105(5)(a), The Code 1979. When a financial financing statement has been filed at the county level prior to January 31, 1975, on collateral consisting of equipment used in farming operations, or farm products, or accounts, contracts, rights, or general intangibles arising from or relating to the sale of farm products by a farmer, the transition continuation statement filed pursuant to §554.11105(5)(a) must be filed within six months prior to the expiration of the five year period or its multiple, from the date of the original county filing as contemplated by §554.9403(3). (Ormiston to Farrell, Office of Secretary of State, 2/17/81) #81-2-15(L)

February 17, 1981

AGRICULTURE: Criminal Law. Recordation of Conveyances of Agricultural Real Property, §558.44, The Code 1979. An action to enforce the provisions of §558.44, The Code 1979, is a criminal prosecution. A violation of §558.44 is a simple misdemeanor and represents only one criminal act regardless of the length of the violation. (Hamilton to Soldat, Kossuth County Attorney, 2/17/81) #81-2-16(L)

February 17, 1981

COURTS, JURY TRIAL COSTS: Sections 606.15(3) and 625.8, The Code 1979. Proper charge for jury trial costs under §§606.15(3) and 625.8 is fifteen dollars. (Cleland to Sprinkle, Harrison County Magistrate, Magistrate, Harrison County, 2/17/81) #81-2-17(L)

February 24, 1981

TAXATION: Application of Partial Property Tax Exemption for Industrial Real Property. 1979 Session, 68th G.A., ch 103 (H.F. 650). A city or county is

given to option in §1 of H.F. 650 of providing partial tax exemption for industrial property engaged in manufacturing or processing. This option may not be construed to apply to a wholesale hardware operation. (Schuling to Hall, State Representative, 2/24/81) #81-2-18

The Honorable Hurley W. Hall, State Representative, State House: You have requested the opinion of this office concerning the proper interpretation of 1979 Session, 68th G.A., ch 103 (hereinafter referred to as H.F. 650). The question posed is whether a wholesale hardware operation would qualify for the property tax exemptions authorized by H.F. 650.

The legislative explanation of H.F. 650 reveals that the bill was also passed to allow:

> ... cities and counties [the opportunity] to authorize a partial exemption from taxation for improvements made to *industrial property* through construction of new buildings and improvements in addition to existing structures and buildings and extends the exemption to machinery and equipment assessed as real property that is acquired or improved other than as a result of normal maintenance, repair, and replacement necessary to maintain or expand existing operating capacities.

(House File 650) [Emphasis Added.]

Section one of H.F. 650 further defines what types of industrial property can be deemed partially tax exempt. These types of *industrial property* are: (1) New *industrial construction* which consists of new buildings and structures or new buildings and structures constructed as additions to existing buildings and structures; (2) In the event that reconstruction is not complete replacement or refitting of an existing building or structure, the partial exemption will apply, provided that such reconstruction is required due to economic obsolescence and is necessary to implement recognized *industry standards for manufacture and processing* of specific products and is required for the proposed reconstructed building or structure's owner to continue to *manufacture or process* such products; And (3) acquisition of new or improvement to machinery and equipment assessed as real property pursuant to §427A.1(1)(e), The Code 1979. [1] Op.Att'y. Gen. #80-3-19.

It is apparent that the tax exemption is for industrial property used in either manufacturing or processing. It is also recognized that the legislature has wide discretion in determining classifications to which its acts shall apply. *Dickinson v. Porter*, 240 Iowa 393, 401, 35 N.W.2d 66, 72 (1948). Consequently, H.F. 650 should be read as providing tax exemptions for property put to industrial use.

This brings us to the crux of your question. Does a wholesale hardware operation fall within the above-defined classification? On the basis of the factual situation presented with your question, it would have to be concluded that such an organization is not within the purview of H.F. 650.

The Iowa Legislature has distinguished between industrial, commercial, residential and agricultural property for property tax purposes. Section 441.21 The Code 1979; 1979 Session, 68th G.A., ch. 25; 1980 Session, 68th G.A., ch. 1136.

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[1] Section 427A.1(1)(e) sets forth the following restriction: Machinery used in *manufacturing establishments.* [Emphasis added.]

Moreover, in the area of property tax, commercial property and industrial property are not considered to by synonymous. *See* Op.Att'y.Gen. #79-11-10.

The Department of Revenue, in order to implement its statutory duties pertaining to assessment practices and equalization under chapters 421 and 441, The Code 1979 [2], has promulgated various agency rules prior to the enactment of H.F. 650. Revenue Rule 71 provides definitions of property classifications applicable to your question:

> 730—71.1(428,441) Classification of real estate.
> 71.1(1) Responsibility of accessors. All real estate subject to assessment by city and county assessors shall be classified as provided herein. It shall be the responsibility of city and county assessors to determine the proper classification of real estate. Said determination shall be based upon the best judgment of the assessor following the guidelines set forth herein and the status of the real estate as of January first of the year in which the assessment is made. Said classification shall be utilized on the abstract of assessment submitted to the department of revenue pursuant to section 441.45 of the Code. See rule 71.8.
>
> * * *
>
> 71.1(5) Commercial real estate. Commercial real estate shall include all lands and improvements and structures located thereon which are primarily used or intended as a place of business where goods, wares, services or merchandise are stored or offered for sale at wholesale or retail. Commercial realty shall also include hotels, motels, rest homes, structures consisting of three or more separate living quarters and any other buildings for human habitation that are used as a commercial venture; except, however, that one and two-family dwellings shall be classified as residential real estate. Commercial real estate shall also include data processing equipment as defined in section 427A.1 of the Code.
>
> 71.1(6) Industrial real estate. Industrial real estate shall include all lands and improvements and structures located thereon primarily used or intended to be used for any form of manufacturing as defined in section 428.20 of the Code. Industrial real estate shall also include machinery and equipment as defined in section 427A.1(1)"e" of the Code.
>
> * * *

730 I.A.C. §71.1(1), (5) and (6).

The legislature when passing H.F. 650 would be presumed to have known the existing state of the law at the time of enactment, *State v. Ranhauser*, 272 N.W.2d 432, 434 (Iowa 1978), and the construction by the Department of Revenue of those

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[2] 421.17(10), The Code 1979, provides in relevant part with reference to classes of property: [D]irect any county board of equalization to raise or lower the valuation of any class or classes of property in any twonship, town, city, or taxing district.... Section 441.47, The Code 1979, provides in relevant part with reference to classes of property: The director of revenue... shall order the equalization of the levels of assessment of each class of property....

statutes wherein the department had defined commercial and industrial real estate. *John Hancock Mutual Life Ins. Co. v. Lookingbill*, 218 Iowa 373, 386, 253 N.W. 604, 611 (1934). Any subsequent judicial review of H.F. 650 would require that weight be given to these administrative interpretations of the real estate classifications. *Iowa Industrial Loan, Co. v. Iowa State Dept. of Revenue*, 224 N.W.2d 437, 440 (Iowa 1974). As a result it must be concluded that the legislature intended property tax exemption status only for industrial property used in manufacturing or processing as defined in §428.20, The Code 1979. *See Burns v. Herberger*, 17 Ariz. App. 462, 498 P.2d 536, 542 (1972); *Pan American Sulpher, Co. v. Maryland Dept. of Assessments and Taxation*, 251 Md. 620, 248 A.2d 354, 357 (1968); *Pennsylvania v. Weldon Pajamas, Inc.*, 432 Pa. 481, 248 A.2d 204, 207 (1968). A wholesale hardware operation as was outlined in your factual situation would fall within a commercial property classification, thus warranting no H.F. 650 tax exemption.

Therefore, it is the opinion of this office that H.F. 650 must be construed to provide a partial tax exemption for industrial property engaged in manufacturing or processing, and not to commercial property such as a wholesale hardware operation.

February 26, 1981

TAXATION: Real Estate Transfer Tax Where Debt Only Is Assumed. §§428A.1 and 428A.2(11), The Code 1979. Where real estate is transferred purportedly as a gift, and the transferee receives the property which is encumbered with a mortgage or other lien and assumes payment of the underlying debt, the deed, instrument, or writing is taxable under the provisions of §428A.1 to the extent of the assumed debt. (Griger to Murray, State Senator 2/26/81) #81-2-19

The Honorable John S. Murray, State Senator, State House: You have requested the opinion of the attorney general concerning the real estate transfer tax found in chapter 428A, The Code 1979. Specifically, in your letter, you state as follows:

> "I respectfully request your opinion of the proper interpretation of the words "actual consideration" in section 428A.2(11), Code of Iowa.
>
> As one of the methods of effective estate planning, it is common in many real estate transactions for a husband/wife or parent to transfer his or her interest and title in real estate to the spouse or child as a gift. In the usual case, the property has been pledged as security for a loan. The donee therefore receives the property subject to the mortgage and assumes its payment. The donor does not receive any monetary compensation and treats the transfer of the value of his or her equity interest as a gift.
>
> My question is whether the underlying mortgage, a debt that is being assumed by the donee, should be considered actual consideration, subjecting such gift transfer to the transfer tax as required on transfers with consideration under section 428A.1, Code of Iowa."

For reasons to be set forth in the situation you pose, the debt which is assumed by the transferee does constitute actual consideration for which the Iowa real estate transfer tax will be imposed and the exception in §428A.2(11), The Code 1979, will not apply.

The Iowa real estate transfer tax was enacted in 1965, became effective on January 1, 1968, and was intended to replace the federal transfer tax which was repealed as of January 1, 1968. 1968 Op.Att'y.Gen. 643; 1976 Op.Att'y.Gen. 776; 178 Op.Att'y.Gen. 221. After the Iowa tax was originally enacted, the tax imposition provisions in §428A.1, The Code 1966, were construed, as the federal tax had been, to exclude from the scope of the tax the amount of any existing mortgage assumed by the transferee. *See* 1968 Op.Att'y.Gen. 5643; 26 U.S.C. §4361 (1954). Therefore, the situation you pose, namely, the assumption of the underlying mortgage by the transferee, without more, would not have subjected the transfer to the Iowa tax when the deed or written instrument was recorded.

In 1972, §428A.1 was rewritten by the legislature in that the first unnumbered paragraph thereof was amended to set forth what is contained therein at the present time. *See* 1972 Session, 64th G.A., ch. 1106, §1. Also, this same legislation expanded the exceptions in §428A.2, The Code, to include, inter alia, the provisions of §428A.2(11) which except from the tax "Deeds between husband and wife, or parent and child, without actual consideration." *See* 1972 Session, 64th G.A., ch. 1106, §2.

Section 428A.1, The Code 1979, first unnumbered paragraph, imposes the Iowa real estate transfer tax as follows in relevant part:

> "There is imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned transferred, or otherwise conveyed, a tax determined in the following manner: When there is no consideration or when the deed instrument or writing is executed and tendered for recording as an instrument corrective of title, and so states, there shall be no tax. When there is consideration and the actual market value of the real property transferred is in excess of five hundred dollars, the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term 'consideration' as used in this chapter, means the full amount of the actual sale price of the real property involved, paid or to be paid, *including the amount of an encumbrance or lien on the property, whether assumed or not by the grantee...*" [emphasis supplied].

The exception in §428A.2(11) must be read in pari materia with the tax imposition provisions in §428A.1, so that the concept of "actual consideration" in the former statute has the same meaning in scope and impact as "consideration" in the latter statute. *See Matter of Bliven's Estate*, 236 N.W.2d 366 (Iowa 1975).

Interpretations placed on the repealed federal transfer tax have, unless they would conflict with the Iowa statute, been historically adhered to in opinions of the attorney general involving interpretations of the Iowa real estate transfer tax law. *See* 1968 Op.Att'y.Gen. 643; 1976 Op.Att'y.Gen. 776.

As noted, the federal tax law expressly excluded the assumption of mortgages and other liens in the definition of "consideration." Clearly, therefore, the Iowa legislature has, since 1972, intended that the assumption of a mortgage by the transferee be considered to be "consideration" as that term is used in §428A.1.

However, the federal tax law (26 U.S.C. §4361) had been construed to impose the federal tax where the transferee did assume the debts (not secured by liens) of the transferor with the consideration held to constitute the debts so assumed. In *Greyhound Corp. v. United States*, 208 F.2d 858 (7th Cir. 1954), under a plan of liquidation, subsidiary corporations transferred their assets to the parent corporation which also agreed to discharge the debts of the subsidiaries. The court held that a "sale" of realty did occur and the consideration for such sale constituted the amount of the debts. The court stated in 208 F.2d at 860:

"The title to the real estate of the subsidiaries passed to the taxpayer by means of the deeds. All of the property of the subsidiaries was transferred subject to liabilities then existing. The creditors of the subsidiaries had the paramount right to the property thus transferred, at least to the extent of the indebtedness. Hence the taxpayer paid for all the assets received to the extent of the subsidiaries' debts which taxpayer later discharged. In effect it purchased from the subsidiaries' creditors the portions of the assets equal to their obligations. This was a valuable consideration. It is only the assets over and above the obligations that were received by the taxpayer without consideration."

The principle set forth in *Greyhound* can be clearly analogized with the situation posed in your opinion request, namely, where the transferee undertakes to assume a debt obligation of the transferor, the transferor has received consideration to the extent of this debt assumption. The transferor is, then, liable for the real estate transfer tax as set forth in §428A.3, The Code 1979. *See also* 1972 Op.Att'y.Gen. 654, 657.

It is the opinion of this office that where real estate is transferred, purportedly as a gift, and the transferee receives the property which is encumbered with a mortgage or other lien and assumes payment of the underlying debt, the deed, instrument, or writing is taxable under the provisions of §428A.1 to the extent of the assumed debt.

February 26, 1981

COUNTIES AND COUNTY OFFICERS: Tax levy to fund solid waste disposal. §§455B.80, 455B.81 and 384.12(13), The Code 1979. Tax authorized in §455B.81 may be levied only upon taxable property in the county outside the incorporated limits of any city. (Peterson to Richter, Pottawattamie County Attorney, 2/26/81) #81-2-20(L)

MARCH 1981

March 3, 1981

COUNTIES AND COUNTY OFFICERS: Court Expense Fund §§74.1-5, 343.10, 343.11, 444.10, The Code 1981. There is no limit set by the Code on the counties' taxing authority for purposes of the court expense fund. The restrictions of the Tuck law are inapplicable to court expenses. When the fund established by §444.10 is depleted, court expenses should be paid from surpluses in general fund accounts. If there are no available funds which can be transferred to cover the court expenses, the county treasurer should issue anticipatory warrants pursuant to chapter 74. (Fortney to Davis, Scott County Attorney 3/3/81) #81-3-1

Mr. William E. Davis, Scott County Attorney: You have requested our opinion regarding the following question: Can the county auditor refuse to pay bills and salaries that accumulate under the authority of the court expense fund if the amount levied by the county board of supervisors for the court expense fund becomes exhausted during the fiscal year?

The court expense fund is established by §444.10, The Code 1981, which provides:

> In any county where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts, the board of supervisors may create an additional fund to be known as court expense fund, *and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county.* Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. [Emphasis supplied.]

This office has in the past examined the provisions of §444.10. We have pointed out that the usual court expenses are payable out of the ordinary revenues of the county when such revenues are sufficient, and when they are not an additional levies authorized to take care of any deficiency. 1928 Op.Att'y.Gen. 404. In a series of opinions we have expressed our view that only a narrow range of expenses may be covered by monies in the court expense fund, e.g., salaries of the sheriff and county attorney may not be paid under §444.10, 1924 Op.Att'y.Gen. 134; permanent improvements in the offices of the clerk of court should be charged against the general fund, and not the court expense fund, 1938 Op.Att'y. Gen. 166; court expense fund cannot be used to defray the cost of remodelling the courthouse to provide additional courtroom space, 1972 Op.Att'y.Gen. 693. In contrast, §340.17, The Code 1981, expressly provides that the salaries for the clerk of court and the clerk's deputies are to be paid from the court expense fund.

Due to the foregoing, we assume that the question you pose carries with it the underlying assumption that expenses charged against the court expense fund during the current fiscal year were properly charged against the fund. Further, we assume that there are no general fund accounts which have a surplus. If such a surplus exists, the proper procedure is to utilize the surplus to pay the remaining court expenses, as the general fund has primary liability. 1928 Op.Att'y.Gen. 404.

It is our opinion that the Code imposes no restriction on the amount of money which may be expended under §444.10. This opinion is premised on the history of §444.10, the language of complementary statutes, and on the imperative need to assure the continued operation of the courts.

As originally established, the additional levy for a court expense fund was limited to three mills on a dollar. Acts 1909 (33rd G.A.) ch. 79, §1. In 1933, the maximum rate of tax authorized for the court expense fund was reduced to three-fourths mill on a dollar. Acts 1933 (45th G.A.) ch. 121, §78. In 1959, the General Assembly again amended §444.10. At that time, the ceiling on the amount of taxes which could be levied was completely removed. Acts 1959 (58th G.A.) ch. 303, §1.

Further support for the premise that there is no statutory limit on the taxing authority of the counties for purposes of the court expense fund is found in the Tuck Law, §343.10, The Code 1981, and the exceptions thereto. Section 343.10 provides:

> It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.
>
> Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provisions of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract.

However, §343.11, The Code 1981, provides:

> *Section 343.10 shall not apply to:*
>
> 1. Expenditures for bridges or buildings destroyed by fire or flood or other extraordinary casualty.
>
> 2. *Expenses incurred in connection with the operation of the courts.*
>
> 3. Expenditures for bridges which are made necessary in any year by the construction of a public drainage improvement.
>
> 4. Expenditures for the benefit of any person entitled to receive help from public funds.
>
> 5. Expenditures authorized by vote of electors.
>
> 6. Contracts let on the basis of the budget submitted pursuant to section 309.93. [Emphasis supplied.]

The exception from the applicability of the Tuck Law which is authorized for court expenses, coupled with the legislature's removal of the millage limitation found in §444.10, lead us to conclude that there are no limits on the total amount which can be expended from the court expense fund. As we stated in 1948: "It was recognized by the legislature that regardless of other bars and restrictions, courts must function under all circumstances." 1948 Op.Att'y.Gen. 224, 226.

Having established that there is no limitation or ceiling imposed on court expenses, it is necessary to address a practical question: *How* are the expenses paid if the fund is in fact depleted? Chapter 74 provides a mechanism known as anticipatory warrants. Section 74.1, The Code 1981, provides: "The procedures of this chapter apply to all warrants which are legally drawn on a public treasury, including the treasury of a city, and which, when presented for payment, are not paid for want of funds."

A warrant issued pursuant to chapter 74, or a warrant which is not paid due to a lack of funds is to draw interest as provided by §74.2, The Code 1981. The treasurer is to maintain a record of such warrants, §74.3, The Code 1981, and they are assignable, §74.4, The Code 1981. When the treasury has funds adequate to pay an outstanding warrant, it is then retired. Section 74.5, The Code 1981. Theoretically, anticipatory warrants issued against a §343.11 account could be retired in a fiscal year other than the year of issuance.

In summary, there is no limit set by the Code on the counties' taxing authority for purposes of the court expense fund. The restrictions of the Tuck Law are inapplicable to court expenses. When the fund established by §444.10 is depleted, court expenses should be paid from surpluses in general fund accounts. If there are no available funds which can be transferred to cover the court expenses, the county treasurer should issue anticipatory warrants pursuant to chapter 74.

March 3, 1981

MUNICIPALITIES: Fire and Police Pension Systems — §§411.1, 411.2, 411.4 and 411.21, The Code 1979; 1980 Session; Ch. 1014, §§31, 34, 35 and 36, Acts of the 68th G.A. When a member of the fire pension system transfers to the police pension system within the same municipality, and legally withdraws the accumulated contributions from the fire pension system during or because of the transfer, such member is entitled to credit for prior service

pursuant to §411.4. (Blumberg to Peterson, Muscatine County Attorney, 3/3/81) #81-3-2(L)

March 3, 1981

MUNICIPALITIES: Home Rule Charter — Terms of Council Members —§§372.10 and 376.2, The Code 1979. A home rule charter may provide for both two year and staggered four year terms for council members. (Blumberg to Fisher, Webster County Attorney, 3/3/81) #81-3-3(L)

March 5, 1981

TAXATION: Severance and Production Tax; Goods Delivered Into Interstate Commerce. U.S. CONST., Art. I, §8, cl. 3. The Iowa legislature could, if it wished to do so, enact a severance and production tax which could apply to the manufacturing, extraction, and production in Iowa of goods, regardless whether the goods were destined for delivery within or without this state, and which would not be invalid under the commerce clause of the United States Constitution. (Griger to Harbor, State Representative, 3/5/81) #81-3-4

The Honorable William H. Harbor, State Representative State House: You have requested an opinion of the attorney general as to whether the Iowa legislature could enact a severance and production tax which could apply to the manufacturing, extraction, and production in Iowa of goods, regardless whether the goods were destined for delivery within or without the state of Iowa. In other words, you inquire whether the mere fact that such goods would be delivered into interstate commerce would render such a tax invalid as in conflict with the commerce clause of the United States Constitution. [1]

When considering whether a particular tax would be invalid under the commerce clause, the United States Supreme Court has refused to consider hypothetical or abstract propositions. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). "We cannot deal with abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do." 358 U.S. at 463. *See also Moorman Mfg. Co. v. Bair*, 254 N.W.2d 737, 753 (Iowa 1977), aff'd 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978). No specific legislative proposal has been presented to us to review. Therefore, this opinion will attempt to discuss relevant case law and the guidelines therefrom. Based upon such case law, it must be concluded that the Iowa legislature could enact a severance and production tax which would not violate the commerce clause merely because the goods manufactured, extracted, or produced in Iowa would be delivered to a destination in another state.

In *Commonwealth Edison Co. v. State*, 615 P.2d 847 (Mont. 1980), probable jurisdiction noted, U.S. Sup. Ct. No. 80-581, December 8, 1980, the Montana court stated in 615 P.2d at 851:

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[1] U.S. CONST., Art. I, §8, cl. 3 provides that congress has the power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;"

> "Yet we have found no United States Supreme Court case, and none has been cited to us, which implicitly or directly overthrows the rule that the several states have the reserved power to tax intrastrate manufacturing, extraction, and production of goods. It is true that some cases have used language which seems to assail this reserved power. Notwithstanding, it must be concluded after an analysis of the cases bearing on the subject that the United States Supreme Court continues to recognize the taxing power of the states in these intrastate fields."

One of the leading cases which rejected a commerce clause challenge to a severance and production tax was *Oliver Iron Min. Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, L.Ed. 929 (1923). In this case, the supreme court upheld the constitutionality of a Minnesota tax which was imposed upon each person engaged in the business of mining or producing iron or other ores in the state. The tax was imposed at the rate of six percent of the valuation of all ores mined or produced. The court noted that this tax "does not differ materially from a tax on those engaged in manufacturing." 262 U.S. at 177. The taxpayers who challenged the validity of the tax were engaged in mining ore in Minnesota and they contend that the tax violated the commerce clause because practically all of the mined ore, upon its severance from the ground, was loaded upon railroad cars for immediate shipment out of the state. The court upheld the validity of the tax and stated in 262 U.S. at 179:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the supreme court was faced with "the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities related to a corporation's operation of an interstate business." 430 U.S. at 274. In this case, the challenge was to the validity of a Mississippi privilege tax imposed upon the privilege of doing business in the state and measured by gross sales or income. The taxpayer was engaged in the state of transporting motor vehicles by motor carrier which were shipped by General Motors Corporation to it in Mississippi and which it would load onto its trucks for transportation to Mississippi motor vehicle dealers. The taxpayer contended that the tax would be unconstitutional as applied to its Mississippi business activities because those activities constituted operations in interstate commerce and the tax was therefore, imposed upon the privilege of engaging in interstate commerce, an imposition alleged to be prohibited by the commerce clause. Conceding that the tax was imposed upon the privilege of doing an interstate business in the taxing state, the supreme court rejected the commerce clause challenge to the tax. In doing so, the court set forth the following four-pronged test to be used to determine whether a state tax violated the commerce clause: (1) the tax must be applied to an activity with a substantial nexus with the taxing state, (2) the tax must not discriminate against interstate commerce, (3) the tax must be fairly apportioned, and (4) the tax must be related to services provided by the taxing state. *See also Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978).

Clearly, the Iowa legislature could, if it wished to do so, enact a severance and production tax which could apply to the manufacturing, extraction, and production in Iowa of goods, regardless whether the goods were destined for delivery within or without this state, and which would not be invalid under the commerce clause of the United States Constitution.

March 5, 1981

PUBLIC RECORDS: Support Record Book. §§68A.1, 68A.2, 598.22, The Code 1981. The support record book established by §598.22 should not be open to public inspection, but should only be open to the parties and their attorneys. A child has the status of a party with attendant access to the support record book, only if an attorney is appointed for that child pursuant to §598.12. Any list of current addresses of support recipients should be open to public inspection. (Norby to Bordwell, Washington County Attorney, 3/5/81) #81-3-5(L)

March 6, 1981

CONSTITUTION; GENERAL ASSEMBLY; COMPENSATION: Iowa Const., Art. III, §25, Art. V, §9, 28th Amendment; §2.10, The Code 1981. The Iowa Constitution, by implication, allows the General Assembly to decrease legislators' compensation and allowances effective prior to the convening of the next General Assembly. (Stork to Hanson and Halvorson, State Representatives, 3/6/81) #81-3-6

The Honorable Darrell Hanson, State Representative; The Honorable Rod Halvorson, State Representative, House of Representatives, State Capitol: You have requested an opinion on the following question:

> Does the Iowa Constitution allow the General Assembly to decrease legislators' compensation and allowances prior to the convening of the subsequent General Assembly?

The 28th Amendment to the Iowa Constitution repeals Article III, Section 25 of the original constitution and provides in lieu thereof:

> Each member of the General Assembly shall receive such compensation and allowances for expenses as shall be fixed by law but no General Assembly shall have the power to increase compensation and allowances effective prior to the convening of its next General Assembly following the session in which any increase is adopted.

This language expressly prohibits the General Assembly from *increasing* compensation and allowances effective prior to the convening of the next General Assembly, but makes no reference to the possibility of decreasing compensation and allowances. The express mention of one thing generally implies the exclusion of others. *See In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). Accordingly, we conclude that the 28th Amendment, by implication, does authorize a General Assembly to decrease legislators' compensation and allowances effective prior to the convening of the next General Assembly. Pursuant to the 28th Amendment, any such decrease would have to "be fixed by law." Currently, the amount of salaries and expenses payable to members of the General Assembly is established in §2.10, The Code 1981.

Comparable provisions in the original constitution did limit the General Assembly's authority to decrease compensation. Article V, section 9 originally provided, in relevant part, that judges were to receive such compensation as the General Assembly would, by law, prescribe: "which compensation shall not be increased *or diminished* during the term for which they shall have been elected."

[Emphasis added.][1] By contrast, the original language in Article III, section 25 provided only that the General Assembly could not "increase" the compensation of its members prior to the convening of the next General Assembly. The utilization of such contrasting language indicates an intent, on the part of the original drafters, to define precisely the scope of the General Assembly's authority with respect to modification of salaries for two different branches of government.

We observe also that in repealing Article III, section 25, the 28th Amendment did not change the prohibition that a General Assembly could not *increase* the compensation of its own members. The retention of such a precise term in lieu of adopting a more general terms such as "change" or "alter" indicates an intent to restrict only the General Assembly's authority with respect to increasing the compensation and allowances of its members prior to the convening of the next General Assembly.

In summary, we conclude that the Iowa Constitution does, by implication, allow the General Assembly to decrease legislators' compensation and allowances effective prior to the convening of the next General Assembly.

March 6, 1981

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — Control Over Nurses Practicing in Iowa by Virtue of Employment with the Federal Government but Licensed in a State Other Than Iowa — §§147.12, 147.13, 147.44, 147.55, 152.1, 152.8, 152.10, 258A.3, 258A.4, The Code. In general, unless a specific provision of the Code provides otherwise, the Board of Nursing has no authority to act with respect to those licensees not licensed in Iowa but practicing in this state as employees of the federal government but that the board does have authority to act with respect to those licensees issued Iowa licenses even though the Iowa licensees are practicing in another state. In particular, the Board of Nursing (1) has no authority or responsibility to investigate a nurse licensed in another state but employed in this state by the federal government for alleged violations of the Iowa Code; (2) has a responsibility to give written notice to another licensing board or hospital licensing agency of evidence of an act or an omission which it reasonably believes is subject to discipline by that other board or agency; (3) has no authority or responsibility to take interim action against a nurse licensed in another state but practicing in Iowa as an employee of the federal government based upon investigative findings while awaiting action by the other state; (4) has no authority or responsibility to require nurses licensed by another state but employed in Iowa with the federal government to meet mandatory continuing education requirements; and (5) has the authority to investigate nurses licensed by Iowa but practicing in another state while employed with the federal government for alleged violations reasonably believed to be cause for licensee discipline. (Freeman to Illes, Executive Director, Iowa Board of Nursing, 3/6/81) #81-3-7(L)

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[1] This provision was repealed in 1962 and replaced by the 21st Amendment to the Iowa Constitution, which provides only that "[j]udges of the supreme court and district court shall receive salaries from the state...".

March 6, 1981

ADMINISTRATIVE LAW; CONTESTED CASES; DEMEANOR OF WITNESSES: §§17A.11(1), 17A.12(7), 17A.15(2), 17A.15(3), The Code 1981. If an agency member attends a contested case proceeding, conducted by a hearing officer, and observes the demeanor of witnesses, the member may take his/her observations into consideration when later reviewing the hearing officer's proposed decision. (Fortney to Reis, Executive Director, Iowa Civil Rights Commission, 3/6/81) #81-3-8(L)

March 6, 1981

SOCIAL SERVICES: *Child Care Centers, Licensing.* Ch. 237A, §§237A.1(7), 237A.1(8), 237A.1(9), 237A.2, 237A.3, The Code 1981. A child should not be counted for licensing or registration purposes under ch. 237A if the child receives less than two hours care per day. (Hege to Anderson, State Representative, 3/6/81) #81-3-9(L)

March 7, 1981

REAPPORTIONMENT: Article III, §§35, 36, Constitution of Iowa. General Assembly must enact reapportionment plan prior to September 1, 1981, or surrender jurisdiction to the Supreme Court of Iowa. (Miller and Appel to Halvorson, State Representative 3/7/81) #81-3-10

The Honorable Robert Halvorson, State Representative, State Capitol: We are in receipt of your opinion request of December 9 in which you ask several questions regarding Article III, §35, of the Iowa Constitution, which outlines the proper procedure for reapportionment of political districts. Article III, §35, as amended in 1968, provides in relevant part:

> The General Assembly shall in 1971 and *in each year immediately following the United States decennial census* determine the number of senators and representatives to be elected to the General Assembly and establish senatorial and representative districts. *The General Assembly shall complete the apportionment prior to September 1 of the year so required.* If the apportionment fails to become law prior to September 15 of such year, the supreme court shall cause the state to be apportioned into senatorial and representative districts to comply with the requirements of the constitution prior to December 31 of such year...

In your letter, you expressed concern that the United States decennial census materials might not be available in time to allow the legislature to meet the constitutionally established deadlines because of pending litigation over the accuracy of the data. You ask under what conditions, if any, the legislature might reapportion the state after the expiration of the September 1 deadline contained in Article III, §35.

Districting and reapportionment have traditionally been considered legislative tasks in the first instance. In the famous case of *Baker v. Carr*, 369 U.S. 186 (1962), however, the supreme court held that equal protection principles apply to state legislative reapportionment. The court further declared that judicial enforcement of equal protection principles was available should the states be unable or unwilling to enact reapportionment plans that comport with constitutional requirements. While *Baker* established the principle of judicial interven-

tion in the reapportionment area, the questions of when and to what extent courts should become involved in the process was left unresolved.

The litigation history in Iowa in the 1960s illustrates the problems left in the wake of *Baker*. In 1963, a suit was filed in federal district court challenging Iowa's existing apportionment plan. The court held the plan constitutionally defective, but refused to grant relief because the so-called Shaff plan — a new apportionment scheme in which the Iowa Senate was apportioned based on population by the House by county — was pending before the electorate. *See Davis v. Synhorst*, 217 F.Supp. 482 (S.D. Iowa 1963). When the Shaff plan was defeated, the district court, in deference to the legislature, declined to impose its own plan, but ordered the legislature to enact an interim reapportionment scheme with at least one House apportioned by population. *See Davis v. Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964).

An interim plan was enacted and the federal court ordered it into effect for the 1964 election. In *Reynolds v. Sims*, 377 U.S. 633 (1964), however, the court held that both houses of a bicameral legislature must be reapportioned based on population. In light of *Reynolds*, the federal court declared the interim Iowa plan unconstitutional, *Davis v. Cameron*, 238 F.Supp. 540 (S.D. Iowa 1964).

A second interim plan was then adopted by the legislature. The Iowa Supreme Court invalidated the plan primarily because of the court's disapproval of multi-member districts, *Kruidenier v. McCulloch*, turned to the legislature. *See generally Note, Judicial Reapportionment An Iowa Lid on Pandora's Box*, 57 Iowa L.Rev. 1270 (1972).

The 1968 amendments to the Iowa Constitution were enacted against this background. We think it clear that the amendments were designed to eliminate the protracted volleys between the courts and the legislature over reapportionment that occurred in the 1960s. As amended, Article III, §35 gives the legislature a window in which to enact a constitutionally valid reapportionment plan, but the Iowa Supreme Court is expressly authorized to intervene and draft its own plan if the legislature is unable to proceed expeditiously.

A clearly defined two-step process thus replaces the previous confusion. Generally, we think it clear that if the legislature does not act within the constitutional time frame, it loses its opportunity to determine the makeup of Iowa's electoral districts for the remainder of the decade. While authority is sparse, what case law exists confirms this view. *See Hovet v. Myers*, 489 P.2d 684, 688 (Ore. 1971) (no reversion of apportionment power to legislature after expiration of specified time period). The court, in its discretion, might consider elements of an untimely legislative reapportionment measure, but is under no constitutional obligation to do so.

At the same time, it is also apparent that the constitutional provisions contemplate the existence of the United States decennial census data that is mandated by the United States Constitution and federal law. *See* 13 U.S.C. §141 (U.S.C.A. 1970) mandating delivery of the census to the President within nine months of April 1 of the decennial year. Otherwise, reference to "each year immediately following the United States decennial census" in Article III, §35 of the Iowa Constitution would be meaningless surplusage.

If the United States decennial census material were not available, the legislature, or the Iowa Supreme Court for that matter, could have substantial difficulty in crafting a reapportionment plan. It is possible that no other reliable population-based material could be gathered, although the United States Supreme Court has held that careful use of voter registration materials may pass constitutional muster where the distribution of legislators is not substantially

different from that which would have resulted from use of a permissible population bases, *see Burns v. Richardson*, 403 U.S. 73, 92-93 (1966).

The Colorado Supreme Court faced the question of nonavailability of federal census data in 1962. The Colorado Constitution stated that reapportionment should occur at "the session next following an enumeration made by the authority of the United States." While the census count itself was conducted in 1960, the enumeration of various counties and legislative and senatorial districts was not available to the legislature until March 21, 1961, two weeks before anticipated adjournment. Under the circumstances, the Colorado court, by a narrow 4-3 majority, rather creatively held that the 1961 session was not the "session next following the enumeration" because it was, for all practical purposes, passed before the data became available. *See In re Legislative Reapportionment*, 374 P.2d 66 at 69 (Colo. 1962). The thorny problem of reapportionment was thus thrown back to the legislature in 1962.

While not entirely free from doubt, we do not believe the 1962 Colorado approach would be followed by an Iowa court in 1980. In 1962, the United States Supreme Court had not given courts guidance as to the proper standards for crafting reapportionment plans. It was not even clear, for instance, that both houses of the state legislature were constitutionally required to be apportioned based on population. The lack of manageable constitutional standards to apply was undoubtedly a major factor in the Colorado court's less than literal interpretation of that state's reapportionment law.

Since 1962, however, the United States Supreme Court has clearly outlined the basic constitutional parameters of reapportionment. *See e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (one person, one vote principle for both houses of state legislature); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (one person, one vote for congressional districts); *Swann v. Adams*, 385 U.S. 440 (1967) (integrity of political subdivisions, maintenance of compactness, and continuity in legislative districts, or recognition of natural or historical boundaries may be considered). Courts are now much better equipped in 1980 than they were in 1962 to apply constitutional principles to the problem in a judicial setting.

It could be argued that while the supreme court would not tolerate a full year's delay in reapportionment that results under the Colorado approach, it might be willing to extend the express deadlines contained in the constitution for some reasonable length of time after tardy receipt of census data by the legislature. For instance, if the data were received on August 15, 1981, it could be argued that the court would stay its hand for a few weeks beyond the September 1 deadline in order to give the legislature a reasonable opportunity to act in a special legislative session.

The problem with extending the deadline for legislative action beyond September 1 of the off-year, however, is that delay beyond that date could impair timely judicial review of the proposed plan prior to the succeeding year's primary elections. Under Iowa's constitutional framework, a legislatively enacted plan can be challenged directly in the Iowa Supreme Court after passage. If the court finds the plan defective, it is directed to enact its own plan within ninety days of judgment, Article III, section 36. It would be extremely difficult for the court to consider thoroughly a plan enacted after September 1, find it defective, and craft a fair, reasonable judicially formulated plan before the traditional opening of the primary season in the following year. We therefore concluded that the supreme court would most likely construe the deadlines contained in Article III, §36 according to their literal meaning.

In any case, we note that the census material should be available to the legislature in a timely fashion. *See Klutznick v. Carey*, 49 U.S.L.W. 3466 (January 6, 1981) (supreme court stays lower court decision enjoining certification of state-

wide census totals to President). If so, the legislature clearly must enact a reapportionment measure by September 1, 1981, or irretrievably surrender jurisdiction to the Iowa Supreme Court.

March 13, 1981

TAXATION: State sales tax. State sales tax on interstate calls originating in Iowa and billed to the caller, U.S. CONST., Art. I, §8, cl. 3. The imposition of a state sales tax on interstate calls originating in Iowa and billed to the caller would not violate the United States Constitution. (Miller and Schuling to Avenson, State Representative, 3/13/81) #81-3-11

The Honorable Donald D. Avenson, State Representative, State House: You have requested the opinion of this office concerning the legality of a sales tax on interstate telephone calls. The question posed is whether the imposition of a state sales tax on interstate calls originating in Iowa and billed to the caller would violate the United States' Constitution.

The United States' Constitution would not prevent the imposition of such a sales tax unless the tax was determined to be a restraint upon interstate commerce. U.S. CONST., Art. I, §8, cl. 3. [1] Determinations as to whether a taxing statute would affect interstate commerce have been a perennial problem in the United States Supreme Court. However, on the basis of your question and the more recent United States Supreme Court decisions interpreting the imposition of state taxes and their effect on interstate commerce, it must be concluded that the sales tax would be legally permissible. *See United States Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1546, 12 L.Ed.2d 430 (1964).

An analysis of your question requires initially a determination as to whether legislative imposition of a state sales tax on interstate commerce is permissible. Early United States Supreme Court decisions involving the imposition of a local tax on interstate commerce held state taxing statutes invalid. *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U.S. 384, 393, 55 S.Ct. 477, 79 L.Ed. 934, 942 (1935); *New Jersey Bell Telephone Co. v. New Jersey*, 280 U.S. 338, 347, 50 S.Ct. 111, 74 L.Ed. 463, 468 (1929); *Wabash, St. L. and Pac. R.R. Co. v. Illinois*, 118 U.S. 557, 577, 7 S.Ct. 4, 30 L.Ed. 244, 251 (1886); *Western Union Telegraph Co. v. Texas*, 105 U.S. 460, 462, 26 L.Ed. 1067, 1068 (1882). Then in 1938, the United States Supreme Court retreated from its doctrine of per se invalidity to a doctrine holding that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823, 827 (1938). The United States Supreme "Court [has since] consistently... indicated that 'interstate commerce may be made to pay its way.'"

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[1] U.S. CONST., Art. I, §8, cl. 1 and 3 provide in relevant part: The Congress shall have Power... To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Complete Auto Transit, Inc., 430 U.S. at 281, 97 S.Ct. at 1080, 51 L.Ed.2d at 332. Consequently, a state sales tax may be constitutionally permissible even when imposed on goods in interstate commerce.

This brings us to the crux of your question: Does the imposition of the sales tax on interstate phone calls, originating in Iowa and charged to the caller, restrain interstate commerce and thereby infringe a power retained exclusively by the United State Congress? U.S. CONST., Art. I, §8, cl. 3. On the factual situation presented with your question, it must be concluded that the sales tax does not interfere with interstate commerce and would be legally permissible.

Recent state court cases have held that a tax upon interstate telephone communication originating in the taxing jurisdiction would not violate the Commerce Clause. *Douglas v. Glacier State Telephone Co.*, 615 P.2d 580, 588 (Alaska 1980); *Illinois Bell Telephone Co. v. Allphin*, No. 73 L 12433, Cir. Ct. Cook County (Illinois, filed Aug. 29, 1979).

Assuming that the sales tax on interstate telephone communications proposed in your question is found to constitute interstate commerce, under the analysis employed in recent cases, the tax could not be found to be an illegal restraint on commerce, *Complete Auto Transit, Inc.*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331. The requirements for sustaining a tax against a Commerce Clause challenge would be: (1) that the tax be applied to an activity with a substantial nexus to the taxing state; (2) that the tax be fairly apportioned; (3) that the tax be non-discriminatory against interstate commerce; and (4) that the tax be fairly related to services provided by the state. *Id.*

The first requirement is satisfied by the factual situation presented in your question. The nexus to the state is evidenced by the fact the charge is for long distance phone calls originating in Iowa and billed to the Iowa caller.

The second requirement is also satisfied by the factual situation presented. A state sales tax provides a like rate pertinent only to the gross receipts of the communication service in this state.

The third requirement would be satisfied by the result of the taxing statute. All intrastate long distance calls have been previously assessed a state sales tax. The imposition of a sales tax on interstate calls in Iowa charged to the Iowa caller would in no way discriminate, but would in fact work to equalize the treatment of interstate and intrastate calls.

As to the last requirement, because the callers in the state are the parties subjected to the tax, it is evident that the tax is related to services provided by the state. All callers reap the benefits of a state government.

Your question presents a tax applied to an activity with a substantial nexus to the state, that is fairly apportioned, that does not discriminate against interstate commerce, and that it appears that no other state could subject the same receipts to tax. There would be no danger of multiple state taxation. [2]

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[2] It should be noted that the Iowa caller is paying for the use of an Iowa telephone in making a long distance interstate telephone call. Under such circumstances, no other state could subject such telephone service to a sales tax.

Therefore, it is the opinion of this office that the imposition of a state sales tax on interstate calls originating in Iowa and billed to the caller would not violate the United States Constitution.

March 13, 1981

MOTOR VEHICLES: Chauffeur's License for Volunteer Firefighters — §§321.1(43) and 321.174, The Code 1979. Volunteer firefighters who operate fire trucks of the type of motor vehicles listed in §321.1(43) must possess chauffeur's licenses. Volunteer firefighters who operate ambulances need not possess chauffeur's licenses if they receive no more than reimbursement for expenses. (Blumberg to Welsh, State Representative, 3/13/81) #81-3-12(L)

March 17, 1981

VETERANS PREFERENCE; PUBLIC EMPLOYEES: §§19A.9, 70.1, 70.6, 400.28, The Code 1981. A public employee who is eligible to invoke the protections of the Veterans Preference Law may be terminated from his position due to a reduction in work force. (Fortney to Hansen, State Representative, 3/17/81) #81-3-13

The Honorable Ingwer L. Hanson, State Representative, State Capitol: You have requested our opinion regarding the applicability of the Veterans Preference Law to a situation in which public employees are to be "laid off" due to a reduction in the size of a work force.

The Veterans Preference Law is codified in chapter 70, The Code 1981. Section 70.1, The Code 1981, provides, in pertinent part:

> In every public department and upon all public works in the state, and of the counties, cities, and school corporations thereof, honorably discharged men and women from the military or naval forces of the United States in any war in which the United States was or is now engaged... who are citizens and residents of this state shall be entitled to preference in appointment over other applicants of no greater qualifications.

Section 70.1 clearly provides a preference to veterans in the filling of specified vacancies. Your question, however, presumes that an eligible veteran already occupies a position of covered employment. Section 70.6 specifies the circumstances, and the manner, by which a veteran who already occupies a position may be removed. The section provides:

> No person holding a public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is herein granted, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari or at such person's election, to judicial review in accordance with the terms of the Iowa administrative procedure Act if that is otherwise applicable to their case.

At the outset, we note that §70.6 does not address the reduction in work force situation. It speaks only to removal based on incompetence or misconduct. On first reading, one might surmise that an eligible veteran who occupies a covered

position could only be removed for misconduct or incompetency, but for no other cause. Such, however, is not the state of Iowa law.

Other Iowa statutes have a bearing on the procedures to be followed when terminating a public employee due to a work force reduction, e.g., §19A.9(14) and §400.28, The Code 1981. Section 19A.9(14), which is applicable to state employees covered by the merit system [1], provides:

> The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide:
>
> 14. For layoffs by reason of lack of funds or work, or organization, and for re-employment of employees so laid off, *giving primary consideration in both lay-offs and re-employment to performance record and secondary consideration to seniority in service.* Any employee who has been laid off may keep his or her name on a preferred employment list for one year, which list shall be exhausted by the agency enforcing the layoff before selection of an employee may be made from the register in his or her classification. *Employees who are subject to contracts negotiated under chapter 20 which include layoff provisions shall be governed by the contract provisions.* [Emphasis supplied.]

Section 400.28, which is applicable to municipal employees [2], provides:

> Whenever the public interests may require a diminution of employees in any classification or grade under civil service, the city council, by resolution and acting in good faith and after notifying the commission of such action, may either:
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> 1. Abolish the office and remove the employee from his classification or grade thereunder, or
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> 2. Reduce the number of employees in any classification or grade by suspending the necessary number.
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> *In case it thus becomes necessary to so remove or suspend any such employees, the persons so removed or suspended shall be those having seniority of the shortest duration in the classifications or grades affected,* and such seniority shall be computed as provided in section 400.12 for all persons holding seniority in the classification or grade affected, regardless of their seniority in any other classification or grade, but any such employee so removed from any classification or grade shall revert to his seniority in the next lower grade or classification; if such seniority is equal, then the one less efficient and competent as determined by the person or body having the appointing power shall be the one affected.
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> In case of such removal or suspension, the civil service commission shall issue to each person so affected a certificate showing his comparative seniority or length of service in each classification or grade from which he is so removed and the fact that he has been honorably so

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1 *See* §19.3, The Code 1981, regarding the applicability of §19A.9(14).

2 *See* §400.6, The Code 1981, regarding the applicability of §400.28.

> removed, and his name shall be carried for a period of not less than three years after such suspension or removal, on a preferred list and all appointments or promotions made during said period to his former duties in such classification or grade shall be made in the order of greater seniority from such preferred lists. [Emphasis supplied.]

A potential conflict exists between §70.6 and §19A.9(14), as well as between §70.6 and §400.28. Section 70.6 provides that a veteran can be dismissed for misconduct or incompetency, and then only if first provided a notice and hearing. In contrast, if the veteran-employee is also within the purview of either §19A.9(14) or §400.28, such veteran is dischargeable if a reduction in work force occurs. When such a reduction occurs, the hiring authority is to determine which employees are to be laid off by criteria which omit consideration of the employee's status as a veteran.

The Iowa Supreme Court has examined the conflict which exists between chapter 70 and the other Code chapters relating to public employment. In *Peters v. Iowa Employment Sec. Commission*, 248 N.W.2d 92 (Iowa 1976), the court reaffirmed its position that chapter 70 is a general statute. The court expressed the opinion that the provisions of chapter 97B, establishing the Iowa Public Employees Retirement System, are controlling where they conflict with chapter 70. The court did not reach the question of whether chapter 97B was a special or a general statute, but given the fact that it was enacted later than chapter 70, chapter 97B would control regardless of how it was characterized. The sections of the IPERS statute construed in *Peters* related to mandatory retirement age for state employees. The employee in question unsuccessfully argued that the veterrans preference established in chapter 70 was controlling.

Likewise, the court has determined that conflicts between chapter 70 and chapter 400 are to be resolved in favor of chapter 400. In *Andreano v. Gunter*, 252 Iowa 1330, 110 N.W.2d 649 (1961), the court construed §365.19, and how it related to §70.6. (Chapter 365, The Code, has now been transferred to chapter 400.) The court stated:

> We must start with the holding that chapter 70 is a general statute governing all appointments and removals to and from positions in the public service in Iowa; and chapter 365 is a special statute relating only to civil service appointments and removals in cities. * * * It is * * * well settled law that when a general and a special statute are in conflict and cannot be reconciled the special one prevails. * * *

252 Iowa 1330, 1335, 110 N.W.2d 649, 651.

In a similar case construing the relationship between chapter 70 and the forerunner of chapter 400, the Iowa Supreme Court commented:

> We have many times held, under both the soldier's preference law and the civil service statutes, that municipalities are not bound to keep those having rights under either upon the payrolls if it is decided, in good faith, that the positions should be abolished, either because of financial necessity or the dictates of good and economical business management.

Wood v. Loveless, 58 N.W.2d 368, 371 (Iowa 1953).

The conflict between chapter 19A, governing merit employment, and chapter 70 is analogous to that which exists between chapter 70 and both chapters 97B and 400. Section 19A.9(14) provides removal procedures and criteria which conflict irreconcilably with §70.6. In that chapter 19A is a later enacted and a special statute (regulating only those public employees covered by the merit system) and chapter 70 is a general statute (regulating all public employment),

the conflict in the two chapters is to be resolved in favor of chapter 19A. *Peters v. Iowa Employment Sec. Commission, supra; Andreano v. Gunter, supra; Wood v. Loveless, supra.*

If a public employee who is eligible to invoke the protections of the Veterans Preference Law and is also covered by civil service or merit employment despite the provision of chapter 70 to the contrary.

The above analysis does not resolve the question of the veteran who is a public employee and is not covered by either civil service or merit employment. Can this veteran invoke the protections of §70.6 and escape termination due to a reduction in work force? We believe such veteran is not protected from removal.

Neargard v. Akers, 232 Iowa 1337, 5 N.W.2d 613 (1942) presented a situation in which the work assigned to the state auditor was greatly reduced as a result of legislative action. As a result, the number of senior examiners employed by the auditor was reduced from 28 down to 6. Neargard, a military veteran, was not retained as one of the 6 senior examiners. He brought suit, invoked the provisions of §70.6, and argued that as an honorably discharged veteran he was entitled to have a position as senior examiner maintained for him. The court rejected the veteran's arguments and offered the following analysis:

> ...[t]he beneficiaries of this law are given a preference over other applicants of no greater qualifications. *It contemplates applicants for a vacancy or a new position. Neither situation exists in this case. There are no vacancies and no new positions.* Here there were twenty-eight senior examiners with work for all of them under the statutes as they existed. By the passage of chapter 42 of the laws of the 48th General Assembly, the work was so reduced that six senior examiners and one assistant could perform it, necessitating the dismissal of the other twenty-two. In such a situation, how are the six places to be filled? Are all of the examiners to be considered as applicants for the six places? The statute gives us little aid. *The defendant cannot be required to employ more examiners than the work requires. He is entitled to use his own reasonable discretion in determining that matter.* He selected six senior examiners from that division, of twenty-eight examiners, to fill the needed places. There is no evidence that he abused that discretion, or that the six selected did not have greater qualifications than any of the remainder, including the appellee.
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> * * *
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> The Optional Audit law, if it did not abolish the position or office, brought about the abolishment of the work to be performed by that particular division of examiners. As stated in Douglas v. City of Des Moines, 206 Iowa 144, 147, 220 N.W. 72, 73: *"Soldier preference as enacted by our legislature, does not prevent the abolishment of an office * * *." Neither does it prevent reduction or abolishment of work, or efficiency in administration of public offices.* [Emphasis supplied.]

5 N.W.2d 613, 617-618.

Under the holding of our supreme court in *Neargard*, a public employee who is eligible to invoke the protections of the Veterans Preference Law may be terminated from his position due to a reduction in work force.

March 18, 1981

ESTATES; NONRESIDENT FIDUCIARIES: Sections 633.63, 633.64, 633.502, 61st G.A., Acts 1965, ch 432 §7, 63rd G.A., ch. 294 §§1 and 2, The Code

1979; Sections 8-158, 8-159, 8-160, Nebraska Law Revised. A Nebraska national bank may qualify and serve, subject to an application to the court, as a personal representative of an estate where; (1) the domiciliary administration of the estate is in Iowa, (2) Nebraska law provides similar reciprocity, and (3) the banking practice is on a sporadic case-by-case basis and not a regular ongoing business activity in Iowa. (Hagen to Connors, State Representative, 3/18/81) #81-3-14(L)

March 20, 1981

MOTOR VEHICLES: Railroads; Schools; §§321.1(63), 321.343, 321.252, The Code 1979. Section 321.343 requires a school bus driver to stop, look and listen before crossing any railroad track at a highway grade crossing, even if it appears that the track is not used by rail traffic, unless a police officer or a traffic signal directs vehicles to proceed. The EXEMPT sign is not expressly defined as a "traffic-control signal" and therefore its use is not specifically authorized by §321.343. (Appel to Benton, State Superintendent of Public Instruction, 3/20/81) #81-3-15(L)

March 26, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Judicial District Departments of Correctional Services, Iowa Constitution, Article VII, §1; ch. 905, The Code 1981; §§905.2, 905.4, 905.4(5), 905.8. Pursuant to the authority vested in §905.4, The Code 1981, the district boards of the judicial departments of correctional services may enter into purchase agreements and long-term leases in order to acquire adequate facilities for the community-based correctional program. (Brenneise to Smith, Chairperson, District Board of the First Judicial District Department of Correctional Services, 3/26/81) #81-3-16(L)

March 26, 1981

GAMBLING: Roulette wheels — §§725.9 and 725.12, The Code 1979; 1980 Session, 68th G.A., ch. 1190. A roulette wheel is a gambling device consisting of a shallow bowl enclosing a rotating disk, that has numbered slots alternately colored red and black, with which players bet on which slot, or which color, a small ball will come to rest in. A paddle wheel, bearing 36 numbers thereon, which when spun and stopped allows a person who has been given a free ticket bearing one such number thereon to purchase an item at a reduced price, is not a roulette wheel. So long as a participant need not provide any consideration, directly or indirectly, for the chance to win the prize, the device is not a gambling device. (Richard to Bisenius, State Senator, 3/26/81) #81-3-17

March 31, 1981

COUNTIES AND COUNTY OFFICERS: Sections 66.1, 332.3, 332.16, The Code 1981. A consistent failure to cast a vote on matters before a board of supervisors constitutes neglect of duty only upon a showing that the failure is willful and is motivated by an evil or corrupt purpose. (Fortney to Cockran, State Representative, 3/31/81) #81-3-18(L)

March 31, 1981

TAXATION: Taxpayers' Information That May Be Revealed By The Iowa Department of Revenue, §422.72, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 94, §2 (H.F. 421) and §170.5, The Code 1979. H.F. 421 prohibits officers or employees of the Department of Agriculture from examining tax information of food establishments in the hands of the Department of Revenue, obtained as a result of examination or investigation of tax returns, for the purpose of determining the appropriate license fees required of food establishments provided in §170.5 (Kuehn to Lounsberry, Secretary of Agriculture, 3/31/81) #81-3-19(L)

March 31, 1981

MUNICIPALITIES: Utility Boards — §§613A.7 and 613A.8, chapter 388, The Code 1981. A utility board established pursuant to chapter 388 is an independent or autonomous board of a city. (Blumberg to Poncy, State Representative, 3/31/81) #81-3-20(L)

March 31, 1981

COLLECTIVE BARGAINING; STATE EMPLOYEES; GENERAL ASSEMBLY; APPROPRIATIONS: Iowa Const., Art. III, §24; §§4.4, 20.3(1) and (3), 20.17(6) and (10), The Code 1981. The General Assembly is not legally bound to appropriate funds sufficient to support a collective bargaining agreement or an arbitrator's decision affecting state employees under chapter 20. In enacting chapter 20, the General Assembly nevertheless intended its provisions to be effective and capable of execution pursuant to the public policy expressly stated in §20.1. Accordingly, the General Assembly has at least an equitable obligation to ensure the necessary funding of a collective bargaining agreement or an arbitrator's decision achieved through the procedures of chapter 20. (Miller and Stork to Robert M. L. Johnson, State Representative, 3/31/81) #81-3-21

The Honorable Robert M. L. Johnson, State Representative, State Capitol: You have requested an opinion with respect to the legal consequences of a failure by the General Assembly to appropriate sufficient funds to support the collective bargaining agreement negotiated by the state of Iowa and its employees pursuant to chapter 20, The Code 1981. This chapter grants the privilege of collective bargaining to state employees. *Iowa State Education Association v. Public Employment Relations Board*, 269 N.W.2d 446, 447 (Iowa 1978). It became effective July 1, 1974, but bargaining was not permitted until June 1, 1976. Prior to the chapter's effective date, the ability of public employees to bargain collectively was sharply limited. *State Board of Regents v. United Packing House, et al.*, 175 N.W.2d 110, 113 (Iowa 1970).

Chapter 20 sets forth a fairly detailed scheme for implementation of collective bargaining between public employers and eligible public employees. A "public employer" is defined to mean "the State of Iowa, its boards, commissions, agencies, departments, and its political subdivisions including school districts and other special purpose districts." §20.3(1). "Public employees" generally include all individuals employed by public employers, such as the state of Iowa. §20.3(1) and (3). Certain categories of public employees are, however, specifically excluded from chapter 20. §20.4. The chapter does not, for example, apply to members of a board or commission or persons employed by the State Department

of Justice. Eligible public employees interested in collective bargaining units determined under §20.13. The bargaining units participate in collective bargaining through an "employee organization", defined as "an organization of any kind in which public employees participate and which exists for the primary purpose of representing public employees in their employment relations." §20.3(4). An employee organization becomes the "exclusive bargaining representative" for an employee bargaining unit through election and certification procedures set forth in §§20.13-20.16. Chapter 20 details the scope of negotiations open to a public employer and employee organization and sets forth impasse procedures (mediation, fact-finding, binding arbitration) in the event the parties do not agree upon their own procedures. §§20.9, 20.19-20.22. In any event, the negotiation of a proposed collective bargaining agreement by representatives of a state public employer and a state employee organization must be completed no later than March 15 of the year in which the agreement is to become effective. §20.17(10).

We understand that, in the negotiations for a new collective bargaining agreement for participating state employees, the "State of Iowa" was represented by the state director of employment relations, who is a member of the executive branch of state government and works within the office of the state comptroller, and the state employees were represented by a member of the American Federation of State, County and Municipal Employees, (AFSCME), Iowa Public Employees Council 61. These negotiations were commenced in the latter part of 1980 on the terms and conditions of employment to be included in labor contracts that are to be effective from July 1, 1981 through June 30, 1983. The negotiations, which affect approximately 13,500 state employees, involve five different bargaining units comprised of blue collar and technical employees, professional employees, and security employees. By February 1, 1981, the state and AFSCME had reached mutual agreement upon all terms and provisions for a new agreement with the exception of two issues relating to wage increases and health insurance. The parties reached impasse on these issues, which were subsequently resolved by binding arbitration in an arbitrator's decision rendered on February 21, 1981.

The question you have raised may be examined in light of relevant provisions in both the Iowa Constitution and statutory law. Iowa Const., Article III, §24, provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Accordingly, the Iowa Supreme Court has observed that the power to appropriate money is essentially a legislative function. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). Inherent in this power is the authority to specify how the money shall be spent. *Id.* at 710. Pursuant to Article III, §24, the General Assembly has exclusive constitutional authority to appropriate funds from the state treasury and may do so only by passage of a law. Neither the negotiators of a collective bargaining agreement for state employees nor an arbitrator appointed under chapter 20 has similar constitutional authority. A collective bargaining agreement or arbitrator's decision is therefore subject to and dependent upon a specific appropriation by the General Assembly. An agreement or decision that requires the expenditure of an amount in excess of such an appropriation would directly conflict with the General Assembly's authority under Article III, §24, and to this extent, would be constitutionally invalid. Thus, we conclude that the General Assembly does have constitutional authority to appropriate a sum less than that required to fund a collective bargaining agreement or an arbitrator's decision arising under the provisions of chapter 20.

We must presume, however, that the General Assembly intended chapter 20 to be constitutional and effective in its entirety. §4.4, The Code 1981. Furthermore, we presume that the chapter is intended to accomplish a result that is "just and reasonable" and "feasible of execution." *Id.* Accordingly, a legislative decision not to fund sufficiently an agreement or decision obtained pursuant to chapter 20 cannot be considered solely in reference to Article III, §24. The consequences of

such a decision must also be viewed in light of the statutory procedures of chapter 20 and the precise legislative intent in enacting such procedures.

No provision in chapter 20 expressly stipulates that a collective bargaining agreement or an arbitrator's decision is contingent upon legislative funding. The importance of the General Assembly's role in this regard is, however, at least inferred from the requirement in §20.17(10) that negotiation of a "proposed" collective bargaining agreement be completed by March 15. [1] By establishing a deadline for completion that is approximately midway through an average legislative session, §20.17(10) serves the practical purpose of providing the General Assembly with considerable time to review the proposed agreement prior to passage of legislation funding the agreement. Nothing in chapter 20 provides that full funding of the agreement is mandatory or automatic. Section 20.17(6) in fact states the following:

> No collective bargaining agreement or arbitrators' decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending or budget or would substantially impair or limit the performance of any statutory duty by the public employer. A collective bargaining agreement or arbitrators' award may provide for benefits conditional upon specified funds to be obtained by the public employer, but the agreement shall provide either for automatic reduction of such conditional benefits or for additional bargaining if the funds are not obtained or if a lesser amount is obtained.

Two significant issues arise in applying this provision to the question you have raised. First, the "public employer" of state employees must be precisely identified since §20.3(1) provides only that a public employer means "the state of Iowa...". Second, there must exist either a statutory limitation on the public employer's funds, spending or budget, or a statutory duty of the employer, the performance of which would be substantially impaired or limited.

In *Iowa State Education Association v. Public Employment Relations Board*, 269 N.W.2d 446 (Iowa 1978), the Iowa Supreme Court examined the question of who was the appropriate public employer to bargain with state employees under chapter 20. The appellant in the case contended that employees of Iowa's regents institutions should bargain directly with the Board of Regents rather than with the "State of Iowa", represented by the state director of employment relations. The court rejected this contention and affirmed the decisions of the Public Employment Relations Board and the trial court, both of which concluded that the state of Iowa is the public employer of all state employees for purposes of chapter 20. *Id.* at 477, 449. In its decision, the Public Employment Relations Board concluded that the governor, through an official designee, was the appropriate representative of the state of Iowa. [2] *In re State of Iowa, Public Employer*, Iowa Public Employment Relations Board Case Nos. 39 et al. (1976). After discussing the legislative history of chapter 20 in considerable detail, the board noted the following:

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[1] March 15 is also the date by which budgets of political subdivisions must be certified to county auditors. §24.17.

[2] Section 20.17 provides that "[t]he employee organization and the public employer may designate any individual as its representative to engage in collective bargaining negotiations."

> The state of Iowa employs approximately 40,000 full and part-time employees, 20,000 of whom are Regents' employees. A substantial majority of state employees are covered by either the state merit system or the Regents' merit system. These systems must be consistent with each other, and are monitored by the Iowa Merit Employment Department, and approved by the Iowa Merit Employment Commission and the state executive council, which is chaired by the governor. The pervasiveness of these merit systems as they impact upon employment is reflected in their scope. *See, Iowa Code* ch. 19A; Bd. of Regents Procedure Guide (State Exhibit 7). Notwithstanding the fact that portions of that scope may now be subject to negotiations, the requirement of consistency remains. *Iowa Code* §§20.9, 19A.3; *Op.Att'y.Gen. to Keating* (June 15, 1970 and Nov. 14, 1973).
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> With few exceptions, pay plans for all state employees exempt from a merit system are determined by the governor, with the approval of the executive council. This factor, coupled with the governor's authority to bargain on behalf of the state with merit employees, demonstrates the possibility of similar treatment of persons performing similar tasks — a goal clearly intended by the legislature. *Iowa Code* §§19A.9(2), 20.17(8).
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> The governor is responsible for the "efficient and economical administration of all departments and establishments of the government," and has the "direct and effective financial supervision over all departments and establishments, and every state agency...". *Iowa Code* §§8.3. To this end, a uniform budgeting procedure has been implemented along with a continuing management training program for government managers, efforts which apparently have enhanced the fiscal management of state government. In addition, most state agencies and departments defer to the governor's final decisions with regard to budget programming. Finally, agency budgets are reviewed and modified by the comptroller, subject to final consideration by the governor for inclusion in his comprehensive budget presentation to the legislature. *See* testimony of Marvin R. Selden, Record at 32-105.

Id. at 13-14. Pursuant to this rationale and the supreme court's affirmation of the board's decision, we conclude that, in applying §20.17(6), the "State of Iowa" is intended to mean the office of the governor as the public employer of state employees.

The Iowa Supreme Court has not had the occasion to interpret §20.17(6) nor has the Iowa Public Employment Relations Board had much opportunity to apply the section. In examining the question of whether a library board of trustees was a public employer under chapter 20, however, the board did interpret §20.17(6) as follows:

> The only power that the library board of trustees lacks is exclusive determination of its budget. The record is clear that the library board submits a budget request to the city council and that on occasion the council has appropriated less money than requested by the library board. The city contends that absent the authority to certify and administer its own budget, the library board cannot be the employer of the employees at issue herein. However, section 17(6) of the Public Employment Relations Act provides that '...'. This section obviously contemplates circumstances in which the obtaining of specified funds is beyond the control of the public employer, and provides a procedure to modify a collective bargaining agreement in the event that the desired funds are not obtained. Hence, we do not find the budget certification authority to be controlling in our determination of the employer issue, and find the library board to be the employer of library employees.

In re Cedar Rapids Public Library, Iowa Public Relations Board Case No. 260 (1975).

In negotiating a collective bargaining agreement with state employees, the office of the governor is in a position similar to that of the library board of trustees noted above. Although it negotiates a collective bargaining agreement with state employees as a public employer under the provisions of chapter 20, the office is dependent upon the General Assembly to appropriate the funds to support such an agreement. After a bargaining agreement or arbitrator's decision is established between the state as a public employer and an employee organization, the amount of the agreement or decision must be presented to the legislature for funding pursuant to Article III, §24. The legislature normally appropriates sufficient money to fund the agreement or decision. The 1979 Session of the 68th General Assembly, for example, passed S.F. 499, an appropriations bill that provided in part as follows:

> Sec. 22
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> 1. There is appropriated from the general fund of the state to the salary adjustment fund provided for in section eight point forty-three (8.43) of the Code, for the fiscal years beginning July 1, 1979, and July 1, 1980, the following amounts or so much as may be necessary, to be distributed to the various departments to supplement other funds appropriated by the General Assembly.
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> a. For the fiscal year beginning July 1, 1979, $25,700,000.
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> b. For the fiscal year beginning July 1, 1980, $51,300,000.
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> 2. The amounts appropriated in subsection one (1) of this section shall be used to fund the following annual pay adjustments, expense reimbursement and benefits not in conflict with the Code.
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> a. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the blue collar bargaining unit.
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> b. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the professional social services bargaining unit.
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> c. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the public safety bargaining unit.
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> d. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the security bargaining unit.
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> e. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the technical bargaining unit.
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> f. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the professional fiscal and staff bargaining unit.
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> g. The collective bargaining agreement negotiated pursuant to chapter twenty (20) of the Code for employees in the university of northern Iowa faculty bargaining unit.
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> h. The annual pay adjustments, expense reimbursement and benefits referred to in sections twenty-seven (27), twenty-eight (28), thirty-one (31) and forty-two (42) of this Act and health care benefits for employees not covered by a collective bargaining agreement.

1979 Session, 68th G.A., ch. 2. Sections 23 and 24 in this appropriations bill make similar types of appropriations to fund the collective bargaining agreements relating to employees of the State Department of Transportation. These appropriations are then allotted for payment pursuant to the procedures contained in the "Budget and Financial Control Act" set forth in chapter 8 of the Code.

Pursuant to these procedures, all appropriations are declared to be "maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full." §8.30. Accordingly, the governor has authority to restrict allotments to prevent an overdraft or deficit in any fiscal year for which appropriations are made. *Id.* §§8.31-8.32. Section 8.19 states further that "[n]o claim shall be allowed [by the state comptroller] when the same will exceed the amount specifically appropriated therefor."

In light of Article III, §24, an appropriations bill is itself a legal limitation upon the spending authority of the governor, as a public employer, under §20.17(6). The governor's authority in controlling the expenditure of appropriated funds is further limited by the statutory duties set forth in chapter 8. A collective bargaining agreement or arbitrator's decision that instructs the governor to expend funds in excess of that appropriated therefor by the General Assembly plainly is inconsistent with these limitations and, to that extent, would be invalid or unenforceable under §20.17(6).

As discussed earlier, the General Assembly does have the exclusive constitutional authority to decide whether, and to what extent, a collective bargaining agreement or arbitrator's decision will be funded. The General Assembly has, however established in chapter 20 a detailed system for collective bargaining that presumably is intended to be constitutional, effective, just and reasonable, and capable of execution. *See* §4.4, The Code 1981. The precise legislative intent in enacting chapter 20 becomes quite clear when these presumptions are considered in light of the public policy stated in §20.1:

> The General Assembly declares that it is public policy of the state to promote harmonious and co-operative relationships between government and its employees by permitting public employees to organize and bargain collectively; to protect the citizens of this state by assuring effective and orderly operations of government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations.

This public policy is unquestionably furthered when both public employers and public employees can engage in bargaining negotiations with the assurance that their efforts are not in vain. Accordingly, they are able to negotiate the terms of a collective bargaining agreement in good faith with the expectation that the General Assembly will fund the agreement. As a practical matter, we understand that, during the substantial negotiations period, legislative leadership is kept informed about the estimated funding necessary for a collective bargaining agreement or arbitrator's decision. Moreoever, chapter 8 of the Code requires the preparation of a budget report and budget message by the comptroller and governor respectively, which reports include estimates of the appropriations necessary to meet the requirements of a collective bargaining agreement or arbitrator's decision. While the General Assembly may not authorize the establishment of a deficit budget in order to fund such an agreement or decision, its constitutional power to tax, and thereby fund for such a purpose, is fundamental. Iowa Const., Art. III, §1; Art. IV, §2; *Merchants Supply Co. v. Iowa Merit Employment Security Commission*, 235 Iowa 372, 16 N.W.2d 572 (1945). In this regard, the General Assembly is not restricted by the specific limitations upon its taxing authority that govern other public employers, including counties and municipalities. Iowa Const., Art. III, §§38A, 39A; §§384.1-384.12, 444.9.

The statutory scheme of chapter 20 evidences a clear legislative intent to promote and implement a collective bargaining process for state employees.

Given the importance of its role in this process, the General Assembly does appear to have at least an equitable obligation to provide necessary funding. Courts in other jurisdictions have in fact recognized that an agreement not legally binding on the state may nevertheless impose a moral or equitable obligation on the part of the state. 81A C.J.S., *States* §§156-157, 206 (1977). Generally, these courts have characterized such an obligation as one "which cannot be enforced by action but which is binding on the person who incurs it in conscience and according to natural justice, or is a duty which would be enforceable by law were it not for some positive rule, which, with a view to general benefit, exempts the person in that particular instance from legal liability." *Id.* §206, at 739. [3]

In summary, we conclude that the General Assembly is not legally bound to appropriate funds sufficient to support a collective bargaining agreement or an arbitrator's decision affecting state employees under chapter 20. We further conclude, however, that in enacting chapter 20, the General Assembly intended its provisions to be effective and capable of execution pursuant to the public policy expressly stated in §20.1. Accordingly, the General Assembly has at least an equitable obligation to ensure the necessary funding of a collective bargaining agreement or an arbitrator's decision achieved through the procedures of chapter 20.

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[3] A decision by the General Assembly not to fund the full amount of a collective bargaining agreement with state employees raises the additional question of whether the General Assembly may nevertheless increase funding for salaries of state employees not covered by the agreement. Again, Article III, §24 provides the General Assembly with the constitutional authority to exercise its own discretion in making appropriations. In chapter 20, however, the General Assembly has made a substantial commitment to the promotion and maintenance of collective bargaining for public employees. Specific rights and duties of public employers and employees are established in §§20.7, 20.8, 20.10 and 20.12, an official public policy in support of collective bargaining is declared in §20.1, and by operation of the chapter, the state of Iowa executes a written contract with state employees concerning their employment. The General Assembly has not established by law the same degree of commitment for state employees who are not covered by collective bargaining.

APRIL 1981

April 1, 1981

APPROPRIATIONS; GOVERNOR; GENERAL ASSEMBLY: Iowa Const., Art. III, §24; §§8.30, 8.31, The Code 1981; S.F. 305. The governor has limited authority under §8.31 to make reductions in the quarterly allotments of appropriations. Such reductions may be made only in order to prevent an overdraft or deficit in the several funds of the state at the end of a fiscal year and only upon a finding, prior to making allotments each quarter, that estimated budget resources during the fiscal year are insufficient to pay all appropriations in full. The General Assembly has both express and inherent constitutional authority to make reductions in appropriations and thereby to prevent an overdraft or deficit in the several funds of the state at the end of a fiscal year. If the governor finds that, due to legislative action in reducing appropriations during the third quarter of the fiscal year, estimated budget resources will produce a surplus in the several funds of the state at the end of the year, he must further modify any reductions in allotments for the fourth quarter to ensure only an overdraft or deficit does not result. The General Assembly has authority to adopt, by law, action already taken by the governor under §8.31, even if the governor's reductions taken together with legislative reductions would produce a surplus at the end of the fiscal year. (Stork to Avenson, State Representative, 4/1/81) #81-4-1

The Honorable Donald Avenson, State Representative, State Capitol: You have requested an opinion of this officer concerning the intended application of §8.31, The Code 1981, in light of present action by the General Assembly to prevent an overdraft or deficit in the state treasury at the end of the 1980-81 fiscal year by making reductions in existing appropriations. You note that Governor Ray has, under §8.31, already reduced spending for fiscal year 1980-81 by 4.6% in order to achieve a "zero balance" in the state treasury. The General Assembly has, however, made further spending reductions in S.F. 305, which was recently signed into law by the governor. Pursuant to the reductions in S.F. 305 and the estimates of the state comptroller regarding expected state revenues, you indicate that the state treasury should have approximately an $11 million budget surplus at the end of this fiscal year. Accordingly, you request an opinion on the following questions:

1. In a fiscal year when the governor has exercised his §8.31 powers to reduce state appropriations, if the General Assembly further reduces appropriations to the extent that revenue estimates by the comptroller project an ending surplus in the state treasury, must the governor remodify fourth-quarter allotments to state agencies so that no more than a zero balance is achieved by his reductions in those allotments?

2. Further, in section 49 of S.F. 305 an apparent effort has been made to maintain Governor Ray's reduction in allocations of standing unlimited appropriations. Does this section have any force and effect and, if so, is the governor forced to remodify his fourth-quarter allotments for items other than standing unlimited appropriations so that no more than a zero balance is achieved?

We observe initially that the appropriation of money is essentially a legislative function under our scheme of government. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). Article III, §24 of the Iowa Constitution provides that no money may

be drawn from the treasury but in consequence of the appropriations made by law. Accordingly, the Iowa Supreme Court has quoted with approval the following statement with respect to the legislative prerogative in the appropriations process:

> The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means, both of their collection and disbursement, is firmly and inexpugnably established in our policital system.

Welden v. Ray, 229 N.W.2d 706, 709 (Iowa 1975). Inherent in the legislature's power to appropriate is the authority to specify how the money shall be spent. *Id.* at 710.

The Iowa Constitution does provide the governor with limited authority to exercise in the appropriations process. Pursuant to Article III, §16, as amended by the 27th Amendment to the Iowa Constitution, the governor possesses a "qualified negative check" upon the legislature's power to appropriate through the "defensive tool" of the item veto. *Redmond v. Ray*, 268 N.W.2d 849, 853 (Iowa 1978). Since the item veto is strictly a negative power, it may not be used to alter, enlarge, or increase the effect of legislation not vetoed. 229 N.W.2d at 711. Thus, if the governor desires to veto a legislatively-imposed qualification upon an appropriation, he must veto the accompanying appropriation as well. *Id.* at 713. The constitution does not grant the governor any express constitutional authority either to reduce the amount of an appropriation or to prevent the expenditure of an appropriation by impoundment of the funds appropriated.

Section 8.31, The Code 1981, is a constitutional delegation of legislative power to the governor whereby the governor has authority to make reductions in appropriations in a uniform and proportionate manner to prevent an overdraft or deficit in the several funds of the state at the end of a fiscal year. Op.Atty.Gen. #80-8-8. Certain paragraphs in §8.31 clearly provide for the allotment and modification of appropriated funds on a quarterly basis:

> Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.
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> The governor shall approve such allotments, unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, and shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, and to the state comptroller, hereinabove provided for, who shall set up such allotments on his books and be governed accordingly in his control of expenditures.
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> Allotments thus made may be subsequently modified by the governor either upon the written request of the head of the department or establishment concerned, or in the event the governor finds that the estimated budget resources during the fiscal year are insufficient to pay all appropri-

> ations in full, upon his own initiative to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year; and the head of the department or establishment and the state comptroller, hereinabove provided for, shall be given notice of such modification in the same way as in the case of original allotments.
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> The finding by the governor that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, as provided herein, shall be subject to the concurrence in such finding by the executive council before reductions in allotment be made, such reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations.

Paragraph 1 above establishes a system for the quarterly allotment of appropriations made by the legislature pursuant to requisitions submitted 20 days before the beginning of each quarter of each fiscal year. Paragraph 2 authorizes the governor to disapprove the quarterly allotments but only upon a finding that estimated budget resources during the fiscal year are insufficient to pay all appropriations in full; in such event, the governor may modify the allotments to the extent necessary in preventing an overdraft or deficit in the several funds of the state at the end of the year. Paragraph 3 plainly authorizes the governor to make subsequent modifications in allotments, either upon a request from the head of an affected department or establishment or upon the governor's own initiative pursuant to the same circumstances described in paragraph 2 with respect to preventing an overdraft or deficit. Paragraph 4 requires any reductions in allotments to be uniform and prorated.

In an earlier opinion of this office which examined whether §8.31 requires reductions to be made on a line item instead of a department-by-department approach, we discussed the nature of the governor's authority under §8.31:

> Finally, the context in which §8.31 was enacted into law strongly supports the line item approach interpretation. Sections 8.30 and 8.32 were enacted by the 45th General Assembly in 1933 and first appeared in the Code of Iowa in 1935. At this time, quarterly allotments of state appropriations were made under what is now §3.13, which provides:
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> > Pro rata disbursement of appropriations. Annual appropriations shall be disbursed in accordance with the provisions of the Acts granting the same pro rata from the time such Acts shall take effect up to the first day of the succeeding quarter as provided in section 3.12.
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> *See* 1958 Op.Att'y.Gen. 58. The legislature, however, met biennially rather than annually in 1933 and therefore would not have been in session when most allotments were paid. If, between sessions, budget estimates indicated that payment of appropriations in full would cause an overdraft or deficit, a special session would have been required to address the situation. The nation, of course, was afflicted with a serious economic depression which increased both the likelihood of a budget overdraft or deficit and the burden of individual legislators in meeting for a special session. The legislature, cognizant of the constitutional debt limitation contained in Article VII, §2 of the Iowa Constitution, could therefore have reasonably concluded that the governor had the practical ability to prevent an overdraft or deficit in the budget and should also have limited authority toward this end. Delegations of legislative authority were not, however, considered favorably by the Iowa Supreme Court in the early 1930s. Note, *Safeguards,*

> *Standards and Necessity: Permissible Parameters for Legislative Delegations in Iowa*, 58 Iowa L.Rev. 974, 977-82 (1973). The court had consistently construed the constitution narrowly to invalidate delegations of authority made by the General Assembly. *Id.* Section 8.31 was therefore enacted during a time when the nature of authority granted therein received close judicial scrutiny and was normally upheld only to the extent that the authority delegated involved the exercise of very limited discretion by administrative officials. *Id.* at 979. We must presume that the legislature intended §8.31 to be both constitutional and effective. §4.4, The Code 1979. Given the state of the law in 1933 concerning delegations of authority, the legislature therefore must have intended discretionary authority under §8.31. Such authority would involve a technical decision that, based upon budget estimates, all appropriations must be reduced in a uniform and prorated manner in order to prevent an overdraft or a deficit. The legislature would not, however, have intended to provide the governor with the discretion to make any type of a selective reduction. Accordingly, the circumstances under which §8.31 was enacted, in conjuction with the common law on the subject of legislative delegation at the time, suggest that the legislature intended the governor to utilize the less flexible, i.e. the line item, approach to prevent an overdraft or deficit.

Op.Att'y.Gen. #80-9-3. We also observed in this opinion that §8.31 must be construed, considered, and examined in *para materia* with other provisions in chapter 8, particularly §§8.30 and 8.32. *Id.; Rush v. Sioux City*, 240 N.W.2d 431, 445 (Iowa 1976). Section 8.30 sets forth the object sought to be attained with respect to granting the governor authority to make reductions in allotments under §8.31:

> Availability of appropriations. The appropriations made shall not be available for expenditure until allotted as provided for in section 8.31. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. *The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made.* [Emphasis added.]

This language plainly indicates that appropriations are to be allotted in full each quarter provided the estimated budget resources at that time are sufficient to pay all appropriations in full for the fiscal year.

Unlike the governor, the General Assembly is not limited by the constitution or by statute in making reductions in appropriations. Inherent in the General Assembly's constitutional right to control the public treasury is its authority to specify precisely how much money will be spent and for what purposes. *See* 229 N.W.2d at 709-10. The governor's discretionary authority in the appropriations process is, on the other hand, clearly and considerably limited under §8.31. Pursuant to the quarterly requisition-allotment system, he may reduce allotments of appropriations only upon finding that estimated budget resources for the entire fiscal year are insufficient to pay all appropriations in full. Thus, the express terms of §8.31 indicate that it is intended to prevent an overdraft or a deficit rather than to establish a fund surplus. We note, however, that the operation of §8.31 is not an exact science since it involves a decision based upon revenue estimates. Some imprecision may also occur due to variances in the requested allotments for a particular quarter. In any event, §8.31 provides that the governor may modify allotments "to the extent he may deem necessary in order that there shall be no overdraft or deficit..." and, accordingly, recognizes that he

must have some flexibility in order to implement the section. As a safeguard against the possibility of the governor making allotment reductions unreasonably, §8.31 requires that the executive council concur in any finding to make reductions. Hence, the council acts as a forum in which the governor's decision to use §8.31 may be discussed and further evaluated. In light of these various considerations, we suggest that a reasonable, good faith finding by the governor under §8.31 would not likely be subject to legal challenge simply because the finding results in an incidental surplus in the several funds of the state at the end of the fiscal year. With these considerations in mind, we make the following specific conclusions in response to your first question:

1. The governor has limited authority under §8.31 to make reductions in the quarterly allotments of appropriations. Such reductions may be made only in order to prevent an overdraft or deficit in the several funds of the state at the end of a fiscal year and only upon a finding, prior to making allotments each quarter, that estimated budget resources during the fiscal year are insufficient to pay all appropriations in full.

2. The General Assembly has both express and inherent constitutional authority to make reductions in appropriations and thereby to prevent an overdraft or deficit in the several funds of the state at the end of a fiscal year.

3. If the governor finds that, due to legislative action in reducing appropriations during the third quarter of the fiscal year, estimated budget resources will produce a surplus in the several funds of the state at the end of the year, he must further modify any reductions in allotments for the fourth quarter to ensure only that an overdraft or deficit does not result.

You indicate that, in an effort to preserve Governor Ray's reduction in the allotment of standing unlimited appropriations, the General Assembly proposed the following:

> Executive orders numbers 38 and 40 executed pursuant to section 8.31 shall remain in full force and effect for allocations of standing unlimited appropriations through June 30, 1981.

S.F. 305, §49. We observe that the General Assembly also took action with respect to the governor's reductions in the allotments of other appropriations:

> The funds available from allotments which are modified because of the execution of the authority under section 8.31 as contained in executive orders numbers 38 and 40 shall revert to the general fund of the state on the effective date of this Act or on the effective date of the allocation, whichever is later.

S.F. 305, §48. We have previously discussed the General Assembly's preeminent constitutional role in the appropriations process. The General Assembly may control the public treasury by dictating the time, manner, and means for the disbursement of any funds in the state treasury. *See* 229 N.W.2d 709-10. In general response to your second question, we therefore conclude that the General Assembly does have authority to adopt, by law, action already taken by the governor in preventing an overdraft or deficit in the several funds of the state at the end of the fiscal year. In light of the limited authority granted in §8.31, however, such legislative action may require the governor to change the amount or percentage of reductions in allotments necessary for the final quarter of the fiscal year.

A separate issue exists, however, concerning the actual effect of §§48 and 49. Section 49 represents a clear exercise of legislative authority under the constitution to specify how, and to what degree, appropriations will be spent. Accordingly, the prior reductions made by the governor in standing unlimited appropriations must be maintained through the fourth quarter of the fiscal year. The legislative intent in §48 is, however, less clear. On the one hand, the section may be interpreted to have essentially the same effect as §49 and thereby to approve a 4.6% reduction in the fourth-quarter allotments of specific appropriations, in addition to other reductions made by the General Assembly in S.F. 305. On the other hand, §48 may be interpreted to mean that the amount of funds not spent in the second and third quarters of fiscal year 1980-81, due to the governor's exercise of authority under §8.31, must revert to the general fund and no longer be available for allocation. The latter interpretation would nevertheless require the governor to make an independent decision under §8.31 as to whether reductions in allotments of appropriations for the fourth quarter are necessary to prevent an overdraft or deficit.

The goal in interpreting an ambiguous statute is to ascertain legislative intent in order, if possible, to give it effect. *See State ex rel. State Highway Commission v. City of Davenport*, 219 N.W.2d 503, 507 (Iowa 1974). In searching for legislative intent, we consider the object sought to be accomplished as well as the language used and place a reasonable construction on the statute which will best effect its purpose. *Id.* Pursuant to these rules of statutory construction, we conclude that the General Assembly intended §48 to receive the second interpretation discussed above. The section obviously seeks to revert appropriated but unallocated money to the general fund but does not expressly modify the governor's responsibility under §8.31 for making allotments in the fourth quarter of the fiscal year. This is in distinct contrast to the language used in §49. The latter interpretation above places a reasonable construction on §48 because it accomplishes a reversion of funds not yet allocated but nevertheless preserves the authority of the governor under §8.31 to make reductions in allocations for the fourth quarter if such reductions are again deemed necessary to prevent an overdraft or deficit. Accordingly, in the absence of a legislative clarification by language similar to that employed in §49, we conclude that §48 accomplishes only a reversion of funds not allocated under §8.31 for the second and third quarters of fiscal year 1980-81 and does not otherwise affect the governor's authority and responsibility under §8.31 with respect to the fourth quarter of the year. If the legislature desires to have the full 4.6% budget reduction to be effective in the fourth quarter of the fiscal year, it should enact legislation that so provides. It clearly has the constitutional power over state appropriations to do so.

April 2, 1981

COUNTIES; SPECIAL ELECTIONS: §345.1 *et seq.* The provisions of chapter 345 are only applicable to the construction or remodeling of a "county building or facility" or a "public building." The rights of the electorate to seek a vote to approve or rescind an expenditure pursuant to chapter 345 is applicable to both §§345.1 and 345.4 proposals. Section 345.13 does not establish any time limitations for petitioning for an election. When a §345.13 petition is signed by 25 percent of those qualified to vote, a petition is valid. A board of supervisors is not required to use the exact language of the petition when the proposal is submitted at a special election. Proposals in addition to those contained in a petition may be included on the ballot. Several distinct public measures may be included on the ballot. Several distinct public measures may be printed on one ballot and inconsistency between the several propositions is no bar if each is independent of the other so as to enable the voter to indicate his choice on one or all. (Fortney to Lee, Homboldt County Attorney, 4/2/81) #81-4-2

April 2, 1981

STATE OFFICERS AND DEPARTMENTS; COMPTROLLER: Iowa Constitution, Article VII, §1; §8.15, The Code 1979. Article VII, §1 of the Iowa Constitution does not prohibit advance payments of expenses by the state of Iowa. The voucher requesting such advance payment shall comply with §8.15, The Code 1979. (Norby to Mosher, State Comptroller, 4/2/81) #81-4-3(L)

April 6, 1981

OPEN RECORDS; COUNTIES AND COUNTY OFFICERS: §§48.5, 68A.2 and 68A.3, The Code 1981. County records should be copied in the county offices unless it is impractical to do so. If it is necessary to perform the copying at a separate location, the copying is still to be performed under the supervision of the custodian or the custodian's deputy. The custodian is not to relinquish control of the records to the requestor. Any charges assessed for such service should be uniformly applied to all requestors. (Fortney to Cochran, State Representative, 4/6/81) #81-4-4

The Honorable Dale M. Cochran, State Representative, State Capitol: You have requested our opinion regarding the proper use of official records. Specifically, you inquired whether an elected county official or other county employee may remove, or allow to be removed, from the premises of the courthouse any official records in order that a person or committee may duplicate said records for political purposes. Secondly, you inquired whether the foregoing service may be provided at no charge or at a charge applied selectively among various groups. It is our opinion that under specified circumstances it is appropriate to allow the removal of official records from the courthouse for the purpose of copying, however, any charges assessed for such service should be uniformly applied to all requestors.

Two sections of the Code are central to our analysis, §§68A.2 and 68A.3. These sections establish the citizen's right to examine public records and provide guidelines by which the custodian of the records is to supervise the records during examination. Section 68A.2 provides:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46.

Section 68A.3 provides:

> Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in

> supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

In a previous opinion we examined §§68A.2 and 68A.3 with regard to a citizen copying minutes of meetings of governmental bodies. Op.Atty.Gen. #79-4-19. Our earlier comments are apropos to your question. We stated:

> Section 68A.3 provides the mechanism by which such copies may be obtained. In general, the statute requires that copying of public records be completed under the supervision of the record's custodian or an authorized deputy in a "suitable place" provided by the custodian. If it is impractical to accomplish the copying at the custodian's office, another place may be employed, at the expense of the individual seeking copies of the records. The individual requesting copies must assume "all expenses" incurred to obtain copies, as well as a "reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records" during copying.

Op.Atty.Gen.#79-4-19, p. 5.

We have therefore taken the position that county records would be copied in the county offices unless it is impractical to do so. If it is necessary to perform the copying at a separate location, the copying is still to be performed under the supervision of the custodian or the custodian's deputy. The custodian is not to relinquish control of the records to the requestor. Such restrictions are both reasonable and necessary to ensure the integrity of the records.

Section 68A.3 expressly allows the custodian to impose a reasonable fee for the expenses of copying public records. We have opined that the section is calculated to insure that the lawful custodian of public records is, in making such records available for examination and copying, not to be obliged to incur unnecessary expense or to have the work of his office disrupted without being reimbursed for such expense or compensated for such disruption. 1968 Op.Atty.Gen. 656, 657. However, while reasonable fees may be assessed for these services, we have stated that all citizens requesting to examine and copy public records are to be treated alike. Certain individuals or classes of individuals are not to receive preferential treatment or reduced rates. We have said:

> ... *it is our opinion that the same fee schedule for use of a room and records supervisor should apply to news media employees, abstracters, family tree researcher and individual attorneys.* I should point out, however, that section 3 of Senate File 537 does require the custodian to provide a suitable place for the work of examination and copying and that it is only when it is impracticable for such work to be carried on in the lawful custodian's office that a charge may be made for providing a place for such work to be carried on. Where records are being examined on a mass basis it would probably be necessary that a special place be set aside for such examination and that some supervision of the records would be required. In such a case it is only reasonable that the lawful custodian be made whole for the expenses incurred by his office. [Emphasis supplied.]

1968 Op.Atty.Gen. 656, 657.

Your concern that public records may be utilized for political purposes is misplaced. We have stated that the fact that the requestor intends to utilize the records for commercial purposes is not a bar to examination and copying of public records. In 1968 Op.Atty.Gen. 518, we stated:

> Whether or not the data obtained from your records is to be used for commercial purposes is immaterial. *The statute does not make any distinctions as to the purpose for which public records may be used. Hence, there is no legal authority under which you could resist the purposes for which the person copying your records could use the information contained therein* to uses determined by your department to be in the public interest. [Emphasis supplied.]

1968 Op.Atty.Gen. 518, 520.

While you did not indicate the nature of the records which prompted your inquiry, we believe that given our foregoing comments regarding the purposes to which a requestor might put public records we should specifically address the use of voter registration lists. Section 48.5 relates to the maintenance and inspection of registration records. It provides, in pertinent part, as follows:

> 1. The county commissioner of registration shall maintain the registration records of all qualified electors in the county in accordance with rules promulgated by the registration commission. *Registration records shall not be removed from that office or other designated locations except upon court order, and shall be open to inspection by the public at reasonable times.*
>
> 2. *Any person may request of the registrar and shall receive, upon payment of the cost of preparation, a list of qualified electors and other data on registration and participation in elections,* in accordance with the following requirements and limitations:
>
> * * *
>
> 3. *Neither the duplicate registration records open to public inspection nor any list obtained under section 2 shall be used for any purpose of any kind or nature, other than to request a registrant's vote or any other bona fide political purpose.* The commissioner or registrar shall keep a list of the name, address, telephone number, and social security number of each person who copies or obtains copies of the registration lists. *Any person that uses such lists in violation of this section shall, upon conviction, be guilty of a serious misdemeanor.* [Emphasis supplied.]

We note that §48.5 specifically limits the use of voter registration lists to a "bona fide political purpose." To utilize such lists for commercial purposes would constitute a serious misdemeanor. However, the fact that a requestor intended to put a voter registration list to a political purpose would not bar the requestor from access to the list. We have opined that the right to examine and copy duplicate registration lists is absolute and may not be interfered with on the grounds that the records thereafter may be used illegally. 1976 Op.Atty.Gen. 79. We have further stated that any citizen, corporate or otherwise, may examine the voter registration list and the responsibility for misuse of such list requests upon said citizen and not upon the commissioner of registration for providing such list. Op.Atty.Gen. 389.

In conclusion, county records should be copied in the county offices unless it is impractical to do so. If it is necessary to perform the copying at a separate location, the copying is still to be performed under the supervision of the custodian or the custodian's deputy. The custodian is not to relinquish control of the records to the requestor. Any charges assessed for such service should be uniformly applied to all requestors.

April 6, 1981

COURTS; COUNTIES AND COUNTY OFFICERS: Chapters 19A, 341A and 400, The Code 1981. The position of bailiff of the Iowa district court has civil service status equivalent to that of a deputy sheriff. (Fortney to McCauley, Dubuque County Attorney, 4/6/81) #81-4-5(L)

April 6, 1981

COUNTIES AND COUNTY OFFICERS; TOWNSHIP TRUSTEES: §§359.42 and 359.43, The Code 1979. Township trustees can levy a tax to fund township ambulance services without a county referendum. (Fortney to Van Maanen, State Representative, 4/6/81) #81-4-6(L)

April 7, 1981

BEER AND LIQUOR: Consumption by minors with parental knowledge and consent. §§123.3(23), 123.47, 123.95, 232.2, 232.8, 233.1, The Code 1981. Minors may legally be served liquor or beer in a private home with consent and knowledge of a parent or guardian, and this act in itself does not constitute contributing to the delinquency of a juvenile. A "private home" includes a residential dwelling and adjacent land which is under the control of the owner or lessor of the dwelling. Written documents are not essential to showing knowledge of and consent of a parent or guardian for another adult to serve liquor or beer to their minor child. (Norby to Dieleman, State Representative, 4/7/81) #81-4-7

The Honorable William W. Dieleman, State Representative, State Capitol: You have requested an opinion of the attorney general concerning the circumstances in which liquor or beer may be served to minors. Your concerns arise from §123.47, The Code 1981, which provides as follows:

> No person shall sell, give, or otherwise supply alcoholic liquor or beer to any person knowing or having reasonable cause to believe him to be under legal age, and no person or persons under legal age shall individually or jointly have alcoholic liquor or beer in his or their possession or control; *except in the case of liquor or beer given or dispensed to a person under legal age within a private home and with the knowledge and consent of the parent or guardian* for beverage or medicinal purposes or as administered to him by either a physician or dentist for medicinal purposes and except to the extent that a person under legal age may handle alcoholic beverages and beer during the regular course of his or her employment by a liquor control licensee or beer permittee under this chapter. [Emphasis supplied.]

Specifically, you have asked the following:

> 1. Do parents or guardians have the legal right to serve liquor or beer to their minor children or would this be contributing to the delinquency of a minor?
>
> 2. Would "within a private home" be interpreted to be a home dwelling or could it mean a rented or owned location such as a country club, community center or an open space such as a pasture?

3. Regarding the phrase "with the knowledge and consent of the parent or guardian" as used in 123.47, does knowledge mean that a written invitation would state liquor and/or beer would be served at a party or gathering; and further does consent of the parent or guardian require a written consent be given to the adult sponsor of the gathering or party within a private home?

I.

Regarding your first question, parents and guardians may serve liquor or beer to their children, within a private home, as provided in §123.47, and this action would not generally constitute contributing to the delinquency of a minor. Section 233.2, The Code 1981, states the elements of contributing to juvenile delinquency, providing as follows:

It shall be unlawful:

1. To encourage any child under eighteen years of age to commit any act of delinquency defined in chapter 232.

2. To send, or cause to be sent, any such child to a house of prostitution or to any place where intoxicating liquors *are unlawfully sold or unlawfully kept* for sale, or to any policy shop, or to any gambling place, or to any public poolroom where beer is sold, or to induce any such child to go to any such places, knowing them to be such.

3. To knowingly encourage, contribute, or in any manner cause such child to violate any law of this state, or any ordinance of any city.

4. To knowingly permit, encourage, or cause such child to be guilty of any vicious or immoral conduct.

5. For a parent willfully to fail to support his child under eighteen years of age whom he has a legal obligation to support.

Section 233.1(1) would not be triggered by the serving of liquor or beer in the home for two reasons. First, violations by minors of §123.47 are excluded from juvenile court jurisdiction and must be prosecuted as simple misdemeanors. §232.8(1)(b), The Code 1981. [1] Secondly, a "delinquent act" is defined in §232.2(11)(a), The Code 1981, as a violation of law or ordinance which would constitute an offense if committed by an adult. As consumption of liquor or beer in a private home is not prohibited for adults, we do not believe it constitutes a delinquent act for purposes of ch. 232.

Regarding §233.1(2), (3) and (4), we do not believe that the mere act of serving liquor or beer to a minor child in a private home constitutes contributing to juvenile delinquency. If, however, a minor was served liquor or beer to the point of intoxication, the adult may risk violation of §233.1(3) if the child were to violate a law while intoxicated. The very act of the minor leaving the private home while

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[1] Section 232.8(1)(b) does, however, provide that a court may advise juvenile authorities if the court has reason to believe a juvenile prosecuted for violation of §123.47 regularly abuses alcohol and may be in need of treatment.

intoxicated might subject the minor to prosecution for public intoxication, prohibited by §123.46, The Code 1981, and in many cities by local ordinance. Under such circumstances, the adult may be subject to prosecution pursuant to §233.1(3) for knowingly encouraging, contributing, or causing the minor to violate a law or ordinance.

II.

Your second question requires an interpretation of the phrase "within a private home" as used in §123.47. This task is hindered by the fact that a private home is not defined in ch. 123. A term which is defined in ch. 123, however, appears of use in defining a private home. A "public place" is defined in §123.3(23) as "... any place, building, or conveyance to which the public has or is permitted access." Also, the term "private *place*" appears in conjunction with "private home" in §123.95, indicating that home is a more restrictive term than place. *Sioux Associates, Inc. v. Iowa Liquor Control Comm.*, 132 N.W.2d 421, 425 (Iowa 1965). Initially, it would appear that at a minimum a public or private place could not constitute a private home.

"Private" is defined in Webster's Third New International Dictionary, 1804 (1967), as "... intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." A "home" is defined in Webster's Third New International Dictionary, 1082 (1967), as "... the house and grounds with their appurtenances habitually occupied by a family: a private dwelling."

We believe that in applying these individual definitions to arrive at a definition of private home, the private home consists of the actual dwelling and land surrounding it which is a part of the owned or leased premises. Particularly in light of the reference in §123.95 to both private *place* and private *home*, we do not believe that private home includes any non-residential locations, whether rented or provided for free. This would prohibit use of a country club, community center, or similar premises for a gathering where liquor or beer is intended to be served to minors even with the knowledge and consent of a parent or guardian. It would appear, however, that all land adjacent to a residential dwelling, and under the control of the owner or lessor, falls within the scope of a private home.

The requirement that the home be "private" appears to present a factual question, and in an appropriate case it might be found by the trier of fact that the premises were in fact open to the public generally. While the Iowa Supreme Court has not had occasion to define a private home, it has discussed the qualities of "private" in distinguishing a private place from a public place. In *Sioux Associates, Inc. v. Iowa Liquor Control Comm.*, the court states as follows:

> Section 123.5(19) [The Code 1962] of the Liquor Control Act defines "public place" as follows:
>
> "Public place" includes any place, building or conveyance to which the public has or is permitted to have access and any place of public resort.
>
> It goes without saying a private place is the opposite. One to which the public does not have and is not permitted to have access and is not a place of public resort.
>
> What this court said in *State v. Perry*, 246 Iowa 861, 867, 69 N.W.2d 412, 416, points up the situation:
>
> "To admit perfect strangers to a club room upon the payment of one dollar

fee and no other requirement, qualification or identification, clearly falls short of proof, even inferentially, that such a place was private."

132 N.W.2d at 425; *see also Carey v. Iowa Liquor Control Comm.*, 132 N.W.2d 429, 431-432 (Iowa 1965). We believe application of these same criteria should be made in the contest of a private home, in conjunction with the more restrictive definition of a "home" as compared to a "place" discussed above.

III.

Regarding your third question, we do not believe that written statements as you have described are necessary to establish a parent or guardian's knowledge and consent. They would, however, certainly serve to clarify the issues of knowledge and consent on the part of a parent or guardian.

In conclusion, it appears that a parent or guardian may serve liquor or beer to their minor child, or authorize another adult to do so, provided that the liquor or beer is served in a private home. A private home is a residential dwelling and the adjacent land which is under the control of the owner or lessor of the dwelling. No specific manner of communication is required for a parent or guardian to manifest their knowledge of and consent to another adult serving liquor or beer to their minor children.

April 7, 1981

COUNTIES; CONFIDENTIAL INFORMATION: Section 68A.7; The county board of health may require those seeking reduced fees for services to make available income information to the supervisors for review. (Morgan to Mahaffey, Poweshiek County Attorney, 4/7/81) #81-4-8(L)

April 8, 1981

CRIMINAL LAW, TRESPASS, CONSERVATION: Sections 716.7 and 716.8, The Code 1979. Trespass as defined in §716.7(2)(a) requires more than mere entry. Sections 716.7(2)(a) and 716.7(2)(b) are alternative ways to commit trespass and exits independently. A person who enters upon premises accidentally, or who honestly believes that he or she is licensed or privileged to enter, is not guilty of trespass. The legislature should give serious and careful consideration to whether it is desirable to enact a separate statute specifically covering hunting, fishing, and trapping on the property of another without permission. This provision should not be made part of §716.7. (Cleland to Ramsey, State Senator, 4/8/81) #81-4-9(L)

April 10, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse. Child Foster Care Facilities. Licensure. Sections 125.13, 237.1, 237.4, The Code 1981. Residential/intermediate substance abuse treatment facilities which provide treatment to substance abusers who are children, is defined by §237.1(2), The Code, appear to provide "parental nurturing" within the meaning of §237.1(3), The Code, and, thus, are required to be licensed as child foster care facilities unless specifically exempted from licensure by §237.4, The Code. (Freeman to Riedmann, Department of Substance Abuse, 4/10/81) #81-4-10(L)

April 13, 1981

PUBLIC OFFICERS AND DEPARTMENTS: Professions, Examining Boards, Disqualification. Section 147.18, The Code 1981. The disqualification of any member of a professional examination board connected in any manner with any wholesale or jobbing house dealing in supplies does not extend to employees of nonprofit organizations. (Schantz to Bisenius, State Senator, 4/13/81) #81-4-11

The Honorable Stephen W. Bisenius, State Senator, State Capitol: We have your request for an opinion of the attorney general interpreting §147.18, The Code 1981. Specifically, you inquired whether this section has been interpreted previously and whether the section covers nonprofit organizations as well as businesses operated for profit.

Section 147.18 currently provides:

> No examiner shall be an officer or member of the instructional staff of any school in which any profession regulated by this title is taught, or be connected therewith in any manner, except nurse examiners and psychology examiners. *No examiner shall be connected in any manner with any wholesale or jobbing house dealing in supplies.* [Emphasis added.]

As presently written, §147.18 has been the subject of neither a judicial interpretation nor opinion of the attorney general. Its predecessor was plainly narrower in scope.

> No examiner shall be an officer or member of the instructional staff or any school in which any profession regulated by this title is taught, or be connected therewith in any manner, and no embalmer or optometry examiner shall be connected in any manner with any wholesale or jobbing house dealing in optical or embalming supplies, and no cosmetology examiner shall be connected with any wholesale or jobbing house dealing in supplies sold to practitioners of cosmetology, and no barber examiner shall be connected with any wholesale or jobbing house dealing in supplies sold to practitioners of barbering, providing, however, that the foregoing shall not apply to nurse examiners.

Section 147.18, The Code 1971.

As previously written, the prohibition of a connection with any "wholesale or jobbing house" applied only to embalmers', optometrists', barbers' and cosmetologists' examining boards and not to the boards of other health professionals. A major revision of chapter 147 in 1974 simplified the section and apparently extended its reach to all examiners whose appointment is governed therein. 1974 Session, 65th G.A., ch. 1086, §75. As then written, it provided:

> No examiner shall be an officer or member of the instructional staff of any school in which any profession regulated by this title is taught, or be connected therewith in any manner, except nurse examiners. No examiner shall be connected in any manner with any wholesale or jobbing house dealing in supplies sold to practitioners.

In the next session an amendment was adopted exempting the psychology examiners from the prohibition against service by a member of an instructional staff teaching the profession. 1975 Session, 66th G.A., ch. 122, §1. The amendment also dropped, inadvertently or as superfluous, the phrase "sold to practitioners" which had previously appeared after the clause in question. (Clearly, a

doctor who sells his garden produce to a market rather than to a consumer has not been brought within the reach of the disqualification.)

With that background, we can focus upon the precise issue you present, whether the language prohibiting a connection between any examiner and a "wholesale or jobbing house dealing in supplies" would be applicable to an employee of a nonprofit organization which provides supplies to licensees.

Chapter 4, The Code 1981, sets forth rules for construing Iowa statutes. It is presumed that a just and reasonable result is intended and that the public interest is favored over any private interest. Section 4.4, The Code 1981. If a statute is ambiguous, a court may seek the intention of the legislature in, *inter alia*, the object sought to be attained, and the common law or former statutory provisions, including laws upon the same or similar subjects. Section 4.6, The Code 1981. Words in a statute are given their ordinary meaning unless defined differently by the legislature or possessed of a peculiar and appropriate meaning in law. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976).

Chapter 147 provides no special definition of "wholesale" or "jobbing house." Webster's *Third New International Dictionary* (1967) defines "wholesale" as "of, relating to or engaged in the sale of goods or commodities in quantity for resale." "Jobbing" is the present participle of "job" and "job" is defined, as pertinent usage, the terms employed would connote a category of business conducted for profit.

The apparent purpose of the disqualification is to prohibit a particular kind of conflict of interest. Although the term may have broader signification in special contexts, *see Wilson v. Iowa City*, 165 N.W.2d (Iowa 1969):

> Generally, when used to suggest disqualification of a public official from performing his sworn duty, the term 'conflict of interest' refers to a clash between public interest and the private *pecuniary* interest of the individual concerned.

Gardner v. Nashville Housing Authority, 514 F.2d 38, 41 (6th Cir. 1975). [Emphasis added.] Because the pecuniary interest of an individual employee in the sale of supplies by a nonprofit enterprise is likely to be attenuated at best, [1] focusing upon the purpose of §147.18 supports the view that the ordinary meaning of the language "wholesale and jobbing house" refers to businesses.

For all of the foregoing reasons, we conclude that the disqualification set forth in §147.18 does not extend to those connected with nonprofit enterprises dealing in supplies.

April 14, 1981

COUNTIES; GENERAL RELIEF: Section 252.1; Section 252.1 as interpreted by the Iowa Supreme Court appears to provide a framework by which counties can provide relief in a manner consistent with the state and federal constitutions. (Morgan to Rush, State Senator, 4/14/81) #81-4-12

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[1] A "nonprofit corporation" is defined in §504A.2(4), The Code 1981, as a "corporation no part of the income or profit of which is distributable to its members, directors or officers except as provided in this chapter."

The Honorable Bob Rush, State Senator, Statehouse: I am writing to respond to your request for an opinion regarding the scope and constitutionality of §252.1 of Iowa's county general relief law. You have asked whether "property" in §252.1, The Code 1981, includes both real and personal property and what amount of property would disqualify an individual from receiving assistance. In addition, if ownership of *any* real or personal property disqualifies one from receiving assistance, you have asked us to evaluate the constitutionality of the general relief statute.

The duty to provide relief to the poor is solely a statutory responsibility. *In re Frentress' Estate*, 249 Iowa 783, 89 N.W.2d 367 (Iowa 1958). There is no common law requirement to support the poor, although historically most English societies have sensed a moral obligation to care for those unable to support themselves.

The Iowa Supreme Court has considered the question of what constitutes "property" within the meaning of §252.1, The Code 1981, (and the same section in preceding codes) and has determined that whether a person is a "poor" person is a question of fact to be appropriately determined by a jury.

> Even where the alleged pauper is possessed of some property, it will ordinarily be a question for the jury whether, despite such ownership, he is a "poor person".

Polk County v. Owen, 187 Iowa 220 at 239, 174 N.W. 99 (Iowa 1919). The court does not generally construe the first part of the statute in isolation. Most cases discuss the circumstances of both "poor" and "needy" persons in determining whether assistance was properly provided or denied. [1]

The court has previously considered both real and personal property to be considered in determining whether any individual is a "poor person". *Hamilton County v. Hallis*, 141 Iowa 447, 119 N.W. 978 (Iowa 1909).

One can glean a sense of the court's definition of "property" from this language in *Hamilton County v. Hollis*:

> The statute, fairly construed, means that a person to come within the class mentioned (the class of poor or needy persons) must be without property which can aid in his support or out of which funds may be realized for his maintenance.

141 Iowa at 481. The court stands by this functional test and urges a functional construction of the statute:

> The test is whether an alleged pauper owns an estate of some substantial value, which, in reason, can be appropriated, and made to contribute to his support....

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[1] Section 252.1, The Code 1981 states:

> "Poor person" defined. The words "poor" and "poor person" as used in this chapter shall be construed to mean *those who have no property*, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid *to needy persons who have some means*, when the board shall be of opinion that the same will be conducive to their welfare and the best interest of the public. [Emphasis added.]

Polk County v. Owens, 187 Iowa at 240. A liberal construction of the statute in favor of the county's discretion is urged by the court:

> The duty of township trustees, when applied to for poor relief, is not to be determined by very rigid rules. They must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it. They must, too, often times act promptly, and without taking time to make an extensive examination of the applicant's circumstances. Where they act in good faith, without abuse of discretion, their action, in our opinions, is not subject to review. (Citations omitted.)

Hardin County v. Wright County, 67 Iowa 127, 130-131, 24 N.W. 754 (Iowa 1885).

Thus the court has found that an application for relief by a man who owned an "undivided one-eighth interest in Iowa farmland, worth $6,000., free from all encumbrances save the life estate of a woman 58 years old and in bad health" shocked the conscience. *Polk County v. Owen*, 187 Iowa 220, 242 (Iowa 1919). The court reversed a trial court which denied relief to an alleged pauper who owned some property worth $1,000., in an inaccessible county, part of which may have been hidden. *Hardin County v. Wright County*, 67 Iowa 127, 24 N.W. 754 (Iowa 1885).

In determining the amount of property which can be available to a pauper to whom relief is properly given, the Iowa Supreme Court has again used a functional test. The court seems to evaluate whether the person receiving relief has resources reasonably available to meet the most basic needs.

> The law on the subject should not be dealt with unreasonably, or with undue rigidity. One who owns a good house and lot in a city can not be entitled to claim provisions made for paupers. On the other hand, the owner of a miserable hovel, which he uses as a shelter for his family, must not be compelled to sell it if it be of any value whatsoever, before he may rightfully call upon the public authorities to furnish medicine and bread for his sick and famishing children.

Polk v. Owens, 187 Iowa at 240. By adopting a functional test of the availability of resources to provide for needs, the Iowa Supreme Court has avoided a direct decision on the constitutionality of the Iowa statute. We have identified no cases in which the question you raise was raised to the court.

The practical application of the law in this area has lead to the adoption of widely divergent standards among the counties in providing general relief. The most comprehensive study of the practical impact of the general relief laws in Iowa is found in the "Contemporary Studies Project: General Assistance in Iowa", 61 *Iowa L.Rev.*, 1155 (June 1976). That study concluded that each of the counties had a different method of administering ch. 252 of the Code. While we have identified no cases in which the Iowa statute is invalid, substantial questions have been raised regarding the constitutionality of §252.1 in practice. "Contemporary Studies Project", 61 *Iowa L.Rev.*, 1155. The law is presently the subject of a federal court challenge in the case of *Collins, et al. v. Hoke, et al.*, No. C 80-159 (N.D. Iowa, filed Dec. 22, 1980), in which the discretion of the county to deny general relief is challenged.

Some of the questions raised in 1976 about the statute are no longer viable because of recent amendments in the law. Since 1979, county boards of supervisors have been authorized to establish standards for eligibility for assistance. Our experience has shown that many counties have now adopted general eligibility standards for granting relief, thereby meeting basic due process requirements.

We conclude that the constitutionality of the Iowa general relief laws may be scrutinized by state and federal courts in the future. Arguments can be made in favor of standardized treatment for residents of various parts of the state as well as in favor of local control in determining the type and amount of relief available. The statute as interpreted by the Iowa Supreme Court appears to provide a framework by which counties can provide relief in a manner consistent with the federal and state constitutions. We do not have the empirical data available to determine whether the administration of the law in each county meets constitutional requirements.

April 15, 1981

MENTAL HEALTH; STATE OFFICERS AND DEPARTMENTS: Creation of State Agencies. 42 U.S.C. §9401 et. seq. (1981), 42 U.S.C. §2689 et. seq. (1980), Iowa Const. of 1857, Art. IV, §§1 and 9, chapter 225B, The Code 1981, §§217.10, 217.11, 217.12, 225B.2, 225B.3(d), 225B.8, The Code 1979, Acts of the Sixty-Eighth General Assembly, 1979 Session, ch. 54. The governor of the state of Iowa does not have the inherent power to create a state agency. Where the legislature mandated the creation of a new agency, but failed to designate the procedure for its creation, the governor is delegated that responsibility by law. The delegation of authority to the governor to create a new state agency is not an unconstitutional delegation of power where adequate guidelines accompany the powers delegated. Where the legislature authorizes a division of state government to perform a particular function, the governor cannot by executive order designate a new agency to perform said function. (Mann to Yenger, State Senator, 4/15/81) #81-4-13

The Honorable Sue Yenger, State Senator, State Capitol: You recently requested an opinion of the attorney general on the question of whether the provisions of §225B.8, The Code 1981, will become effective if no action is taken to establish a unified mental health agency by the 1981 Session of the General Assembly.

Specifically, you ask the following questions:

1. If there is no unified mental health agency created by July 1, 1981, does the repeal sections cited in 225B.8 take effect?

2. Can the governor, by executive order, designate another agency as the Iowa Mental Health Authority, which would in essence, effect a unified mental health agency?

After careful analysis of your questions, we have subdivided them into four questions in order that we may give a more complete answer. Our response to each is as follows:

I. *Does the governor have the power to create an agency by executive order?*

As a general proposition, most courts hold that a governor only has such powers as are vested in the office of governor by constitution and by statutes enacted pursuant thereto, and basically, the governor's power is to execute the laws, not to create laws. *Pagano v. Pennsylvania State Horse Racing Commission*, 413 A.2d 44 (Pa. 1980); *Colorado Polytechnic College v. State Board for Community College and Occupational Education*, 173 Colo. 39, 476 P.2d 38 (1970); *Martin v. Chandler*, 318 N.W.2d 40 (Ky. 1958); 1967 Op.Att'y.Gen. 166; 81A C.J.S. *States* §130(b) (1977); *Gubernatorial Executive Orders As Devices For Administrative Direction and Control*, 50 Iowa L.Rev. 78 (1964).

Consequently, the general proposition holds that state offices or agencies may only be created by the constitution or laws of the state. In the absence of express or implied constitutional restriction, the legislature has inherent power to create state agencies. *Decker v. University Civil Service System Merit Board*, 406 N.W.2d 173 (Ill. 1980); *Hryhorchuk v. Smith*, 379 So.2d 281 (La. App. 1979); *Opinion of the Justices to the Council*, 368 Mass. 866, 334 N.E.2d 604 (1975); *Colorado Polytechnic College v. State Board for Community College and Occupational Education*, 173 Colo. 39, 476 P.2d 38 (1970); *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958); *State v. Marsh*, 146 Neb. 750, 21 N.W.2d 503 (1946); 1967 Op.Att'y.Gen. 166; 1967 Op.Att'y.Gen. 132; 81A C.J.S. *States* §82 (1977): *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L.Rev. 78 (1964).

Contrary to the general proposition, the courts of New Hampshire have held that New Hampshire's governor has inherent constitutional power to create state agencies by executive order. *Monier v. Gallen*, 414 A.2d 1297 (N.H. 1980); *Opinion of the Justices*, 381 A.2d 1204 (N.H. 1978). Other courts have held that a governor may have inherent power to establish commissions whose functions are limited to gathering information and making recommendations to the governor, and which does not exercise any of the sovereign powers of the state. *Opinion of the Justices to the Council*, 368 Mass. 866, 334 N.E.2d 604 (1975); *Ryan v. Wilson*, 231 Iowa 33, 300 N.W. 707 (1941).

However, where express constitutional or statutory authority exists, a governor may create state agencies. *Monier v. Gallen*, 414 A.2d 1297 (N.H. 1980); *State ex rel Milwaukee County v. Wisconsin Council on Criminal Justice*, 73 Wis.2d 237, 243 N.W.2d 485 (1976); *Metropolitan Sanitary District v. Pollution Control Board*, 62 Ill.2d 38, 338 N.E.2d 392 (1975); *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973); *In re Opinion of the Justices*, 87 S.D. 114, 203 N.W.2d 526 (1973).

In no case, however, may executive power be used to frustrate valid legislative enactments. *Monier v. Gallen*, 414 A.2d 1297 (N.H. 1980); *Shapp v. Sloan* 391 A.2d 595 (Pa. 1978); *Ball v. Carey*, 85 Misc.2d 1052, 381 N.Y.S.2d 652 (1976); *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958); 1967 Op.Att'y.Gen. 166; 1967 Op.Att'y.Gen. 132. Thus, a governor could not create a new agency or restructure an existing agency even where given such power by constitution or statute, if such an act would frustrate the implementation of a valid legislative enactment.

Although this question of whether a governor has the power to create an agency has not been addressed by the Iowa Supreme Court, it has been discussed in prior opinions of the attorney general. In a 1967 opinion, 1967 Op.Att'y.Gen. 132, this office opined that the governor has no prerogative powers, but possesses only such powers and duties as are vested in the office by constitutional or statutory grant. Thus, the governor was obliged to recognize existing agencies and could not establish or create new agencies. Another opinion, 1967 Op.Att'y.Gen. 166, reiterated this position.

Accordingly, we conclude that the governor of the state of Iowa does not have the inherent power to create a state agency.

II. *Was the power to create an agency delegated to the governor by the adoption of §§225B.2 and 225B.8, The Code 1981?*

By an Act of the Sixty-Eighth General Assembly, 1979 Session, ch. 54., the legislature amended ch. 225B. The language of that amendment is now contained in present ch. 225B, The Code 1981, and in pertinent part, reads as follows:

225B.2 Implementation.

1. A unified state mental health agency having broad responsibility both to plan, co-ordinate and review the delivery of mental health services to this state, and to directly deliver certain mental health services, shall be established effective July 1, 1980. The title, administrative structure, and specific powers and duties of the unified state mental health agency shall be as prescribed by the 1980 Session of the Sixty-eighth General Assembly.

2. If the governor determines that it would not be in the best interest of the state for subsection 1 of this section to be implemented on July 1, 1980, or if legislation prescribing the title, administrative structure, and specific powers and duties of the unified state mental health agency has not been approved prior to that date, the governor may by executive order delay the implementation of that subsection to a date not later than July 1, 1981.

* * *

225B.8 Repeals. Chapter 225B and sections 217.10, 217.11 and 217.12, Code 1977, are repealed effective July 1, 1980. However if the implementation of subsection 1 of section 225B.2 is delayed pursuant to subsection 2 of that section, the division of mental health resources of the department of social services and the Iowa mental health authority shall continue to be governed by the provisions of the statutes repealed by this section as if they were in full force and effect, until subsection 1 of section 225B.2 is implemented. On that date, in the absence of any prior legislative action to the contrary, the powers and duties assigned the Iowa mental health authority by chapter 225B, Code 1977, and by any other statutes referring to the Iowa mental health authority, and the powers and duties assigned the division of mental health of the department of social services by sections 217.10, 217.11 and 217.12, Code 1977, and by any other statutes referring to that division of the department of social services, shall be transferred to and imposed upon the unified state mental health agency established by subsection 1 of section 225B.2.

The amendment mandated that a unified mental health agency be established by July 1, 1980, and further indicated that the legislature was to be responsible for prescribing the structure and duties of the new agency by subsequent legislative act. The amendment also authorized the governor to delay until July 1, 1981, by executive order, the establishment of the new mental health agency. This delay was effectuated.

In addition to the foregoing, the amendment repealed all of ch. 225B and sections 217.10, 217.11 and 217.12, The Code 1979, effective as of July 1, 1980. Accordingly, those provisions have been repealed.

Although the legislature repealed the above referred to provisions by the 1979 Act, it authorized the Iowa Mental Authority to continue operating pursuant to §§217.10, 217.11, and 217.12, The Code 1979. The authority to operate pursuant to the repealed provision was an interim measure designed to remain effective until the establishment of the new mental health agency.

The question, then, is whether the legislature has delegated to the governor the power to take actions necessary to establish the new unified mental health agency.

The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should

have said. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976): *Steinbeck v. Iowa District Court*, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. *State v. Berry*, 247 N.W.2d 263 (Iowa 1976).

Clearly, absent further action by the legislature during the 1981 session, §225B.2, The Code 1981, requires that a new unified mental health agency be established by July 1, 1981. The governor was authorized to delay the implementation of the statute until July 1, 1981, but not beyond that date. Absent further legislative action, a new unified mental health agency must be established.

The new agency, absent further legislative action and per the dictates of §225B.8, must assume the powers specified in ch. 225B and sections 217.10, 217.11, 217.12, The Code 1979, and other related mental health statutes. However, the legislature failed to state what the administrative structure of the agency should be. In the absence of legislative action, responsibility for creating an appropriate structure falls to some other authority, and in our opinion, that authority is the governor.

We rely on the governor's constitutional responsibility to see that the laws are faithfully executed to reach the above conclusion. This rationale is best explained in *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L.Rev. 78 (1964), where the following is quoted from a California case where the court discussed a legislative failure to provide for the publication of an act prior to its submission to a referendum vote:

> [I]t by no means followed that because the legislature in the act itself failed to expressly designate some particular officer to make publication the duty of doing so was not otherwise fully provided for. On the contrary, as the constitution in another provision had made the governor the chief executive officer of the state, to see that the laws were faithfully executed, and as this constitutional provision is one of the laws required by him to be so executed, it is quite obvious that, assuming the legislature could have designated some other officer, still, in the absence of such delegation, it was the duty of the governor, in seeing that the laws were executed to provide for publication of the act, and having done so the constitutional mandate was legally carried out.

Likewise, the Iowa Constitution invests the supreme executive power of the state in the governor. Iowa Const. of 1857, Art. IV, §1. Further, the constitution dictates that the governor "take care that the laws are faithfully executed". Iowa Const. of 1857, Art. IV, §9. Since §225B.2, which requires that a new mental health agency be established, is a law of this state, the governor is constitutionally required to take actions necessary to implement it.

Accordingly, where the legislature mandated the creation of a new agency, but failed to designate the procedure for its creation, the governor is delegated that responsibility by law.

III. *Is the delegation of power to the governor as contained in chapter 225B unconstitutional for failure of the legislature to provide sufficient guidelines for the exercise of the power delegated?*

As previously discussed, the power to create an agency is a legislative function. A legislative function may be delegated to another branch of government only if adequate guidelines for the exercise of the power accompanying the delegation. *Warren County v. Judges of the Fifth Judicial District*, 243 N.W.2d 849 (Iowa 1976); *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179

N.W.2d 449 (Iowa 1970); 1967 Op.Att'y.Gen. 166. 1967 Op.Att'y.Gen. 132. A court will not find an unconstitutional delegation of legislative power if the functions left to be fulfilled are administrative details, not functions of legislating or adjudicating, and the statute prescribed in considerable detail what may be done and how it may be done. *John R. Grubbs, Inc. v. Iowa Housing Finance Authority*, 225 N.W.2d 89 (Iowa 1977).

There are at least three areas where legislative guidelines would be required in the creation of a new agency. First, there should be some guidelines as to what the name and objectives of the new agency should be. Second, there should be some guidance on the establishment of an administrative structure. Third, there should be some guidance as to what the powers and duties of the new agency should be.

With reference to the question of the name and objectives of the new agency, we see no reason why it couldn't be referred to as the Iowa Unified Mental Health Agency and have the goals and objectives as specified in chapter 225B, The Code 1981. Sufficient guidelines are established there.

With reference to the administrative structure of the new agency, we think adequate structural dictates are contained in chapters 217 and 225B to provide guidance to the governor. Section 217.10 authorized the appointment of a director of mental health, and §217.11 provides that s(he) shall be responsible for the mental health institutes and hospital-schools for the mentally retarded. Section 225B.3 provides for the establishment of an advisory council for mental health much similar to the advisory council for the Department of Social Services established by §217.2 of the Code. It is, therefore, our opinion that there is sufficient guidance in these statutes and other related mental health statutes for an administrative structure to be created.

With reference to the powers and duties of the new agency, the legislature clearly provided adequate guidelines for determining such duties. Pursuant to §225B.8, the new agency should assume the powers and duties presently assigned to the Iowa Mental Health Authority under chapter 225B and to the Division of Mental Health Resources under §§217.10, 217.11 and 217.12 of the Code, and other related mental health statutes. No other power or duty could be imposed on the new agency. We think that this is sufficient legislative direction.

Accordingly, we conclude that the delegation of authority to the governor to create a unified mental health agency is not an unconstitutional delegation of power in violation of the separation of powers doctrine where adequate guidelines accompany the power delegated. [1]

Although we reach the above conclusion with respect to the new creation of a new agency, we must also advise that such a newly created agency could not operate in the absence of available funds appropriated by the legislature. No expenditure of state funds may constitutionally be made except upon a legislative appropriation. *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975); *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966).

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[1] Although we have concluded that adequate standards accompany the power delegated to the governor herein, we note that such standards are found in provisions of chs. 217 and 225B. which have been repealed. We reach our conclusion, however, because the legislature has dictated that such provisions continue to be operative and that the successor mental health agency be endowed with the powers set forth in the repealed provisions. §225B.8, The Code 1981. These provisions, then, have continuing legal effect.

In the instant case, however, funds appropriated to the Division of Mental Health Resources and the Iowa Mental Health Authority may be transferred to the new agency. We reach this conclusion because §225B.8 dictates that all laws relating to the Division of Mental Health Resources and the Iowa Mental Health Authority would apply to the new agency. The appropriation bills for those agencies would be included in the laws referred to in §225B.8. *Ball v. Carey*, 85 Misc.2d 1052, 381 N.Y.S.2d 652 (1976). Thus, pursuant to law, funds so appropriated would be transferable.

IV. *If the legislature acts to extend the deadline for the implementation of ch. 225B, can the governor redesignate the agency responsible for state mental health programs as required by 42 U.S.C. §9421?*

Federal law requires that each state designate an agency to be responsible for its mental health programs. 42 U.S.C. §9421. The Mental Health System Act, 42 U.S.C. §9401 et. seq., otherwise referred to as P.L. 79-487, was adopted in 1980 and is the successor to the Community Mental Health Centers Act, 42 U.S.C. §2689 et. seq., otherwise known as P.L. 94-63, which also contained a similar requirement. Pursuant to §225B.3(d), The Code 1977, the Iowa Mental Health Authority was given that responsibility in accordance with the dictates of P.L. 94-63.

The question then is whether the governor may designate an agency to be responsible for state mental health programs, other than the Iowa Mental Health Authority, in accordance with P.L. 79-487, the successor to P.L. 94-63.

Section 7.9, The Code 1981, grants to the governor the general authority to accept federal funds and to designate agencies to administer them. Op.Att'y.Gen. #79-4-40. Ordinarily this statute would permit the governor to designate or redesignate an agency to administer federal funds.

However, in the present case, the Iowa Mental Health Authority was designated the agency responsible for Iowa mental health programs by the legislature in §225B.3(d) of the Code. Although this designation was made pursuant to the requirements of P.L. 94-63, which has been succeeded by P.L. 79-487, no change in designation has occurred. Only the federal statute upon which the designation was based has changed. Even there, the change has been more one of form than substance, for both P.L. 94-63 and its successor P.L. 79-487 are substantially similar, with the latter retaining the same goals and objectives of the former. Thus, there are no provisions of the new federal act which dictates a change in the designation of the agency responsible for mental health programs at the state level.

Even more important, the Iowa Mental Health Authority was designated the agency responsible for state mental health programs by statute, and changes in such designation can only be made by statute. Section 225B.3(d) states that the state mental health advisory council shall exercise all functions and have all responsibilities imposed by P.L. 94-63, unless said functions or responsibilities are assigned elsewhere by law. It must be conceded, then, that the responsibilities imposed under P.L. 94-63 and its successor P.L. 79-487 can only be reassigned by law. The governor, not having the power to legislate, may not reassign said functions. Where the legislature authorizes a division of state government to perform a particular function, the governor cannot by executive order designate a new agency to perform said function. *Opinion of the Justices*, 381 A.2d 1204 (N.H. 1978); *Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978); *Colorado Polytechnic College v. State Board for Community College and Occupational Education*, 173 Colo. 39, 476 P.2d 38 (1970); *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958).

Accordingly, we conclude that the legislative designation of the Iowa Mental Health Authority as the agency to perform functions imposed by federal law should continue until reassigned by the legislature, or until the creation of a unified mental health agency.

Summary

In summary, we conclude that the governor of the state of Iowa does not have the inherent power to create a state agency. Where the legislature mandated the creation of a new agency, but failed to designate the procedure for its creation, the governor is delegated that responsibility by law. The delegation of authority to the governor to create a new state agency is not an unconstitutional delegation of power where adequate guidelines accompany the powers delegated. Where the legislature authorizes a division of state government to perform a particular function, the governor cannot by executive order designate a new agency to perform said function.

April 17, 1981

CRIMINAL LAW: Witness Fees. Prosecuting Attorney's Subpoena Duces Tecum — Sections 815.3, 622.69, and 333.3(2), The Code 1981; Iowa R.Crim.P. 5(6), 13(6)(a), and 14(2); Iowa R.Civ.P. 123 and 155(c). A person who is ordered to produce certain documents or other items pursuant to a prosecuting attorney's subpoena duces tecum under Iowa R.Crim.P. 5(6) is only entitled to receive fees for his attendance and mileage and can not charge or receive fees for other costs incurred in obeying the subpoena. Such person may move the court for an appropriate protective or modifying order upon sufficient showing that compliance would be unreasonable or oppressive. (Richards to Mary E. Richards, Story County Attorney, 4/17/81) #81-4-14(L)

April 17, 1981

COUNTIES: Tax levies to fund solid waste disposal, §§332.32 and 455B.81, The Code 1981. County board of supervisors can levy the stated tax under either §§332.32 or 455B.81 but not both. (Peterson to Polking, Carroll County Attorney, 4/17/81) #81-4-15(L)

April 27, 1981

COUNTIES AND COUNTY OFFICERS; CLAIMS: Article III, §31, the Iowa Constitution; Chapter 28E, §§309.17-21, 332.3(5), 332.3(6), The Code 1981. The county has no authority to pay or settle claims which would be contrary to existing statutory law. Whether recovery of claims paid is pursued in court is a matter within the discretion of the county attorney. (Hagen to Johnson, State Auditor, 4/27/81) #81-4-16(L)

April 27, 1981

SOIL CONSERVATION, DEPARTMENT OF/ADMINISTRATIVE LAW/ REAL ESTATE/AGRICULTURE: Chapter 467A, §467A.7(16), The Code 1981. 780 I.A.C., §5.74(5)(e). Department of Soil Conservation rule pro-

viding for recording of cost-share agreements is not ultra vires. Statute and implementing rule imposing duty on subsequent purchaser of land to maintain cost-shared erosion structures do not create lien on land or cloud on title. (Ewald to Pellett, State Representative, 4/27/81) #81-4-17

The Honorable Wendell C. Pellett, State Representative, State Capitol: By letter dated January 29, 1981, you have requested an opinion of the attorney general regarding the effect and construction of section 467A.7(16), The Code 1981, and the validity, construction, and effect of Department of Soil Conservation subrule 780 I.A.C., §5.74(5)(e), implementing that statute.

Section 467A.1(16), The Code 1981, reads, in relevant part, as follows:

> 16. The commissioners shall, as a condition for the receipt of any state cost-sharing funds for permanent soil conservation practices, require the owner of the land on which the practices are to be established to covenant and file, in the office of the soil conservation district of the county in which the land is located, an agreement... providing that if the project is removed, altered, or modified so as to lessen its effectiveness for a period of twenty years after the date of receiving payment, the owner of the land on which the practices have been so removed, altered or modified shall refund to the Department of Soil Conservation the state cost-sharing funds used for the project... on a pro rata basis.... The agreement to refund shall not create a lien on the land, but shall be a charge personally against the owner of the land at the time of removal, alteration or modification.... Each soil conservation district which has entered into agreements under this subsection shall file in the office of the county recorder a statement that there are in effect in that county certain agreements covenanted under this subsection....

The Department of Soil Conservation subrule 780 I.A.C., §5.74(5)(e), provides for recording of documents showing the existence of an agreement for specific property as well as for recording the general statement required by the statute. That rule states in relevant part:

> e. *Recording and filing of agreements.*
>
> * * *
>
> (2) Recording of maintenance agreement. In addition to the statement form filed in each county pursuant to section 467A.7(16), The Code, the district shall present either the Declaration of Agreement... or the maintenance agreement to the county recorder for filing and indexing in the county book of records....
>
> (4) Effect of failure to record. The failure to record a Declaration of Agreement does not affect the responsibility of a subsequent owner to maintain the practices so long as the statement required by section 467A.7(16), The Code, is on file in the recorder's office. The purpose of recording the Declaration of Agreement is solely to provide additional notice to purchasers.

This subrule is presently in the process of being amended by the Department of Soil Conservation. *See* ARC 1817, I.A.B. 2/18/81 at 1044. The proposed rules would, if adopted, make the present rules regarding recording of specific agreements permissive rather than mandatory. In other words each district would elect whether to record the specific agreements.

Your specific questions with respect to these statutes and rules can be paraphrased as follows:

1. Is subrule 780 I.A.C. §5.74(5)(e)(1), calling for the filing of a Declaration of Agreement, a valid implementation of §467A.1(16), The Code, which mentions only the filing of a "statement," or does the rule impermissibly expand the authority delegated to the Department of Soil Conservation?

2. What is the nature and effect of the "statement" to be filed with the county recorder under §467A.1(16)? Is a separate "statement" required for each landowner who may install a practice with cost-sharing funds, or for each individual practice so constructed?

3. Does the filing of the "statement" constitute a lien on the land?

4. Could the documents recorded pursuant to the administrative rule be construed to constitute a "cloud on title"?

5. Does §467A.7(16) impose upon a purchaser of agricultural land on which cost-share structures have been installed the obligation to maintain the structures for the time remaining in the 20-year period required by statute? If the "agreement" does not create a lien on the land, does it merely have the status of a private contract between the soil conservation district and the landowner?

6. If a buyer of agricultural land on which cost-share structures have been installed refuses to assume the obligation of a maintenance agreement and later destroys these structures, who is liable for a refund to the soil conservation district? In the event the seller is liable for destruction by his buyer, what happens if the assets of the seller are insufficient to cover the obligation to the soil conservation district based on the remaining life of the structure? In the event of a seller's default or insolvency, could this constitute a cloud on title?

7. If the legislative intent of §467A.7(16) is to require that permanent soil conservation structures built with cost-sharing funds run with the land, how can this be accomplished by an "agreement" that does not create a lien on the land?

I. VALIDITY OF ADDITIONAL RECORDING REQUIRMENTS IMPOSED BY AGENCY RULE.

We are of the opinion that the Department of Soil Conservation subrule 780 I.A.C. §5.74(5)(e), in its present form and in its proposed amended form, is a valid implementation of §467A.7(16), The Code 1981.

In deciding whether an agency has acted ultra vires, i.e., promulgated a rule beyond the scope of powers properly delegated to it by the General Assembly, review is confined to considerations of statutory construction. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610 (Iowa 1976). Agency rules must be consistent with the constitution and authorized by the statute creating the agency, 1A Sutherland, *Statutory Construction*, §31.02 (Sands 4th ed. 1972), and cannot alter the plain provisions of the statute. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610, 615 (Iowa 1976); *Nishnabotna Valley Rural Electric Coop. v. Iowa Power & Light Co.*, 161 N.W.2d 348, 352 (Iowa 1968); *Consolidated Freightways Corp. of Delaware v. Nicholas*, 258 Iowa 115, 137 N.W.2d 900 (1965). Phrased differently, administrative rules must be reasonable and consistent with legislative enact-

ments. *See Holland v. State of Iowa*, 253 Iowa 1006, 1010, 115 N.W.2d 161 (1962); *Bruce Motor Freight, Inc. v. Lauterback*, 247 Iowa 956, 77 N.W.2d 613 (1956).

The intent of the legislature is the polestar in statutory construction, and the goal of the court in construing a statute is to ascertain that intent and, if possible, give it effect. *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822 (Iowa 1978); *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978); *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In discovering legislative intent, the court considers the language used in the statute, the objects sought to be accomplished, and the evils and mischief sought to be remedied, and places a reasonable construction on the statute which will best effect its purpose rather than to defeat it. *State v. Vietor*, 208 N.W.2d 894 (Iowa 1973); *Krueger v. Fulton*, 169 N.W.2d 785 (Iowa 1969); *State v. Robinson*, 165 N.W.2d 802 (Iowa 1969); §4.6, The Code. In this process, effect must be given, if possible, to every word, sentence and section. *Iowa Natural Resources Council v. Van Zee*, 261 Iowa 1287, 158 N.W.2d 111 (Iowa 1968). The circumstances under which the statute was enacted may be considered in ascertaining legislative intent. §4.6(2), The Code. Statutory language, legislative history and the statutory scheme may be looked to in the construction of statutes. *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975).

Section 467A.7(16), The Code 1981, authorizes each soil conservation district to "file in the office of the county recorder a statement that there are in effect in that county certain agreements." The legislative intent of this statutory provision is apparently to provide constructive notice to potential transferees of the possible existence of agreements which would place certain obligations upon them should they purchase the land in question. The apparent intent of the administrative rule is to provide additional constructive notice to potential transferees and to increase the likelihood of actual notice to them, since the filings pursuant to the rule are indexed, whereas the general statement is not likely to be indexed inasmuch as to do so would require indexing every landowner in the county.

Also, 780 I.A.C. §5.74(5)(e)(4) specifically provides that the rule filings are intended "solely to provide additional notice to purchasers," and do not in any way affect the legal consequences resulting from the statutorily required filing of the general statement. It follows that in merely providing for additional notice, the rule is consistent with the general legislative intent to provide such notice.

Of course, in addition to being consistent with legislative enactments, administrative rules must also be reasonable. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610 (Iowa 1976). There are several reasonable foundations upon which the soil conservation rules may rest. First, they facilitate the notice function by providing the abstracter with more information at the centralized location of the county recorder's office. Ready access to such information could, in many cases, eliminate the necessity of making a special inquiry at the soil conservation district office every time a tract of agricultural real estate was abstracted. It would also reduce the district's inconvenience and expense required to individually respond to abstracters' requests for information without significantly increasing the burden on county recorders' offices.

Secondly, the statutory method of providing notice is an unusual approach, since the general statement would not likely be indexed. This raises the question as to how or where the notice would be displayed in the various county recorders' offices. Apparently each office would make this decision dependent upon its local procedures, with no guarantee of uniformity from county to county. Filing individual agreements eliminates this problem, since all county recorders' offices provide for grantor-grantee indexing.

Although the statutory procedure for imparting constructive notice appears to satisfy constitutional due process notice requirements, the rule procedure clearly enhances the likelihood of actual notice. *See, e.g., Hron v. Ryan*, 164 N.W.2d 815

(Iowa 1965) (notice is an essential of due process); *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 473 (Iowa 1973) (notice may be constitutionally sufficient even if not received, but notice statutorily provided for must be reasonably calculated to accomplish its purpose). For purposes of compliance and eventual enforcement, such actual notice may well be preferable to mere constructive notice.

Given that the administrative rule is reasonable and not inconsistent with the statute, it is still necessary to ask whether the statutory provision was intended to provide the exclusive means of notice so as to preempt the agency from adding to its notice provisions. In support of such a restrictive construction there is the maxim *expressio unius est exclusio alterius* (the mention of one thing is the exclusion of the other), which has been applied in numerous Iowa cases involving statutory construction. *See e.g., Iowa Farmers Purchasing Association, Inc. v. Huff*, 260 N.W.2d 824 (Iowa 1977); *Lenertz v. Municipal Court of Davenport*, 219 N.W.2d 513 (Iowa 1974); *In re Wilson's Estate*, 202 N.W.2d 41 (Iowa 1972).

However, the maxim requires great caution in its application, and in all cases is applicable only under certain conditions. *See* 2A Sutherland, *Statutory Construction* §47.25, at 132 (Sands 4th ed. 1973). For example, the maxim will be disregarded where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, or is the established custom usage or practice. *Id.* All of these reasons for disregarding the maxim are applicable to the present issue. An expanded interpretation of the statute, i.e., that the express mention of a general statement filing does not necessarily preclude the agency from specifying additional methods of filing, accomplishes the beneficial result of increasing the likelihood of actual notice. It also serves the purpose for which the statute was enacted — to provide notice to transferees. And the established, customary method of providing notice of specific encumbrances upon specific tracts of land is by means of a centralized, indexed filing system which provides all the information an abstracter or purchaser needs in one office.

Moreover, an examination of the Iowa cases applying the *expressio unius* rule reveals that it is always subordinated to the primary rule that the intent of the statute prevails over the letter. *See, e.g., Lenertz v. Municipal Court of Davenport*, 219 N.W.2d 513 (Iowa 1979) (*expressio unius* maxim applied to determine whether statute was intended by legislature to be penal in nature); *State v. Anthes Force Oiler Co.*, 22 N.W.2d 324, 329 (Iowa 1946) (statute authorizing attorney general to prosecute corporations intended by legislature to negative other modes of prosecution); *District Township of Dubuque v. City of Dubuque*, 7 Iowa 262 (1858) (the great object and office of all rules and maxims of interpretation is to discover the true intent of the law).

Thus, where the overriding of the statutory provision is to provide notice, the *expressio unius* maxim should not be employed to restrict the means by which the notice can be effectively given.

We would note also that recording of instruments affecting real estate is covered by chapter 558, The Code 1981, and is standard practice in the public and private sector alike. Therefore no legislative authority would appear necessary to authorize an agency to record an instrument affecting real estate. We think §467A.7(16) does away with the *necessity* for recording the agreements, but we do not construe it as prohibiting such recording.

II. NATURE AND EFFECT OF FILING OF GENERAL STATEMENT.

The statutorily required general statement when filed with the county recorder provides constructive notice that a state cost-sharing agreement may

exist, and that the abstracter or purchaser should check further, both in the indexed files of the county recorder's office and with the local soil conservation district office and with the local soil conservation district office, to determine whether such an agreement actually exists with respect to the land being abstracted, and if so, its terms.

This function is in no way diminished by the fact that under the administrative rule the same notice may additionally be found in the indexed files.

The constructive notice effect of the general statement resembles, for example, that for sewage liens established by §384.84, The Code 1981 (although neither the statement nor the agreement is a lien). *See* Op.Att'y.Gen. #79-9-10. In the case of sewage liens, the statute itself provides notice that unpaid charges for sewer services shall constitute liens upon the premises served. Since no idexed filing is required by the statute, the transferee of property must consult municipal records to see if the property is encumbered by such a lien.

The general statement is filed only once in each county recorder's office by the respective soil conservation district. This single, one-time filing is all that the statute envisions. No separate or additional statement is to be filed for each landowner or for each practice or for each piece of affected property.

As to filing under the rule, the situation at the time when funds are received will determine how many separate filings are required. At least one indexed filing would result from each Maintenance Agreement entered into on a given date.

The filing of the general statement does not create a lien on the land, §467A.7(16), The Code 1981; it merely constitutes constructive notice of the possible existence of cost-sharing agreements, which agreements likewise create no liens. The express intent of the statute is rather to create a personal obligation on landowners to maintain structures erected with public funds. The statute imposes a financial obligation upon the owner of the land at the time of breach, to refund, pro rata, the cost-sharing funds to the state. *Id.* This personal obligation differs from a lien, which is an obligation, tie or claim which attaches itself to and binds property for its satisfaction. *Grant v. Whitwell*, 9 Iowa 152 (1859).

There are several practical distinctions between a lien and the statute's imposition of a personal obligation on whoever owns the land at the time of the breach. First, the land is not collateral which could be sold to realize the obligation. Second, mortgagees need not be concerned with lien priority since the statute creates a personal obligation rather than a direct encumbrance upon the land. Third, a subsequent purchaser is in no way subject to liability for damage caused by his predecessor in title. If the statute created a lien, the subsequent purchaser's interest in the land would be subject to the district's interest in the land as security for the pro rata refund, even if the damage occurred before the purchase. *See, e.g., Howard v. Burke*, 176 Iowa 123, 157 N.W. 744 (1916) (legislature may create statutory liens not subject to prior liens).

While it is conceivable that a judgment against landowners for breach of the agreement and failure to refund cost-share funds might, eventually, result in a judgment lien against the land on which the practices happen to be located, such a lien would only be indirectly related to the Maintenance Agreement.

The term "cloud on title" has apparently not been specifically defined by the Iowa Code or Iowa case law. One definition of this term is that it is any recorded or apparently valid title, right, or lien which is in fact invalid, released, or barred, and which must be refuted by use of evidence extrinsic to the record, usually in a quiet title action. 2 *Patton on Titles* §601 (2d ed. 1957). Under this definition the recorded documents and the Maintenance Agreement to which they refer would

not constitute clouds on title, since they in no way affect the validity of record title or right to land, and create no liens. Nor would a quiet title action be the appropriate method to challenge the validity of a Maintenance Agreement.

Another sense in which the expression "cloud on title" has been used is in terms of the marketability of title. *See, e.g., Johnston v. State Bank*, 195 N.W.2d 126, 129 (Iowa 1972). In *Johnston*, the prospective purchaser had agreed to buy a lot and building to be constructed by the seller. The building, when constructed, violated the subdivision's restrictive covenants on building size. Under these circumstances, the court found that the restrictions on the use of land along with the violation of the restriction rendered the title unmarketable. In short, the court refused to compel the purchaser to "buy a lawsuit." *See also Smith v. Huber*, 224 Iowa 817, 828, 277 N.W. 557, 563 (1938).

The questions with respect to the Maintenance Agreements would thus appear to be (1) whether, as express restrictions on the use of land, they render the title to such land unmarketable, and (2) whether they render title unmarketable by compelling the purchaser to buy a potential lawsuit along with the land.

The statute protects the purchaser from being compelled to "buy a lawsuit," since the purchaser has no liability for existing damage. The rule, too, provides the purchaser with a mechanism for firmly establishing the degree of damage, if any, at the time of purchase. Section 780 I.A.C. §5.74(e)(6).

Both the statute and the rule also protect the seller from incurring liability for acts of the purchaser after sale. *See* §467A.7(16), last sentence. The burden imposed on the purchaser is to maintain and not damage the structure, not to assume liability for preexisting damage.

The use restriction question is somewhat more problematic. The general rule is that express public restrictions on land do not render title unmarketable, but express private restrictions may do so. *See Annot., Zoning or Other Restrictions on the Use of Property as Affecting Rights and Remedies of Parties to Contract for the Sale Thereof*, 39 A.R.L.2d 362, 368-375, 408-411 (1971). The Maintenance Agreement, however, exhibits aspects of both public and private restrictions. Nevertheless, an examination of the common law of restrictive covenants leads us to conclude that the restrictions which the Maintenance Agreement place on the land do not result in an unmarketable title.

One common law principle is that where the private restriction does not require the purchaser to do or refrain from doing anything which the law itself does not require, or which does not exceed the limitations of a public restriction, then the marketable quality of the title is unaffected. *See* 77 Am.Jur.2d *Vendor & Purchaser* §210, at 389-390 (1975). Under §467A.7(16) the purchaser as "owner of the land" is bound by the cost-share agreement. The obligations imposed on him by the statute and by the agreement itself are identical resulting in no effect on the quality of title. Since the statute expressly imposes a personal obligation rather than an encumbrance upon the land, it would appear that this obligation, although imposed on anyone who purchases the land, would not render it unmarketable.

Furthermore, even though the agreement is enforceable against subsequent purchasers and hence "runs with the land," *see Iowa Improvement Co. v. Aetna Explosives Co.*, 181 Iowa 1186, 1189, 165 N.W. 408, 409 (1917) (a covenant running with the land, as distinguished from a personal covenant, inures to the benefit of the grantee and subsequent grantees and passes to the subsequent grantees as a result of the original conveyance containing the covenant); *Associated Grocers of Iowa v. West*, 297 N.W.2d 103 (1980) (parties' intent to charge land and whether burden comports with policy and principle determine whether convenant runs with the land); *Thodos v. Shirk*, 248 Iowa 172, 179, 79 N.W.2d 733,

737 (1956) (covenant running with the land is enforceable against subsequent purchasers with actual or constructive notice); *see also* Note, *Land Use Planning: Restrictive Covenants in Iowa*, 49 Iowa L.Rev. 1246 (1964), it is limited in its effect and enforcement by statutory and administrative provisions. One such provision is that the agreement does not create a lien on the land. §467A.7(16), The Code 1981. Another is that its breach results in liquidated money damages, *Id.*, not in the remedy of injunctions to compel compliance with the terms of the restriction. *Thodos v. Shirk*, 248 Iowa 172, 180, 79 N.W.2d 733, 738 (1956).

We would also note that in *Johnston v. State Bank*, 195 N.W.2d 126 (Iowa 1972), it was the violation of the covenants and not the covenants themselves which rendered the title unmarketable. Under this statute a purchaser assumes no liability for past violations but only future responsibility to maintain structures which prima facie benefit the land by reducing soil erosion.

The cumulative effect of these common law considerations, we feel, is that the express restrictions contained in the agreement differ significantly from those found in restrictive covenants, and hence do not cloud title by adversely affecting its marketability. This is not to say that a purchaser might not establish a breach of a contract of purchase in a specific case where the seller is aware of specific purposes for which the buyer intends to use the land, where these purposes are inconsistent with maintenance of the structures, and where the refund would be very costly. But we do not believe that the existence of a statutorily created personal obligation to maintain soil erosion structures affects the marketability of title.

III. OBLIGATION IMPOSED ON SUBSEQUENT PURCHASER.

Section 467A.7(16) specifically makes the agreement to refund "a charge personally against the owner of the land at the time of removal, alteration or modification which gives rise to the need for a refund." It is apparent from this language, from the notice provided by filing of the general statement, and from the provision for a seller to be furnished with a statement that no obligation to refund has been incurred, that the legislature clearly imposed upon future purchasers the obligation to either maintain the structures for the remainder of the twenty-year period or pay a prorated refund. Thus in addition to the contractual obligations voluntarily assumed by the landowner there is a statutory duty imposed on the landowner and any subsequent owner of the land during the twenty-year period.

The legislation is unusual in that it in effect creates a personal obligation which follows land ownership but is not a lien. The obligation imposed is triggered only by a contractual relationship between a prior seller and a soil conservation district. However the fact that the legislature chose a new device for insuring maintenance of state-funded soil erosion structures does not render the obligations thereby imposed invalid. *See, e.g., Penn Central Transportation Company v. New York*, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271, *aff'd.* 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1977) (statute may impose duty to maintain historic structure); *Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975) (legislature may enact any law not constitutionally prohibited); *Farrell v. State Board of Regents*, 179 N.W.2d 533 (Iowa 1970) (same).

You ask whether a purchaser could refuse to assume the obligation of a maintenance agreement and destroy the structure. As we construe the statute the purchaser would be liable to the state and could not avoid this liability by refusing to assume the agreement. Any agreement between the seller and the purchaser on this subject could settle the financial responsibility of each to the other but would not affect the liability of each to the state under the statute. (If

neither the seller nor the purchaser takes advantage of the procedure for establishing the integrity of the structure at the time of sale, each might well be a party to a suit for refund.)

If the seller establishes that no damage has occurred at the time of sale, the seller would incur no liability for future destruction by the purchaser. The statutory obligation to pay the refund is imposed on the owner of the land at the time of the removal, alteration, or modification. The seller can prevent potential liability by demanding an inspection at the time of sale. If the sale does not transfer fee title but is merely an installment land contract or transfer of equitable title, the contract seller and purchaser would each be a landowner and potentially liable. *See, e.g., Getchell & Martin Lumber & Manufacturing Co. v. Peterson & Sampson*, 124 Iowa 599, 100 N.W. 550 (1904) (statutory term "owner" includes holders of equitable or legal title). Alternatively, the parties to a contract sale can apparently limit their respective potential liability by following the procedures set forth in 780 I.A.C. §(5)(e)(6).

We would conclude then that the only instance in which the seller's destructive acts would affect the marketability of title is when a judgment lien has been obtained in an action for a refund. As a practical matter, both seller and purchaser should protect their interests by requesting an inspection to verify preexisting damage at the time of sale.

IV. ADEQUACY OF THE STATUTORY SCHEME TO PROTECT STRUCTURES.

Your final question asks how the legislative intent to insure that the soil conservation practices run with the land can be accomplished by an agreement that does not create a lien on the land.

As noted above, we believe the statute effectively imposes a duty on future purchasers of land to refund the prorated value of state cost-share funds if the purchaser damages the structure within the twenty-year period. Recovery of the funds can be compelled only by an action for damages. If the purchaser or seller fails to request an inspection at the time of sale, a question of fact will arise as to which party is liable. We would note that the cost-share agreement imposes on the seller a duty to notify prospective purchasers of the agreement and to arrange for the purchaser to assume the contractual obligation as well.

If the statute imposed a lien on the land, such would provide collateral to secure the amount of the refund due. If the lien ran from the date the funds were paid rather than the date the damage occurred, there would be even additional assurance that the state would have either the benefit of the structure or a refund of monies. However, a statutorily imposed lien would affect the marketability of the land and might discourage landowners from erecting soil erosion structures. This would reduce the incentive for voluntary erosion prevention work created by the cost-sharing program. It is for the legislature to balance these factors. The statute does accomplish its apparent purpose of transferring the personal obligation to any subsequent owner of the land on which the structures are located.

CONCLUSION

Soil Conservation Department subrule 780 I.A.C. §5.74(5)(e) validly implements §467A.7(16), The Code 1981. Its purpose in providing for additional, indexed filing is to increase the likelihood of actual notice to potential purchasers

of land on which cost-share practices have been constructed. This is consistent with the legislature's intent to provide constructive notice.

None of the documents mentioned in either the statute or the rule creates a lien on the land or results in a cloud on title. Rather, they provide an orderly means of determining which parties in the chain of title to affect land are personally responsible for maintaining the practices at any given time. Seller and purchaser are protected from liability for any breach but their own. Breach results in prorated money damages against the owner or owners at the time of breach.

The legislature's decision to impose only personal liability for breach, as opposed to a lien on the land, probably represents an innovative compromise designed to encourage landowner participation in the soil conservation program.

April 28, 1981

MUNICIPALITIES: Recomputation of Pensions — §§411.1(12), 411.6(12)(a), The Code 1981; 1980 Session, ch. 1014, §33, Acts of the 68th G.A. The recomputation of pensions for retired members are based on increases in the earnable compensations of active members occupying the same steps or salary scales as the retired members held. (Blumberg to Holden, State Senator, 4/28/81) #81-4-18(L)

MAY 1981

May 1, 1981

STATE BOUNDARIES; IOWA—SOUTH DAKOTA: An Act To Define The Boundaries Of The State Of Iowa, 9 Stat. L. 52, Iowa Const. of 1846, 1857, Preamble and Boundaries. The boundary between Iowa and South Dakota is the thalweg or middle of the main channel of the Big Sioux River. References to Nicollet's map in relation to the Big Sioux River in the boundary act and the 1846 and 1857 constitutions do not restrict the boundary to a fixed line. The laws of accretion and avulsion would apply to movements of the Big Sioux River. (Sarcone to Crabb, State Representative, 5/1/81) #81-5-1

The Honorable Frank Crabb, State Representative: You have requested the opion of the attorney general regarding certain language in the Act (9 Stat.L. 52) defining the boundaries of the state of Iowa. Specifically you point out that reference is made in the boundary act to Nicollet's map in relation to the Big Sioux River and ask "...whether this reference has the effect of fixing the Iowa-South Dakota Boundary at the location shown on that map or whether the laws of accretion and avulsion that apply on the other boundary rivers also apply on the Big Sioux River."

We are of the opinion that the references to Nicollet's map in the boundary act did not fix the Iowa-South Dakota Boundary on a specific line as shown on Nicollet's map. The Iowa-South Dakota Boundary follows the thalweg of the Big Sioux River, and hence, the laws of accretion and avulsion would apply thereon.

The original boundaries of the state of Iowa, approved by congress at the time of Iowa's admission into the Union, on December 28, 1846, were defined as follows:

> Beginning in the middle of the main channel of the the Mississippi River, at a point due east of the middle of the mouth of the main channel of the Des Moines River; thence up the middle of the main channel of the said Des Moines River, to a point on said river where the northern boundary line of the state of Missouri — as established by the constitution of that state, adopted June 12th, 1820 — crosses the said Des Moines River, thence westwardly along the said northern boundary line of the state of Missouri, as established at the time aforesaid, until an extension of said line intersect the middle of the main channel of the Missouri River; thence up the middle of the main channel of the said Missouri River to *a point opposite the middle of the main channel of the Big Sioux River, according to Nicollett's map; thence up the main channel of the said Big Sioux River, according to said map,* until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east along said parallel of forty-three degrees and thirty minutes until said parallel intersects the middle of the main channel of the Mississippi River; thence down the middle of the main river; thence down the middle of the main channel of said Mississippi River to the place of beginning. [Emphasis added.]

Iowa Const. of 1846, The Code 1981, p. XXXVI, An Act to Define The Boundaries of the State of Iowa, 9 Stat.L. 52, The Code 1981, p. 1XXVI.

South Dakota's boundary statute merely adopts by general reference the Iowa boundary along its border with Iowa. There are no compacts adjusting the original boundary between Iowa and South Dakota.

The legislative history provides no basis for concluding that either congress or the drafters of the State Constitution intended to permanently fix this portion of the boundary to the line of the Big Sioux River on Nicollet's map. Historically, Iowa's first constitutional convention of 1844 approved what became known as the Lucas boundaries, which encompassed an area of approximately 58,000 square miles. Shambaugh, "Boundary History of Iowa", 2 Iowa J. of Hist. and Pol. 372-373 (1904); J. of the Const. Conv. of 1844, 187 (1844). The area extended from the St. Peters River on the north to the northern boundary of the state of Missouri on the south and was bounded on the east by the Mississippi River and on the west by the Missouri River until it reached north to the mouth of the Big Sioux River. From that point, the remainder of the western boundary extended in a direct line to where the Watonwan River entered the St. Peters River. The boundaries proposed by the 1844 constitutional convention were defined as follows:

> Beginning in the middle of the main channel of the Mississippi River opposite the mouth of the Des Moines River, thence up the said river Des Moines in the middle of the main channel thereof, to a point where it is intersected by the Old Indian Boundary line or line run by John C. Sullivan in the year 1816; thence westwardly along said line to the Old Northwest Corner of Missouri; thence due west to the middle of the main channel of the Missouri River; thence up in the middle of the main channel of the river last mentioned to the mouth of the Sioux or Calumet River; thence in a direct line to the middle of the main channel of the St. Peters River; where the Watonwan River (according to Nicollet's map) enters the same; thence down the middle of the main channel of said river to the middle of the main channel of the Mississippi River; thence down the middle of the main channel of said river to the place of beginning.

Shambaugh, B. *The Constitution of Iowa*, pp. 156-157 (1934).

Before the constitution adopted by the convention could be voted on by the people of the Iowa territory, these boundaries were changed by the United States Congress due mainly to the efforts of Representative Samuel F. Vinton of Ohio. Vinton successfully persuaded the congress to approve the Nicollet boundaries, named after J. N. Nicollet who had been commissioned by congress under the supervision of the Bureau of the Corps of Topographical Engineers to survey and map the upper Mississippi River Basin. These boundaries divided the territory along the Prairie of the Hills on the west and would have cut off most of western Iowa including the Missouri River from the state. Vinton was motivated by the sectional rivalry over slavery and desire to increase the influence of the western states in congress by carving up the western territory into smaller states. Cong. Globe, 28th Cong., 2nd Session 269-273 (1844-1845); Eriksson, "Boundaries of Iowa", 25 Iowa J. of Hist. and Pol. 214—215 (1927); Shambaugh, "Boundary History of Iowa", 2 Iowa J. of Hist. and Pol. 373—375 (1904). However, this change of boundaries so incensed the people of the Iowa territory that even many supporters of the constitution joined with the opposition in voting it down. Eriksson, "Boundaries of Iowa", 25 Iowa J. of Hist. and Pol. 209, 216 (1927). After this initial rejection, the Legislative Assembly of the territory amended the boundary provisions by substituting those adopted by the convention and resubmitted the constitution to the people. Again, it was defeated. *Id.* at 217—218.

In May 1846, a second constitutional convention was held which eventually agreed to the boundaries which were approved by congress at the time of our admission. Initially, the committee assigned to draft the preamble and boundaries adopted the Lucas boundaries. Id. at 221; *Journal of the Convention for the Formation of a Constitution for the State of Iowa 1846*, pp. 31—56, 87—88, 101—102 (1846). Iowa's delegate to congress in 1845, Augustus Caesar Dodge, was instructed that he should accept nothing less from congress than the Lucas boundaries. Eriksson, "Boundaries of Iowa", 25 Iowa J. of Hist. and Pol. 221—222

(1927). However, the House Committee on Territories proposed a compromise between the Lucas and Nicollet boundaries which was later accepted by the 1846 convention and became the state's original boundaries. Cong. Globe, 29th Cong., 1st Session 562, 938 (1845—1846); Appendix to the Cong. Globe, 29th Cong., 1st Session 668, 669 (1845—1846); Ericksson, "Boundaries of Iowa", 25 Iowa J. of Hist. and Pol. 222 (1927). A thorough search of the 1846 convention journal revealed that no debate on this issue was ever recorded. Thus, no legislative history at the state level can be found to explain why the Big Sioux River and references to Nicollet's map were made a part of the boundary provisions.

A review of the available congressional debates revealed that the House Committee on territories believed the Nicollet boundaries were unnatural and inconvenient and left the remainder of territory in the worst shape possible for the formation of future states. The committee also believed the people themselves should have a voice in the boundary choice. Cong. Globe, 29th Cong. 1st Session 938, 939 (1845—1846); Eriksson, "Boundaries of Iowa", 25 Iowa J. of Hist. and Pol. 222 (1927). Fragmentary comments by Representative Douglas of Illinois, the chairman of this committee, indicated that the compromise boundaries would provide Iowa with natural boundaries. Pelzer,*Augustus Caesar Dodge*, p. 123 (1908). These comments were the only sources found which show any reference by congress to the act (9 Stat.L. 52) defining Iowa's boundaries.

The ultimate object in construing a statute is to discover the real purpose and meaning of the act together. *Cedar Memorial Park Cemetery Assn. v. Personnel Associates, Inc.*, 178 N.W.2d 343 (Iowa 1970). While the expression of legislative intent on the part of congress regarding our boundary act is not as thorough as would be expected, it is apparent that congress intended that the state of Iowa be bordered on the east and west by natural boundaries, the Mississippi, Missouri, and Big Sioux Rivers. When a navigable river is designated as the boundary between the two states, the general rule is that the middle of thalweg of the navigable river is the boundary between the two states. *Texas v. Louisiana*, 410 U.S. 702, 35 L.Ed.2nd 646 (1973); *Arkansas v. Tennessee*, 246 U.S. 158, 62 L.Ed. 638 (1918); *Iowa v. Illinios*, 147 U.S. 1, 37 L.Ed. 55 (1892). The boundary must be fixed at the middle of the main navigable channel and not along the line equidistant between the banks. *Arkansas v. Mississippi*, 250 U.S. 39, 43, 63 L.Ed. 832, 834 (1919). The thalweg rule prevails unless congress sufficiently indicates it intends a different boundary in a navigable river. *Texas v. Louisiana*, 410 U.S. 702, 709-710, 35 L.Ed.2d 646, 652-653 (1973).

An argument can be made that the references to Nicollet's map in relation to the Big Sioux River restricts the Iowa-South Dakota boundary to a specific line fixed in the main channel as shown on that map since no references in the boundary act are made to this or any other map in relation to the Mississippi and Missouri Rivers. However, the intent of congress to provide Iowa with its eastern and western boundaries naturally located in navigable streams, the difficulty of drawing an accurate boundary line from the Nicollet map, and cases interpreting similar boundary provisions lead to a different result.

The state of Iowa is one of four states which has a specific reference in its boundary provisions to Nicollet's map. While Iowa and South Dakota have not been involved in any litigation over their common boundary, the states of Minnesota and Wisconsin have called upon the federal courts to settle boundary disputes which in part concerned references to Nicollet's map.

In *Whiteside v. Norton*, 205 F.5 (8th Cir. 1913), a dispute arose over the location of the boundary between Minnesota and Wisconsin in relation to ownership of an island in the St. Louis River. Wisconsin's enabling act, to which Minnesota's boundary act refers, described part of its boundary with what would later be Minnesota as follows:

> thence westwardly through the center of Lake Superior to the mouth of the St. Louis River, thence up the main channel of said river to the first rapids in the same above the Indian village according to Nicollet's map.

Whiteside v. Norton, 205 F.5, 8 (8th Cir. 1913).

The Court of Appeals held the thalweg rule was applicable in determining the location of the boundary and Nicollet's map was treated more as a reference device and not as a restrictive term of the act.

> On Nicollet's map, especially referred to and recognized in this Act, the St. Louis River is drawn and indicated as a river down to the lake proper, and far below the wider portion now known as "Pokegama Bay" and on this map as Pokegomag. If this, then, be the St. Louis River, not only is the boundary between Wisconsin and Minnesota declared by legislative enactment to be the middle of its main channel, — as that channel then existed — but the doctrine of the "thalweg," meaning, the middle or deepest or most navigable line of boundary between the two states, *Louisiana v. Mississippi*, 202 U.S. 1, 26 S.Ct. 408, 571, 50 L.Ed. 913, and there the boundary remains subject to the changes which come to it by the slow and imperceptible process of erosion and accretion.

Whiteside v. Norton, 205 F.5, 9 (8th Cir. 1913).

Similarly in *Minnesota v. Wisconsin*, 252 U.S. 273, 64 L.Ed. 558 (1920), the same provision of the Wisconsin enabling act as set forth above was in question in a dispute over location of the boundary between these two states. The supreme court found that the determination of the boundary location had to be made upon a consideration of the situation existing in 1846 (when Wisconsin was admitted to the Union) and applied the thalweg rule in arriving at its decision. The court also implicitly held that Nicollet's map was not sufficiently accurate in locating the mouth and main channel of the St. Louis River.

> The situation disclosed by an accurate survey gives much room for differences concerning the location of the "mouth of the St. Louis River" and "the main channel of said river." Nicollet's map of the Hydrographical Basin of the Upper Mississippi River published in 1843 and drawn upon a scale of 1:1, 200,000 — approximately 20 miles to the inch — is too small either to reveal or to give material aid in solving the difficulties.

Minnesota v. Wisconsin, 252 U.S. at 276, 64 L.Ed. at 561.

It is the opinion of this office that the thalweg rule would apply in determining the location of the Iowa—South Dakota boundary and any changes in the Big Sioux River from the time of Iowa's admission to the Union forward would be governed by the laws of accretion and avulsion. The Iowa—South Dalota boundary was fixed as of the date of Iowa's admission to the Union in the middle or thalweg of the main channel of the Big Sioux River as it existed at that time subject to subsequent changes by accretion. *Minnesota v. Wisconsin*, 252 U.S. 273, 64 L.Ed. 558 (1920). The boundary was not, we believe, forever restricted to a specified line equidistant between the banks of the river as shown on Nicollet's map. Rather, the boundary was moveable and changed with the gradual movements of the thalweg by accretion.

> When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no

> other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount concern...

Louisiana v. Mississippi, 202 U.S. 1, 49, 50 L.Ed. 913, 931 (1905).

While the navigation factor has diminshed, at the time this state was formed this policy consideration was extremely important and is still valid today in deciding boundary disputes between states. It is apparent from the sketchy records of the congressional debates on Iowa's boundaries that congress intended that the Iowa—South Dakota portion of Iowa's western boundary be located in the Big Sioux River. Use of the words "middle of the channel" and "up the main channel" in relation to the Big Sioux River in the boundary act (9 Stat.L. 52) and the lack of an express intent by congress that the boundary should follow a fixed line as shown on Nicollet's map leads to the conclusion that congress intended the thalweg rule to apply thereon. *Texas v. Louisiana*, 410 U.S. 702, 35 L.Ed.2d 646 (1973); *Arkansas v. Mississippi*, 250 U.S. 39, 63 L.Ed. 832 (1919). Also the questionable accuracy of Nicollet's map due to its minute scale and the fact that the Big Sioux is shown to have only one channel on the map indicate that congress intended that a natural water boundary separate Iowa and South Dakota.

Moreover, principles of prescription acquiescence might be applicable depending on certain circumstances. While you do not indicate whether each state has always treated the river as the boundary between them since 1846, if this were the case then acquiescence by each in the river as the boundary would be conclusive as to the location of the boundary.

> It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." Again in *Louisiana v. Mississippi*, 202 U.S.7, 53, 50 L.Ed 913, 932, 26 S.Ct. 408, 571 the court observed: "the question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

Arkansas v. Tennessee, 310 U.S. 564, 569, 84 L.Ed. 1362, 1366 (1940).

Whether acquiescence could be established by either state is a factual question which we decline to speculate about without further information.

To summarize, the boundary between Iowa and South Dakota was fixed in the middle of the main channel of the Big Sioux River as of 1846 subject to change by the law of accretion. References to Nicollet's map did not fix the Iowa—South Dakota boundary at a specific line as shown on that map.

May 1, 1981

CRIMINAL LAW; IMPLIED CONSENT: §§148C.1(6), 148C.4, 321B.1, 321B.4, The Code 1981. A physician's assistant has sufficient training in the withdrawal of blood to be considered a "medical technologist" within the contemplation of §321B.4. Therefore, a physician's assistant is qualified to withdraw a blood sample for the purpose of determining alcoholic content. (Mull to Saur, Fayette County Attorney, 5/1/81) #81-5-2(L)

May 4, 1981

SCHOOLS: Bond Indebtedness. Ch. 296, §§296.2, 296.3, 297.7(3), The Code 1981. It is within the discretion of the local school board of education to have two separate referendum questions submitted on a single ballot, or the board may present one bond issue prior to the other and if the first fails they must timely submit the second legally sufficient bond issue or face a potential mandamus action for arbitrary and capricious action. A petition for election may only be eliminated for legally sufficient reasons. (Hagen to Deluhery, State Representative, 5/4/81) #81-5-3 (L)

May 6, 1981

COUNTIES; ZONING: Mobile Homes. §§135D.1 *et seq.*; 358A.1 *et seq.* Mobile homes and mobile home parks which do not comply with a county zoning ordinance constitute nonconforming uses if they were occupied or established prior to the effective date of the ordinance. Such uses cannot be eliminated in the absence of a showing that they constitute a nuisance or that their removal is necessary to protect the public health, morals, safety or welfare. (Fortney to Gratias, State Senator, 5/6/81) #81-5-4(L)

May 6, 1981

TAXATION: Motor Fuel and Special Fuel Taxes: Constitutionality of Timely Refund Application Requirement For Excess Purchases. U.S. CONST., Amend. XIV; IOWA Const., Art. I, §§6, 9; §324.54, The Code 1981. The tax paid by interstate motor vehicle operators, where the refund application is not timely made does not facially operate to deprive any such interstate operator of due process or equal protection as guaranteed by the United States and Iowa Constitutions. (Griger to Schwengels, State Senator, 5/6/81) #81-5-5

The Honorable Forrest V. Schwengels, State Senator: You have requested an opinion of the attorney general pertaining to the constitutionality of the provisions of §324.54, The Code 1981, which preclude refunding of excess fuel tax where the refund claim is not timely applied for with the Department of Transportation. Specifically, you question whether the statutory prohibition of such refund due to inadvertent untimely application is so unreasonable as to facially violate the due process and equal protection clauses of the United States and Iowa Constitutions. *See* U.S. CONST., Amend. XIV; IOWA CONST., Art. I, §§6, 9.

Section 324.54, in precluding refunds of excess fuel tax paid by interstate motor vehicle operators, where the refund application is not timely made, does not operate, on its face, to deprive any such interstate operator of constitutional due process or equal protection. The time period set forth in the statute for claiming a refund of fuel taxes voluntarily paid is not unreasonably short and all persons who inadvertently fail to timely apply for a tax refund are treated alike.

Section 324.54, The Code, provides as follows:

> Fuel tax liability under this division shall be computed on the total number of gallons of each kind of motor fuel and special fuel consumed in the operation in Iowa by commercial motor vehicles subject to this division at the same rate for each kind of fuel as would be applicable if taxes under division I or division II of this chapter. A refund against the fuel tax

liability so computed shall be allowed, on excess Iowa motor fuel purchased, in the amount of fuel tax paid at the prevailing rate per gallon set out under division I or division II of this chapter on motor fuel and special fuel consumed by commercial motor vehicles the operation of which is subject to this division.

Notwithstanding any provision of this chapter to the contrary, the holder of a permanent permit may make application to the state department of transportation for a refund, not later than the last day of the month following the quarter in which the overpayment of Iowa fuel tax paid on excess purchases of motor fuel or special fuel was reported as provided in section 324.8, and which application is supported by such proof as the state department of transportation may require. The state department of transportation shall refund Iowa fuel tax paid on motor fuel or special fuel purchased in excess of the amount consumed by such commercial motor vehicles in their operation on the highways of this state.

Application for a refund of fuel tax under the provisions of this division must be made for each quarter in which the excess payment was reported, and will not be allowed unless the amount of fuel tax paid on the fuel purchased in this state, in excess of that consumed for highway operation in this state in the quarter applied for, is in an amount exceeding ten dollars. An application for a refund of excess Iowa fuel tax paid under the provisions of this division which is filed for any period or in any manner other than herein set out shall not be allowed.

To determine the amount of fuel taxes due under this division and to prevent the evasion thereof, the state department of transportation shall require a quarterly report on forms prescribed by the state department of transportation. It shall be filed not later than the last day of the month following the quarter reported, and each quarter thereafter. These reports shall be required of all persons who have been issued a permit under this division and shall cover actual operation and fuel in Iowa on the basis of the permit holder's average consumption of fuel in Iowa, determined by the total miles traveled and the total fuel purchased and consumed for highway use by the permittee's entire operation in all states to establish an overall miles per gallon ratio, which ratio shall be used to compute the gallons used for the miles traveled in Iowa.

Department of transportation subrule 830—[07,F]7.4(2), IAC, in implementing §324.54, states:

All persons holding uncanceled permanent fuel permits, pursuant to the provisions of section 324.53, The Code, shall file quarterly reports with the department of transportation and either remit any tax due or request a refund no later than the last day of the quarter covered by the report. If the claim for refund is filed late, the refund shall be disallowed.

The due process and equal protection provisions of the United States and Iowa Constitutions contain similar guarantees and, therefore, are usually considered to be identical in scope import, and purpose. *Davenport Water Co. v. Iowa State Commerce Com'n.*, 190 N.W.2nd 583 (Iowa 1971); *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977). In *Selden*, the Iowa Supreme Court set out the following principles when consitutionality of statutes is considered in 251 N.W.2d at 508:

The general principles applicable to the determination of the constitutionality of the challenged statutory provision are well established. All presumptions are in favor of the constitutionality of the statute and it will not be held invalid unless it is clear, plain and palpable that such decision is

required. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of a statute. The remedy for those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature. The burden is not upon defendent Selden and intervenor state appeal board to prove the act is constitutional. Plaintiffs have the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provision invoked and to point out with particularity the details of the alleged invalidity. To sustain this burden plaintiffs must negative every reasonable basis which may support the statute. *Dickinson v. Porter*, 248 Iowa 393, 399-400, 35 N.W.2d 66, 71 (1949). Every reasonable doubt is resolved in favor of constitutionality. *Avery v. Peterson*, 243 N.W.2d 630, 633 (Iowa 1976).

In addition, it should be pointed out that there is no common law or vested constitutional right to secure a tax refund in the event that the tax was voluntarily paid, even if the tax was paid under a statute subsequently declared unconstitutional. Op.Att'y.Gen. #79-3-13. Indeed, the refund of voluntarily paid taxes is, therefore, considered to be a matter of legislative grace. *Armstrong v. Driscoll Const. Co.*, 107 Colo. 218, 110 P.2d 651 (1941). The purpose of providing for a limitation of time within which to file application for fuel tax refunds "undoubtedly was a legislative attempt to prevent the filing of stale claims, and other corrupt practices that so often materialize when state government agencies are authorized to make refunds." *Armstrong*, 110 P.2d at 652-3.

The purpose of Division III, chapter 324, The Code 1981, of which §324.54 is a part is to "provide an additional method of collecting fuel taxes from interstate motor vehicle operators commensurate with their operations on Iowa highways." *See* §324.51, The Code 1981. Thus, such interstate motor vehicle operators must file quarterly reports and remit any fuel tax due or claim a tax refund on excess purchases of fuel. Typically, excess purchases of fuel, for which a tax refund is available, involve a situation where the tax has been voluntarily paid on fuel consumed by the interstate operator in a commercial motor vehicle on both Iowa and non-Iowa highways. Since the tax was paid on consumption of fuel on a highway outside of Iowa, and since the tax is imposed on fuel consumption in Iowa, the legislature clearly provided in §324.54 for refund of Iowa tax on fuel "purchased in excess of the amount consumed by such commercial motor vehicles in their operation on the highways of this state."

Since a refund of voluntarily paid taxes is a matter of legislative grace, the legislature has the authority to place conditions upon the right to receive such refund, including a time period within which to apply for such refunds, provided that the conditions are reasonable. *Burrill v. Locomobile Co.*, 258 U.S. 34, 42 S.Ct. 256, 66 L.Ed. 450 (1922). In several cases, the courts have held that a statutory time limit of thirty days after payment of taxes to commence a suit against the taxing authority to recover back excess taxes voluntarily paid was not unreasonable and, as a consequence, the constitutionality of such statutes, on their face, was upheld. *Security Nat. Bank of Watertown, S.D. v. Young*, 55 F.2d 616 (8th Cir. 1932); *Bagneris v. City of New Orleans*, 130 So.2d 421 (La.App.Ct. 1961). Clearly, the conditions for claiming a fuel tax refund on excess fuel purchases in §324.54 are not facially incompatible with the results reached in these cases.

The provisions of §324.54, including the timely refund application requirement, are presumed to be constitutional. The legislature clearly has the authority to prevent filing of stale claims and preclude other perceived problems which could occur in the event that no time limit existed for cutting off refund applications. The time period in which to claim a refund under §324.54 does not appear to be unreasonably short. Whether a longer period should exist in which to claim

such refund is a question for the legislature. Therefore, no violation of due process by the facial provisions of §324.54 appears to exist.

In your opinion request, you suggest that the statute is discriminatory in its effect since some taxpayers who inadvertently fail to timely apply for a refund would lose substantial refund amounts while others could only lose insubstantial amounts. Yet, it is clear that all persons who inadvertently fail to apply for a refund for which they would be eligible to receive are treated alike, namely, none will receive refunds under §324.54. Under such circumstances, the statute clearly does not create an unconstitutional discrimination. *Lee Enterprises, Inc. v. Iowa State Tax Com'n.*, 162 N.W.2d 730 (Iowa 1969); *City of Waterloo v. Selden*, supra.

In your opinion request, you contend that in order to be constitutional, §324.54 should provide for a penalty, rather than denial of an untimely refund application, for late refund claims and such a penalty ought to bear some reasonable relationship to the administrative costs of processing an untimely refund application. In essence, you contend that the present provisions of §324.54 are unduly burdensome, discouraging, and unfair to a taxpayer who has voluntarily paid excess fuel tax and who inadvertently fails to apply for a refund within the statutory time period. But, such contentions have generally been considered to relate to the wisdom or fairness of a statute, and not to its constitutionality. *Vilas v. Board of Assessment & Review*, 223 Iowa 604, 273 N.W. 346 (1937), app. dismissed 302 U.S. 637, 58 S.Ct. 38, 82 L.Ed. 496 (1937). Whether the present provisions of §324.54 are wise or fair is a matter within the discretion of the legislature.

It is the opinion of this office that §324.54, in precluding refunds of excess fuel tax paid by interstate motor vehicle operators, where the refund application is not timely made, does not facially operate to deprive any such interstate operator of due process or equal protection as guaranteed by the United States and Iowa Constitutions.

May 6, 1981

COUNTIES AND COUNTY OFFICERS: Sheriff. §§337.11(12) and 724.9, The Code 1981. Fees collected by the sheriff and sheriff's deputies pursuant to §§337.11(12) and 724.9, The Code 1981, pass to the county and are to be deposited in the county general fund. (Fortney to Kenyon, 5/6/81) #81-5-6(L)

May 7, 1981

COUNTIES: Payroll Deductions. §§110.12, 333.15, 335.14, 337.11, 509A.1, 509A.3, 509A.12, 514.16, 514B.21, 554.9407, 606.15, The Code 1981. A county may not assess a service charge for processing employee payroll deductions for items such as health insurance and deferred compensation plans. (Fortney to Neighbor, Jasper County Attorney, 5/7/81) #81-5-7(L)

May 11, 1981

MUNICIPALITIES: Condominium Conversions — §364.1; Chapters 499B and 562A, The Code 1981. Municipalities may require permits for conversions

of apartments to condominiums. They may not create causes of action of jurisdiction for private citizens in the district court. Municipalities may enact ordinances regarding notice to tenants of conversions and a right of first refusal. (Blumberg to Arnould, State Representative, 5/11/81) #81-5-8(L)

May 14, 1981

HIGHWAYS; DEPARTMENT OF TRANSPORTATION: §§321.457, 307.10(5), The Code 1981. The United States Supreme Court ruling in the case of *Kassel v. Consolidated Freightways Corp.* does not require Iowa to allow 65-foot twin trailers on all primary highways in Iowa. It only requires Iowa to allow 65-foot twin trailers on Interstate Highways 80, 35, 280, 380, 29, 680 and 235. For any DOT rules concerning the length limitations of twin trailers to be valid, they must be submitted to the General Assembly within five days following the convening of the regular session of the General Assembly as required by §307.10(5), The Code 1981. (Goodwin to Drake, State Senator, 5/14/81) #81-5-9

The Honorable Richard F. Drake, State Senator: You have asked for our opinion whether the ruling of the United States Supreme Court in the case of *Kassel v. Consolidated Freightways Corporation* requires Iowa to allow 65-foot twin trailers on all primary highways in Iowa that have had some federal funding in their construction. The answer to that question is no, it does not.

The Plaintiff's Complaint in that case only requested the court to allow 65-foot twin trailers on the Interstate Highway System in Iowa. The ruling of the United States District Court in Des Moines only allowed 65-foot twin trailers "on Iowa Interstate Highways 80, 35, 280, 380, 29, 680 and 235 and roads furnishing reasonable access between said interstates and terminals and facilities for fuel, food, repairs or rest. The court would view any distance greater than five miles as unreasonable." *Consolidated Freightways Corporation, Etc. v. Kassel*, 475 F.Supp. 544, 553, and 554 (S.D. Iowa 1979). The U.S. Circuit Court of Appeals affirmed the ruling of the District Court, and did not enlarge the ruling. *Ibid.*, 612 F.2d 1064 (8th Cir. 1979).

The U.S. Supreme Court also affirmed the ruling of the district court without any modifications. Footnote 28 of the majority opinion of the supreme court states as follows:

> Consolidated's complaint sought only a declaration that the Iowa statute was unconstitutional insofar as it precluded the use of 65-foot doubles on major interstate highways and nearby access roads. App. 10-11. We are not asked to consider whether Iowa validly may ban 65-foot doubles from smaller roads on which they might be demonstrably unsafe.

If a similar challenge to Iowa's 60-foot length limitation of twin trailers on its primary highways were made, the rationale of the plurality opinion could support the length limitation if there is a "significant countervailing safety interest" as opposed to any burden on interstate commerce from such length limitations. This would be a factual determination to be made from evidence produced at trial. Therefore, no opinion can be expressed in this regard without the benefit of all those facts.

You also ask for our opinion concerning whether a rule enacted by the IDOT Commission pursuant to §307.10(5), Code of Iowa will take effect only if it is

submitted to the General Assembly within five days following the convening of a regular session of the General Assembly. The answer to that question is yes.

Section 307.10(5), Code of Iowa, in pertinent part reads as follows:

> The transportation commission shall also adopt rules, which rules shall be exempt from the provisions of chapter 17A, governing the length of vehicles and combinations of vehicles which are subject to the limitations imposed under section 321.457. The commission may adopt such rules which permit vehicles and combinations of vehicles in excess of the length limitations imposed under section 321.457, but not exceeding sixty-five feet in length, which may be moved on the highways of this state. Any such proposed rules *shall*be submitted to the General Assembly within five days following the convening of a regular session of the General Assembly. The General Assembly may approve or disapprove the rules submitted by the commission not later than sixty days from the date such rules are submitted and, if approved or no action is taken by the General Assembly on the proposed rules, such rules shall become effective May 1 and thereafter all laws in conflict therewith shall be of no further force and effect. (Emphasis added.)

In construing a state statute the Iowa Supreme Court has consistently held that the controlling factor is what the legislature said, and not what it may have meant to say. Rule of Appellate Procedure 14(f)(13); *Spillman v. Board of Directors of Davis County Community School Dist.*, 253 N.W.2d 593 (Iowa 1977); *First National Bank of Ottumwa v. Bair*, 252 N.W.2d 723 (Iowa 1977); *In Interest of Clay*, 246 N.W.2d 263 (Iowa 1976). The statute clearly states that "any such proposed rules *shall* be submitted to the General Assembly within five days following the convening of the regular session of the General Assembly." (Emphasis added.) If not done in accordance with the statutory requirements, such DOT rules would not be valid. Thus, this procedure would not produce effective rules prior to May, 1982.

It should be noted, however, that §307.10(5), Code of Iowa does not preclude the Iowa General Assembly from enacting whatever legislation it deems appropriate concerning twin-trailer length limitations. Section 307.10(5) simply provides a possible way for twin-trailer length limitations to be established in Iowa. But, it is not the exclusive method. The Iowa General Assembly still retains ultimate authority to legislate twin-trailer length limitations.

May 14, 1981

MUNICIPALITIES: Housing Codes — §364.17, The Code 1981. If a city creates a variance in a housing code that affects the habitability of property, an action can be brought to determine whether the variance should be permitted. (Blumberg to Rush, State Senator, 5/14/81) #81-5-10(L)

May 14, 1981

CRIMINAL LAW: Uniform Citation and Complaint — Section 805.6(4), The Code 1981. The authority of designated individuals to administer oaths and certify verifications under section 805.6(4) applies only to scheduled violations charged by uniform citation and complaint. Such designated individual may administer oaths and certify verifications only for other members of his or her particular law enforcement agency. (Richards to Poncy, State Representative, 5/14//81) #81-5-11(L)

May 14, 1981

COUNTIES: Iowa Constitution, Article III, §§38A, 39A; §§363.2, 384.24, 384.26, 384.82, 388.1, 390.1, The Code 1981; 69th G.A., 1981 Session, S.F. 130, §§440.2, 441, 462. A county does not have the authority to establish and operate a utility plant. (Fortney to McCauley, Dubuque County Attorney, 5/14/81) #81-5-12(L)

May 15, 1981

COUNTIES: FOSTER CARE REIMBURSEMENT AND JUVENILE JUSTICE EXPENSES: §§232.141, 234.35 and 234.36. Section 232.141 should be broadly interpreted to include expenses related to the care, examination and treatment of juveniles pursuant to the order of the juvenile court under ch. 232 and for which no other provision for payment is otherwise made by law. If the expenses are of a category for which there is another provision of law governing reimbursement, then, the restrictions and limitations contained in that section shall apply and the portion of such expenses disallowed by virtue of such limitations and restrictions is not an eligible expense for reimbursement by the state under §232.141. (Black to Richards, Story County Attorney, 5/15/81) #81-5-13

Ms. Mary E. Richards, Story County Attorney: You have requested our opinion as to whether §232.141(l)(e) and §232.141(2) of the Code authorizes a county to include as expenses reimbursable by the state under §232.141(4)(d) of the Code, costs incurred by reason of an order of the juvenile court pursuant to ch. 232 of the Code which places a child in a licensed foster home with custody granted to the home or the probation officer. More specifically, the concern with your county is that the Iowa District Court is placing children in licensed foster homes charging rates in excess of the maximum reimbursement rates for public and private agency group foster care set forth at 770 IAC 137.9. That payment provision limits reimbursement in facilities with eight or less children to forty-six dollars per day, per child and to larger facilities to fifty-eight dollars per day, per child. The rules were adopted to implement §234.38 of the Code of Iowa which provides that the department shall establish rules pursuant to ch. 17A of the Code to provide for reimbursement of foster care required under §§234.35 and 234.26 of the Code.

Foster care expenses are addressed by §§234.35 et seq. of the Code. Basically, those sections provide:

> Each county shall pay from the county mental health and institutions fund as provided by §444.12(2), the cost of foster care for a child placed by a court as provided in §232.50 or §232.99. However, in any fiscal year for which the General Assembly appropriates state funds to pay for foster care for children placed by courts under the statute or sections of ch. 232 cited in this section, the county shall become responsible for these costs only when the funds so appropriated to the department for that fiscal year have been exhausted. The rate of pay by the county or state, as the case may be, under this section shall be that fixed by the Department of Social Services, pursuant to §234.38.

Section 234.36, The Code.

In addition to the foregoing, The Code also imposes preliminary responsibility for payment of foster care on the state in certain defined circumstances:

> The Department of Social Services shall be initially responsible for paying the cost of foster care for a child under any of the following circumstances:
>
> 1. When a court has committed the child to the commissioner of social services or his designee.
>
> 2. When a court has transferred legal custody of the child to the department of social services.
>
> 3. When the department has agreed to provide foster care services for the child on the basis of a signed placement agreement between the department and the child's parent or guardian.
>
> 4. When the child has been placed in emergency foster care for a period of not more than 30 days upon approval of the commissioner or his designee.

Section 234.35, The Code.

In our opinion, it is necessary in evaluating a specific case or charge for foster care to first examine the provisions of §234.35 of The Code to determine if the state has liability. In the event it does not, one then turns to §234.36 relating to county liability and state assumption of that liability in the event of the existence of funds appropriated by the legislature for such payment.

As we understand your situation, the state obligations set forth in §234.35 of The Code are not applicable and you do not so contend. It is also our understanding that the court orders to which you allude were made under the authority of §232.50 of The Code (relating to placements upon an adjudication of juvenile delinquency) or §232.99 of The Code (relating to dispositions upon an adjudication of a child in need of assistance). Assuming these facts, the orders for foster care would be governed by §234.36 which mandates the expenses would be paid by the county provided:

> However, in any fiscal year for which the General Assembly appropriates state funds to pay for foster care for children placed by courts under the statute or sections of ch. 232 cited in this section, the county shall become responsible for these costs only when the funds so appropriated to the department for that fiscal year have been exhausted.

Section 234.36, The Code.

Questions have arisen in the past as to how it is determined when the funds appropriated to the department for foster care are exhausted, since the appropriation for the current biennium was not separate line item but was included within the overall children's service appropriation. Fortunately, we do not have to reach this question as your inquiry states that the reason for denial of payment by the state was not the exhaustion of the appropriation, but rather "because the children to whom the services had been provided had been placed by court order with persons in agencies other than the department of social services and had been put in out-of-home placements by such persons or agencies".

Although we understand that the Department of Social Services disputes your characterization of the reasons for the denial of payment, we will respond by assuming the correctness of your characterization of the explanation received by Story County. It is not the purpose of an Attorney General's Opinion to resolve disputed factual questions but rather questions of interpretation of law.

The assumptions made, based upon the statements in your inquiry and subsequent phone conversations are, as follows: 1. The foster care provided was rendered in each case pursuant to court order issued under ch. 232. 2. The foster care provided in each case was provided by a duly licensed foster care facility. 3. Adequate funds remain in the state appropriation for foster care to pay for the care rendered. 4. The sole reason for the refusal of the department of social services to pay was because the children to whom the services had been provided had been placed by court order with persons in agencies other than the department of social services and had been put in out-of-home placements by such persons or agencies.

Based upon these assumptions, it would be our opinion that the department should honor a request for reimbursement made under §234.36. Obviously, if one or more of these factual assumptions proves to be in error, our conclusion would necessarily have to be reviewed accordingly.

It is clear from your letter that Story County seeks reimbursement of these foster care expenses under §232.141 of The Code, if they are not recoverable under §234.36 of The Code. In order to be a chargeable expense under "county juvenile base", the expenses must fit within one of the five categories classified under §232.141(1) of The Code. Based upon your letter of inquiry, we assume that no suggestion is made that categories a through d apply and the only issue is whether the expenses are "treatment or care ordered by the court under authority of subsection 2". Section 232.141(l)(e) of The Code. The relevant portion of subsection 2 of §232.141 of The Code is as follows:

> Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents, or whenever homemaker — home health aid services is provided under §232.80, or whenever a minor is given physical or mental examinations or treatment under order of court and no provision is otherwise made by law for payment for the care, examination or treatment of the minor, the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge to the board of supervisors.

Ch. 232.141(2), The Code.

Such expenses as are allowable under §232.141(l) and (2) are reimbursable to the county by the state to the extent that they exceed the county's juvenile justice base as established under §232.141(4) of The Code.

We base our opinion as to the eligibility of these expenses for payment by the state under ch. 232 upon the earlier recitation of the facts in this opinion derived from our communications with you. Again we would add the caveat that the Department of Social Services disputes this statement of the facts. Assuming that these expenses were incurred under a court order in each case issued under ch. 232 of The Code, the requirement of §232.141(2) for a transfer of custody or a court placement has been met by the placement of the juveniles with someone other than the parents. We also understand that these children were placed in licensed group or residential foster homes. The issue, thus, becomes whether "no provision is otherwise made by law for payment of the care, examination or treatment of the minor". [1] This naturally raises two questions: 1) Did the legisla-

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[1] Section 232.141(l)(e) speaks only of "treatment or care" ordered by the court under the authority of subsection 2 whereas that subsection 2 talks in terms of "care, examination or treatment". We conclude that the noninclusion of

ture mean to insert the word "full" in front of the word "payment" in the above cited section, or did it intend to incorporate the limits or restrictions imposed by the alternative payment system? 2) Do all sums expended upon a child under ch. 232 fit within the definition of "care, examination or treatment"?

These questions may best be answered by reviewing the legislative scheme of §232.141 of The Code. A statute must be read as a whole and be given its plain and obvious meaning in a sensible and logical construction. *Telegraph Herald v. City of Dubuque*, 297 N.W.2d 529 (Iowa 1980). In the construction of a statute, a court must consider all its parts together without according undue importance to a single or isolated portion. *Shidler v. All American Financial Corp.*, 298 N.W.2d 318 (Iowa 1980). Under the rules of statutory construction, the intent of the legislature prevails over the literal language of the statute. *Hanson v. State*, 298 N.W.2d 263 (Iowa 1980).

Essentially, §232.141 of The Code is a maintenance of effort approach that requires counties to continue spending for juvenile costs at the level when the act took effect (adjusted for increases listed in the Consumer Price Index) with the state assuming the balance of the cost resulting from the provisions of the new juvenile justice act. This legislative scheme suggests that question number two should be answered broadly to include all types of expenses which the court has authority to direct to be made on behalf of a child under the court's power granted by ch. 232. Unless these expenses were ordered by a judge in violation of his statutory authority, it would appear that they cannot be challenged as being care, examination or treatment, so long as they may broadly fit into any one of those three categories. Clearly, each expense must be judged on its own, but we believe that the legislature intended the phrase "care, examination or treatment" to be broadly construed to be an inclusive phrase.

The legislative scheme also causes us to conclude that the answer to the first question is that the legislature did not inadvertently leave out the word "full" in referring to "expenses for which no provision is otherwise made by law for payment". Section 232.141 was not intended to pay for categories of expenses which would be paid by other statutory provisions. [2] Rather, it was intended to provide for the additional expenses caused by the substantive terms of ch. 232, as well as the other expenses not provided for elsewhere in The Code. The legislature did not know how much these expenses would be as it was a new statute. This uncertainty as to amount is demonstrated by the following excerpt of the appropriation for those expenses.

(Footnote Cont'd)

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the word "examination" in §232.141(l)(e) was not done with the intent of limiting allowable expenses or with the purpose of creating a distinction between §§232.141(l)(e) and 232.141(2) of The Code.

[2] Expenses allowable under 232.141(1) and (2) are, if anything, broader in scope than those included in the county's juvenile justice base established under §232.141(4). We, therefore, note that if a type or category of expenses is disallowed for reimbursement under §232.141(1) or (2) then that type of category of expense should not be included in the historic computation of the county's juvenile justice base. Because that historic juvenile justice base will govern the amount of reimbursement the county will receive in future years, it is critical that those historic computations of expenses are made accurately and as openly as possible.

> Six hundred sixty thousand (660,000) dollars of the funds appropriated by section eight (8), subsection six (6) of this Act may be used for reimbursement of county juvenile court expenses pursuant to section two hundred thirty-two point one hundred forty-one (232.141), subsection four (4) of the Code. If it appears at any given time that six hundred sixty thousand (660,000) dollars will be insufficient for reimbursement of county juvenile court costs, the department shall report to the comptroller and the joint appropriations subcommittee on social services relative to the need for additional funds for such costs. The department of social services shall also report to the joint appropriations subcommittee on social services and to the legislative council no later than December 1, 1979 on the projected costs to the state for county juvenile court expenses, based upon reports received from the counties for the first quarter of the fiscal year beginning July 1, 1979.

Ch. 8, §17(2), Laws of the Sixty-Eighth G.A. 1979 Session.

Our conclusion that there was no inadvertent deletion of the word "full" in front of the word "payment" is based on our assessment that it does not seem reasonable to read out of the Code the restrictions, limits or qualifications inherent in these other payment provisions of the Code.[3] Allowing the coverage or disallowed portions of expenses to be charged as §232.141(l)(e) costs would negate the efficacy of these limits, restrictions and maximums. When statutes relate to the same subject matter or the closely allied subjects, they are said to be *pari materia* and must be construed, considered and examined in the light of their common purpose and intent so as to produce a harmonious system or body of legislation. *Rush v. Sioux City*, 240 N.W.2d 431 (Iowa, 1976). Related statutes are read in *pari materia*, the terms of a specific statute control over a general statute. *Berger v. General United Group, Inc.*, 268 N.W.2d 630 (Iowa 1978). Thus, if a particular category of juvenile expense is otherwise provided for in law, that portion of such expense that is ineligible for payment by reason of not meeting the requirements or limits of that payment provision cannot be charged as §232.141 expenses. This result is required if the statutes are to be read in *pari materia* and if the specific provisions are to govern over the general.

Care provided by a licensed foster home is subject to the limits of §§234.35, 234.36 and 234.38, as well as the applicable departmental regulations previously cited. The charges of a licensed foster home in excess of the state mandated rate set forth in those departmental regulations would not appear to us to be eligible as expenses under §232.141(l)(e). Indeed, it would appear that the county could not properly pay such excess expenses without being in violation of the provision of

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[3] Although your primary concern is billing for court ordered placements in licensed foster homes, we also understand that there are medical bills for certain of these children. It would be our opinion, based on the factual assumptions we previously set forth, that such medical expenses would be eligible §232.141 expenses so long as they are incurred pursuant to a court order issued under ch. 232 and so long as they are not governed by a specific reimbursement program established by law, such as Title XIX (Medicaid, see ch. 249A, The Code). If such medical expenses are governed by Medicaid rules and regulations, then, in our opinion excess charges could not be included as §232.141 expenses. Charges for medical procedures not within the scope of the Title XIX program could, however, be billed as §232.141 expenses.

§234.36 which states that "the rate of payment by the county or the state, as the case may be, under this section shall be that fixed by the department of social services pursuant to §234.38."

We conclude, the reference in §232.141(2) to expenses for "care, examination or treatment" for which provision for payment is "otherwise made by law" are subject to all restrictions of the law under which payment is to be made. Expenses or portions of expenses disallowed under such provisions cannot be charged as §232.141(2) expenses. To interpret this section in a contrary manner, would for all practical purposes, negate the limits and restrictions contained in these other payment provisions. It is a general rule of statutory construction that repeals by implication are not favored. *McMurry v. Board of Sup'rs. of Lee County*, 261 N.W.2d 688 (Iowa 1978). The legislature could very simply have provided that these limits and restrictions in other payment provisions did not apply and we believe that its failure to so do was intentional. The portions of those expenses disallowed by other payment provisions specifically dealing with such expenses cannot, therefore, be charged to the county or the state under §232.141.

May 19, 1981

TAXATION: Property Tax — Assessor Engaging In Appraisal Business Outside The Assessing Jurisdiction. §441.17(1), The Code 1981. Although an assessor is not, per se, prohibited by §441.17(1) from engaging in an appraisal business in another assessing jurisdiction, the "entire time" requirement in the statute would preclude the assessor from engaging in any activity associated with such business during the normal working hours of the assessor's office. (Griger to Richter, Pottawattamie County Attorney, 5/19/81)#81-5-14

Mr. David E. Richter, Pottawattamie County Attorney: You have requested an opinion of the attorney general pertaining to whether §441.17(1), The Code 1981, prohibits an assessor from engaging in an appraisal business which would appraise property in other assessing jurisdictions for use in cases involving assessment appeals. Such appraisal business would not operate in the assessor's assessing jurisdiction. The appraisals would be used to defend the assessments. Specifically, you inquire whether the provisions of §441.17(1) which require the assessor to "devote his entire time" to the duties of assessor would permit an assessor to have such an appraisal business.

In 1968 Op.Att'y.Gen. 370, the attorney general opined that the offices of county assessor and county civil defense director were not, per se, incompatible, but that unless the assessor could perform the duties of civil defense director at night and on weekends, the "entire time" requirement in §441.17(1) would be violated.

In discussing the meaning of §441.17(1), the opinion states in 1968 Op.Att'y.-Gen. at 370:

> From the foregoing it is clear that the legislature contemplated that the office of assessor was to be a full time position and that the incumbent of such office would not engage in other pursuits which would interfere or be inconsistent with his post as assessor. However, it is equally apparent that it was also expected that an assessor could engage in another occupation or business so long as the same was not in conflict with his duties as assessor or would not prevent him from devoting his full time thereto. Otherwise, the expression in §441.17(1) "...and shall not engage in any occupation or business interfering or inconsistent with such duties," becomes mere surplusage which could have better been written "...and shall not engage in

> any other occupation or business".... Hence it is our opinion that the prohibition contained in §441.17(1) against an assessor engaging in a business or occupation which would interfere or be inconsistent with his duties as assessor, impliedly permits an assessor to engage in other occupations which do not interfere or conflict.

The attorney general concluded at page 372:

> Futhermore, unless the duties of civil defense director could be performed at night and on weekends the requirement of §441.17(1) that the assessor "devote his entire time to the duties of his office" would be violated.

It is our opinion that although an assessor is not, per se, prohibited by §441.17(1) from engaging in an appraisal business in another assessing jurisdiction, the "entire time" requirement in the statute would preclude the assessor from engaging in any activity associated with such business during the normal working hours of the assessor's office. [1]

May 20, 1981

ADMINISTRATIVE LAW; Agency Jurisdiction; Merit Employment Commission; Civil Rights Commission: §§19A.3, 19A.9, 19A.14, 19A.18, 19A.22, 601A.2, 601A.6, 601A.15. Both the Merit Employment Commission and the Civil Rights Commission have jurisdiction to hear certain complaints by merit employees. The Merit Employment Commission does not have exclusive jurisdiction over complaints of merit employees that are otherwise within the jurisdiction of the Civil Rights Commission. (Norby to Reis, Executive Director, Iowa Civil Rights Commission, 5/20/81) #81-5-15

Ms. Artis Reis, Executive Director: You have requested an opinion of the attorney general regarding the respective jurisdictions of the Iowa Civil Rights Commission (hereinafter Civil Rights) and the Merit Employment Commission (hereinafter Merit). Specifically, you are concerned with where jurisdiction lies with respect to civil rights[1] complaints made by merit employees.

As you have indicated, this issue was addressed by an attorney general's opinion in 1972. 1972 Op.Atty.Gen. 684. This opinion appears to conclude that Merit has jurisdiction over civil rights complaints of merit employees that is in some sense superior to that of Civil Rights, although it is rather unclear in this respect, stating as follows:

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[1] The result reached in this opinion would not prohibit the assessor from engaging in appraisal activities during his or her vacation.

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[1] For purposes of this opinion, a "civil rights complaint" means one generally falling within the scope of §§601A.6—601A.13, The Code 1981.

> ...while the civil rights commission may function as a safety check on employment practices of the merit system, its responsibility has been superseded, but not eliminated, by the more recent expression of legislative intent,[2] §19A.22, Code of Iowa 1971. If an instance of discrimination should arise which is not acted upon from within the merit system, the civil rights commission may prosecute the violation.

1972 Op.Atty.Gen. 686.

We find this statement troubling in that it appears to indicate that failure of Merit to act upon a complaint confers jurisdiction upon the Civil Rights Commission which is otherwise absent. We believe this conclusion is erroneous. Both the rules of the Merit Commission and Ch. 17A provide remedies if a particular decisionmaker fails to act in a timely manner. 570 IAC 15.6; §§17A.2(9)(a failure to act constitutes agency action subject to judicial review). Nor does any provision of either Ch. 19A or Ch. 601A purport to establish jurisdiction in the Civil Rights Commission upon failure to act by the Merit Commission. Accordingly, we find this conclusion to be clearly erroneous. Additionally, the 1972 opinion relies in part on §19A.22, The Code 1971,[3] in reaching its conclusion. This section has been repealed. Therefore, we believe a new inquiry into the issue presented in your request is needed.

Initially, it is instructive to note the sections which give rise to the appearance of overlapping jurisdiction between Civil Rights and Merit. Section 601A.2(2)[4] defines a "person" to include the state of Iowa, and §601A.2(5) defines unfair employment practices by persons or employers, and presumably violations of §601A.6 by the state would subject the state to the full scope of procedures outlined in Ch. 601A unless Ch. 19A diminishes the jurisdiction of the Civil Rights Commission.

Section 19A.3 specifies the employees covered by the merit system. As the merit system does not cover all state employees, we might initially note that even if Ch. 19A gives the Merit Commission total jurisdiction over civil rights complaints of merit employees, the application of Ch. 601A to the state in §§601A.2(2) and (5) would not be superfluous as there are nonmerit state employees.[5]

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[2] Ch. 19A was enacted in 1967. 1967 Session, 62nd G.A., ch. 95. Ch. 601A was enacted in 1965. 1965 Session, 61st G.A., ch. 121.

[3] Section 19A.22, The Code 1971, provided as follows:

> The provisions of this chapter, including but not limited to its provisions on employees and positions to which the merit system apply shall prevail over any inconsistent provisions of the Code and subsequent Acts unless such subsequent Acts provide a specific exemption from the merit system.

[4] All statutory references are to the Code 1981 unless otherwise specified.

[5] It should also be noted that Merit Commission proceedings are not available to probationary merit employees who are discharged for alleged discriminatory reasons. *See* §19A.14; 570 IAC 12.6. These merit employees would therefore be compelled to bring their complaint before Civil Rights Commission.

A review of several sections of Ch. 19A reveals that this chapter, in addition to Ch. 601A, purports to extend jurisdiction over civil rights complaints. Section 19A.18 provides in relevant part as follows:

> No person shall be appointed or promoted to, or demoted or discharged from, any position in the merit system, or in any way favored or discriminated against with respect to employment in the merit system because of his political or religious opinions or affiliations or race or national origin or sex, or age.

Section 19A.20 provides that violation of §19A.18 is a simple misdemeanor. The 1972 opinion concluded that Merit Commission rules may be adopted to discipline merit employees for violation of §19A.18 pursuant to §19A.9(16) which, in addition to several specific grounds, provides for discipline for "any other good cause...". 1972 Op.Atty.Gen. 685. We concur in this conclusion, and believe it is reinforced by §19A.14, which addresses the remedy for actions found to have been taken by the employer for any political, religious, racial, national origin, sex, age or nonmerit reason. Accordingly, there does appear to be a substantial area in which Chs. 19A and 601A seem to confer overlapping jurisdiction.

The interplay between Ch. 19A and other chapters of the Code has been considered by the Iowa Supreme Court and the attorney general on several occasions, although the jurisdictional question considered herein is only addressed in the opinion previously cited. *Iowa Dept. of Social Services v. Iowa Merit Employment Dept.*, 261 N.W.2d 161 (Iowa 1977) does, however, present an interesting example of the relationship between Chs. 19A and 601A. In this case, a female merit employee sought to raise her employment classification at a men's reformatory to a job which required, among other things, superintending inmates bath and shower rooms and conducting "pat" and "strip" searches. 261 N.W.2d at 163. The Department of Social Services argued that the requirement of a male in this position constituted a bona fide occupational qualification (BFOQ), as provided in §601A.6(1)(a), and hence was not discrimination. The Merit Commission countered that §19A.22 (the now-repealed section set out in Fn. 4) precluded application of a BFOQ to merit employment decisions, and since §19A.18 did not provide for a BFOQ, the requirement of being a male constituted discrimination. The court concluded that a BFOQ may be applied, although it is unclear whether the court felt compelled to apply the BFOQ because of §601A.6(1)(a) or for other reasons. At 261 N.W.2d 164, the court stated as follows:

> Turning to the two Code chapters [19A and 601A] referred to we do not believe the legislature's failure to include a BFOQ provision in §19A.18 indicates a total prohibition of BFOQ provisions for that chapter. We note that §356.5(6), The Code, requires jailers '[t]o have a matron on the jail premises at all times during the incarceration of any one or more female prisoners**.'
>
> We do not think the department of transportation is prohibited from hiring male attendants for male restrooms or females for female restrooms in highway rest stops. But the commission's interpretation of §19A.18, precluding BFOQ exceptions, would make such hiring practices impossible. Similarly, we do not believe male officers could be required, for lack of a BFOQ clause, for a CO II position at the women's reformatory at Rockwell City.
>
> In any event the absence of a BFOQ provision in §19A.18 could not justify an unconstitutional invasion of the inmates' rights to human dignity and privacy.

The proceeding in *Iowa Dept. of Social Services v. Iowa Merit Emp. Dept.*, was initiated before Merit and no question of jurisdiction was raised. To the extent

that this case appears to require application of criteria found in Ch. 601A to Merit proceedings even prior to repeal of §19A.22, it weakens any argument that the Merit Commission has exclusive jurisdiction over civil rights complaints by Merit employees.

In contrast to the apparent conclusion of the 1972 opinion, it appears that a substantial area of civil rights complaints fall exclusively within the jurisdiction of Civil Rights. This area can be outlined by looking at the nature of the actions allowed under chs. 19A and 601A and at the person who may be a party to the proceedings which might be initiated under these chapters.

Chapter 19A authorizes proceedings against a merit employee who is alleged to have discriminatory action. Section 19A.18 provides criminal sanctions against such a person, and §19A.9(16) authorizes promulgation of rules to provide for discharge, suspension, or reduction in rank or grade (hereinafter referred to as merit disciplinary action) of persons who engage in discriminatory practices. In regard to a Merit employee who is subject to merit disciplinary action, except during his or her probationary period (*see* Fn. 5) for a discriminatory reason, §19A.14 provides for reinstatement to his or her former position without loss of pay for the period of suspension. In other words, Ch. 19A proceedings might involve a civil rights complaint in two contexts, merit discipline of a merit employee who engages in discriminatory acts, and as a defense in a merit disciplinary action. These two contexts do not encompass the full range of civil rights complaints which might be brought before the Civil Rights Commission, nor does Ch. 19A provide as extensive a range of remedial action as is available in civil rights proceedings. Section 19A.14 provides for reinstatement to the employee's former position without loss of pay if merit discipline is determined to have been taken for a discriminatory reason. In contrast, §601A.15(8) provides numerous additional remedies, including, but not limited to issuance of a cease and desist order against the involved employer, upgrading of employment, admission to occupational training, reporting requirements regarding future compliance by the state, and awarding of damages. §601A.15(8)(a)(l), (2), (6), (8).

As an illustration of the differences between merit and civil rights proceedings, assume that an agency of the state refuses to promote persons of a particular religion above a certain merit rank. [6] A merit disciplinary action or a criminal action might be brought against the merit employee who has engaged in this practice, however, do not appear to have a remedy available to them under Ch. 19A as they have not been subjected to merit disciplinary action. In other words, an individual who is denied promotion for discriminatory reason cannot obtain promotion through merit, even though their supervisor might be disciplined by Merit. The employee could, however, obtain a promotion through Civil Rights.

In summary, it appears that Civil Rights is authorized to hear a broader range of civil rights complaints than Merit, and where concurrent jurisdiction appears to exist, Civil Rights has greater remedial powers. Having reached this conclusion, we now turn to an examination of the area of apparent coexisting jurisdiction to determine if jurisdiction may be concurrent or if it must be exclusive with one agency.

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[6] Section 19A.18 provides that "no person shall be... promoted to... any position in the merit system... because of his political or religious opinions or affiliations or race or national origin or sex, or age." This would appear, however, to only provide for merit discipline or criminal sanctions against the party causing the promotions rather than providing a remedy for a person denied promotion.

In a recent attorney general's opinion, it is stated that Ch. 19A prevails over Ch. 70 with regard to termination due to work reductions of merit employees who are veterans. Op.Atty.Gen. #81-3-13. Section 70.6 provides that public employees entitled to a veteran's preference may be removed only for incompetency or misconduct, while §19A.9(14) provides for layoffs of merit employees due to lack of funds. In concluding that this conflict must be resolved in favor of Ch. 19A, the opinion states that Ch. 19A is an enactment later in time and a special statute (regulating only those public employees covered by the merit system) and Ch. 70 is a general statute (regulating all public employment).

In the question considered herein, Ch. 19A is a later enactment than Ch. 601A. *See* Fn. 2. As to the specific/general question, we might ask:

1. Is Ch. 19A a specific statute regulating only merit employees while Ch. 601A is a general statute covering all employees?

2. Is Ch. 601A a specific statute regulating discrimination in employment and Ch. 19A general in the sense that it regulates all manner of discharge of merit employees?

We do not feel compelled to answer the above questions, as these questions need to be faced only if the two statutes are irreconcilable. §4.7. The opinion discussed above regarding veterans' preferences presented such a conflict, in that one section required that discharge be made only upon fault of the employee while the other provided for layoffs when funds were lacking. In the instant question, it appears that the potential conflict between Ch. 19A and Ch. 601A in the area of apparent coexisting jurisdiction lies in the fact that greater remedial powers are provided in Ch. 601A. We are reluctant to say that Ch. 19A in any manner denies §601A.15(8) remedies to Merit employees, particularly since §19A.22, The Code 1971 (*see* Fn. 4) has been repealed and §601A.18 provides for construction of Ch. 601A to "broadly effectuate its purpose." On the other hand, no language of Ch. 601A appears to expressly preempt Ch. 19A proceedings. [7]

In constrast to the 1972 opinion issued on this question, we do not find any reason to declare exclusive jurisdiction in one agency. [8] No principle has been

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[7] Additionally, it is not entirely clear whether the substantive nature of civil rights complaints is the same for both Merit and Civil Rights. The criteria stated in §§19A.14 and 19A.18 appears to generally be the same as those contained in §601A.6. One possible difference, however, appears in that §601A.6 expressly prohibits discrimination on the basis of disability. Possibly this form of discrimination falls within the scope of §19A.14 as a "non-merit" reason for merit disciplinary action. As we are reluctant to deny the additional remedies of Ch. 601A to merit employees, we are similarly reluctant to deny any substantive ground of complaint to merit employees.

[8] In any case, the 1972 opinion is very equivocal in its conclusion, stating as follows:

> It appears that the legislature intended the merit system to have *primary responsibility* for eliminating discrimination within covered departments and provided the means for doing so. Chapter 19A manifests the

discovered which prohibits concurrent jurisdiction of a complaint by two agencies.[9] While this obviously raises questions of forum shopping and possible application of *res judicata* in later agency or judicial proceedings, these questions must be addressed by the legislature. Accordingly, we believe that both the Merit Employment Commission and the Civil Rights Commission may hear a civil rights complaint which is within the scope of their respective jurisdictions as described above, however, certain types of civil rights complaints which might be made by a merit employee fall exclusively within the jurisdiction of the Civil Rights Commission.

May 20, 1981

STATE OFFICERS AND DEPARTMENTS: State judicial nominating districts. Section 46.1, The Code 1981. The previous interpretation of §46.1, that it calls for the appointment of seven judicial nominating commissioners, 1972 Op.Att'y.Gen. 68, is not clearly erroneous and should be followed until modified by the General Assembly. (Miller to Hultman and Junkins, State Senators, 5/20/81) #81-5-16(L)

May 20, 1981

JUDGES: Retirement Systems — §§97B.41, 97B.49, 97B.53, 97B.69 and 605A.3, The Code 1981. Membership in the Judicial Retirement System is not mandatory. A member of the Judicial Retirement System is not entitled to a pension from IPERS. (Blumberg to Longnecker, Administrator, State Retirement Systems, 5/20/81) #81-5-17(L)

May 26, 1981

COUNTIES; OFFICIAL NEWSPAPERS: Chapter 349, The Code 1981. Absent a joint request pursuant to §349.15, a county board of supervisors is

(Footnote Cont'd)

> legislature's concern that our state employment system should stand as a fair, honorable and efficient model to all other employers, public and private. Thus, the merit system has been given the *immediate means* to correct injustices as soon as they arise. [Emphasis supplied.]

It is unclear from the opinion what "primary responsibility" or immediate means" are meant to entail.

[9] The fact that overlapping agency jurisdictions are possible, and that the legislature can address such a situation, is indicated by §455A.38, which provides as follows:

> The [Natural Resources] council shall have no executive prerogatives outside of its own duties and functions as set out by this chapter and shall not disturb the work, functions or authority of any of the several state or local agencies and institutions, provided the powers conferred upon the council by this chapter shall not be exercised by any other of the agencies or institutions.

limited to designating the number of official newspapers specified in §349.3 and may not pay tax monies to an additional newspaper for purpose of publishing those matters required by §349.16 and 18. (Fortney to Heitland, Hardin County Attorney, 5/26/81) #81-5-18(L)

May 27, 1981

STATE OFFICERS AND DEPARTMENTS: Rulemaking Authority of Medical Licensing Boards. Sections 147.55, 147.76, chapter 258A, The Code 1981; S.F. 2070, 1980 Session, 68th G.A., ch. 1036, §33. In light of S.F. 2070, passed by the 1980 Session of the 68th General Assembly, the boards of Medical Examiners, Pharmacy Examiners, Dentistry, Podiatry, Nursing and Veterinary Medicine do not have authority to promulgate rules concerning the dispensing of prescription drugs, including controlled substances, by practitioners licensed by the boards. Accordingly, these boards do not have authority to promulgate rules regarding the "delegation of nonjudgmental functions in the physical presence of the practitioner" to the extent that such functions involve the dispensing of prescription drugs. (Stork to Kirkenslager, State Representative, 5/27/81) #81-5-19(L)

May 27, 1981

STATE OFFICERS AND DEPARTMENTS: State Judicial Nominating Commission. Authority of the clerk of the supreme court to determine eligibility of persons to serve on the State Judicial Nominating Commission. Sections 46.2, 46.11, 46.25, 57.1, 685.1, 685.2, The Code 1981. Iowa Const. Art. V, §16 (1857, amended 1962). The clerk of the supreme court does not have the authority to determine the eligibility of nominees of newly-elected commissioners to the State Judicial Nominating Commission. Challenges to the election of a judicial nominating commissioner are not handled pursuant to chapter 57, The Code, but ultimately may necessarily be carried to a court of law. Commissioners elected to serve a six-year term on the State Judicial Nominating Commission even though, due to a technical delay in the previous election, they served only five and one-half years of their elected terms. When the election of a commissioner is successfully challenged, the elector with the next highest number of votes shall become the newly-elected commissioner. (Freeman to Richardson, Clerk of the Supreme Court, 5/27/81) #81-5-20

R.K. Richardson, Clerk of Supreme Court: You recently requested an opinion from our office concerning chapter 46 of the Code of Iowa. You are primarily concerned with those provisions of chapter 46 governing the election of state judicial nominating commissioners, as well as with Article 5, §16 of the Iowa Constitution pertaining to state and district judicial nominating commissioners.

Specifically, you note that in July of 1975, the terms of certain commissioners on the Judicial Nominating Commission expired. Technically, an election of new commissioners should have been held at that time, but said election actually was not held until January of 1976. Another election of commissioners was held in January 1981. Two candidates receiving the most votes in this January 1981 election are both commissioners who were elected in January of 1976 and whose terms will expire in July of 1981. These two commissioners, thus, have served only five and one-half years of a six-year term. Article V, of the Iowa Constitution provides that elective members of the Judicial Nominating Commission shall serve for six-year terms and shall be ineligible for a second six-year term on the same commission.

In your opinion request, you have posed three questions relating to the above situation.

These questions are as follows:

1. Does chapter 46, The Code 1981, require the clerk of the supreme court to determine the eligibility of candidates placed on the election ballot and/or the eligibility of those candidates receiving the most votes who are to be certified as elected?

2. If the clerk is to determine eligibility as noted above, are the two present commissioners eligible for a second six-year term?

3. If the two commissioners are not eligible, should the two candidates receiving the next highest number of votes be certified as elected?

To answer your questions, it is necessary to examine the provisions of chapter 46 of the Code and of Article V, §16 of the Iowa Constitution.

The State Judicial Nominating Commission enjoys the responsibility of certifying to governor and the chief justice the names of a proper number of individuals to be considered for a vacant judicial post on the Iowa Supreme Court and the Iowa Court of Appeals. §46.14, The Code 1981. Some members of the commission are appointed by the governor, §46.1, The Code, while others are elected by the resident members of the Iowa bar of each congressional district. §46.2, The Code. Nominees to the commission must be "eligible electors." §§46.1 and 46.2, The Code. An "eligible elector" is a person who possesses the qualifications necessary to entitle him or her to be registered to vote, whether or not he or she is so registered. §§46.25 and 39.3(1), The Code. "Every citizen of the United States of the age of eighteen years or older who is a resident of this state is an eligible elector." §47.4(1)(a), The Code.

To be eligible for a position on the State Judicial Nominating Commission, then, a person must satisfy two criteria: 1) the person must be an eligible elector and 2) the person must not have served a previous six-year term on the commission. As noted above, this latter criteria derives from the Iowa Constitution. Iowa Const. Art. V, §16 (1857, as amended 1962). While it is explicitly clear that the clerk of the supreme court is to ascertain whether individuals certified as members of the Iowa bar actually are such members and impliedly clear that the clerk is to determine whether sufficient persons have signed each nominating petition, §§46.8 and 46.10, The Code, no mention is made in chapter 46 concerning who, if anyone, determines whether a person is eligible to serve on the commission. It should be further noted that chapter 46 also fails to provide a mechanism of operation in the event that another person challenges the election of a particular commissioner. The first question that must be answered, then, is whether the clerk of the supreme court has the duty or the authority to determine the eligibility of a nominee without a challenge from another person. If not, the second question is whether, upon challenge, the clerk has the authority or duty to determine the eligibility of a nominee or an elected commissioner who has not been certified as elected.

The office of clerk of the supreme court was created by statute, §685.1, The Code, and as such the authority of the clerk is either explicitly or impliedly derived from statute. The general duties of the clerk are outlined in §685.2, The Code, where it is stated that, among other things, the clerk shall keep a complete record of the proceedings of the court, shall certify opinions, shall notify parties by mail of decisions and rulings, and *shall perform all other duties pertaining to his or her office.* The latter phrase, while allowing flexibility, results in a measure of uncertainty with respect to the nature of the duties to be performed by the clerk

pursuant to it. To determine the scope of such duties, it is necessary to examine the nature of the responsibilities statutorily assigned to the clerk.

The functions of the clerk as outlined by §685.2 are ministerial in nature. In assigning such duties, the statute is consistent with the ordinary definition of a clerk. Webster's defines a clerk as a person "employed (as in a business office) to keep records or accounts or to perform more or less routine office tasks." *Webster's Third New International Dictionary* 421 (unabridged 1971). *Black's Law Dictionary* defines a clerk as an "[o]fficer of court who files pleadings, motions, judgments, etc., issues process, and keeps records of court proceedings. Functions and duties of clerks of court are usually specified by statute or court rules. "*Black's Law Dictionary* 229 (5th ed. 1979). An alternative definition is a person "employed in public office whose duties include keeping records or accounts." *Id.*

It appears from the above that the usual powers and duties of a clerk of court are ministerial in nature as provided for by statute or court rules. This fact is important in examining chapter 46 to determine the extent of the supreme court clerk's duties with respect to the election of judicial nominating commissioners.

The clerk of the supreme court has duties in relation to bar registration, the conduct of elections of the judicial nominating commissioners, the nomination of commissioners, and the certification of elected commissioners. Section 46.8 provides that the clerk shall ascertain from his or her records whether individuals certified by the district courts as members of the Iowa bar are actually such members. Section 46.9 provides that the clerk shall mail ballots for the purpose of electing judicial nominating commissioners to the members of the bar who have property registered; ballots shall be counted under the direction of the clerk. Section 46.10 states that nominating petitioners containing the signatures of at least fifty residents of the bar of a particular congressional district must be timely filed with the clerk of the supreme court and that no member of the bar may sign more petitions than number of commissioners to be elected; this section implies that the clerk is to ascertain that nominating petitions are in order. Finally, section 46.11 provides that the clerk shall certify the names and addresses of elective judicial nominating commissioners to the state commissioner of elections and the chairpersons of the respective nominating commissions.

The responsibilities assigned to the clerk pursuant to sections 46.8, 46.9 and 46.10 are clearly clerical or ministerial in nature. "To certify" means "[t]o authenticate or vouch for a thing in writing. To attest as being true or as represented." *Black's, supra* at 207. Furthermore, a "certificate" has been defined as "[a] written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with." *Id.* at 205. Section 46.11 appears, then, to require only that the clerk attest to the results of the election of judicial nominating commissioners as determined by the counting of ballots under his or her direction. This task is ministerial in nature and does not require the exercise of discretion.

Chapter 46 clearly does not give explicit authority to the supreme court clerk to determine whether a particular nominee or newly-elected commissioner is qualified to hold that position. Furthermore, the above discussion indicates that the clerk also lacks implied authority to exercise the discretionary function of deciding whether a particular person is qualified to serve as a judicial nominating commissioner. Consequently, in answer to your first question, it is the opinion of this office that the clerk of the supreme court does not possess the statutory authority, either expressed or implied, to determine the eligibility of candidates for or of persons newly-elected to the post of judicial nominating commissioner either on his or her own motion or upon challenge by another party.

The question rightfully may be asked, then, concerning the proper procedure to be followed when it appears that a person is not qualified to be a judicial

nominating commissioner. To answer this question, one might logically turn to chapter 57, The Code 1981, which outlines general provisions for contesting elections. Section 57.1(1) provides in part as follows:

> Elections may be contested under this chapter as follows:
> a. The election of any person to any county office, to a set in either branch of the General Assembly, to a state office, to the office of senator or representative in congress, or to the office of presidential elector may be contested by any eligible person who received votes for the office in question.

It could be argued that a position on the state judicial nominating commission is a state office and that an election to this state office may, thus, be challenged according to the provisions of chapter 57.

Chapter 57, however, appears to contemplate challenges resulting from those elections which are vigorously contested in a general election forum for positions which are full-time and salaried or which require significant time commitments in order to fulfill serious sovereign responsibilities. Certainly the position of judicial nominating commissioner is a serious one and, when needed, such commissioners sacrifice significant time to meet their statutory responsibilities, but the elected commissioners receive their positions by virtue of a separate election by a limited electorate and for purposes of fulfilling a specialized, well-defined statutory function. Consequently, we are of the opinion that challenges to the election of a judicial nominating commissioner are not brought pursuant to chapter 57. Rather, where it appears that a particular elector is not qualified to be a commissioner and this elector continues to seek election and/or refuses to resign from his or her position after election, it may be necessary to seek a judicial determination of qualification pursuant to prosecution in a court of law.

Your second question is, if the clerk is to determine eligibility of a nominee or newly-elected commissioner, is a commissioner elected to a six-year term eligible for a second six-year term when that commissioner actually served only five and one-half years of the six-year term due to a delay in holding the first election? Although we have concluded that the supreme court clerk does not determine eligibility of nominees or newly-elected commissioners, we have decided to render an opinion on your second question as well. Unlike the situation where a person completes the unexpired term of a commissioner who vacates his or her office, the person in the situation posited by you was elected to a six-year term of office. The Iowa Constitution does state that commissioners shall serve six-year terms and shall be eligible for a second six-year term on the same commission. Art. V, §16. While a person filling an unexpired term of another commissioner would be eligible to serve another six-year term as an elected commissioner, O.A.G. 69-1-17, it does not appear that Article V, §16 of the Iowa Constitution would allow a person *elected* to a six-year term to serve a second six-year term when that person, due to a technical delay in holding the election, actually only served on the commission for five and one-half years. An interpretation to the contrary would negate the clear intent of the above constitutional provision.

Your third question asks whether, upon the successful challenge of an elector, the person receiving the next highest number of votes then becomes a properly elected commissioner. Chapter 46 provides no explicit recourse for determining who should then become commissioner. Section 46.9 does clearly provide, though, that "[t]he elector receiving the most votes shall be elected." An elector must be qualified. If determined through proper procedures not to be qualified, then votes received by that elector would no longer count. The qualified elector with the next highest number of votes would become the elector with the most votes and should be deemed elected by virtue of §46.9 and qualified to serve pursuant to §63.4, The Code.

At this point, we might suggest that the clerk of the supreme court notify those commissioners who have been elected, but who most likely are not eligible for the position pursuant to article five, section sixteen of the Iowa Constitution, of this opinion and ask that they resign their particular positions, to be effective at the end of their present terms. If these two commissioners do so resign, then the next two highest electors could be certified as elected. If the two commissioners do not voluntarily resign, the action in a court of law will be required.

In conclusion, we are of the opinion that the clerk of the supreme court shall not determine the eligibility of nominees or newly-elected commissioners to the State Judicial Nominating Commission either upon his or her own motion or upon challenge by another party. Furthermore, the general election contest provisions of chapter 57 do not appear to embrace challenges to the election of judicial nominating commissioners. Where an elector is believed to be unqualified for the position of judicial nominating commissioner and where that elector refuses to resign his or her position despite his or her suspected lack of qualification, it would be necessary to prosecute the issue in a court of law. We also are of the opinion that commissioners who were elected to serve six-year terms but who actually served only five and one-half years due to a technical delay in the original election are ineligible to serve another six-year term on the state judicial nominating commission. Likewise, we are of the opinion that when an elector is declared ineligible to serve on the commission, then the eligible elector who received the next highest number of votes becomes the newly-elected commissioner.

May 28, 1981

SCHOOL FINANCE; Supplemental School Income Surtax: U.S. Const. Amend. XIV, §1; Iowa Cost. Art I, §6; 1981 Session, H.F.414, §17 (to be codified in ch. 442, The Code). The supplemental school income surtax allows individual school districts to levy a limited amount of general fund revenue beyond that provided by the mandatory property tax levy contained in §§442.2 and 442.9, The Code 1981. Although variation in the taxable income of the residents of individual districts will cause variation in the rate which will produce an equal amount of revenue, the supplemental school income surtax does not violate the equal protection clause of either the U.S. or Iowa Constitutions. (Norby to Davitt, State Representative, 5/28/81) #81-5-21

The Honorable Philip A. Davitt, State Representative: We have received your request for an opinion of the attorney general concerning the constitutionality of 1981 Session, H.F. 414. Your concern relates to §17 of the Act, which provides for local school districts to levy a supplemental school income surtax. Specifically, you are concerned with whether this section is violative of the equal protection clauses of the U.S. and Iowa Constitutions. U.S. Const. Amend. XIV, §1; Iowa Const. Art. I, §6. [1]

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[1] On numerous occasions, it has been stated that the same equal protection analysis applies under the Iowa Constitution as under the federal. *Iowa Ind. Bankers v. Bd. of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir. 1975); *Becker v. Bd. of Ed. of Benton Co.*, 138 N.W.2d 909 (Iowa 1965). Accordingly, the analysis below is applicable to both clauses. It is not uncommon for state provisions to apply the same analysis as required by the federal provision. *Danson v. Casey*, 382 A.2d 1238, 1244 (Pa. Commonwealth Ct. 1978); *Olson v. State*, 276 Or. 9, 554 P.2d 139, 142 (1976); *Northshore Sch. D. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974): Contra; *Seranno v. Priest (Seranno II)* 135 Cal. Rptr. 345, 557 P.2d 929, 949, 951 (1977).

Section 17(1) of the Act describes this levy, providing as follows:

> For the budget school year beginning July 1, 1981, if the board of a school district wishes to spend more than the amount permitted under sections 442.1 through 442.13, the board may call a special election to determine whether to impose a supplemental school income surtax on individual state income tax for the calendar year beginning January 1, 1981. The supplemental school income surtax for the school district shall not exceed an amount equal to the difference between the portion of district cost of the district attributable to regular program costs for the school year beginning July 1, 1981 if the state percent of growth [2] had been nine and twenty-six thousandths percent and the portion of the actual district cost of the district attributable to regular program costs for the school year beginning July 1, 1981. Any income derived from the supplemental school income surtax is miscellaneous income.

Your concern with this section lies in the fact that, as the taxable income of the residents of different districts will vary, as does the value of taxable property, the surtax rate which must be applied to produce a certain amount of revenue will vary among districts. The problem might also be stated conversely, that is, a given tax rate will produce varying amounts of revenue in different districts.

Before turning to the constitutional analysis of §17, it should be noted that this levy is a supplement to the state aid and mandatory property tax levies which provide revenue to all Iowa districts. §§442.1, 442.2, 442.9 (all references are to The Code 1981 unless otherwise specified). Accordingly, it is important to view this section in its proper context, as a local option levy for individual districts to provide additional revenue beyond the mandatory level provided by the School Foundation Program.

In 1973, the U.S. Supreme Court decided the case of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In *Rodriguez*, the Texas system for financing public schools was challenged. The Texas system generally provided as follows: A total amount of money to be spent by all schools in the state for teacher salaries, operational expense, and transportation was established by statute, this total being designated by the Texas Minimum Foundation School Program. The state supplied 80% of this amount from general revenues. The remaining 20% of the Minimum Foundation was funded from local property taxes. The amount to be received by each district and the tax rate applicable in each district was determined by an economic index. Additionally, local Texas school districts had the ability to levy amounts beyond the Minimum Foundation Program amount. 411 U.S. at 61. The alleged defects in the Texas system involved the fact that the amount of revenue which could be produced by local districts varied widely according to assessed valuation of property in a district, and in addition, the distribution of state aid actually benefited richer districts more than poorer districts. The following comparison of two districts. Edgewood and Alamo Heights, demonstrates these points:

> The average assessed property value per pupil [in Eastwood] is $5,960 —the lowest in the metropolitan area — and the median family income ($4,686) is also the lowest. At an equalized tax rate of $1.05 per $100 of assessed property — the highest in the metropolitan area — the district contributed $26 to the education of each child for the 1967-1968 school year

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[2] *See* §442.7 for a description of the allowable growth formula.

> above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248...
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> ...The assessed property value per pupil [in Alamo Heights] exceeds $49,000, and the median family income is $8,001. In 1967-1968 the local tax rate of $.85 per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that program, the district was able to supply $558 per student.

In upholding the constitutionality of the Texas system, *Rodriguez* established the principles discussed below.

First, the court states that classifications in school financing drawn on the basis of district boundaries do not generally create suspect classifications for purposes of equal protection analysis. At 411 U.S. 22-25, the court states as follows:

> Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system — discrimination against a class of definably "poor" persons — might arguably meet the criteria [of a suspect class based on wealth discrimination] established in these prior cases. [3] Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated property level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts...
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> Second, neither appellees nor the district court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasional and absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages...
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> For these two reasons — the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education — the disadvantaged class is not susceptible of identification in traditional terms.

Secondly, *Rodriguez* establishes that there is no fundamental right to education for purposes of equal protection analysis. At 411 U.S. 35-36, the court concludes as follows:

> Education, of course, is not among the rights afforded explicit protection under our federal constitution. Nor do we find any basis for saying it is

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[3] *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400 (1971); *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

implicitly so protected. As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the state because it bears a peculiarly close relationship to other rights and liberties accorded protection under the constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of first amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "market-place of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote...

We need not dispute any of these propositions. The court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities. [4] [Emphasis in original.]

Having reached these conclusions, the *Rodriguez* majority proceeded to review the Texas system to determine whether, despite its "conceded imperfections", it had a rational relationship to a legitimate state purpose. 411 U.S. 44. In concluding that the Texas system satisfies the rational basis standard, the court primarily focuses on the fact that the system furthers a legitimate policy of local control of schools. At 411 U.S. 49-53, the court states as:

The persistance of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-

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[4] At 411 U.S. 36-37, the court states as follows:

> Even if it were conceded that some identifiable quantum of education is a constitionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.

Similarly, we must presume for purposes of this opinion that the level of education in all Iowa schools meets this minimal level. For application of equal protection analysis in a situation involving a complete denial of education, *see Doe v. Plyer*, 628 F.2d 448 (5th Cir. 1980).

making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for education excellence...

While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of "some inequality" in the manner in which the state's rationale is achieved is not alone a sufficient basis for striking down the entire system. [Citations omitted.]

...It is also well to remember that even those districts that have reduced ability [due to a relatively low total assessed value of taxable property] to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools. The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the state, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.

In addition, having concluded that an impact on education does not trigger review under the standard of strict scrutiny, the court expresses concern that requiring equality of expenditures for education would have an extremely broad potential for upsetting financing of other services provided by local governments. At 411 U.S. 54, the court states as follows:

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

These principles established in *Rodriguez* have essentially rendered futile challenges based on federal equal protection. *Serano v. Priest (Serano II)*, 135 Cal. Rptr. 345, 557 P.2d 929, 949 (1977); *Olson v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Northshore Sch. D. No. 417 v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974); *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973).

In light of *Rodriguez*, equal protection challenges have shown an attempt to incorporate state constitutional guarantees of education into a state equal protection analysis in an effort to establish a fundamental right to education. *Weskill v. Horton*, 332 A.2d 113, 119 (Conn. 1977); *Thompson*, 573 P.2d 646-647; *Robinson*, 303 A.2d 282. [5] As the Iowa Constitution contains no provision guaranteeing

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[5] *Compare Serano II*, 55 P.2d at 950-952 (the court adopts state definitions of a suspect class and fundamental interest consistent with *Serano I*, 487 P.2d at 1250, 1255, and proceeds to find the system violative of the California equal

education, this avenue is not available in Iowa equal protection analysis. *See* Lindquist, *Developments in Educational Litigation: Equal Protection*, 5 Journal of Law and Education, 7 fn. 27 (1976). Iowa Const., Art. IX, 2d, §7 does not affect the issues herein as its application is limited to the permanent school fund, Iowa Const., Art. IX, 2d., §3, and has no application to state appropriations or locally generated funds. *See Kleen v. Porter*, 237 Iowa 1160, 23 N.W.2d 904 (1946).

Turning to H.F. 414, §17, we have little difficulty in finding that this section rationally serves the legitimate state purpose of allowing local control of schools. Indeed, we believe that, when placed in the context of the entire Iowa financing system, H.F. 414, §17 allows this local ability to increase local spending without creating the great degree of disparity found in other state systems which have been upheld. For example, the levy authorized in §17 is limited to a rather modest amount. [6] Secondly, in contrast to several other systems which reward increased local tax efforts with increased state aid, §17 cannot be used as a vehicle for a wealthy district to obtain greater state aid. [7] For example, under the Texas system upheld in *Rodriguez*, a wealthy district actually received more state aid than a poorer district. 411 U.S. 12-13.

In summary, we find that H.F. 414, §17 does not violate the equal protection clause of either the U.S. or Iowa Constitutions. In fact, this section appears to allow only a relatively narrow exercise of the well established ability of states to allow local districts to exercise local control by raising additional revenue.

(Footnote Cont'd)

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protection provisions. As the California Constitutional clause on provision of education was held to not be violated by the California system of finance, *Serano v. Priest (Serano I)*, 487 P.2d 1241, 1248 (Cal. 1971), California appears to be the only state to find a school finance system to violate equal protection without incorporating an express constitutional education guarantee in the analysis.

6 The limitations placed on local option levies in H.F. 414, §7, and §442.14 (not to exceed ten percent of state cost per pupil) would prevent the wide interdistrict disparities found in other states. *See Rodriguez*, 411 U.S. 12-13 (a state and local total of $248 per pupil in *Edgewood*, $558 per pupil in *Alamo Heights*); *Serano I*, 487 P.2d 1247, 1248 (Baldwin Park [California], school district, $577.49 per pupil, Beverly Hills School District, $1,231.72 per pupil); *Northshore*, 530 P.2d 185 ($4,517 per pupil highest, $470 per pupil lowest); *Serano II*, 55 P.2d 953 (where the continued ability for local districts to vote overrides of tax limitations, pursuant to legislation enacted after *Serano I*, is stressed as one defect leading the court to conclude that the new system continues to violate the California equal protection clause, although not in violation of the U.S. equal protection clause.)

7 See *Serano I*, 487 P.2d 1248 (a flat grant to districts of state aid regardless of wealth widens disparity in expenditures per pupil); *Horton v. Weskill*, 31 Conn. Supp. 337, 332 A.2d 813 (Sup.Ct. 1974) (state aid in uniform grant per pupil with no equalization aid.)

JUNE 1981

June 3, 1981

JUVENILE LAW: Chapter 232, §§232.2(10), 232.2(18), 232.11, The Code 1981. Foster parents may not execute a written waiver of the right to counsel for a foster child, absent appointment as guardian or custodian. (Hege to Fisher, County Attorney, 6/3/81) #81-6-1(L)

June 3, 1981

PUBLIC RECORDS: Chapter 68A, The Code 1981. Motor vehicle titles and registration information maintained by a county treasurer are "public records." Such records are available for public inspection. Voluntary associations, such as labor unions, are entitled to inspect public records with rights equivalent to those of their individual members. Reasonable fees may be assessed for the expense of copying public records. The uses to which information may be put does not justify a denial of a citizen's right to inspect public documents. (Fortney to Mahaffey, Poweshiek County Attorney, 6/3/81) #81-6-2(L)

June 9, 1981

EVIDENCE, JUDICIAL NOTICE, MUNICIPAL ORDINANCES: Section 622.62, The Code 1981. The "properly pleaded" requirement is satisfied when the pleading asserting the municipal ordinance refers to the ordinance by the designation appearing in the appropriate city code or city code supplement. (Cleland to McKean, State Representative, 6/9/81) #81-6-3(L)

June 10, 1981

SOCIAL SERVICES; JUVENILE LAW: Exceeding "client capacity" of county juvenile detention home: ch. 232, §§232.142(1), (2), (3), (4), (5), 232.22, 232.(12), 232.133, The Code 1981; 770 IAC 105.1, *et. seq.* Section 232.142, The Code 1981, mandates the commissioner of social services to promulgate rules regarding the establishment, maintenance and operation of county or multicounty juvenile detention or shelter care homes. Pursuant to that authority the commissioner has promulgated 770 IAC 105.1, *et. seq.*, which include a limitation on "client capacity" for such facilities. These rules are substantive or legislative rules, having the force and effect of law. No waiver or exemption therefrom is allowed. The violation of the rules would expose the facility, its administrators and the county to possible sanctions. A court requiring detention in violation of the rules would be illegal and appealable. (Hege to Kopecky, Linn County Attorney, 6/10/81) #81-6-4

Mr. Eugene J. Kopecky, County Attorney: You have requested an opinion of this office relative to overcrowding in juvenile detention facilities. Specifically, you propounded the following questions:

1. Is there any circumstance under the existing administrative rules and statutes which would allow a juvenile detention facility to exceed its capacity?

2. Would a county and/or the administrators of a juvenile detention facility be subject to sanctions for allowing their facility to exceed its capacity?

3. When compliance with court orders requiring juvenile to be held in detention will cause violation of the established capacity for the facility, which takes precedence?

QUESTION ONE:

As pointed out in your request, Iowa Administrative Code, 770—105.1, *et. seq.*, are the rules promulgated by the Department of Social Services for the approval, operation and maintenance of county and multicounty juvenile detention and shelter care facilities. The authority for that promulgation is found in §232.142(5), (6), The Code 1981.

IAC 770—105.6 sets out the rules relating to intake procedures. Chapter 105.6(1) answers your initial question in the negative:

> 105.6(1) Admissions. Admission to shelter care or detention shall be in accordance with sections 232.20, 232.21 and 232.22, The Code. In no case shall a youth be admitted to detention or shelter care when the resulting admission would exceed the facility's approved client capacity.

Upon review of all other sections of ch. 105, there is no provision made for exceptions or waiver of the approved client capacity set out above. Therefore, the answer to your first question is no.

QUESTION TWO:

Your second inquiry relates to the potential sanctions applicable to the county or administrators when a child is placed in a juvenile detention facility in violation of the administrative rules.

County sponsored juvenile detention and shelter care facilities are generally controlled by §232.142, The Code 1981. Counties are given the authority to provide and maintain juvenile detention facilities either singly or in concert with other counties (regional juvenile detention facility) which power is exercised through the county board of supervisors. Section 232.142(1), The Code 1981. A taxing power is provided to the board of supervisors for the provision and maintenance of the juvenile detention facility. Section 232.142(2), The Code 1981. A programmatic educational service for the facility must be provided by the area educational agency upon request of the board of supervisors. Section 232.142(3), The Code 1981.

Other provisions place authority or responsibility for juvenile detention facilities in the Department of Social Services. Specifically, those responsibilities are set out as follows:

> 4. Approved county or multicounty juvenile homes shall be entitled to receive financial aid from the state in the amount and in such manner as determined by the commissioner. Aid paid by the state shall not exceed fifty

percent of the total cost of the establishment, improvements, operation, and maintenance of such a home.

County or multicounty juvenile homes established; 68th G.A., ch. 8, §17(3).

5. The commissioner shall adopt minimal rules and standards for the establishment, maintenance, and operation of such homes as shall be necessary to effect the purposes of this chapter. The commissioner shall, upon request, give guidance and consultation in the establishment and administration of such homes and programs for such homes.

6. The commissioner shall approve annually all such homes established and maintained under the provisions of this chapter. No such home shall be approved unless it complies with minimal rules and standards adopted by the commissioner. [S13, §254-a20, -a26, -a29, -a30; C24, 27, 31, 35, 39, §§3653-3655; C46, 50, 54, 58, 62, §§232.35-232.37; C66, 71, 73, 75, 77, §§232.21-232.26; C79 §232.142]

Section 232.142(4), (5), (6), The Code 1981.

Subsection 5 imposes upon the commissioner of social services the duty to promulgate rules for the establishment, maintenance and operation of juvenile detention facilities. From that duty flow the rules promulgated in the Iowa Administrative Code, 770, ch. 105.1, *et. seq.* Subsection 6 further mandates that the commissioner annually approve all juvenile detention facilities established and maintained per ch. 232. The commissioner shall not approve the facility unless compliance with IAC 700—105.1, *et. seq.*, is shown. Finally, in return for approval of the facility, the county may be entitled to financial assistance from the state for the provision and maintenance of the juvenile detention facility. Section 232.142(4), The Code 1981. That aid is limited to fifty percent of the cost of the establishment, improvements, operation and maintenance of the juvenile detention facility. Section 232.142(4), The Code 1981.

Two sanctions directed to the county and its juvenile detention home administrators appear from the statute and rules promulgated by its authority. IAC 770—105.21(232) provides for the loss or denial of approval.

770—105.21(232) Approval. The department will issue a certificate of approval annually without cost to any juvenile detention homes or juvenile shelter care home which meets the standards. The department may offer consultation to assist homes in meeting the standards.

105.21(1) Applications. An application shall be submitted on forms provided by the department. It shall be signed by the operator of the home and shall indicate the type of home for which the application is made.

a. The withdrawal of an application shall be reported promptly to the department.

b. Each application will be evaluated by the department to ensure that all standards are met.

c. Reports and information shall be furnished to the department as requested.

105.21(2) Rejection.

a. Application will be rejected when the minimum standards set forth in the rules in this chapter are not met.

b. Fraudulent applications will be rejected. A fraudulent application is one which contains false statements knowingly made by the applicant or one in which the applicant knowingly conceals information.

c. Applications will be rejected when the applicant has been convicted of a crime indicating an inability to operate a children's facility or care for children.

d. Applications will be rejected for just cause.

105.21(3) Approval. Approvals will be given for one year.

105.21(4) Notification. Homes will be notified of approval or rejection within one hundred twenty days of application.

105.21(5) Renewals.

a. Applications for renewal shall be made on forms provided by the department and shall be made at least thirty days, but no more than ninety days prior to expiration of the approval.

b. Each application for renewal will be evaluated by the department to ensure that standards continue to be met.

c. The application for renewal will be rejected or approved in the same manner as an application.

d. Decisions or renewals shall be made within sixty days from the application for renewal.

105.21(6) Revocations.

a. Approval shall be revoked by the state director for the following reasons:

(1) When the facility violates laws governing the provision of services or rules contained in this chapter.

(2) When the facility is misusing funds furnished by the department.

(3) When the facility is operating without due regard to the health, sanitation, hygiene, comfort, or well-being of the children in the facility.

(4) When the director has been convicted of a crime indicating an inability to operate a children's facility or care for children.

b. The following may be causes for revocation:

(1) Substantiated child abuse.

(2) When the facility staff has been convicted of a crime indicating an inability to operate a children's facility or care for children.

105.21(7) Certificate of approval. Upon approval, the home will be issued a certificate of approval containing the name of the home, address, capacity, and the date of expiration. Renewals will be shown by a seal bearing the new date of expiration, unless a change requires a new certificate to be issued.

IAC 770—105.21(2)(a) specifically rejects approval of the facility when the minimum standards of the rules are not met. "Approved client capacity" is one of the minimum standards delineated by ch. 105. IAC 770—105.6(1); 105.10(2)(h); 105.10(3)(a); 105.11.

As a result of the loss or denial of approval, a second sanction is available. Section 232.142(4) allows for financial assistance only to "approved county or multicounty juvenile homes". Therefore, the loss or denial of Department of Social Service approval will result in a loss of financial assistance to the county. [1]

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[1] The financial assistance provided by the state is limited. From July 1, 1979 through June 30, 1981, the amount is one-half of one percent of the total cost of the establishment, improvements, operation and maintenance of approved county or multicounty juvenile homes. 1979 Session, 68th G.A., ch. 8, §17(3). That amount was reenacted by the 69th General Assembly. 1981 Session, 69th G.A., S.F. 566, §3(10)(c).

A third potential sanction for overcrowding of a juvenile detention facility, independent of the statute and administrative rules, would be litigation initiated on behalf of an incarcerated juvenile. These actions are most commonly brought as civil rights actions, grounded under §1983, for violation of the child's Eighth Amendment right to be free from cruel and unusual punishment. *Ahrens v. Thomas*, 434 F.Supp. 873 (W.D. Mo. 1977), aff'd. in part, rev'd. in part, 570 F.2d 286 (8th Cir. 1978); *Thomas v. Mears*, 474 F.Supp. 908 (E.D. Ark. 1979); *Cole v. Scott County, Iowa*, Civ. No. 78-8-D, (S.D. Ia., filed January 24, 1978); *Daratsakis v. Smith*, No. 76 Civ. 3218 (IBW) (S.D. N.Y., filed July 30, 1976); *F.E.V. Hensley*, No. 73 CV 43-W-1 (W.D. Mo., filed December 15, 1978); *Inmates of Judge John F. Connelly Youth Center v. Dukakis*, No. 75-17866, (D. Mass., filed April 1976); *Manney v. Cabell, No. 75-3305-R Civ. (C.D. Cal., filed April 1979). Such actions generally seek declaratory and injunctive relief, with money damages available against both individuals and governmental subdivisions under certain circumstances. See generally, Piersma, Gandusis, Volenik, Swanger and Connell, Law and Tactics in Juvenile Cases*, ch 26, 27, (3rd Ed. 1977).

Therefore, the answer to your second question would be in the affirmative. The county and/or its administrators may lose their facility approval and subsequently, any state financial assistance. Additionally, the overcrowding of the facility may expose the county and administration to litigation for failure to meet minimal constitutional standards under the Eighth Amendment to the United States Constitution.

QUESTION THREE:

Your final question may not be susceptible to the legal clarity which you request. The possible confusion results from application of both statutes and rules and a determination of the legislative intent in delegating a rule-making power for promulgation of rules on the establishment and maintenance of county juvenile detention facilities.

Initially, it is of note, that the juvenile justice chapter allows the detention of juveniles in certain selected facilities:

> 2. A child may be placed in detention as provided in this section only in one of the following facilities:
> a. A juvenile detention home.

Section 232.22(2)(a), The Code 1981.

Neither this section nor the definition of detention, §232.2(13), The Code 1981, state that the placement is restricted to a detention facility which is "approved" as set out in §232.142. This argument would appear to allow the "operation" of the juvenile detention facility in spite of its absence of "approval" and failure to qualify for state financial assistance under §232.142(4).

Close scrutiny of §§232.142(5) and (6), however, appears to militate against the limited construction that the department "approval" relates solely to the granting of state financial assistance. To reiterate, subsection six provides:

> The commissioner shall approve annually *all such homes established and maintained under the provisions of this chapter.* No such home shall be approved unless it complies with minimum rules and standards adopted by the commissioner. [Emphasis added.]

The crux of the issue becomes whether the legislature, by virtue of 232.142(5) and (6), intended to delegate to the department the power to pomulgate substan-

tive rules or merely interpretive rules relating to juvenile detention and shelter care homes. The distinction is explained:

> The key distinction, with regard to types of rules, is that between substantive and interpretative rules. Under the federal APA, both substantive and interpretative rules must be published; but the rule-making procedures prescribed by the APA do not apply to interpretative rules. A substantive rule is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency ambit. Substantive rules are issued pursuant to statutory authority and implement the statute, they create law just as the statute itself does, by changing existing rights and obligations. An interpretative rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them. Interpretative rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers. (Footnotes omitted.)

Swartz, *Administrative Law*, ch. 4, §58, 153-154 (1976).

> An interpretative rule is a rule issued by an agency in the absence of a legislative authorization to issue such rules with the binding force of law. The power to issue rules of this type is usually derived from other tasks assigned to an agency — such as law enforcement. "Interpretative rules may interpret (1) a statute, (2) a legislative rule, (3) another interpretative rule, (4) judicial decision, (5) administrative decisions, (6) administrative rulings, (7) any other law or interpretation...." The key point, however, is that interpretative rules do not emanate from a power expressly or implicitly conferred on the agency by the legislature to make rules which must be treated as binding law. On the other hand, "[a] legislative rule is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body." The clear example is a rule issued pursuant to a statute specifically empowering an agency to issue a rule which "shall have the force of law." Such a legislative rule may also, however, rest on an implied or an unclear grant of legislative power to make rules with the force of law. The consequence of this difference between interpretative rules and legislative rules is substantial.
>
> In the case of an interpretative rule, the inquiry is not into validity but is into correctness or propriety. The legislative body has not delegated power to make a rule which will be binding upon the court if it is valid. The statute does not prevent the reviewing court from substituting its judgment on questions of desirability or wisdom. The law is embodied in the statute, and the court is free to interpret the statute as it sees fit.
>
> In reviewing a legislative rule a court is free to make three inquiries: (1) whether the rule is within the delegated authority, (2) whether it is reasonable [to see if it is a violation of due process], and (3) whether it was issued pursuant to proper procedure. But the court is not free to substitute its judgment as to the desirability or wisdom of the rule, for the legislative body, by its delegation to the agency, has committed those questions to administrative judgment and not to judicial judgment. (Footnotes omitted.)

Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access Agency Law, The Rulemaking Process*, 60 Iowa L.R. 731, 858 (1975).

The rules to which you refer were expressly authorized by the legislature "for the establishment, maintenance, and operation of such homes." Section 232.142(5),

The Code 1981. They appear to change existing rights and obligations. They do not appear to merely clarify or explain existing law. In short, they are substantive or legislative rules.

The Iowa Supreme Court has clearly held with the above authorities in finding an administrative rule has the force and effect of law. *Davenport Comm. School Dist. v. Iowa Civil Rights Comm.*, 277 N.W.2d 907, 909 (Iowa 1979); *Young Plumbing and Heating Co. v. Iowa Natural Resources Council*, 276 N.W.2d 377, 382 (1979); *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610, 615 (Iowa 1976).

It follows from the above analysis, that any court considering a proposed detention must consider the rules as it would other law. For instance, a court could not disregard the plain prohibition of §232.22(d), The Code 1981, and place a child alleged to be a CHINA in detention. Therefore, it is the conclusion of this office that an order of detention which contravenes 770 IAC 105, relating to client capacity, is in violation of law and is appealable pursuant to §232.133, The Code 1981.

As a practical matter, in the unusual event that an order is entered that would be in violation of client capacity requirements, this fact should be communicated to the juvenile judge for correction. The facility administrator would be well advised not to disregard the order, but communicate to the judge, or communicate through the county attorney to the judge, of the surpassing of the client capacity of the facility. Alternatives to assure compliance may be to remove a juvenile previously detained or to modify the order of detention resulting in exceeding the client capacity.

In summary, the departmental rules found in 770 IAC 105.1 *et. seq.*, are substantive rules having the force and effect of law. They provide no exception or waiver to the standards relating to client capacity. A county and/or the administrators would be subject to sanctions for violation of the rules relating to client capacity. Finally, an order of detention failing to consider and follow the administrative rules on client capacity would be in violation of law and appealable as such.

June 12, 1981

JUVENILE LAW: Requirements of §232.54 relating to the termination, modification or vacation and substitution of dispositional orders and parole revocation of juveniles. §§232.54, 232.103, 232.153, The Code 1981; §232.54(2), The Code 1979; 1979 Session, 68th G.A., ch. 56, §31; ch. 242, The Code 1975; 770 IAC, 141(232). Section 232.54 requires court authority and a written order to terminate, modify or vacate and substitute for any original disposition under 232.52. Notice and opportunity for evidentiary hearing are required. Under provisions of 232.54(1), (2), (3), the hearing is waivable if not requested by any party or upon the court's own motion. Under provisions of 232.54(4), (5), the hearing requirement may not be waived. Similarly, §232.54 will require court authority and a written order to revoke the parole placement of a juvenile for return to the more restrictive setting of the Eldora or Mitchellville Training Schools. All dispositional orders currently in effect, regardless of adjudication date, must be terminated, modified or vacated and substituted only pursuant to §232.54. There is no distinction between "old code" and "new code" juveniles. Chapter 232 has provided a court procedure for revocation of parole and the administrative procedure act, contested case hearing has been supplanted by this enactment. (Hege to Reagen, Commissioner, Iowa Department of Social Services 6/12/81) #81-6-5

Dr. Michael V. Reagen, Commissioner, Iowa Department of Social Services: You have requested an opinion of the attorney general relating to the parole and parole revocation requirements under the present juvenile justice act. Specifically, you inquire:

> 1. Is a modification of the order required when a juvenile is placed back in the community on parole according to §232.54(4), The Code 1981?
>
> 2. Is a revocation hearing required to return a child to the institution or can the child sign a waiver — §232.54(5), The Code 1981?

A brief history of juvenile parole and parole revocation proceedings may be of assistance.

Prior to 1976, a juvenile had no statutory or constitutional right to a hearing prior to revocation of parole from the Eldora or Mitchellville Training Schools.

However, under ch. 242, The Code 1975, the director of the Division of Children and Family Services was authorized to parole juvenile residents. *Airhart v. Iowa Department of Social Services*, 248 N.W.2d 83 (Iowa 1976). The department, at that time, had promulgated, by employee's manual rules, not pursuant to chapter 17A, Administrative Procedures Act, a procedure for revocation of paroles. *Id.* at 84.

With the decision in *Airhart*, the Iowa Supreme Court determined that juvenile parole revocations were contested cases under the APA, ch. 17 of the Code, and reversed a revocation of parole under the former procedure. Of major importance to the court's holding was whether a juvenile is constitutionally entitled to a parole revocation hearing. The court held:

> [3] The only question which arises under this definition is whether the constitution or a statute requires an opportunity for an evidentiary hearing in a juvenile parole revocation proceeding. Were this an adult parole revocation proceeding, no question would exist; opportunity for an evidentiary hearing is mandatory. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. In view of the manifest concern of the United States Supreme Court for the interests of youth, we have no doubt that juveniles possess a similar constitutional right. Cf. *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84; In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527; in re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368; Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725.

Airhart, at 86.

In light of that decision, the department promulgated rules pursuant to the APA, ch. 17A, for revocation of parole. 770 IAC 141 (232).

Subsequently, the legislature passed the new juvenile justice act, ch. 232, The Code 1979. It included provisions for the termination, modification, or vacation and substitution of dispositional orders. Section 232.54, The Code 1979. Of particular importance to your inquiry was unnumbered paragraph two (2) of §232.54(2), The Code 1979, which provided:

> Notwithstanding the dispositional order, an agency, facility, or institution to whom custody has been granted under section 232.52, subsection 2, paragraphs "d" or "e" may terminate the order and discharge the child, modify the order by imposing less restrictive conditions, or vacate the order and substitute a less restrictive order without leave of court.

This provision allowed the department to modify an original disposition to the training schools or in which legal custody had been transferred without return to the court for approval, if the new placement was less restrictive.

Two legislative enactments have amended the result of §232.54(2), The Code 1979. First, §232.54(2), unnumbered paragraph two, The Code 1979, was repealed. 1979 Session, 68th G.A., ch. 56, §31. The second enactment provided for the applicability of the new juvenile justice act in a retrospective manner. 1979 Session, 68th G.A., ch. 56, §31.

These two enactments are now codified as §§232.54 and 232.153, The Code 1981. As presently applicable, they are as follows:

232.54 Termination, modification or vacation and substitution of dispositional order. At any time prior to its expiration, a dispositional order may be terminated, modified, or vacated and another dispositional order substituted therefor only in accordance with the following provisions:

1. With respect to a dispositional order made pursuant to section 232.52, subsection 2, paragraph "a", "b" or "c" and upon the motion of a child, a child's parent or guardian, a child's guardian ad litem, a person supervising the child under a dispositional order, a county attorney, or upon its own motion, the court may terminate the order and discharge the child, modify the order, or vacate the order and substitute another order pursuant to the provisions of section 232.52. Notice shall be afforded all parties, and a hearing shall be held at the request of any party.

2. With respect to a dispositional order made pursuant to section 232.52, subsection 2, paragraphs "d" and e", the court shall grant a motion of the person to whom custody has been transferred for termination of the order and discharge of the child, for modification of the order by imposition of less restrictive order unless there is clear and convincing evidence that there has not been a change of circumstance sufficient to grant the motion. Notice shall be held at the request of any party or upon the court's own motion.

3. With respect to a dispositional order made pursuant to section 232.52, subsection 2, paragraphs "d" or "e" or "f", the court shall grant a motion of a person or agency to whom custody has been transferred for modification of the order by transfer to an equally restrictive placement, unless there is clear and convincing evidence that there has not been a change of circumstance sufficient to grant the motion. Notice shall be afforded all parties, and a hearing shall be held at the request of any party or upon the court's own motion.

4. With respect to a dispositional order made pursuant to section 232.52, subsection 2, paragraphs "d", "e" or "f", the court may, after notice and hearing, either grant or deny a motion of the child, the child's parent or guardian, or the child's guardian ad litem, to terminate the order and discharge the child, to modify the order either by imposing less restrictive conditions or by transfer to an equally or less restrictive placement, or to vacate the order and substitute a less restrictive order. A motion may be made pursuant to this paragraph no more than once every six months.

5. With respect to a dispositional order made pursuant to section 232.52, subsection 2, paragraphs "d" and "e", the court may, after notice and a hearing at which there is presented clear and convincing evidence to support such an action, either grant or deny a motion by a county attorney or by a person or agency to whom custody has been transferred, to modify an order by imposing more restrictive conditions or to vacate the order and substitute a more restrictive order.

Notice requirements of this section shall be satisfied in the same manner as for adjudicatory hearings as provided in section 232.37. At a hearing under this section all relevant and material evidence shall be admitted. [C79, §232.54; 68 G.A., ch. 56, §§10-13]

232.153 Applicability of this chapter prior to its effective date.

1. Except as provided in subsection 2 and 3 of this section, this chapter does not apply to juvenile court cases brought prior to July 1, 1979 or to acts committed prior to July 1, 1979 which would otherwise bring a child or his or her parent, guardian or custodian within the jurisdiction of the juvenile court pursuant to this chapter...

... 3. Provisions of this chapter governing the termination, modification or vacation of a dispositional order shall apply to persons to whom a dispositional order has been issued for acts committed prior to July 1, 1979, except that the maximum length of the order and the severity of the disposition shall not be increased. The provisions of this chapter shall not affect the substantive or procedural validity of a judgment entered before July 1, 1979, regardless of the facts that appeal time has not run or that an appeal is pending. [68th G.A., ch. 56, §31]

Your initial question appears to be answered by §232.54 when it states:

> At any time prior to its expiration, a dispositional order may be terminated, modified or vacated and another dispositional order substituted therefor only in accordance with the following provisions:

Section 232.54, The Code 1981. This provision, in conjunction with the repeal of the second unnumbered paragraph of §232.54(2), The Code 1979, requires an order of modification whenever a disposition imposed under §52 is changed. Specific to your question, subsection (4) contains no allowance for deviation from the general provision requiring court authority for termination, modification or vacation and substitution of a dispositional order. Therefore, the answer to your initial question is in the affirmative.

Your second question relates to modification of a disposition which has placed a juvenile on parole from a training school. As stated above, the *Airhart* decision held that a juvenile has a constitutional right to an evidentiary hearing incident to parole revocation. Generally, even constitutional rights are capable of waiver. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Therefore, one must look to the specific statute to determine whether an individual right is waiverable under state law.

Section 232.54 contemplates five different situations in which a dispositional order foreseeably could be amended. Section 232.54(1), (2), (3), (4), (5), The Code 1981. Subsections (1), (2) and (3) contain the following language:

> 1.... Notice shall be afforded all parties, and a hearing shall be held at the request of any party.
>
> 2.... Notice shall be afforded all parties, and a hearing shall be held at the request of any party or upon the court's own motion.
>
> 3.... Notice shall be afforded all parties, and a hearing shall be held at the request of any party or upon the court's own motion.

Section 232.54(1), (2), (3), The Code 1981. These three provisions, when applicable, mandate a hearing only "at the request of any party", subsection (1), or "upon the court's own motion", subsections (2), (3). Therefore, unless a party or the court request a hearing, it will be deemed waived from the plain language of these three subsections.

Subsections (4) and (5), by implication, present a different result:

> 4.... the court may, after notice and hearing, either grant or deny a motion...

> 5.... the court may, after notice and a hearing at which there is presented clear and convincing evidence to support such an action, either grant or deny a motion...

Section 232.54(4), (5), The Code 1981. Neither of these provisions appear to allow a waiver of the hearing requirement. If the legislature intended a waiverable hearing under these subsections, the plain language of the statute could have so provided.

The answer to your second question is that a hearing is mandated under §§232.54(4) and (5), The Code 1981, and it is not waiverable. On the other hand, the hearing under §§232.54(1), (2) and (3), The Code 1981, is available upon request of a party but is waived if not requested.

Two other comments are in order after review of the department rules regarding parole revocation hearings. 770 IAC 141. First, the administrative procedure for parole revocation has been supplanted by §232.54 requiring court authority to terminate, modify or vacate and substitute another dispositional order. Secondly, the rules distinguish between dispositions entered prior to July 1, 1979 and those entered after that date. 770 IAC 141.3(232). Section 232.153(3), The Code 1981, provides:

> Provisions of this chapter governing the termination, modification or vacation of a dispositional order shall apply to persons to whom a dispositional order has been issued for acts committed prior to July 1, 1979, except that the maximum length of the order and the severity of the disposition shall not be increased.

Therefore, the modification of dispositional orders provisions found in §§232.54 and 232.103 apply to dispositions entered upon the "old code" and "new code" alike.

In summary, the answer to your first question is yes, a hearing is required under §232.54(4), The Code 1981, whenever a modification of a dispositional order is contemplated which will return a delinquent child from a training school back to the community on parole. Secondly, a parole revocation hearing is required by §232.54(5) and that section does not allow for a waiver of the requirement.

June 15, 1981

COUNTIES; SECONDARY ROADS: Chapters 17A and 306, §§306.3, 306.4, 306.10 and 306.19, The Code 1981. A county has authority to control and restrict access to the secondary roads within its jurisdiction. It is not necessary for the board of supervisors to adopt written criteria for approval or denial of road access. (Fortney to Criswell, Warren County Attorney, 6/15/81) #81-6-6(L)

June 16, 1981

COUNTIES AND COUNTY OFFICERS: County Compensation Commission. Chapters 340A and 509A, §§340A.1, 340A.6 and 340A.8, The Code 1981. When a county governing body provides group insurance and similar fringe benefits to county officers, such benefits need not be included in the determination of compensation pursuant to chapter 340A. (Fortney to Bordwell, Washington County Attorney, 6/16/81) #81-6-7

Richard S. Bordwell, Washington County Attorney, Courthouse: You have requested an opinion of the attorney general regarding the role of the county compensation board established by §340A.1, The Code 1981. You inquire whether a county board of supervisors may provide group insurance for county officers, as permitted by chapter 509A, when the recommendation received from the compensation board did not include any reference to insurance. We are of the opinion that when a county governing body provides group insurance and similar fringe benefits to county officers such benefits need not be included in the determination of compensation pursuant to chapter 340A.

Chapter 340A sets up a mechanism by which the compensation of county officers is determined. The chapter establishes a local commission which makes recommendations to the board of supervisors regarding county officers' compensation. After reviewing the recommendations, the supervisors determine the final compensation schedule, which may not exceed the recommendations. The supervisors may reduce the recommended compensations. In an earlier opinion, 1978 Op.Att'y.Gen. 111, we held that the supervisors can only accept the recommendations or reduce them across the board. They may not increase the recommendations.

The problem presented by chapter 340A is that it fails to expressly provide a definition of "compensation". We believe, however, that an examination of two clauses reveals that "compensation", as contemplated in chapter 340A, encompasses salary or wages. It is not so broad as to include various other benefits which may be provided by a county, such as insurance. The two relevant clauses are found in §§340A.6 and 340A.8. In pertinent part, they provide:

* * *

> In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the annual salary or compensation of each elected county officer shall be reduced an equal percentage.

* * *

Section 340A.6, The Code 1981.

> Effective July 1, 1975, the annual salary or per diem compensation of the members of the board of supervisors, county treasurer, county auditor, county recorder, county attorney, sheriff, and clerk of the district court as such salary or per diem exists June 30, 1975 may be increased by resolution of the board of supervisors, according to the following schedule which shall remain effective until modified by the county compensation board as provided in this chapter.

* * *

Section 340A.8, The Code 1981.

We believe that §§340A.6 and 340A.8, taken together, evidence an intent on the part of the General Assembly to give the county compensation board jurisdiction over salary and wages, not fringe benefits. Section 340A.6 permits the board of supervisors to reduce the commission's recommendations. If a reduction occurs, it is directed to the proposed "annual salary or compensation." The utilization of the term "compensation" as an alternative or an adjunct to the term "salary" is

explainable by reference to §340A.8, authorizing interim increases in officers' compensation. This section recognizes that not all county officials receive compensation in the form of salary. Some are compensated on a per diem basis. The term compensation is thus used generically as a term which encompasses remuneration in the form of salary or per diem.

We note that other sources define "compensation" as "remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument." *Black's Law Dictionary* (Rev. 4th Ed. 1968, p. 354).

Because of the foregoing analysis, we are compelled to conclude that fringe benefits, such as group insurance, are not "compensation" as that term is utilized in chapter 340A. As a result, a board of supervisors is not limited to the compensation commission's recommendations, or lack thereof, with regard to such benefits. If the board deems it advisable to provide benefits, such as group insurance, for county officers, it may do so without a chapter 340A recommendation.

June 16, 1981

TAXATION: Special Assessments for Public Improvements Against Property Used and Assessed as Agricultural Property — Deferral of Installment Payments, §384.62(4), The Code 1981. Section 384.62(4) requires that the owner of property subject to a special assessment file a deferral statement six months prior to the date that the assessment installment is due. (Kuehn to Danielson, Assistant Cerro Gordo County Attorney, 6/16/81) #81-6-8(L)

June 16, 1981

LAW ENFORCEMENT, POLICEMEN AND FIREMEN, SHERIFF: Reserve peace officers — §§4.1(18), 80D.1, 80D.8, 80D.9, 337.1, The Code 1981. The requirement that reserve peace officers serve as peace officers only "under the direction of regular peace officers" means that the supervisory regular officers must have knowing control of the subordinate reserve officers. "Under the direction of regular peace officers" does not require that reserve officers be physically accompanied by regular officers at all times. Knowing control of reserve officers by regular officers may be exercised through radio contact. (Richard to Rush, State Senator and Hall, State Representative, 6/16/81) #81-6-9

The Honorable Bob Rush, State Senator; The Honorable Hurley Hall, State Representative, Statehouse: You have requested an opinion of the attorney general regarding section 80D.9, The Code 1981. That section provides in pertinent part:

> Reserve peace officers shall be subordinate to regular peace officers, [and] shall not serve as peace officers *unless under the direction of regular peace officers*.... [Emphasis added.]

With respect thereto, you have raised the following specific questions:

> 1. Does the phrase 'under the direction of regular peace officers' mean that the reserve peace officer must literally be accompanied by a regular peace officer at all times when serving as a peace officer for the purpose of section 80D.9?

2. Would maintenance of radio contact between regular and reserve peace officers constitute 'under the direction of regular peace officers' for purpose of section 80D.9?

We will answer your questions in the order presented.

Chapter 80D is a recent addition to the laws of Iowa. Enacted by the 1980 Session of the 68th General Assembly, it constitutes a formalization of the traditional practice of employing persons as adjunct law enforcement officers. This practice has been detailed in several prior opinions of this office. *See* 1972 Op.Att'y.Gen. 605; 1978 Op.Att'y.Gen. 822; 1978 Op.Att'y.Gen. 836. In 1978 Op.Att'y.Gen. 836, we opined that a county sheriff's authority to appoint irregular, special deputies and form posses was derived from section 4.1(18) and 337.1 of The Code. We also identified the duties and powers of such special deputies to include "keeping the peace, preventing crime, arresting persons liable thereto, and executing process of law." This view is in accord now with section 80D.1, The Code 1981, which states in part: "A reserve peace officer... has regular police powers while functioning as an agency's representative and participates on a regular basis in the agency's activities including those of crime prevention and control, preservation of the peace and enforcement of the law."

Reserve peace officers are not, however, given a free hand in the exercise of these powers. They are mere subordinates who "act only in a supplementary capacity to the regular force." Section 80D.8, The Code 1981. And under the section here in question they may function only "under the direction of regular peace officers." The scope of this direction has been discussed in a prior letter opinion of this office in which the following was stated:

> The language in section nine... should not be construed to limit reserve peace officer activities to situations when they are under the direct supervision of a regular officer.
>
> When construing a statute, the intent of the legislature should be the primary consideration. *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822, 825 (Iowa 1975). The clear intent of the General Assembly is that reserve peace forces be an option existing for law enforcement agencies to assist them in the performance of their duties. Requiring the physical presence of a regular officer at all times would tend to frustrate that intent.
>
> Reading such a requirement into the act would also be inconsistent with the generally accepted meaning of 'under the direction of.' That phrase indicates something short of immediate supervision. *Ross v. Long*, 219 Iowa 471, 258 N.W. 94 (1935). However, it also means more than 'ultimately responsible to.' It infers a requirement of knowing control by a supervisory regular peace officer.

Op.Att'y.Gen. #80-12-4(L) at page 5. We adhere to this pronouncement in our prior letter opinion. The purpose of chapter 80D is to provide an optional reserve force to assist the regular force in performing its duties. To require the direct, physical supervision of a regular peace officer at all times would add to rather than alleviate the burdens of the regular force. The standard of supervision implied in section 80D.9 is that of knowing control over a reserve officer by a regular officer, Thus, in response to your first question, the phrase "under the direction of regular peace officers" does *not* mean that the reserve peace officer must literally be accompanied by a regular peace officer at all times.

The answer to your second question follows logically from our answer to the first. The maintenance of radio contact between regular and reserve officers

would certainly provide a facile means of knowing control. Hence, such radio contact would place reserve officers "under the direction of regular peace officers" in satisfaction of section 80D.9, The Code 1981.

June 18, 1981

STATUTES; RULEMAKING; NURSES, ADVANCED EMERGENCY MEDICAL TECHNICIANS AND PARAMEDICS: Scope of Authority. §§147A.1, 147A.4, 147A.8, 147A.10, 147A.11, 152.1, The Code 1981. A registered nurse may provide emergency services within the scope of his/her license as defined in chapter 152 provided he/she does not profess to be an advanced emergency medical technician or paramedic under chapter 147A. The Iowa Board of Medical Examiners does not have statutory authority, under §147A.4, to promulgate rules requiring a registered nurse to be certified under chapter 147A in order to perform any emergency services. A registered nurse is subject to possible liability under §147A.11 upon proof that he/she has acted outside the scope of his/her authority in chapter 152 and in violation of one of three prohibitions contained in §147A.11 (Stork to Illes, Executive Director, Iowa Board of Nursing, 6/18/81) #81-6-10

Ms. Lynne M. Illes, Executive Director, Iowa Board of Nursing: You have requested an opinion concerning the general scope of authority of a registered nurse in performing emergency services pursuant to Iowa Code chapter 152, which governs the practice of nursing. As noted in your request, this office provided some advice in this regard to the Iowa Board of Medical Examiners by letter dated February 2, 1981. You also request advice regarding the following specific questions:

1. If the registered nurse acts within the scope of his/her nursing license when providing emergency services and does not profess to be an advanced emergency medical technician or paramedic, is there any requirement in chapter 147A. that governs said licensee's practice?

2. Does the Board of Medical Examiners have the authority to promulgate rules which limit the registered nurse's involvement (i.e., riding an ambulance, etc.) in performing emergency services unless he/she becomes an emergency medical technician or paramedic?

3. If under the rules and regulations of the Iowa Board of Nursing the registered nurse performs similar acts of an emergency medical technician or paramedic, will he/she be liable under the provisions of 147A.11?

The Iowa General Assembly adopted chapter 147A, an Act governing the training, certification, and authority of advanced emergency medical technicians (hereinafter "advanced EMTs") and paramedics, in 1978. *See* 1978 Session, 67th G.A., ch. 1074. Section 147A.1(1) defines "advanced emergency medical care" to mean the following medical procedures:

a. Administration of intravenous solutions.
b. Gastric or tracheal suction or intubation.
c. Performance of cardiac defibrillation.
d. Administration of parenteral injections of any of the following classes of drugs:
   (1) Antiarrhythmic agents;
   (2) Vagolytic agents;
   (3) Chronotropic agents;

(4) Analgesic agents;
(5) Alkalizing agents;
(6) Vasopressor agents;
(7) Anticonvulsive agents; or
(8) Other drugs which may be deemed necessary by the supervising physician.

e. Any other medical procedure designated by the board, by rule, as appropriate to be performed by advanced EMTs and paramedics who have been trained in the procedure.

Such care may be performed by either an "advanced EMT" or a "paramedic". The former is defined as an individual who is trained to provide the care described above and who has been issued an appropriate certificate by the Board of Medical Examiners. §147A.1(4). A paramedic, on the other hand, is defined more expansively as an individual "trained in *all areas* of advanced emergency medical care, and who has been issued a paramedic certificate by the board."[Emphasis added.] §147A.1(5).

An advanced EMT or paramedic certified under chapter 147A is expressly authorized to do the following:

1. Render advanced emergency medical care, rescue, and resuscitation services in those areas for which he or she is certified as defined and approved in accordance with the rules of the board.

2. While employed by or assigned to a hospital or other medical facility, or an ambulance service or other rescue squad service, and caring for patients in the course of that assignment, administer parenteral medications under the direct supervision of a physician or of another individual specifically designated by the responsible physician.

§147A.8, The Code 1981. Under these various provisions in chapter 147A, advanced EMTs and paramedics have statutory authority to perform *specific* emergency medical services. The chapter does not, however, contain any provisions governing the practice of nursing nor does it express any intent to supplant the authority of registered nurses as set forth in chapter 152.

Chapter 152 defines the practice of nursing in terms of both what it "does not mean" and what it "means". §§152.1(1), 152.1(2). The former section indicates that nursing does not include certain other medical practices, including the practice of medicine and surgery as defined in chapter 148. The section does not, however, indicate that the provision of emergency medical services as described in chapter 147A is outside the scope of the practice of nursing.

Section 152.1(2), on the other hand, states affirmatively that a person who is licensed by the Board of Nursing may do all of the following:

a. Formulate nursing diagnosis and conduct nursing treatment of human responses to actual or potential health problems through services, such as case finding, referral, health teaching, health counseling, and care provision which is supportive to or restorative of life and well-being.

b. Execute regimen prescribed by a physician.

c. Supervise and teach other personnel in the performance of activities relating to nursing care.

d. Perform additional acts or nursing specialties which require education and training under emergency or other conditions which are recog-

nized by the medical and nursing professions and are approved by the board as being proper to be performed by a registered nurse.

e. Apply to the abilities enumerated in paragraph "a" through "d" of this subsection scientific principles, including the principles of nursing skills and of biological, physical, and psychosocial sciences.

Subsections (b) and (d) do appear to authorize a registered nurse to provide emergency medical services on a limited basis. Pursuant to subsection (b), a registered nurse has express authority to "execute regimen prescribed by a physician", which would appear to include the performance of certain emergency services as directed by a supervising physician. Subsection (d) specifically permits the performance of "acts" or "specialties" by a registered nurse in emergency situations. Such authorization does not, however, apply unless certain conditions have been satisfied:

(1) the nurse must have received "education and training under emergency or other conditions";

(2) the additional acts or nursing specialties must include only those that are "recognized" by the medical and nursing professions. Since the term "recognize" is not defined in chapter 152, we interpret it according to its context and approved usage. §4.1(2). *Webster's New Collegiate Dictionary* indicates that the term means "to acknowledge formally," "to acknowledge the de facto existence or independence of: and "to admit as being of a particular status." Accordingly, both the nursing and medical professions must generally accept certain acts or specialties as appropriate for a nurse to perform in an emergency situation. Although the manner of acceptance remains undefined, it does not require rulemaking; and

(3) the additional acts or nursing specialties must be "approved" by the Board of Nursing "as being proper to be performed by a registered nurse". This indicates that the board must take some affirmative action, for example, through the promulgation of administrative rules, to define acceptable acts and specialties.

The definitions contained in §152.1 indicate that performing emergency services generally is within the scope of authority of a registered nurse provided such authority is exercised within the parameters described above. This authority is independent from that provided to advanced EMTs and paramedics under chapter 147A of the Code. Nevertheless, certain provisions of chapter 147A are instructive in clarifying further what a nurse may and may not do in rendering emergency services.

Section 147A.11 provides in relevant part as follows:

1. Any person not certified as required by this chapter who holds himself or herself out as an advanced EMT or a paramedic, or who uses any other term to indicate or imply that he or she is an advanced EMT or a paramedic or who acts as an advanced EMT or a paramedic without having obtained the appropriate certificate under this chapter, is guilty of a class "D" felony.

Pursuant to this language, a registered nurse plainly may not represent himself or herself as either an advanced EMT or a paramedic. A more troublesome situation, however, is presented when a registered nurse, acting within the scope of his/her authority as set forth in §152.1(2), performs a medical procedure expressly defined as emergency medical care to be performed by an advanced EMT or a paramedic under §147A.1. Section 147A.10, concerning "exemptions

from liability in certain circumstances", provides some direction for resolving this apparent conflict:

> 1. A physician or physician's designee who gives orders, either directly or via communications equipment from some other point, to an appropriately certified advanced EMT or paramedic at the scene of an emergency, and an appropriately certified advanced EMT or paramedic following such orders, shall not be subject to criminal liability by reason of having issued or executed such orders, and shall not be liable for civil damages for acts or omissions relating to the issuance or execution of such orders unless such acts or omissions constitute recklessness.
>
> 2. A physician, physician's designee, advanced EMT or paramedic shall not be subject to civil liability solely by reason of failure to obtain consent before rendering emergency medical, surgical, hospital or health services to any individual, regardless of age, when the patient is unable to give his or her consent for any reason and there is no other person reasonably available who is legally authorized to consent to the providing of such care.

* * *

A "physician's designee" is not defined in chapter 147A. The term should therefore be interpreted according to its context and approved usage. §4.1(2). *Webster's New Collegiate Dictionary* defines "designee" as "one who is designated." "Designated" is defined as indicating or setting apart for a specific purpose, office, or duty. Accordingly, a "physician's designee" would seem to include those individuals who may perform medical services at the direction or under the supervision of a licensed physician. Chapter 147A therefore would contemplate the performance of emergency medical care, in appropriate cases, by a registered nurse as well as a physician's assistant, as defined in chapter 148C. This conclusion is supported by the fact that no provision in either chapter 147A or chapter 152 restricts the practice of nursing to the extent that it may, on occasion, overlap with the services performed by advanced EMTs and paramedics.

In addition to establishing the general scope of authority of a registered nurse in performing emergency services, the definitional scheme of chapters 147 and 152 provides the answer to your first specific question. Accordingly, sections 147A.1, 147A.8, and 152.1 indicate that chapter 147A governs the services rendered by advanced EMTs and paramedics, not those rendered by registered nurses. A registered nurse may, therefore, provide emergency services within the scope of his/her license as defined in chapter 152, provided he/she does not profess to be an advanced EMT or paramedic without the necessary certification.

Your second specific question indicates the potential for disagreement between the Boards of Nursing and Medical Examiners when an individual licensed by the former engages in acts that are commonly performed by individuals who are certified by the latter. Section 147A.4 enables rulemaking as follows:

> 1. The department, with the advice and assistance of the council, shall promulgate rules required or authorized by this chapter pertaining to the operation of ambulance services and rescue squad services which have obtained authority under section 147A.5 to utilize the services of certified advanced EMTs or paramedics. These rules shall include, but need not be limited to, requirements concerning physician supervision, necessary equipment and staffing, and reporting by ambulance services and rescue squad services which have obtained such authority pursuant to section 147A.5.

2. The board, with the advice and assistance of the council, shall promulgate rules required or authorized by this chapter pertaining to the certification of advanced EMTs and paramedics. These rules shall include, but need not be limited to, requirements concerning prerequisites, training and experience for advanced EMTs and paramedics and procedures for determining when individuals have met these requirements.

The "department" means the Iowa Department of Health, the "board" means the Iowa Board of Medical Examiners, and the "council" refers to the Advanced Emergency Medical Care Council created by §147A.2. §§147A.1(6), (8) and (9). According to the express language of §147A.4, the Department of Health has responsibility for promulgating rules concerning physician supervision, staffing, and reporting by ambulance services and rescue services operating pursuant to §147A.5. This section does not require ambulance and rescue services to utilize advanced EMTs and paramedics certified by the board but, rather, requires the services to obtain authorization from the department only in the event that they seek to establish a program utilizing such professionals.

The rulemaking authority of the Board of Medical Examiners under chapter 147A, on the other hand, generally involves the establishment of requirements incident to the certification of advanced EMTs and paramedics, including training and experience. As discussed previously, the authority of registered nurses in performing emergency services is governed by the provisions of chapter 152 and rules promulgated thereto by the Board of Nursing. Accordingly, we conclude that the Board of Medical Examiners does not have statutory authority to promulgate rules requiring a registered nurse to be certified as an advanced EMT or paramedic in order to perform any emergency services. We caution, however that the Board of Medical Examiners generally does have authority to establish certification requirements for those individuals who seek to render advanced emergency medical care. While this authority does not limit the practice of nursing accordingly, it does express a legislative intent to ensure proper training for those individuals who regularly seek to render such care. In this regard, §147A.11 prohibits any individual, including a registered nurse, from holding himself/herself out as an advanced EMT or paramedic without proper certification. Thus, in order to avoid the potential for a factual dispute concerning the applicability of §147A.11 to his/her actions, a registered nurse whose practice regularly involves emergency medical care as defined in §147A.1 may be well-advised to obtain certification under chapter 147A. Lacking such certification, the question of whether a nurse is acting properly within the scope of his/her authority under chapter 152 may repeatedly occur.

Your third specific question concerns the applicability of §147A.11(1) to a registered nurse who performs emergency medical services that are similar to those performed by an advanced EMT or paramedic but which are expressly permitted by rules of the Board of Nursing. Section 147A.11(1) prohibits "any person" not certified under chapter 147A from (1) holding himself/herself out as an advanced EMT or paramedic; (2) using any term to indicate he/she is an advanced EMT or paramedic; or (3) acting as an advanced EMT or paramedic. In these three situations, any person, including a registered nurse, may be found to be in violation of chapter 147A and thereby guilty of a class "D" felony. Proof of such a violation is, of course, dependent upon the precise facts existing in a particular case. The only absolute exemption from potential liability under §147A.11(1) is through proper certification as an advanced EMT or paramedic.

An agency may act only within its statutory authority in promulgating and enforcing rules. *See Davenport Community School District v. Iowa Civil Rights Commission*, 277 N.W.2d 907 (Iowa 1979). Rules may not be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent. *Bruce Motor Freight, Inc. v. Lauterbach*, 247 Iowa 956, 961, 77 N.W.2d 613, 616

(1956). Also, rules must be reasonable and consistent with legislative enactments. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610, 616 (Iowa 1976). Several observations may be made in light of these judicial decisions and the express language of §147A.11(1). First, while the Board of Nursing has statutory authority under §147.76 to promulgate rules implementing and interpreting the practice of a registered nurse, the board does not have authority to modify the application of §147A.11(1) by rulemaking. Second, "any person", including a registered nurse, may be subjected to liability under §147A.11(1) upon proof that he/she has violated one of the grounds set forth in the section. Third, a registered nurse's adherence to the rules of the board regarding the scope of his/her practice unquestionably does reduce the likelihood of liability under §147A.11(1). Finally, §147A.11(1) does not prohibit a registered nurse from rendering emergency services pursuant to, for example, §152.1(2)(d). The former section does, however, expose a registered nurse to possible liability in a particular case wherein the facts demonstrate he/she has acted outside the scope of chapter 152 and within the prohibition of §147A.11.

June 18, 1981

MONEY: Legal Tender; 31 U.S.C. §371 (1976); 31 U.S.C. §372 (1976); 31 U.S.C. §392 (1976); 31 U.S.C. §452 (1976); Section 535.1, The Code 1981. Federal Reserve Notes are legal tender for the payment of debts and taxes to the state of Iowa, and the monetary units used by the United States Government are the legislatively required denominations of measurement known as money of account. (Miller and Schuling to DeKoster, State Senator, 6/18/81) #81-6-11

The Honorable Lucas J. DeKoster, State Senator, State House: You have requested an opinion of this office concerning the subject of legal tender. Specifically, you asked the following:

1. Are Federal Reserve Notes now legal tender for the payment of debts and taxes to the state of Iowa and its subdivisions?

2. What substance is now "money of account" in this state?

3. What is the current legal definition of the unit or of the dollar as used to measure the "money of account"?

In answer to your first question, all coins and currencies of the United States (including Federal Reserve Notes) are legal tender for all debts, public and private, public charges, taxes, duties and dues. 31 U.S.C. §392 (1976); *See also* 31 U.S.C. §452 (1976). The United States Constitution prohibits the states from declaring legal tender anything other than gold or silver, but does not limit Congress' power to declare what shall be legal tender. *United States v. Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978); *See also* 1938 Op.Att'y.Gen. 641. Therefore, Federal Reserve Notes are legal tender for the payment of debts and taxes to the state of Iowa and its subdivisions.

Your remaining questions deal with the term "money of account". There appears to be some misconception as to what money of account is.

Money of account is a monetary denomination used in keeping accounts. It is usually not a monetary denomination that is actually issued as a coin or piece of paper money. An example is the United States mill. *Webster's New World Dictionary of the American Language*, 917 (2nd C.Ed. 1972).

The answer to your second question is that there is no substance which is money of account. Money of account describes the system of monetary denomination used by a government. In the United States this is the decimal system. *See* 31 U.S.C. §§371 and 372 (1976).

As a result of my answer to your second question, your third question must be rephrased. The question may be restated to ask what units are used to measure money of account? The money of account for the United States is expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths, a dime being the tenth part of a dollar, a cent the hundredth part of a dollar, and a mill the thousandth part of a dollar. 31 U.S.C. §371 (1976); Section 535.1, The Code 1981. This question and answer revolve around the realization that money of account defines monetary units used in calculating, not substantive material. Therefore, it is the opinion of this office that Federal Reserve Notes are legal tender for the payment of debts and taxes to the state of Iowa, and that the monetary units used by the United States Government are the legislatively required denominations of measurement.

June 18, 1981

INCOMPATIBILITY OF OFFICE; CONFLICT OF INTEREST: Iowa Const., Art III, §22. A state legislator is not barred by either Article III, §22 of the Iowa Constitution or the doctrine of incompatibility of offices from serving as an uncompensated member of a local board of transit trustees. The legislator must exercise discretion to avoid any conflict of interest that could develop in a particular situation. (Stork to O'Kane, State Representative, 6/18/81) #81-6-12(L)

June 23, 1981

LEGISLATIVE REDISTRICTING; GENERAL ASSEMBLY: §§42.3, 42.4, The Code 1981. The redistricting plan submitted by the legislative service bureau to the General Assembly on June 10, 1981, pursuant to §§42.3(2) and 42.3(4)(b), does not comply with the redistricting standards set forth in §42.4(1)(a). The corrected redistricting plan submitted by the legislative service bureau to the General Assembly on June 17, 1981, comports with the intent and purpose of §42.3(2) and is therefore properly placed before the General Assembly for its consideration. (Miller and Stork to Garrison, Director, Iowa Legislative Service Bureau, 6/23/81) #81-6-13

Mr. Serge H. Garrison, Director, Iowa Legislative Service Bureau, State House: We are in receipt of your request for an opinion concerning the legality of two legislative redistricting plans submitted by the legislative service bureau pursuant to chapter 42, The Code 1981. A basic understanding of the facts leading to your opinion request is important to analyze the issues you have raised. Accordingly, we repeat the somewhat detailed account of the facts as set forth in your request:

> I have been requested by the Temporary Redistricting Advisory Commission to seek an attorney general's opinion relative to the validity of Redistricting Plan II and the corrected Plan II. The Temporary Redistricting Advisory Commission is created by section 42.5 of the Code and its duties are specified in section 42.6 of the Code. Pursuant to chapter 42 the

Legislative Service Bureau is required by section 42.3 of the Code to file one, two, or three plans of legislative and congressional districting, depending upon the action of the General Assembly, which must be prepared in accordance with section 42.4 of the Code. Various dates are established for filing the plans with the Chief Clerk of the House and the Secretary of the Senate according to section 42.3 and an escalator provision is provided in paragraph b of subsection 4 of section 41.3 if census data is not delivered at the time anticipated. Since the census data was not delivered on time, this provision has become effective and a computation determined under that section for Plan II, which is provided for in subsection 2 of section 42.3, will indicate that Plan II was to be delivered not later than June 10, 1981. (See the attached exhibit A for delivery dates computed). Census data was received by the Legislative Service Bureau on March 13, 1981.

Plan I was delivered on April 22, 1981 although it was not due until May 11, 1981, and evidence of that delivery can be found in the Journals of the House and Senate. It was rejected by the Senate on May 14, 1981 after it became Senate File 570. Even before rejection, the Service Bureau had commenced its preparations on Plan II.

On June 10, 1981, the Legislative Service Bureau delivered to the Chief Clerk of the House and the Secretary of the Senate Plan II and the records of those officials will indicate the timely delivery of the plan. For the sake of simplicity, the plan delivered on June 10, 1981 will be referred to as Plan IIA and the plan delivered on June 17, 1981 will be referred to as Plan IIB.

After delivery of this plan the Legislative Service Bureau mailed to all county auditors and city clerks of cities that had more than one legislative district within it, copies of the maps and the bills embodying the plan. We asked that the maps and the bills be reviewed to determine if there were any errors in the descriptions. This is necessary because it is difficult to determine the names of all streets in the various cities, particularly if they have been changed, and other descriptive features used. While we attempted to obtain as much information as possible through the use of census maps and phone calls to county and city officials, we could not reveal the plans before June 10, 1981 for review purposes because of the restriction found in subsection 2 of section 42.6, and thus we could not be sure we had correctly described all districts.

On June 12, 1981 we received a call from an Iowa City official who indicated that she could not make the statistics she had computed from the Iowa City map outlining legislative districts 89 and 90, match the statistics we submitted with the plan. (Enclosed is a copy of Plan IIA). In reviewing our plan for districts 89 and 90 we then found that the map we had drawn (see Exhibit B copy labeled "Master copy") placed precinct 17 in the 90th district instead of the 89th as we had intended. Since we dictated the bill from the master map, the descriptions in the bill were also erroneous. Thus the statistics for the actual Plan IIA submitted and the plan violated the provisions of paragraph a, subsection 1, of section 42.4 of the Code.

Because of the error there were deviations from the ideal district of + 1976 persons and - 1856 persons, instead of the deviations of + 10 persons and - 70 persons anticipated. This results in a population variance ratio of 1.134 instead of the ratio of 1.0178 anticipated. The bill thus provides for population variances from the ideal of 6.16 percent and 6.37 percent, compared to the intended variations of 0.034 percent and 0.240 percent. Evidence of the intended variations is contained in the statistics submitted with Plan IIA and is Exhibit B.

On June 17, 1981, I submitted a corrected plan, hereafter referred to as Plan IIB, to the Secretary of the Senate and Chief Clerk of the House. A copy is enclosed. Copies of their acknowledgements of receipt of Plan IIB are enclosed. Plan IIB reflects the original intent of the Legislative Service Bureau.

A brief scenario of how the error occurred indicates that the original map was drawn during the first drafting of the plan and the making of manual computations of the populations. A second map was drawn, called the master map, and the error was made on this map. The population data was loaded into the computer for the purpose of making a computer statistical analysis. The error was then found and the computer statistical analysis was corrected, however we failed to correct the master map. The bill embodying the plan was dictated from the master map. Thus the master map and the bill did not reflect the statistics nor the original map. See the memo from Gary Kaufman to me dated June 20, 1981 outlining in detail how the error occurred.

In light of this factual situation, you submit the following questions:

1. Is Plan IIA presented on June 10, 1981, in compliance with the requirements of chapter 42 and specifically paragraph a, subsection 1, of section 42.4 of the Code?

2. If Plan IIA is not in compliance, can Plan IIA be corrected by the filing of Plan IIB on June 17, 1981?

3. If the filing of Plan IIB is not proper, can the General Assembly change its procedural rules relating to the amendment of the plan and consider Plan IIB as the proper Plan II? In this regard I call your attention to subsection 1 of section 42.3 which does not permit amendments to the filed Plan II except those of a purely corrective nature. This restriction appears to be carried over to Plan II by subsection 2 of section 42.3. I also note that the bill embodying Plan II has not yet been introduced and as such is only a draft copy and not the official jacketed copy that would ordinarily be introduced by the committee on state government of either House.

4. If the General Assembly does not have the right or the power to consider either Plan IIA or Plan IIB, or correct Plan IIA, is it your opinion that the procedures for consideration of the third plan III must be implemented?

I.

Section 42.4(1)(a) provides:

Senatorial and representative districts, respectively, shall each have a population as nearly equal as practicable to the ideal population for such districts, determined by dividing the number of districts to be established into the population of the state reported in the federal decennial census. Senatorial districts and representative districts shall not vary in population from the respective ideal district populations except as necessary to comply with one of the other standards enumerated in this section. In no case shall the quotient, obtained by dividing the total of the absolute values of the deviations of all district populations from the applicable ideal district population by the number of the applicable ideal district population. No

> senatorial district shall have a population which exceeds that of any other senatorial district by more than five percent, and no representative district shall have a population which exceeds that of any other representative district by more than five percent.

You indicate that the error in the map from which Plan IIA was drawn, which error places an additional precinct in the 90th representative district, produces a population percentage variance for the representative districts in Iowa City that exceeds the five percent variance permitted by the last sentence in §42.4(1)(a). Computations by Mr. Gary Kaufman of your office confirms that the variance in House Districts 89 and 90 under Plan IIA is 13 percent, which clearly exceeds the allowable 5 percent. Consequently, we conclude that Plan IIA, presented to the General Assembly on June 10, 1981, does not comply with the requirements of §42.4(1)(a).

II.

The legislative service bureau corrected the error made in the redistricting plan submitted on June 10, 1981, (Plan IIA) pertaining to house districts 89 and 90, and submitted the corrected version (Plan IIB) to both houses of the General Assembly on June 17, 1981. We understand that Plan IIB contains no other modifications to Plan IIA and is in compliance with the percentage limitations of §42.4(1)(a).

Section 42.3 sets forth a procedure for adoption of a redistricting bill that contemplates the possible consideration of three distinct plans. The legislative service bureau has the statutory responsibility for the development of each bill in accordance with the standards specified in §42.4. With respect to a proposed second plan, which is the subject of your opinion request, §42.3(2) states:

> If the bill embodying the plan submitted by the legislative service bureau under section 1 fails to be approved by a constitutional majority in either the senate or the house of representatives, the secretary of the senate or the chief clerk of the house, as the case may be, shall at once transmit to the legislative service bureau information which the senate or house may direct regarding reasons why the plan was not approved. The legislative service bureau shall prepare a bill embodying a second plan of legislative and congressional districting prepared in accordance with section 42.4, and taking into account the reasons cited by the senate or house of representatives for its failure to approve the plan insofar as it is possible to do so within the requirements of section 42.4. If a second plan is required under this subsection, the bill embodying it shall be delivered to the secretary of the senate and chief clerk of the house of representatives not later than May 1 of the year ending in one, or fourteen days after the date of the vote by which the senate or the house of representatives fails to approve the bill submitted under subsection 1, whichever date is later. It is the intent of this chapter that, if it is necessary to submit a bill under this subsection, the bill be brought to vote not less than seven days after the bill is printed and made available to the members of the General Assembly, in the same manner as prescribed for the bill required under subsection 1.

Your opinion request notes that, in accordance with §42.3(4)(b), the legislative service bureau was required to deliver to the chief administrative officers in each house, by June 10, 1981, a bill embodying the second plan. The legislative service bureau complied with this timetable by submission of Plan IIA. Plan IIB, the corrected version of the plan, was, however, submitted one week later than the

date specified by statute. [1] Section 42.3 neither authorizes nor prohibits the submission of a corrected bill by the legislative service bureau prior to its consideration by the legislature and does not detail the legal consequences of a late submission.

Our goal in construing the time requirement of §42.3(2) is to ascertain legislative intent in order, if possible, to give it effect. *State ex rel. State Highway Comm. v. City of Davenport*, 219 N.W.2d 503 (Iowa 1974). In searching for legislative intent, we are to consider the objects sought to be accomplished as well as the language used and place a reasonable construction on the entire statute which will best effect its purpose. *Id.*

Section 42.3(2) does provide that the bill embodying a second plan "shall" be delivered to the chief administrative officers in the legislature by a certain date which, as computed in accordance with §42.3(4)(b), was June 10, 1981. The word "shall" imposes a duty. §4.1(36)(a), The Code 1981. Unquestionably, the duty of the legislative service bureau under §42.3(2) is "obligatory" rather than "permissive" in the sense that the bureau has no discretion in deciding whether to develop a plan. *State v. Lohr*, 266 N.W.2d 1, 5 (Iowa 1978). The legal consequences of a failure to perform an obligatory duty depend, however, upon whether the duty was intended to be "mandatory" or "directory". *Id.* Accordingly, the Iowa Supreme Court has held that, if the term "shall" imposes a "mandatory" duty, a failure to perform has the effect of invalidating the governmental action which the duty affects. *Taylor v. Department of Transporation*, 260 N.W.2d 521, 523 (Iowa 1977). In the matter at hand, for example, the term "shall" could mean that the failure of the legislative service bureau to perform its duty correctly by June 10, 1981, has the legal effect of invalidating any governmental action that the duty affects, including legislative consideration of Plan IIB submitted on July 17, 1981. The crucial issue, therefore, is whether the General Assembly intended the term "shall" as used in the timetable in §42.3(2) to create a "mandatory" or a "directory" duty. The supreme court has explained the nature of the difference between the duties as follows:

> Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty. Whether the statute is mandatory or directory depends upon legislative intent. When statutes do not resolve the issue expressly, statutory construction is necessary. If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown. "The rule is, that when a statute is merely directory, a thing therein required, omitted to be done at the proper time, may be allowed afterward. * * * If, however, a thing is prohibited, or if it is to be done at one time and prohibited at any other, such prohibitation cannot, without judicial legislation, be disregarded." *Hill v. Wolfe*, 28 Iowa 577, 580 (1870).

Id. The duty of the legislative service bureau to submit a bill by June 10, 1981, does not appear to be mandatory under this analysis. Such a duty is not essential to the main objective of §42.3(2), which clearly is to develop a redistricting plan in

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[1] We note that the corrected version of Plan IIA, as contained in Plan IIB, does not itself constitute an "amendment" under §42.3. Clearly, only members of the legislature have the authority to originate and amend bills. Iowa Const., art. III, §§9, 15.

accordance with the standards set forth in §42.4. Instead, the timetable of §42.3(2) is designed to assure the orderly and prompt consideration of a second plan if such consideration was necessary. The timetable also serves the purpose of ensuing that legislators would have a reasonable opportunity to review the plan before voting on it; legislative intent in this regard is plainly stated in the last sentence of §42.3(2):

> It is the intent of this chapter that, if it is necessary to submit a bill under this subsection, the bill be brought to a vote not less than seven days after the bill is printed and made available to the members of the General Assembly, in the same manner as prescribed for the bill required under subsection 1.

Plan IIB accomplishes this legislative intent since it was submitted by the legislative service bureau on June 17, 1981, at least seven days prior to the beginning of the special legislative session scheduled for June 24, 1981. Moreover, this submission appears to accomplish the prevailing objective of §42.3 in achieving a redistricting plan that is consistent with the standards of §42.4, including those contained in §42.4(1)(a).

Our construction that §42.3(2) does not create a mandatory duty comports with the general rule of law that statutes directing the mode of proceeding of public officers, relating to time and manner, are directory only. 260 N.W.2d at 523. In this regard, the Iowa Supreme Court has stated:

> ...[S]tatutory provisions fixing the time, form and mode of proceeding of public functionaries are directory because they are not of the essence of the thing to be done but are designed to secure system, uniformity and dispatch in public business. Such statutes direct the thing to be done but are designed to secure system, uniformity and dispatch in public business. Such statutes direct the thing to be done at a particular time but do not prohibit it from being done later when the rights of interested persons are not injuriously affected by the delay. *Younker Brothers, Inc. v. Zirbel*, 234 Iowa 269, 274, 12 N.W.2d 219, 223 (1943); *Bechtel v. Board of Supervisors of Winnebago County*, 217 Iowa 251, 257 N.W. 633 (1933); *Yengel v. Allen*, 179 Iowa 633, 161 N.W. 631 (1917); *Dishon v. Smith*, 10 Iowa 212, 218 (1859)...

Id. In response to your second question, we therefore conclude that the filing of Plan IIB on June 17, 1981, properly places that plan before the General Assembly for its consideration.

III., IV.

Since we have responded in the affirmative to the second question raised in your opinion request, no answer to your third and fourth questions is required.

Summary

In summary response to your opinion request we conclude the following:

1. The redistricting plan submitted by the legislative service bureau to the General Assembly on June 10, 1981, pursuant to §§42.3(2) and 42.3(4)(b) does not comply with the redistricting standards set forth in §42.4(1)(a).

2. The corrected redistricting plan submitted by the legislative service bureau to the General Assembly on June 17, 1981, comports with the intent and purpose of §42.3(2) and is therefore properly placed before the General Assembly for its consideration.

JULY 1981

July 2, 1981

MUNICIPALITIES: Fire Safety Codes — §364.16, The Code 1981. A city has discretion to adopt a separate fire safety code. (Blumberg to Holien, Marshall County Attorney, 7/2/81) #81-7-1(L)

July 2, 1981

COUNTIES AND COUNTY OFFICERS; SOLID WASTE DISPOSAL COMMISSIONS: §§23.1, 23.18, 28E.4, 28E.5, 332.7, 384.95, 453.1, 455B.76, The Code 1981 and Senate File 130, 69th G.A., 1981 Session §§340 and 1001. There is no requirement that a contract entered into by a county solid waste commission be let pursuant to public bid procedures. A current contract can be renewed or renegotiated without public bidding. (Fortney to Fisher, Webster County Attorney, 7/2/81) #81-7-2(L)

July 6, 1981

OPEN MEETINGS ACT: School Board. Sections 13.2(4), 20.17, 28A.2, 28A.3, 28A.4, 28A.5, 28A.6, 279.15, The Code 1981. A school board must comply with the public notice procedures contained in §28A.4 of the Open Meetings Act when holding any meeting as defined in §§28A.2(2) of the Act. Generally, such a meeting occurs whenever a majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties. The Public Employment Relations Act contained in chapter 20 of The Code, however, exempts negotiating sessions and strategy meetings of public employers or employee organizations from the provisions of the Open Meetings Act. Accordingly, when conducting a negotiating session or strategy meeting under the Public Employment Relations Act, a school board does not hold a meeting which would necessitate compliance with the procedural requirements, including public notice, of the Open Meetings Act. A school board committee created under §28A.2(1)(c) must comply with the public notice requirements of the Open Meetings Act except when holding meetings pursuant to §28A.4(3). Procedures for teacher termination hearings are governed by §§279.15 through 279.19 of The Code and do not require prior notification to the media.

In order for a school board to conduct a closed session during a meeting, the requirements of §28A.5(2) must be followed. These mandate that a specific reason for holding the closed session, as set forth in §28A.5(1), must be announced publicly in open session and entered in the minutes. Discussion during a closed session of a school board must relate directly to the specific reason announced as justification for the session. (Stork to O'Kane, State Representative, 7/6/81) #81-7-4(L)

July 7, 1981

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind; §601D.3, The Code. The commission's policy excluding guide dogs from orientation centers does not contravene §601D.3 or §601D.4, The Code. Appel to Hall, State Representative, 7/7/81) #81-7-5(L)

July 7, 1981

CONSTITUTIONAL LAW: Comptroller; State Debts; Article VII, section 2, Constitution of Iowa. Article VII, §2 applies only where the state actually borrows money from a third party in order to meet obligations of government. Debts contracted in violation of the constitutional limitations are generally not enforceable. Appel to Chiodo, State Representative, 7/7/81) #81-7-6(L)

July 7, 1981

COUNTIES; COUNTY CARE FACILITY; INVOLUNTARY SERVITUDE: Thirteenth Amendment, Article I, section 23, Iowa Constitution; §253.5, The Code 1981. While all residents of county care facilities are protected from coerced labor by the Thirteenth Amendment, the requirement by a county of a resident of a county care facility to perform reasonable and moderate labor including housekeeping with or without compensation does not necessarily violate the federal or state prohibition against involuntary servitude and courts will examine whether the work is therapeutic or reasonably related to housekeeping for the facility. (Morgan and Herring to White, Assistant Johnson County Attorney, 7/10/81) #81-7-7

Mr. J. Patrick White, First Assistant County Attorney: We received your request for an opinion regarding the constitutionality of §253.5, The Code 1981. Specifically, you ask:

> Does §253.5, The Code 1981, violate the prohibition against involuntary servitude of the Thirteenth Amendment of the United States Constitution of Article I, §23 of the Iowa Constitution, in that residents of a county care facility may be required to work with or without compensation if a physician permits?

This question arose because a civil rights specialist of the Iowa Civil Rights Commission speculated that the above section of the Code may be violative of state or federal constitutional rights. The civil rights specialist was investigating a complaint of discrimination made by a resident of the Johnson County Care Facility because she was being required to perform work of a housekeeping nature for $1.00 per day. The evidence before the commission was disputed regarding the amount of work performed.

The individual county care facility resident about whom the request for an opinion was raised is one whose legal settlement is from a county other than Johnson County and Johnson County, therefore, has no legal responsibility to provide care. In addition, the resident who felt she was working too long and not being adequately compensated was a voluntary resident and under no compulsion to remain at the Johnson County Care Facility.

The Thirteenth Amendment to the United States Constitution prohibits involuntary servitude and permits the congress to establish laws forbidding involuntary servitude. The amendment dates to the post civil war era. While the specific evil the amendment was intended to overcome was slavery and its incidents, the courts have applied the amendment to any coercion of one person to work without compensation for another. *Hodges v. United States*, 203 U.S. 1, 275 S.Ct. 6, 51 L.Ed. 65 (1906).

> It is a denunciation of a condition, and not a declaration in favor of a particular people.

Hodges v. United States, 203 U.S. at 16-17.

Both the federal and state constitutions contain a provision banning slavery or involuntary servitude of persons, unless such condition is related to the punishment for the conviction of a crime. The federal amendment, U.S. Const., Amend. XIII, was adopted in 1865 and provides:

> Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The provision found in the present Iowa Constitution was originally contained in concept in the Constitution of 1846 and similarly provides:

> There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.

Iowa Const. of 1857, Art. 1, §23.

An initial question is whether either of these constitutional provisions speaks to the issue at hand, namely the utilization of labor at county care facilities for minimal or no wage and the appropriations by the county care facilities of any wages earned. The scope of the federal amendment has been construed broadly as a "charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag." *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911). It is the condition of slavery or involuntary servitude which is denounced by the amendment, not the fact that this condition was initially imposed only upon persons of the Negroid race. The breadth of the federal amendment is also apparent from the fact that it reaches to both state action and acts of private citizens. The Thirteenth Amendment denounces a status or condition, regardless of who imposes this condition. *Clyatt v. United States*, 197 U.S. 207, 216 (1095). For these reasons, we conclude that the protection of the Thirteenth Amendment reaches both voluntary and committed residents of institutions such as county care facilities established under ch. 253 of the Iowa Code.

(Exceptions have been made to the prohibition against involuntary servitude, most notably to permit enforced labor of prisoners, *United States ex rel Smith v. Dowd*, 271 F.2d 292 (7th Cir. 1959) *cert. den.* 362 U.S. 978 (1960), and for public works projects, including conscriptive service and public road projects, *Butler v. Perry, Sheriff*, 240 U.S. 329, 36 S.Ct. 258, 60 L.Ed. 672 (1916); *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).)

Recent cases have raised the applicability of the Thirteenth Amendment in several contexts, including public and private mental hospitals, children's detention facilities, and public schools.

The Second Circuit described the general principles which have been applied by the Federal District Courts in recent Thirteenth Amendment cases in *Jobson*

v. Henne, 355 F.2d 129, 132 (2nd Cir. 1966). In reversing a motion for summary judgment in favor of the state defendants on a theory of Eleventh Amendment immunity, the court found that the Thirteenth Amendment clearly applied to confined mental hospital patients. In *Jobson*, committed mental patients were required to work eight hours per day and were further required to work eight hours at night on boiler room duty for which they were paid one cent per hour. The court states the following:

> As we cannot say that any such work program would not go beyond the bounds permitted by the Thirteenth Amendment, the complaint states a claim under §1983.

Jobson v. Henne, 355 F.2d 129, 132 (2nd Cir. 1966). The applicable principles appear in *dictum* (at footnote 3 on p. 132):

> ... Therefore, whether an institution's required program in any given case constitutes involuntary servitude would seem to depend on the nature of the tasks that are required of the inmate. If a court can conclude that the chores are reasonably related to a therapeutic program or to the inmate's personal needs, the fact that the performance of the chores also assists in defraying the operating costs of the institution should not constitute involuntary servitude, even if inmates are required to engage in this activity. On the other hand, it would seem that the Thirteenth Amendment may be violated if a mental institution requires inmates to perform chores which have no therapeutic purpose or are not personally related, but are required to be performed solely in order to assist in the defraying of institutional costs, and it would appear that this would be so even if the inmates were compensated for their labor, for the mere payment of a compensation, unless the receipt of the compensation induces consent to the performance of the work, cannot serve to justify forced labor.

The court further states that:

> State may require lawfully committed inmates [to perform] without compensation certain chores designed to reduce the financial burden placed on a state by its program of treatment for the mentally retarded, if the chores are reasonably related to therapeutic program... or chores of a normal housekeeping type and kind.

Jobson v. Henne, 355 F.2d 129, 131-132 (2nd Cir. 1966).

Other Federal District Courts have taken the following actions:

In *Downs v. Department of Public Welfare*, 368 F.Supp. 454 (E. D. Pa. 1973), the court overruled a motion to dismiss by stating that the plaintiffs had made out a claim under the Thirteenth Amendment by bringing a complaint to end the forced labor of mental patients.

Another complaint was brought on behalf of mental patients in *Weidenfeller v. Kidulis*, 380 F.Supp. 445 (E. D. Wis. 1974). The court clearly applied the Thirteenth Amendment to forced but compensated labor of mental patients because no therapeutic basis for the labor was propounded. Forced labor of the mentally retarded was not found by the court to be *per se* unconstitutional, however. 380 F.Supp. at 450. In the *Weidenfeller* case a defendant's motion to dismiss was overruled because the facts as pled stated causes of action under both constitutional and statutory theories. The court describes the hurdles a plaintiff must reach in pleading a sufficient cause of action.

> Plaintiffs who wish to allege a cause of action under the Thirteenth Amendment must confront two substantial hurdles. First, they must allege (and ultimately prove on the merits) that their labors were performed involuntarily. . . . Even upon a showing that labor was performed involuntarily, however, courts have held that such labor is not violative of the Thirteenth Amendment if it serves a compelling state interest. (Citing *Butler v. Perry, supra; Heflin v. Sanford, supra;* and others).

380 F. Supp. at 450. The court determined that the involuntary nature of the commitment and required work was sufficient to meet the first test, while the lack of any therapeutic value for the work (from the plaintiff's pleadings) met the second part of the constitutional test.

In *Kreiger v. New York*, 283 N.Y.S.2d 86 (Ct. Clms., 1966), the court dismissed a §1983 petition for failure to state a claim when the patient of a mental hospital was required to perform mopping and other housekeeping chores within the institution.

The Colorado Supreme Court discussed a Thirteenth Amendment argument raised by a patient of a mental hospital who worked over 6,000 hours during several periods of intermittent confinement and concluded that no constitutional violation was present.

> It is only where the mandatory work programs are so ruthless in amount of work demanded and in the conditions under which the work must be performed, and thus so devoid of therapeutic purpose, that a court could justifiably conclude that the patient had been subjected to involuntary servitude.

Estate of Buzzelle v. Colorado State Hospital, 176 Colo. 554, 491 P.2d 1369, 1371 (1971). The court relies on the voluntary nature of work within the institution although the patient argued that he was "induced to do (work) in order to gain privileges and benefits directed toward his rehabilitation." 491 P.2d at 1370.

A state requirement that children perform cafeteria duty upon penalty of suspension for failure to perform was found not to violate the Thirteenth Amendment in *Bobilin v. Board of Education, State of Hawaii*, 403 F.Supp. 1095 (D. Hawaii 1975). (The case discusses many of the Federal Thirteenth Amendment case authorities.) A requirement that children who are compelled to work while being committed to detention facilities after an adjudication of delinquency was upheld by the court in *King v. Carey*, 405 F.Supp. 41 (W. D. N.Y. 1975).

Pursuant to the provisions of the Iowa Code, county care facilities may be established by order of a county board of supervisors. §253.1, The Code 1981. Rules and regulations for the management of the facility may be established by either the board of supervisors or its appointed management committee. §253.2, The Code 1981. Persons are admitted as residents only upon an order of the board of supervisors following a physical examination; however, residents may be admitted on a temporary basis or in an emergency situation without a pre-admission physical examination. §§253.6 and .9, The Code 1981. Residents of such facilities are discharged by order of the board of supervisors upon the advice of a physician and if the resident is able to "support and care for himself or provide for his own care." §253.7, The Code 1981. The statutory provision permitting the use of residents' labor at a county care facility is found in §253.5, The Code 1981:

> The administrator shall admit into the county care facility as residents only those persons ordered admitted in the manner prescribed by section 253.6, and shall maintain a record of the name and age of each person

> admitted and the date of his admission. The administrator may require of any resident of the county care facility, with the approval of a physician, reasonable and moderate labor suited to the resident's age and bodily strength. Any income realized through the labor of residents, together with the receipts from operation of the county farm if one is maintained, shall be appropriated for use by the county care facility in such manner as the board of supervisors may direct.

Section 253.5, The Code 1981.

Because only "reasonable" and "moderate" labor are required and because a medical determination is to be made of each person's ability to work based on age and strength, the statute may be properly applied and is not violative of the Thirteenth Amendment or Art. I, §23, on its face.

A closely related issue to the question of forced labor is the requirement for payment of a minimum wage to residents. A number of cases were brought on behalf of committed mental patients and others under the Fair Labor Standards Act following the amendment of the act in 1966 to include coverage for public agencies. Special provisions covered the compensation of handicapped persons. The cases of *King v. Carey, supra, Weidenfeller v. Kidulis, supra;* and *Bobilin v. Board of Education, supra,* discussed the applicability of the Fair Labor Standards Act.

In *Souder v. Brennan,* 367 F.Supp. 808 (D. C. 1973) the Secretary of Labor was directed by the court to change its policy of nonenforcement of the Fair Labor Standards Act in facilities for the mentally retarded.

However, the case of *National League of Cities v. Usury,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) held the following:

> Our examination of the effect of the 1974 amendments, as sought to be extended to the states and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions (of the FLSA) will impermissibly interfere with the integral governmental functions of these bodies.

426 U.S. at 851, 49 L.Ed.2d at 257. Patient-workers are left after *National League v. Usury* only with constitutional remedies.

Even when applied to the facts you present, several critical factors distinguish your request from the cases which find the Thirteenth Amendment applicable to institutions:

> 1. The resident is a voluntary resident and is under no coercion to remain at the Johnson County Care Facility. She may move to any other public or private residential care facility at any time. (The civil rights specialist notes that she has resided in a number of facilities in recent years.) It is axiomatic that the voluntary nature of her residence at the county care facility removes this situation from the scope of protected activities under the Thirteenth Amendment. The resident fails to meet the first aspect of stating a claim upon which relief may be granted as outlined in *Weidenfeller v. Kidulis, supra,* that is, that the labor is forced, compelled or involuntary.
>
> 2. The work performed is reviewed by a physician and the resident's ability to work is reviewed by a physician. The fact that the statute requires a medical determination of the ability to work and the appropriateness of

the work assures that the work will be reasonably suited to the resident's needs and abilities and permits the county to require work with a medical evaluation of therapeutic value.

3. The work described in the civil rights specialist's report appeared to be housekeeping work for the facility. Those cases applying the Thirteenth Amendment to committed persons permit facilities to require residents to perform reasonable housekeeping tasks. *Jobson v. Henne, supra; Weidenfeller v. Kidulis, supra.*

The civil rights specialist finds discrepancies between the facts as related by the facility and by the residents. The resident appears from the report to say that the work she was required to perform was in excess of that recommended by the physician and in violation of the statute. The Iowa Civil Rights Commission determined that it was not an appropriate forum for the resolution of such disputes.

Clearly, the statute must be applied in a legal manner so that the work performed by the resident does not exceed a "reasonable" and "moderate" amount under medical review and some therapeutic purpose must be identified for work going beyond the scope of housekeeping for the resident or the facility. [1] If the statute is followed, we do not believe a state or federal constitutional violation will result.

July 9, 1981

REAL PROPERTY; COUNTIES; MUNICIPALITIES: Subdivision platting. Chapter 409, §§409.30(3), 114.16, The Code 1981. Professional land surveyor's statement regarding post-recording monumentation binds both surveyor and proprietor. If proprietor prevents timely performance, surveyor may bring action for breach of contract, or may base defense on proprietor's conduct. (Ewald to Hanson, 7/9/81) #81-7-8(L)

July, 10, 1981

MUNICIPALITIES: Conflict of interest — §362.5, The Code 1981. In cities of less than ten thousand population, a city officer or employee may enter into a contract with the city if there was competitive bidding in writing, publicly invited and opened. The city does not have to accept the lowest bid. (Blumberg to Coleman, State Senator, 7/10/81) #81-7-9(L)

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[1] The county undoubtedly has some method of resolving factual disputes in the nature of complaints against county officials. We suggest that the resident's claim that she is being required to work more than the physician permits be investigated by the county for appropriate resolution. If the resident is unable to resolve this dispute with the county without resort to litigation, it is possible that she could make out a claim under 42 U.S.C. §1983 against the county.

July 15, 1981

CRIMINAL LAW: Disposition of Seized Property. Section 809.6, The Code 1981. Unclaimed property delivered to the treasurer of the county pursuant to §809.6(2), The Code 1981 may be sold by the Sheriff of the county at public auction pursuant to §§626.74-626.81, The Code 1981. An unclaimed automobile must be inspected prior to sale. Section 321.238(12), The Code 1981. (Martin to Swearingen, State Representative, 7/15/81) #81-7-10

Representative George R. Swearingen, State Representative: Section 809.6(2), The Code 1981 provides:

> 2. No claimant. Where there is no claimant or where the right to possession cannot be determined, nonperishable property shall be held for a period of six months from the date of filing of the return, pending claim. Thereafter, the magistrate or other officer having the propery in his or her custody shall, on payment of the necessary expenses incurred for its preservation, deliver it to the treasurer of the county, to be credited to the court fund.

You have asked for an opinion on the procedure for the disposition of seized property where there has been no claimant to the property after six months. To quote from your letter of May 12, 1981:

> What has evolved from this subsection in Washington County is that there is no specification regarding how the county treasurer is to liquidate this property for deposit to the court fund. Attached you will find a listing of property in the county sheriff's department and the subsequent turning over of the 1973 Ford auto to the county treasurer. The county treasurer is requesting guidance for the sale of the auto so that the funds may be deposited to the court fund.

Prior to the enactment of the new Iowa Criminal Code, seized property was sold pursuant to chapter 626. Section 751.26, The Code 1977 provided:

> Execution shall issue for the sale of all property, except money, ammunition and firearms which may have a legitimate use, and for the destruction of all property having no legitimate use. Sales shall be as provided by section 626.75. Due return of the execution shall be made thereon by the officer executing it. Ammunition and firearms shall be disposed of pursuant to section 749A.9.

Proceeds from the sale were paid to the county treasurer for deposit in the school fund. Section 751.29, The Code 1977.

Section 809.6(2), The Code 1981, provides that the proceeds from the sale of the property be credited to the court fund. Unclaimed property must also be retained for a period of six months. Other than these two changes, the procedure for disposing of the property remains the same as the procedure required under §751.26 of the 1977 Code. *See* P. Roehrick, *The New Criminal Code: A Comparison*, pp. 389-391 (1976); 4 J. Yeager and R. Carlson, *Iowa Practice: Criminal Law and Procedure*, §911 at pp. 197-198 (1979).

It is our opinion that property turned over to the county treasurer pursuant to §809.6(2), The Code 1981 may be sold by the sheriff at public auction pursuant to §§626.74 to 626.81, The Code 1981. Three weeks notice of the time and place of selling the personal property must precede the sale. Section 626.74, The Code 1981. Specific requirements for the posting and publication of the notice are set out in §626.75, The Code 1981.

Special provisions apply to the sale of the 1973 automobile mentioned in your letter. A transfer by operation of law, such as a sheriff's sale under execution, is no longer exempt from the motor vehicle inspection requirements of §321.238(12), The Code 1981. Consequently, motor vehicles sold pursuant to §809.6(2) and chapter 626 must be inspected prior to sale. The county need not, however, supply an odometer statement to the purchaser. Section 321.71(7), The Code 1971. The purchaser of the motor vehicle may be issued a certificate of title by "the treasurer of the county in which the last certificate of title to any such vehicle was issued..." Section 321.47, The Code 1981.

July 15, 1981

MENTAL HEALTH: Liability for the Costs of Treating Substance Abusers; Commitment of Substance Abusers to Mental Health Facilities. Laws of the Sixty-Eighth General Assembly, 1980 Session, ch. 1003; Laws of the Sixty-Ninth General Assembly, 1981 Session, House File 821; §§3.7, 125.2, 125.13, 125.21, 125.43, 125.44, 204.401, 204.409(2), 229.20, 229.50(3), 229.51, 229.52, 230.1, 230.2, 230.20(5), 321.281, 321.283(3), and 812.3, The Code 1981. As of July 1, 1981, state mental health institutes shall be facilities as defined by §125.2, The Code 1981, as amended, and therefore facilities within the meaning of §125.44, The Code 1981. State mental health institutes are not facilities within the meaning of §204.409(2), The Code 1981. Courts are not authorized to commit violators of §204.401, The Code 1981, to state mental health institutes as they are not facilities licensed by the Iowa Department of Substance Abuse. Neither the state nor counties will incur any liability for the costs of care and treatment provided to a substance abuser at a state mental health institute in contravention of §204.409(2), The Code 1981. Persons committed to a state mental health institute in violation of §204.409(2) may not be considered to be state patients. Chapter 230, The Code 1981, governs the costs of treatment provided to a substance abuser at a state mental health institute, and §204.409(2), The Code 1981, governs the costs of treatment provided to a substance abuser at a facility licensed by the Iowa Department of Substance Abuse.

A court may order a person committed to a state mental health institute for substance treatment under chapter 812 when it reasonably appears that the defendant is suffering from a mental disorder, which is inclusive of dependency on a chemical substance. Counties must be billed at the rate of eighty percent of the total costs of treatment provided to a person committed to a mental health institute under chapter 812 for a psychiatric evaluation and treatment of a mental disorder, but only at the rate of twenty-five percent of the total costs where the mental disorder results from substance abuse.

A court may commit a violator of §321.281, The Code 1981, to any institution in Iowa providing treatment for alcoholism or drug dependency, including a state mental health institute. In addition, courts may refer a defendant to a state mental health institute under §321.283(3), The Code 1981, after the effective date of H.F. 821 on July 1, 1981. The state is responsible for seventy-five percent of the costs of providing treatment to a person committed to a mental health institute under §321.281, The Code 1981, and the county of legal settlement is responsible for the remaining twenty-five percent of the costs. Persons committed to a mental health institute under §321.281 may not be considered to be a state patient. (Mann to Reagen, Commissioner, Dept. of Social Services, 7/15/81) #81-7-11(L)

July 16, 1981

COUNTIES AND COUNTY OFFICERS: Full-time County Attorney. §§332.61-64, The Code 1981. There is no affirmative duty placed on the supervisors to adopt a resolution relating to the status of the county attorney. If the supervisors take no action regarding the county attorney's full-time/part-time status, he or she maintains the status existing prior to the adoption of §§332.61-64, be it either full-time or part-time. As to county attorneys who assumed office after July 1, 1978, the critical distinction between full-time and part-time county attorneys is whether the county attorney is permitted to maintain a private legal practice. (Fortney to Longnecker, Iowa Public Employees Retirement System, 7/16/81) #81-7-12

Ed R. Longnecker, Iowa Public Employees Retirement System: You have requested an opinion of the attorney general regarding the concept of a full-time, as opposed to a part-time, county attorney. Your inquiry recognizes that Acts of the 67th G.A., 1978 Session, chapter 1119 defined the procedure by which a board of supervisors could alter the status of the county attorney, either converting a full-time position to a part-time position or converting a part-time position to a full-time position. These provisions are now codified in §§332.61-64, The Code 1981.

Your opinion request essentially inquires as to the consequence of a failure of a board of supervisors to make an election pursuant to §§332.61-64. In addition, your inquiry seeks to ascertain the criteria by which a determination is made as to whether a particular county attorney is full-time or part-time. It is our opinion that there is no affirmative duty placed on the supervisors to adopt a resolution relating to the status of the county attorney. If the supervisors take no action regarding the county attorney's full-time/part-time status, he or she maintains the status existing prior to the adoption of §§332.61-64, be it either full-time or part-time.

We are further of the opinion that the critical distinction between full-time and part-time county attorneys is whether the county attorney is permitted to maintain a private legal practice. Full-time county attorneys are those who, due to action of the supervisors, are not authorized to engage in private practice. In contrast, a part-time county attorney may maintain a private practice. The foregoing assumes, however, that the respective board of supervisors took action regarding the status of the county attorney pursuant to either §332.62 or §332.63. If no change was made in a county attorney's status after July 1, 1978 §332.64 provides that §§332.61-63 have no applicability to a county attorney holding office on July 1, 1978. Consequently, such county attorney's maintenance of a private practice would not be a controlling element in differentiating between full-time and part-time status. Holdover county attorneys are effectively "grandfathered" by the terms of §332.64.

Sections 332.61-332.64 do not mandate any action be taken by the board of supervisors. Section 332.61 provides "A county *may* provide that the county attorney shall be a full-time or part-time county officer in the manner provided in this Act." [Emphasis supplied.] The use of the word "may" denotes a permissive, not a mandatory, function. *See* §4.1(36), The Code 1981. Consequently, a county may elect to take no action whatsoever regarding the status of the county attorney. Should a county take no action, §332.64 controls the continuing status of the office of county attorney. That section provides:

> The provisions of this division shall not affect the full-time or part-time status of a county attorney that is in effect on July 1, 1978, but any subsequent change in the full-time or part-time status of the county attorney shall be made as provided in section 332.62 or 332.63, as applicable.

The language of §332.64 indicates that the distinction between full-time and part-time county attorneys existed prior to 1978, and the enactment of what is now §§332.61-64. Therefore, if a county attorney was employed on a full-time status prior to July 1, 1978 and the supervisors took no subsequent action pursuant to §332.63 to change the status to part-time, that county attorney position remains full-time. Similarly, part-time county attorney status is maintained if the position was part-time prior to July 1, 1978 and the supervisors took no action to convert the position to full-time pursuant to §332.62. Whether a particular county attorney was full-time or part-time prior to July 1, 1978 is a factual question which can only be resolved on a case-by-case basis, not appropriately addressed by an attorney general's opinion.

Regarding the question of how one determines whether a particular county attorney is full-time or part-time, we believe it is useful to quote a paragraph from your letter of May 6, 1981. You state:

> Prior to the July 1, 1978 amendments indicated above, county attorneys were ruled to be in full-time elective positions and thus, subject to coverage under Social Security. The basis for this ruling was that although all such positions do not require the full time of the individual, the position exists the full twelve months each year; that the duties of the office have first call upon the county attorney's services, and are therefore continuous, not sporadic or intermittent, or to be performed at his convenience.

Initially, we point out that this office cannot authoritatively construe federal law, nor can we pass upon questions regarding eligibility for coverage under federal retirement programs. Our role is limited to construing Iowa law. Because of these limitations, we here seek to construe §§332.61-64 regarding their scope for purposes of Iowa law. We do not construe these sections as bearing upon Social Security eligibility. We believe that the full-time/part-time distinction established by §§332.61-64 was a mechanism designed by the legislature to permit a board of supervisors to bar a county attorney from maintaining a private practice. Whether maintenance of a private practice constitutes part-time employment for Social Security purposes is a question we do not address. Indeed, it may be possible that a county attorney may be considered part-time for purposes of §§332.61-64 and still be considered full-time for Social Security purposes.

Because of the foregoing considerations, we are unable to respond to your statement that all county attorneys were considered full-time for purposes of Social Security prior to July 1, 1981. The Iowa Code, however, recognizes in §332.64 that there did exist part-time county attorneys prior to July 1.

While disagreeing with the conclusion that all county attorneys were full-time prior to July 1, 1978, we recognize that the elements you cite in reaching this conclusion may be relevant to determining whether a particular county attorney was full-time or part-time. Also of importance would be the proportion of the individual's professional time which is devoted to official duties. However, following July 1, 1978, there is one factor which overrides all others in determining the status of a county attorney. Whether that individual is permitted to maintain a private legal practice is the controlling factor. The General Assembly has specified that, effective July 1, 1978, "A full-time county attorney shall refrain from the private practice of law." *See* §332.61.

By adopting §332.61, the legislature has removed any question as to whether a county attorney serves on a full-time or a part-time basis. The determination is no longer resolved by subjective analysis. Rather a one-element test is provided. If a county attorney is designated as full-time, the person occupying the position is barred from engaging in private practice. Analogously, a county attorney who

maintains a private practice is not devoting his or her full-time to the duties of the office. [1]

We hasten to point out as we did earlier in this opinion, that the one-element test (i.e., existence of a private practice) is inapplicable to determining whether a county attorney is full-time if such county attorney held office on July 1, 1978 and the respective board of supervisors has taken no action to change the status of the office. *See* §332.64. The full-time or part-time status of these officers must be determined on a case-by-case basis with reference to their pre-July 1, 1978 status.

In conclusion, there is no affirmative duty placed on the supervisors to adopt a resolution relating to the status of the county attorney. If the supervisors take no action regarding the county attorney's full-time/part-time status, he or she maintains the status existing prior to the adoption of §§332.61-64, be it either full-time or part-time. As to county attorneys who assumed office after July 1, 1978, the critical distinction between full-time and part-time county attorneys is whether the county attorney is permitted to maintain a private legal practice.

July 16, 1981

GAMBLING: §99B.7, The Code 1981. The Elks, Kiwanis, Lions, community clubs and senior citizen groups qualify for §501(c) status and would be eligible as "qualified organizations" pursuant to §99B.7, The Code 1981. (Fortney to Mullins, State Representative, 7/16/81) #81-7-13(L)

July 16, 1981

MOTOR VEHICLES: Livestock Truck Shifting Load Provision — §321.463, The Code 1981; When read in light of its purpose §321.463 requires that there must be a corresponding decrease in weight of one axle including a tandem for a livestock hauler to be within the livestock exemption from the maximum weight limitations. (Goodwin to Kassel, Director, Iowa Department of Transportation, 7/16/81) #81-7-14(L)

July 16, 1981

COUNTIES AND COUNTY OFFICERS; COUNTY HOSPITAL TRUSTEE: §§8.51, 39.8, 347.9 and 347A.1, The Code 1981. The term of office of a person elected county hospital trustee must commence on the first day of January following the general election which is not a Sunday or legal holiday. (Fortney to Johnston, Polk County Attorney, 7/16/81) #81-7-15(L)

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[1] We note that the relationship between private practice and a full-time county position is not limited to the office of county attorney. Section 341.9, relating to full-time county prosecutors, was amended by the same bill which enacted §§332.61-64. Section 341.9 provides, in pertinent part: "The county attorney may appoint, with the approval of the board of supervisors, assistant county attorneys to serve as full-time prosecutors who shall refrain from the private practice of law."

COUNTIES: Drainage Districts. U.S. Const., Amend. XIV; Iowa Const., Art. V, §18; 1969 Session 63rd G.A., ch. 260, §27; §§4.1(36)(c), 455.2, 455.45, 455.135, 455.136, 455.182, 459.8, 459.10, 459.11, 462.7, 462.27, The Code 1981; §7634, The Code 1931. That portion of §462.7 which provides that only bona fide owners of agricultural land may serve as drainage district trustees denies equal protection of the laws to non-agricultural landowners within the district, and therefore violates U.S. Const. Amend. XIV. (Benton to Pavich, State Representative, 7/21/81) #81-7-16

The Honorable Emil S. Pavich, State Representative: In your letter of May 21, 1981 you requested an attorney general's opinion concerning the constitutionality of the provision of the Iowa Code which establishes the qualifications necessary to hold office as a drainage district trustee. According to your letter, as a result of municipal annexation, a drainage district has come to lie wholly within the city limits of Council Bluffs, Iowa. Although a portion of the land within the district is presently agricultural, your letter indicates that other portions of the land are used for residential purposes and that the agricultural land itself is being developed with a large residential area. Apparently the district is managed by a panel of trustees pursuant to ch. 462 of The Code, rather than the board of supervisors. It is the provision within ch. 462 setting forth the prerequisites necessary to serve as a drainage district trustee which prompts your inquiry. Specifically, §462.7, The Code 1981, provides:

> Each trustee shall be a citizen of the United States not less than eighteen years of age, *the bona fide owner of agricultural land in the election district for which he or she is elected,* and a resident of the county in which that district is located or of a county which is contiguous to or corners on that county. [Emphasis supplied].

The statutory language itself answers part of your question; property owners within a drainage district who own only residential property and are not bona fide owners of agricultural land are plainly ineligible to serve as trustees. Your central question concerning the constitutional validity of this provision however, is much more complex, and requires at the outset an examination of the nature of drainage districts, and the statutory procedures through which they are managed by a panel of trustees. With this understanding, we can examine whether the legislature's requirement that a drainage district trustee must own agricultural land passes constitutional muster.

Drainage districts in Iowa are by nature political subdivisions of the counties within which they are located, established to facilitate the drainage of surface waters for the protection of agricultural and other lands subject to overflow. Sections 455.2, 455.182, The Code 1981. *Voogd v. Joint Drain. Dist. Kossuth & Winnebago Cos.*, 188 N.W.2d 387, 393 (Iowa 1971). Although initially under the control of the county board of supervisors, any drainage or levee district in which the original construction has been completed and paid for may be placed, upon the petition of a majority of persons owning land within the district, under the control and management of a panel of three trustees. Any person owning land which is assessed for benefits within the district is eligible to vote at district elections. Section 462.10, The Code 1981. Once elected, the panel of trustees is clothed with all of the powers of a board of supervisors for the control, management, and supervision of the district. Section 462.27, The Code 1981.

Your letter notes that the district involved here now lies wholly within the city of Council Bluffs. Since ch. 459 of the Code addresses those situations in which a drainage district lies within the corporate limits of a city, its provisions merit discussion to determine if they apply to the problem your letter raises. Although the various provisions of ch. 459 refer to the board of supervisors, we will assume,

given §462.27, that the various powers and duties given a board of supervisors by ch. 459 are applicable to a panel of trustees managing a drainage district. Section 459.8, The Code 1981, seems most appropriate to this set of facts. This provision states:

> If the board of supervisors of any county at any time finds that twenty-five percent or more of the total area of any established drainage district is located within the corporate limits of any city, that the district's drains are wholly or partially constructed of sewer tile, and that the district's drain or drains are needed or being used by the city for storm sewer or drainage purposes, the board may by resolution transfer to the city control of the entire drainage district, including the portion outside the corporate limits of the city.

Upon the proper transfer to the city of the district's control, the city's governing body has the duty to accept control of the district, and to exercise complete control over it. Sections 459.10, 459.11, The Code 1981. If §459.8 could be read as requiring the trustees in the district described in your letter to relinquish control of the district to the city of Council Bluffs, that would obviate any need for our office to decide the constitutionality of §462.7. However it does not appear that §459.8 can be construed to reach that result, at least upon the facts stated in your letter. First, §459.8 sets out three conditions necessary for the transfer of control, of which only the first, that twenty-five percent or more of the total area of the district is located within the corporate limits of a city, appears to be met here. Even assuming that all of the statute's conditions were satisfied, the transfer of control to the city would still be discretionary with the trustees. Section 459.8 states that "... the board *may* by resolution transfer to the city control of the entire drainage district...." Section 4.1(36)(c), The Code 1981, states that the word "may" confers a power. In statutory construction the word "may" is usually construed as implying permissive or discretional conduct rather than mandatory conduct. *John Deere Tractor Works v. Derifield*, 252 Iowa 1389, 1392, 110 N.W.2d 560 (1961). This does not appear to be a circumstance in which "may" should be given a mandatory construction. *Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue;* 224 N.W.2d 437, 440 (Iowa 1974). An examination of the section's history supports this conclusion. Section 7634, The Code 1981, provided that upon fulfillment of certain conditions concurrent with a district lying within the corporate limits of a city the board "... shall relinquish all authority or control of all of said drain that is included within such corporate limits...." Such a transfer was clearly mandatory under the statutory predecessor to §459.8. See 1932 Op.Att'y.Gen. 273. However the verb "shall" was changed to "may" by 1969 Session, 63rd G.A., ch. 260, §27. This revision seems to clearly manifest a legislative intent to change the transfer of control of a district from a mandatory to a discretionary act. *Hanover Ins. Co. v. Adams Motel*, 264 N.W.2d 774, 777 (Iowa 1978).

Accordingly, we would conclude that a board of supervisors or panel of trustees is under no duty to transfer the control of a district to a city even when all of the conditions of §459.8 are met. Assuming then that the panel of trustees managing the district involved here retains control of the district, we must turn to an examination of the constitutionality of the requirement that trustees own agricultural land.

There are several principles germane to our inquiry which merit discussion before turning to the merits of the question involved. First, in considering the constitutionality of this statute, we must accord it every presumption of constitutionality and find it unconstitutional only if it clearly infringes on constitutional rights and then only if every reasonable basis for support of the provision is negated. *Woodbury Cty. Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 277 (Iowa 1979). Secondly, although ch. 462 restricts the right to vote in drainage

district elections to landowners within the district, that restriction has not been challenged in your opinion request, therefore we need only consider the agricultural landowner requirement to hold office as a trustee.

With these principles in mind, we can turn to an examination of §462.7 itself. In setting forth the criteria for holding office as a trustee, the legislature has in §462.7 drawn a classification between those owning agricultural land and other landowners within the district. For purposes of constitutional analysis, governmental classifications are considered, with varying degrees of scrutiny, under the equal protection clause of the fourteenth amendment to the United States Constitution. U.S. Constitutional amendment XIV provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* [Emphasis supplied].

The courts have recognized that it frequently is necessary for government to classify persons for legitimate state purposes, yet by the same token these classifications may not, under the equal protection clause, be based upon impermissible criteria or be arbitrarily or unreasonably drawn. *Redmond v. Carter*, 247 N.W.2d 268, 271 (Iowa 1976); J. Nowak, R. Rotunda, J. N. Young, *Handbook on Constitutional Law*, p. 519 (1978). Our inquiry must focus on whether the classification within §462.7, restricting the right to hold office as a trustee to those owning agricultural land, is violative of the equal protection clause as an improper classification.

The first step in our inquiry is to decide what level of scrutiny must be applied in examining the classification. There are essentially two levels of examination which the courts employ in determining whether a governmental classification is constitutionally valid. Those classifications which are based upon sex, race, alienage or national origin are considered suspect classifications, and hence in scrutinizing these classifications the courts require the government to demonstrate a compelling state interest to justify the classification. *State v. Kramer*, 235 N.W.2d 114, 116 (Iowa 1975). Similarly, if the classification imposes upon what the courts view as fundamental rights, the classification will be subject to a strict scrutiny, and the government required to demonstrate a compelling state interest. *Kramer* at 116; *Lunday v. Vogelmann*, 213 N.W.2d 904, 907 (Iowa 1973). For example, the courts view the right to vote as a fundamental right, with the consequences that if a classification denies the franchise to some citizens, that exclusion must be based upon a compelling state interest. *Hill v. Stone*, 421 U.S. 289, 297, 95 S.Ct. 1637, 1643, 44 L.Ed.2d 172, 179 (1975); *Kramer v. Union Free School District*, 395 U.S. 621, 626-627, 89 S.Ct. 1886, 1889-1890, 23 L.Ed.2d 583, 589 (1969). [1]

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[1] But cf: *Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973) in which the supreme court considered an equal protection challenge to a California statute which only permitted landowners to vote in water storage district elections. The court applied a rational basis test in sustaining the voter qualification statute. *Salyer* at 734-735. *Salyer* seems to stand for the proposition that voting restraints may be upheld where the election is one of a "special interest" and the functions of the election district specialized. *Hill* at 297. Although we have noted that your request does not concern the validity under ch. 462 of restricting the franchise to landowners within the district, we believe that if challenged the classification could be defended on the basis of *Salyer*.

As to those classifications not based upon a suspect class and which do not infringe upon fundamental rights, the courts employ what might be termed a traditional equal protection test. Under this criteria, the classification must bear a rational relationship to a legitimate governmental purpose in order to be sustained. *Hawkins v. Preisser*, 264 N.W.2d 726, 729 (Iowa 1978).

Obviously this latter standard is far less onerous than the strict scrutiny standard, and therefore the determination as to which standard to apply is frequently crucial.

The classification within §462.7 is not on its face based on any of the suspect criteria such as sex, race, alienage or natural origin. And although a trustee should be considered a public official, *State v. Pinckney*, 276 N.W.2d 433, 435 (Iowa 1979), there is no fundamental constitutional right to hold public office. *Trafelet v. Thompson*, 594 F.2d 623, 626 (7th Cir. 1979), *cert. denied* 444 U.S. 906, 100 S.Ct. 219, 62 L.Ed.2d. 142 (1979). Ostensibly then, the rational relationship analysis appears appropriate to test the classification within §462.7. There is additional support for this conclusion in Iowa case law. In *Redmond v. Carter*, 247 N.W.2d 268 (Iowa 1976), the Iowa Supreme Court considered an equal protection challenge to an application of Iowa Const. Art. V, §18, which would have made district court judges ineligible for appointment to the Iowa Court of Appeals while on the bench and for two years thereafter. In striking down this classification as violative of the district judges' rights under the equal protection clause, the court expressly found that traditional reasonable relation analysis should be applied to equal protection challenges involving ordinary restrictions on eligibility for public office. *See* also 88 Harv. L.Rev. 1111, 1218 (1975).

The Iowa court in *Redmond* based its conclusion that the reasonable relation standard should be applied in cases involving ordinary restrictions on eligibility for public office on *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). However, *Bullock* can be read as standing with a strong line of authority which holds that if the restriction on eligibility for public office infringes indirectly upon a right which the courts consider fundamental, such as the right to vote, the strict scrutiny test should be applied. Specifically, in *Bullock* the court considered the constitutionality of a Texas statute which required candidates to pay a filing fee as an absolute prerequisite to having their names placed on the ballot in primary elections. *Bullock* at 135. The court noted that it had not before attached fundamental status to candidacy so as to invoke a rigorous standard of review, but went on to consider the impact that the Texas fee system had upon less affluent voters. *Bullock* at 142-144. Concluding that the Texas statute had the effect of denying less affluent voters the opportunity to vote for candidates of their choosing since their favorites would be less likely to afford the fee, the *Bullock* court found that the Texas filing fee scheme had an appreciable impact on the exercise of the franchise, and that this impact was based upon the resources of the voters. *Bullock* at 144. The court went on therefore, to apply a close scrutiny test in striking down the fee requirement. *Bullock* at 149.

Other cases which have employed the *Bullock* analysis in striking down restrictions on eligibility for public office include *Choudry v. Free*, 552 P.2d 438, 131 Cal.Rptr. 654 (Cal. 1976); *Stapleton v. Clerk for City of Inkster*, 311 F.Supp. 1187 (E.D. Michigan 1970), and *Socialist Workers Party v. Welch*, 334 F.Supp. 179 (S.D. Texas 1971). *Choudry* bears the closest relation to the instant case, since it involved a constitutional challenge to a California statute requiring that the elected director of an Irrigation District be a freeholder [owner of real property] within the district. *Choudry* at 439. The California Supreme Court in *Choudry* found that the compelling state interest standard was applicable because:

> ...the limitation involved in the present case has an appreciable impact upon the equality and fairness of the electoral process. The freeholder requirement has the effect of denying nonlandowner voters the right to elect candidates who do not own real property. The voters' choice is thus confined to those whose predilections may favor the special concerns of landowners over the general welfare of all residents. *Choudry* at 444.

Applying the close scrutiny standard, the California court struck down the freeholder requirement as violative of equal protection. *Choudry* at 444. Reaching a like result in considering a Michigan city ordinance which limited eligibility for city council to real property owners, the federal court in *Stapleton v. Clerk for City of Inkster*, 311 F.Supp. 1187 (E.D. Michigan 1970) stated:

> ...a restriction upon who may be a candidate necessarily affects the efficacy of a person's vote. The effectiveness of the franchise can just as certainly be curtailed by restricting the group from whom candidates may be drawn as by restricting those entitled to cast a vote or by malapportioning a legislative body. *Stapleton* at 1190.

Section 462.7 does have a certain impact upon the voting rights of nonagricultural landowners in the sense that they are in effect prevented from voting for one of their group for district trustee. It is unclear however, whether this restriction on candidate eligibility has such a "... real and appreciable impact on the exercise of the franchise..." so as to merit a close scrutiny examination of the statute. We are not persuaded, as the federal court apparently was in *Stapleton* at 1190, that any restriction upon candidate eligibility merits the strict standard of review. The court in *Bullock* for example, explicitly linked the impact on the franchise of the Texas filing fee with the fact that the impact was related to the financial resources of the voters. *Bullock* at 144. And in *Choudry* the Irrigation District Director exercised a control over the residents of the district which could "...vitally affect the economic welfare of the residents...." *Choudry* at 441. Chapters 455 and 462 do not vest the trustees of drainage districts with a similar grant of power. Therefore, although the question is not free from doubt, we do not believe a court would impose a strict scrutiny standard in considering the validity of §462.7. The question then, is whether the eligibility requirement bears a reasonable relation to a legitimate state purpose.

The courts have on several occasions considered the constitutionality, under the equal protection clause, of property ownership requirements as a prerequisite to eligibility for public office. Our own case represents a requirement even more stringent than that found in these cases, in that §462.7 limits eligibility for trustee to a particular species of property owners, those who are bona fide owners of agricultural land. The seminal supreme court case in this area remains *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) in which the court considered an equal protection challenge to a Georgia statute which limited membership on county boards of education to freeholders. The court declined to specify which test should apply, holding that the Georgia freeholder requirement must fall even when judged by the traditional test of equal protection. *Turner* at 362. In *Turner*, the court acknowledged that there is no right to appointment to the county board of education but went on to state that the plaintiffs:

> ...have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications. The state may not deny to some it extends to others on the basis of distinctions that violate federal constitutional guarantees. *Turner* at 362-363.

The court went on to examine the proffered state reasons for the property-ownership requirement and found that the requirement was not reasonably related to any rational state interest. *Turner* at 363-364.

Subsequently the court, citing only *Turner*, reversed without opinion a Louisiana court which had found a Louisiana statute limiting membership on the Greater Baton Rouge Airport District to real property owners constitutional. *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977). Other cases which have struck down property ownership requirements on eligibility for public office utilizing a reasonable relation test include, *Gebelein Ex Rel. State v. Nashold*, 406 A.2d 279, 280 (Del.Ch. 1979); *Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 284 N.Y.S.2d 441, 231 N.E.2d 120, 122 (1967); *Sadler v. Connolly*, 575 P.2d 51, 54 (Mont. 1978); *Davis v. Miller*, 339 F.Supp. 498, 500 (D. Maryland 1972). For contrary authority see *Murphy v. Schilling*, 389 N.E.2d 314, 317 (Ind. 1979).

Even considering the presumption of constitutionality which attaches to §462.7, we must find that its standard limiting eligibility to serve as a drainage district trustee to bona fide owners of agricultural land to the exclusion of other landowners within the district is not reasonably related to any legitimate state purpose. An examination of two hypothetical justifications for the statute's classification serves to underscore this conclusion. First, it may be argued that drainage districts are primarily for the benefit of agricultural lands, and therefore only agricultural landowners should serve as trustees. Yet this rationale is defeated by the language of §455.2 which provides:

> The drainage of surface waters from agricultural lands *and all other lands* or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare. [Emphasis supplied.]

Obviously drainage districts are established and maintained for the benefit of all lands within the district, not merely agricultural property. Secondly, the argument could be made in defense of the classification, that bona fide agricultural landowners would have a greater incentive to manage the district properly, since in most instances districts are composed primarily of agricultural landowners. The legislature could clearly desire to have persons serve as trustees who have a stake in the district since their property is subject to an assessment and who therefore would have incentive to manage the district competently and frugally. However, to paraphrase the court in *Turner*, it cannot be seriously urged that a person otherwise qualified to serve as a trustee must also own agricultural property if he is to participate responsibly in the management of the district. Non-agricultural landowners are assessed for the benefits which their lands receive pursuant to §455.45, The Code 1981. Moreover, the panel of trustees of a district exercise such disparate powers over the district as appointing the group of commissioners which assess benefits pursuant to §455.45 and ordering repairs or improvements to the district which may be financed by an assessment levied by the trustees. Sections 455.135 and 455.136, The Code 1981. Accordingly, the interests of agricultural and non-agricultural landowners in the proper management of the district directly coincide. Even given the legislature's legitimate interest in insuring that drainage districts are competently and frugally managed, we fail to see why non-agricultural landowners would be any less interested in the frugal and competent management of the district.

There is, in sum, no reasonable basis for the exclusion of non-agricultural landowners from service as drainage district trustees. We must conclude therefore, that that portion of §462.7 which limits eligibility for service as such a trustee to bona fide owners of agricultural land operates to deny equal protection of the laws to non-agricultural landowners within the district, and is therefore unconstitutional under the fourteenth amendment.

July 21, 1981

CRIMINAL LAW; COUNTY ATTORNEYS; SIMPLE MISDEMEANORS: Section 336.3, The Code 1981, Iowa R.Crim.P. 27(1). The county attorney is obligated to inform the magistrate prior to each hearing or trial if he or she cannot attend due to conflicting official business. When the county attorney, after being advised as to the trial or hearing date, fails to appear or advise the magistrate as to the reason for his or her absence, the magistrate may appoint a special prosecutor under §336.3, The Code 1981. When the county attorney fails to appear, and does not request a continuance, the magistrate, absent a request from the defendant, should not continue a case to another date. When the county attorney fails to appear or advise the magistrate as to the reason for his or her absence, the magistrate may dismiss the case for want of prosecution. The magistrate may not conduct a jury trial in the absence of the county attorney with the arresting officer or complainant acting as the prosecutor. (Cleland to Horn and Kuiken, Judicial Magistrates, Jefferson County, 7/21/81) #81-7-17(L)

July 21, 1981

COUNTIES; COUNTY OFFICERS AND EMPLOYEES; MILEAGE EXPENSE: §§79.9 and 79.10, The Code 1981. Local units of government, including municipalities and school districts, may pay a maintenance allowance to a local employee for furnishing a private vehicle to be used by the employee in a public capacity, such allowance being in addition to the mileage expense reimbursement for actual and necessary travel paid under §79.9. The term "automobile", as used in §79.9, is intended in a generic sense to connote a motor vehicle without regard to the specific nature of the vehicle in question. Section 79.9 applies solely to reimbursement for miles actually driven in a private vehicle. It does not relate to other incidents of travel. (Fortney to Johnson, Auditor of State, 7/21/81) #81-7-18(L)

July 21, 1981

COUNTIES; COUNTY HOSPITALS: Chapter 347 and §§347.7, 347.13, 347.14, 347.28-29, The Code 1981. The board of trustees of a chapter 347 facility possess the authority to contract for office space for the purpose of subletting the same to medical practitioners who will utilize the county hospital facilities. If no bonding is contemplated to raise funds to satisfy the lease obligation, the board of hospital trustees may use money generated by the §347.7 tax levy to satisfy the lease. (Fortney to Olesen, Adair County Attorney, 7/21/81) #81-7-19(L)

July 22, 1981

CRIMINAL LAW; PUBLIC RECORDS; PUBLIC SAFETY, DEPARTMENT OF: §§68A.7(9), 80.9(2)(d), 690.2, 692.1, 692.17, 692.18, 901.5, 907.3(1) and 907.9, The Code 1981. §692.17 requires the removal of arrest and disposition data from computer data storage system whenever the charges are dismissed or the defendant acquitted, but does not require the removal of such data from manual data storage systems. Discharge from probation on a deferred judgment or deferred sentence is not a dismissal under §692.17. The master name index in the Bureau of Criminal Identification as currently

constituted does not contain criminal history data. (Hayward to Miller, Commissioner of Public Safety, 7/22/81) #81-7-20(L)

July 24, 1981

MUNICIPALITIES: Conflicts of Interest; Open Meetings §§28A.2, 28A.5, 362.5, 362.6 and 380.4, The Code 1981. A conflict of interest of a council member other than those covered by §362.5, must be certain, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal. A city cannot declare that one of its boards or committees is not subject to the open meetings law. (Blumberg to Spear, State Representative, 7/24/81) #81-7-21(L)

July 24, 1981

CIVIL RIGHTS/CONCILIATION/ADJUDICATING COMMISSIONERS: Sections 601A.15(3)(d), 601A.15(5), 601A.15(6), 17A.12(6), 17A.12(8), 17A.17(1), 17A.17(3), The Code 1981. Civil Rights Commissioner who approves bypassing further conciliation which thereby places complaint in line for hearing may participate in final adjudication of complaint if the commissioner (1) does not investigate the complaint, (2) does not prosecute or advocate for the complainant, (3) does not obtain the aid or advice of agency personnel with a personal interest in the complaint or who have prosecuted or advocated for the complainant, and (4) is not exposed, ex parte, to evidence outside the record of the contested case hearing. (Nichols to Reis, Civil Rights Commission, 7/24/81) #81-7-22(L)

July 30, 1981

COUNTIES; FIRE DEPARTMENTS; MUNICIPALITIES; DEPARTMENT OF PUBLIC SAFETY: Iowa Constitution, Art. III, §38A(1968); Art. III, 39A(1978): §§100.10, 100.12, 100.31, 101A.7, 103A.10(2), 123.30(1), 135B.9, 135C.9, 138.11, 218.4, 332.3(22), 356.36, 364.1 and 364.17, The Code 1981; 1981 Session, 69th G.A., H.F. 467, §3, H.F. 751, §§2-6, S.F. 324, §1. The fire marshal has a duty to inspect all Social Service institutions, schools in cities not employing fire inspectors, health care facilities and initially all smoke detectors installed pursuant to 1981 Session, 69th G.A., S.F. 324. He may enlist the aid of local authorities for the inspection of health care facilities and smoke detectors. Cities employing fire inspectors must inspect schools. Cities with population over 15,000 must inspect rental housing. Police in cities must inspect facilities with explosive licenses or permits. Sheriffs must inspect all other such facilities. Cities and counties may give their employees authority to inspect structures by ordinance. Any law enforcement or fire official may inspect a licensed liquor establishment. Any agency licensing a premise which requires compliance with fire safety regulations as a requisite for a license or permit may inspect for compliance. The fire marshal may not appoint local officials as his "designated subordinates" under 100.10, The Code, 1981. (Hayward to Miller, Commissioner of Public Safety, 7/30/81) #81-7-23

William D. Miller, Commissioner, Iowa Department of Public Safety: You have asked this office for an opinion on several questions regarding the duties and powers conferred by The Code on state and local agencies to make inspections of premises to check for compliance with fire safety statutes, regulations and ordinances. Specifically, you have asked four questions.

1. Does §103.14, The Code 1981, in requiring local authorities to inspect certain buildings to enforce compliance with applicable regulations regarding "protection from fire" create a responsibility to inspect for violations of, and to enforce compliance with the whole range of fire safety regulations promulgated by the Department of Public Safety?

2. If the answer to the preceding question is in the negative, does any provision of The Code place a duty to inspect any building for fire safety violations upon any agency, local or state?

3. What agencies are authorized to inspect buildings and enforce compliance with fire safety regulations?

4. May the fire marshal appoint local authorities as his "designated subordinates" under §100.10, The Code 1981, and, if so, would they be acting in their local capacity or as state employees?

Your question was rendered moot by the repeal of ch. 103, The Code 1981. 1981 Session, 69th G.A., H.F. 467.

I. STATUTORY DUTIES TO INSPECT

A. *The Fire Marshal*

The Code contains several provisions which require mandatory inspections by the fire marshal.[1] The last unnumbered paragraph of §218.4, The Code 1981, requires the fire marshal annually to inspect all institutions under the jurisdiction of the Department of Social Services. Section 135C.9(b), The Code 1981, requires the fire marshal or his deputy to inspect all health care facilities. Such facilities must comply with fire safety requirements as a condition for the issuance of a license. That provision allows the fire marshal to appoint a deputy to perform these inspections who may be a member of a local fire department. Section 100.31, The Code 1981, requires the fire marshal to inspect all public and private schools, colleges and universities except in cities which employ fire department inspectors. In such cities, the local fire inspectors have the duty to inspect such institutions. The fire marshal is also required to initially inspect all smoke detectors placed in multiple unit residential buildings required by 1981

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[1] This opinion only concerns routine safety inspections and not inspections which are part of a fire investigation.

Session, 69th G.A., S.F. 324. In performing this task, he may have the assistance of the various fire departments in the state.[2]

B. *Other Agencies*

Cities and counties are vested with the general authority to enact ordinances setting fire safety standards within their jurisdictions. *Iowa Constitution*, Art. III, §§38A and 39A(1968). Section 332.3(22), The Code 1981, restricts a county's authority in regard to a building code, stating in pertinent part:

> . . . Such code shall not be construed to apply within the limits of any city, or to farm houses or other farm buildings which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used or while under construction for such use.

With that exception, cities and counties generally have the authority, consistent with statute and the Iowa Constitution to enact fire safety regulations. Section 103A.10(2), The Code 1981, provides a specific grant of authority in this regard, stating in pertinent part:

> The state building code shall be applicable:
>
> * * *
>
> b. In each governmental subdivision where the governing body has adopted a resolution accepting the application of the Code.

To the extent cities and counties enact fire safety standards and require inspections by ordinance, they are legally bound to perform the required inspections.

Section 364.17, The Code 1981, requires all cities with populations exceeding fifteen thousand (15,000) to adopt a housing code. Section 364.17(1), The Code 1981, lists several different codes among which such cities could choose before January 1, 1981. Cities not adopting one of the specified housing codes are, pursuant to §364.17(2), The Code 1981,

> [S]ubject to and shall be considered to have adopted the uniform housing code promulgated by the International Conference of Building Officials, as amended January 1, 1980.

These housing codes contain minimum fire safety standards regarding design and materials. Section 364.17(3), The Code 1981, requires cities over fifteen

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[2] Smoke detectors must be placed in specified locations in existing multiple unit residential buildings, excluding owner occupied rooms or units by July 1, 1984. Any multiple unit residential building under construction on or after July 1, 1981, must comply prior to its occupancy. Multiple unit residential buildings are defined in 1981 Session, 69th G.A., S.F. 324, §1(1)(a), as follows:

> [A] residential building, an apartment house, or portion of a building or an apartment house with four or more units, hotel, motel, dormitory or rooming house.

thousand (15,000) in population to inspect rental housing to assure compliance with the mandated housing codes, stating in pertinent part:

> A city which adopts or is subject to a housing code under this section shall adopt enforcement procedures, which shall include a program for regular rental inspections, rental inspections upon receipt of complaints, and certification of rental housing....

* * *

The goal of statutory interpretation is to effect the intent of the legislature whenever possible. *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978). The legislature would not have required cities of over fifteen thousand (15,000) in population to inspect regularly unless it intended that such cities adopt meaningful enforcement procedures. Therefore, while the frequency of such inspections is left to the cities discretion, its enforcement procedures must be reasonably calculated to monitor landlords' compliance with safety standards.

Every six months, the police in cities exceeding ten thousand (10,000) in population, and the sheriff in all other places, must inspect all facilities covered by a license for the commercial use of explosives or a permit for the noncommercial use of explosives, to determine that they conform with applicable safety standards. §101A.7, The Code 1981.

The Department of Social Services has the authority to set fire safety standards for jails under §356.36, The Code 1981. Once it has adopted such standards, it is responsible to see that all jails are inspected to assure compliance with its standards. At the time of this opinion such rules have not been finalized. Proposed rule 770—15.9, *Iowa Administrative Bulletin*, p. 1131 (March 4, 1981).

II. DISCRETIONARY INSPECTIONS

The fire marshal and his staff have the authority to enter any building in this state which are subject to his regulations. Section 100.10, The Code 1981, states:

> The state fire marshal, and his designated subordinates, in the performance of their duties, shall have authority, to enter any building or premises and to examine the same and the contents thereof.

The fire chief of every city in which a fire department is established may enter any building within his jurisdiction for such purposes as well.[3] Section 100.12, The Code 1981, states in pertinent part:

> In order to effect the purposes of this chapter, the chief of the fire department aforesaid shall have the authority to enter any building or premises and to examine the same and the contents thereof, and orally or in writing, to order the correction of any condition contemplated by section

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[3] If consent to perform a lawful search is denied to the state fire marshal, fire safety inspector, or other person authorized to inspect a building for compliance with fire safety regulations, such person should obtain an administrative search warrant in accordance with 1981 Session, 69th G.A., H.F. 751, §§2-6.

> 100.13. Should said order not be complied with the officer making the inspection shall report to the state fire marshal who shall proceed as though the inspection had been made by himself.[4]

An officer may not delegate any power that involves judgment and discretion to a subordinate. *State v. Johnston*, 253 Iowa 674, 113 N.W.2d 309 (1962). However, an inspection is a ministerial function not involving discretion or policy making. Discretionary functions in this regard remain with the fire marshal so far as ch. 100, The Code 1981, and his rules and regulations are concerned. Therefore, the fire chief may delegate his power under §100.12 to his subordinates.

Under §§332.2(22), quoted above, and 364.1, The Code 1981, counties and cities may provide inspection authority by ordinance to check compliance with their own fire safety regulations.

Any law enforcement or fire official, may inspect any licensed liquor establishment to check for compliance with fire safety requirements. §123.30(1), The Code 1981. Such inspections may enforce any requirement, whether created by statute, administrative rule, ordinance or local regulation.

Any agency charged with the licensing of a business or activity at least in part for the purpose of protecting the physicial safety of the public when on or around the licensed or regulated premises may require that such premises are maintained in compliance with applicable fire safety standards. They may even condition the approval, renewal, or continuance of a license on such compliance.

It is clear that the state of Iowa has, pursuant to its police powers, the authority to regulate commercial activity to protect the public health, morals, safety or welfare. *State v. Logsdon*, 215 Iowa 1297, 248 N.W. 4 (1933). 53 C.J.S. *Licenses* §15 (1948). Of course, without this basic authority, this opinion would not be necessary because no public official could be charged with the authority, much less a duty, to set and enforce fire safety standards. (This authority is also vested in the cities and counties as discussed above.) It is also clear that the General Assembly can vest part of this authority in the various administrative agencies of the state.

> Where discretion is to be exercised by administrative officials, proper standards or guides for the use of such discretion may, and as a general rule must be established by the enactment. In prescribing guides for administrative action, the enactment need not cover every detail, and it need not fix the conditions on which a license may be granted by an official where it would be impracticable to lay down a comprehensive rule or where the enactment relates to the administration of police regulation and is necessary for the protection of the public. 53 C.J.S. *Licenses* §15 (1948).

In determining whether an agency has the authority to require an enterprise to comply with fire safety standards, one should review the statute to ascertain the purpose of the regulation. If the legislature is attempting to regulate an enterprise only to protect the public from incompetent or dishonest practitioners, fire safety regulation would not be within the licensing agencies authority. On the other hand, if the purpose for the regulation includes preserving the safety of

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[4] The word "aforesaid" in §100.12 refers to the reference in §100.2, The Code 1981, to "[t]he chief of the fire department of every city in which a fire department is established."

persons on or about the premises, the licensing agency should be able to set fire safety standards for the premises. The easiest method would be to require conformance with those set by the fire marshal and local authorities.

Examples of statutes providing such regulatory authority are ch. 170 (concerning food processing establishments), ch. 170A (The Iowa Food Service Sanitation Code), and ch. 170B (The Iowa Hotel Sanitation Code), The Code 1981, which delegate authority of the Iowa Department of Agriculture, and ch. 135B (Licensure and Regulation of Hospitals), ch. 135C (regulation of health care facilities), or ch. 138 (regulation of migratory labor camps), The Code 1981, which delegate authority to the Iowa Department of Health. While the Department of Agriculture has not promulgated rules requiring compliance with fire safety standards as a requisite to obtaining or maintaining a license, it could do so if it wanted. The Department of Health has promulgated such rules pursuant to its statutory authority to regulate hospitals, 470 I.A.C. 51.7(6)(b) and 57.7(8), health care facilities, 470 I.A.C. 60.20(2), and migratory labor camps, 470 I.A.C. 81.6. Furthermore, pursuant to the inspection provisions in §§135B.9, 135C.9 and 138.11, The Code 1981, the Department of Health may inspect the premises of such establishments to check for compliance with its fire safety standards.

The foregoing paragraph is not intended to be an exhaustive study of all the agencies of the state which have the authority to set and enforce fire safety standards. It is intended to be an example of two approaches to the question of setting fire safety standards as part of a regulatory or licensure program. One department chose to set such standards. The other did not. Neither exceeded its statutory authority nor failed to meet its statutory responsibilities.

III. DESIGNATED SUBORDINATES UNDER §100.10

The fire marshal may not appoint local authorities as his "designated subordinates" under §100.10, The Code 1981. That section states:

> The state fire marshal, and his designated subordinates, in the performance of their duties, shall have authority to enter any building or premises and to examine the same and the contents thereof.

Before one can be a designated subordinate, one must be a subordinate. In this context a subordinate is one who occupies "a lower position in a regularly descending series." H.C. Black, *Black's Law Dictionary* p. 1595 (1968). Local fire officials are independent of the fire marshal, not generally subject to his supervision, direction or control. Therefore, the term "designated subordinates" in §100.10 cannot refer to local officials.

As stated above, §100.12, The Code 1981, provides local fire departments the same authority to enter and inspect buildings as the fire marshal has under §100.10. This provision would be unnecessary if local fire officials could be appointed "designated subordinates" under §100.10.

IV. CONCLUSION

The fire safety inspection provisions in The Code 1981 provide a patchwork of various duties and powers assigned to state and local authorities. The fire marshal has the duty to inspect all Department of Social Services institutions, schools in cities not employing fire inspectors, health care facilities and smoke detectors installed pursuant to 1981 Session, 69th G.A., S.F. 324. He may appoint local fire officials as his deputies to inspect health care facilities and may enter into agreements with them for the inspection of smoke detectors.

All cities with a fire inspector must inspect all school buildings. Cities with a population over fifteen thousand must inspect all rental housing. The police department in all cities over ten thousand in population must inspect facilities with explosive licenses or permits. The county sheriff must inspect all other such facilities. Cities and counties may by ordinance mandate fire inspections by their officials. The Department of Social Services must inspect all jails for compliance with its fire safety standards.

The fire marshal, the chiefs of local fire departments and their agents may enter any structure within their jurisidiction to make a fire safety inspection. Cities and counties may provide discretionary inspection authority to their employees by ordinance. Any law enforcement or fire official may inspect a licensed liquor establishment for fire safety compliance. Any agency charged with the regulation of a business at least in part for the purpose of protecting the safety of the public using its facilities may set fire safety standards by regulation and inspect the premises for compliance.

The fire marshal cannot appoint local fire officials as his "designated subordinates."

July 30, 1981

COURTS; RETIRED JUDGES: §605.25, The Code 1981. Section 605.25 does not establish an entitlement to a salary in lieu of continued receipt of an annuity. The section contemplates that a retired judge on temporary assignment make an election between receipt of a salary and continued receipt of an annuity. The section prohibits receipt of both a salary and an annuity. (Fortney to O'Brien, Court Administrator, 7/30/81) #81-7-24(L)

July 30, 1981

MUNICIPALITIES: Civil Service — §§400.8, 400.9, 400.16, 400.17, 400.18, The Code 1981. A city can refuse to hire or promote a person under civil service to a department where a relative works if it believes that such an action will result in divided loyalties or personnel problems. However, a city cannot deny a qualified individual from applying or being examined for a civil service position, nor from being placed on the certified eligible list. A city cannot remove a person from a civil service position merely on the basis of marriage to a co-worker. (Blumberg to Slater, State Senator, 7/30/81) #81-7-25(L)

July 30, 1981

MUNICIPALITIES: Police and Fire Chief's Retirements — §§384.6, 411.3 and 411.8(1)(a), The Code 1981. Section 384.6(1) only provides for the normal contribution of §411.8(1)(a) to be made to the International City Managers Association/Retirement Corporation instead of the pension fund under chapter 411. Past earned retirement credits and past contributions are not included. (Blumberg to Doderer, State Representative, 7/30/81) #81-7-26(L)

July 30, 1981

MUNICIPALITIES: Cemeteries — §§566.14, 566.15 and 566.16, The Code 1981. Money from donations and bequests and from the sale of lots must be used for the care and maintenance of the lots or property of the donor, unless the terms of the donation, bequest or the sale of lots provides otherwise. Money from the perpetual care fund of a municipal cemetery cannot be used for the purchase and improvement of additional land. (Blumberg to Shimanek, State Representative, 7/30/81) #81-7-27(L)

July 31, 1981

MUNICIPALITIES: Incompatibility: Conflict of Duties — The positions of chief of a volunteer fire department and city council member are not incompatible. However, there is a conflict for a person holding both positions taking part in the decision making process and vote as a council member with regard to fire department matters. (Blumberg to Carney, State Senator, 7/31/81) #81-7-28(L)

July 31, 1981

COUNTIES: County Conference Board — §§336.2, 441.2, 441.16, 441.31, 613A.1, 613A.2, and 613A.8, The Code 1981. If a County Conference Board and its individual members are sued in tort, the county attorney shall defend the board and the members of the Board of Supervisors. The cities and school districts shall provide defense for the mayors and school board directors that sit on the board. (Blumberg to Folkers, Mitchell County Attorney, 7/31/81) #81-7-29(L)

July 31, 1981

LIBRARIES: §303B.9, The Code 1981. The tax receipts levied pursuant to §303B.9 are to be apportioned equally among all libraries which provide library services to a tax jurisdiction, unless the apportionment is otherwise specified in the contract between the county and the municipal libraries. (Fortney to Richter, Pottawattamie County Attorney, 7/31/81) #81-7-30(L)

July 31, 1981

MUNICIPALITIES: Incompatibility of Offices — §§384.16, 441.31, 441.32, 441.35, 441.37, 441.38, The Code 1981. The positions of city council member and membership on the Board of Review are incompatible. (Blumberg to Maher, Fremont County Attorney, 7/31/81) #81-7-31(L)

AUGUST 1981

August 4, 1981

COUNTIES; POOR FUND; PURCHASE OF MEDICAL SERVICE: While some nursing homes in Iowa may voluntarily agree to provide care at the Title XIX (Medicaid) rate to counties, there is no requirement that care paid by counties be provided at the Title XIX rate. (Morgan to Brown, State Senator, 8/4/81) #81-8-1(L)

August 4, 1981

OPEN MEETINGS ACT: Reasonably accessible place. Section 28A.4(2), The Code 1981. A county board of supervisors must hold its meetings at places that are reasonably accessible to residents of the county. This reasonableness requirement is satisfied when the board meets at places located within the county. (Stork to Clark, State Representative, 8/4/81) #81-8-2(L)

August 6, 1981

COUNTIES; FINANCES: Transfer of funds. Counties, under H.F. 836 recently enacted by the legislature, may honor warrants drawn on a county fund when there is a temporary shortfall of revenues in that fund if the county has balances otherwise available. (Appel to Johnson, State Auditor, 8/6/81) #81-8-3(L)

August 6, 1981

PIPELINES; COMMERCE COMMISSION; DRAINAGE DISTRICT: Chapter 455, §§455.1, 455.199(1); chapter 479, §§479.1, 479.29(1), The Code 1981. Federal law (Natural Gas Pipeline Safety Act of 1968 and Alaska Natural Gas Transportation Act of 1976) totally preempt state law with respect to regulation of interstate gas pipelines. Sections 455.199(1) and 479.29(1) are constitutionally valid, but subordinate to preemptive federal law. Section 479.29(1) prevails over §455.199(1). County home rule amendment does not give county authority to enforce ordinance inconsistent with state law. (Ewald to Craft, State Senator, 8/6/81) #81-8-4(L)

August 6, 1981

STATE OFFICERS AND DEPARTMENTS: Hearing Aid Dealers. Authority to test for hearing loss. §§147.151(5), 154A.1(4), 154A.1(5), 154A.20, The Code 1981. The authority of a hearing aid dealer to measure human hearing by any means is limited by the statutory phrase "for the purposes of selections, adaptations, and sales of hearing aids." Chapter 154A does not grant hearing

aid dealers the authority to administer tests and interpret the results of said tests for the purpose of determining a hearing loss. (Freeman to Hawes, Chairperson, Board of Speech Pathology and Audiology Examiners, 8/6/81) #81-8-5(L)

August 6, 1981

STATE OFFICERS AND DEPARTMENTS; ENVIRONMENTAL QUALITY: Drinking water supply program; General Assembly: Appropriations. §§455B.31, .32, .33, .36, .45, The Code 1981. Fact that legislature cut department's budget by amount greater than the cost of enforcing its drinking water program does not relieve department of its mandatory statutory duty to enforce said program in the absence of express statutory language, even though there is legislative history indicating intent not to fund the program. (Miller and Osenbaugh to Goldsmith, Assistant Lucas County Attorney, 8/6/81) #81-8-6

Mr. Paul M. Goldsmith, Assistant Lucas County Attorney: You have asked our opinion whether the Iowa Department of Environmental Quality's decision to cease enforcing its drinking water supply program violates §§455B.31, .32, and .33 of the Code of Iowa.

In 1980 DEQ and other state agencies were ordered to submit alternative budget proposals which provided for reduced appropriations necessitated by declining state revenues. DEQ proposed to eliminate its water supply program if its budget were thus reduced. The governor recommended a budget for DEQ which reduced its prior budget by approximately $230,000. We are told that materials submitted to the legislature stated that DEQ would eliminate enforcement of the water supply program if the governor's recommended level of funding was adopted. The water supply program cost the state approximately $150,000 per year, and the state received an additional $450,000 per year in federal funds to administer it. At the time that the governor recommended a budget which did not include the $150,000, a bill was submitted to delete the statutes concerning water supply. The legislature cut DEQ's general appropriation by more than $150,000; the appropriations bill contains no reference to deletion of the water supply program. While there is legislative history indicating that the budget cut was intended to delete the water supply program, no bill referring to these sections was passed. Chapter 455B of the Iowa Code still contains various provisions requiring DEQ to administer a water supply program. *See* §§455B.31-.33, 455B.36, The Code 1981. The question arises whether DEQ can terminate its water supply program when those statutes remain in the Code.

For purposes of this opinion, DEQ's water supply program consists of two major functions. One function is enforcement and testing of water quality standards mandated by the federal Safe Drinking Water Act, 42 U.S.C. §300f, *et seq.*, passed in 1974. That Act establishes drinking water standards and monitoring requirements and provides that the states can assume the primary enforcement of those standards if state statutes and rules are no less stringent than those of the Act. 42 U.S.C. §300g-2. In 1976 the Iowa legislature amended chapter 455B to authorize DEQ to enforce the Safe Drinking Water Act. 1976 Session, 66th G.A., chapter 1204, codified in §§455B.31-.33, .36, The Code 1981. DEQ had been enforcing the Safe Drinking Water Act standards since 1977, when the federal Environmental Protection Agency approved the state's regulatory plan. DEQ

returned the enforcement of the Safe Drinking Water Act standards to the Environmental Protection Agency on July 1, 1981. These functions will therefore now be performed in Iowa by that federal agency applying federal standards.

The other function is the review of applications for construction permits for public water supply systems which have at least fifteen connections or serve at least twenty-five people. §§455B.30(19), The Code 1981. The construction permit program for drinking water supply systems was originally administered by the State Board of Health and was transferred to the DEQ in 1976. *See* §135.11(7), The Code 1966; 1976 Session, 66th G.A., chapter 1204, §9. These construction permits are not required by the Safe Drinking Water Act and will not be enforced by the Environmental Protection Agency.

The legislative history of the recent appropriations bill indicates that the legislature deleted state funding for the water supply program but it did not expressly state that it was not funding that specific program. The House Appropriations Subcommittee approved a bill which struck the specific water supply provisions of chapter 455B. This bill was amended on the House floor to also strike several substantive water pollution provisions and the bill eventually died. Meanwhile a senate subcommittee added an amendment to DEQ's appropriation requiring DEQ to continue its water supply program until February 1982. On the senate floor this was amended to require DEQ to continue its water supply program indefinitely. The House deleted this amendment from the appropriations bill. H-4178, Iowa State House Journal, May 14, 1981. The appropriations bill returned to the senate and it concurred. The result was a general appropriation to DEQ for "salaries, support, maintenance and for miscellaneous purposes," 1981 Session, 69th G.A., S.F. 553, §9. The appropriation, as stated above, does not include the $150,000 which was Iowa's share of the cost of its water supply program.

Did the legislature's reduction of funding in this general appropriations bill result in the implied repeal or suspension of §455A.31 and other sections establishing the water supply program? A finding of repeal by implication requires a clear showing of legislative intent.

> There is a presumption against repeal of statutes by implication. Such repeals are not favored by the courts and will not be sustained unless legislative intent to repeal is clear in the language used and such a holding is absolutely necessary.

State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978) (prior statute punishing public intoxication not repealed by enactment of revised Criminal Code). The appropriations bill contains absolutely no language suspending operation of the water supply statutes. Had the legislature clearly deleted all funding for the water supply program in an appropriations bill with specific line items, one could conclude that the legislative intent not to enforce such program was clear in that such bill would be incapable of harmonization with the statutes during the period covered by the appropriations bill. However, nothing on the face of this appropriations bill even suggests a change in substantive law. We are advised that there was much debate in the legislature and legislative subcommittees concerning abolition of the water supply program and that individual legislators were aware that the budget cut was to suspend enforcement of the water supply program. While legislative history is admissible to clarify a statute of doubtful meaning, *Lenertz v. Municipal Court*, 219 N.W.2d 513, 516 (Iowa 1974), legislative history of a silent general appropriations bill cannot, in our opinion, provide the clear expression of legislative intent sufficient to suspend the operation of an existing statute. *United States v. Langston*, 118 U.S. 389, 6 S.Ct. 1185, 30 L.Ed. 164 (1886) (appropriation of salary of $5,000 for ambassador did not repeal statute setting salary at $7,500 absent words that expressly or by clear implication modified or repealed prior law).

> The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.

Iowa State Educ. Ass'n. v. Public Employment Relations Board, 269 N.W.2d 446, 448 (Iowa 1978). Although specific riders requiring DEQ to carry out the program were deleted, such would also be consistent with recognition that the statutes remained in effect absent specific enactments to the contrary. We therefore conclude that the appropriations bill did not modify, suspend, or repeal the statutes establishing the water supply program. [1]

The statutes in question state DEQ "shall" establish rules for construction and operation of public water supply systems, §455B.32(2); establish drinking water standards, §455B.32(7); establish rules regarding inspection and monitoring of public water supply systems, §455B.32(8); adopt a statewide emergency plan, §455B.32(9); formulate statewide standards for review of construction, §455B.32(10); approve or disapprove those plans, §455B.33(4); and inspect municipal systems, §455B.33(5). Furthermore, §455B.45 makes it unlawful for any person to construct, modify, or operate a water supply distribution system without a DEQ permit. Violation is punishable both civilly under §455B.49(1) and criminally under §455B.49(2).

The word "shall" in these statutes is persuasive evidence of legislative intent that a statutory duty is obligatory rather than permissive. *State v. Lohr*, 266 N.W.2d 1, 5 (Iowa 1978).

> When addressed to a public official the word "shall" is ordinarily mandatory, excluding the idea of permissiveness or discretion. Hanson v. Henderson, 244 Iowa 650, 665, 56 N.W.2d 59.

Schmidt v. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (Iowa 1968). Although there are Iowa cases holding that the word "shall" is not always mandatory but may be directory only, such cases do not hold that the public officer may lawfully avoid compliance with such a statute but are instead concerned with the effect of failure to comply. As stated in *Taylor v. Department of Transportation*, 260 N.W.2d 521, 523 (Iowa 1977):

> The mandatory-directory dichotomy does not refer to whether a statutory duty is obligatory or permissive but instead relates to whether the failure to perform an admitted duty will have the effect of invalidating the governmental action which the requirement affects. [Citation omitted.]

Since the issue before us is simply whether the Environmental Quality Commission has discretion to refuse to enforce provisions of the statute, the mandatory-directory dichotomy is not relevant. In §4.1(36)(a), The Code, the legislature has stated that "[u]nless otherwise specifically provided by the General Assembly . . . [t]he word 'shall' imposes a duty." We must conclude that the statute is obligatory and not merely permissive. Therefore, DEQ has a duty to enforce §§455B.32, 455B.33, and 455B.34.

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[1] We also note that it is not advisable to amend substantive statutes by general appropriations bills funding several agencies since such may violate the Iowa Constitution, Art. III, §1, requiring every act to embrace only one subject. 1975 Op.Att'y.Gen. 149.

While the legislature delegated to the commission discretion as to the means by which to carry out the water supply program, the statute does, we believe, compel the commission to adopt and enforce rules and to review and permit water supply systems. While the agency's construction of the statute as permissive and not obligatory is entitled to weight, the commission may not change the law by giving it a construction which departs from the clear meaning of the statute. *Consolidated Freightways Corp. of Delaware v. Nicholas*, 258 Iowa 115, 122, 137 N.W.2d 900, 905 (1965) (statute providing that board "shall" use specified formula precludes agency from adopting different formula).

Although DEQ has a statutory duty to administer the water supply program, is the lack of adequate appropriations a justification for non-enforcement? The Iowa Supreme Court has stated that a court will not compel a public officer to perform a statutory duty if performance is factually impossible. *Christopher v. District Court*, 255 Iowa 694, 697, 123 N.W.2d 892, 894 (Iowa 1963) (mandamus would not issue to compel transcription of trial transcript where reporter's notes lost); *see also* 52 Am.Jur.2d, *Mandamus* §38, p. 363. It would be very difficult for an agency to establish that a decrease in its general appropriation makes it impossible for it to perform any of its functions in one entire program. There are factors rendering it very difficult for DEQ to provide even a skeletal water supply program. Its overall budget was cut by more than the cost of this program. Much of its funding is federal and must be used for other specific functions. We would also note that EPA will not provide its share of the water supply program costs (or seventy-five percent) unless the state provides adequate funding.

Furthermore, §455B.45 makes it unlawful for persons to construct, modify, or operate a water supply system without a DEQ permit. We understand that DEQ has notified municipalities and other public water supply systems that it will no longer review construction permit applications and that permits will no longer be required after July 1. As stated above, DEQ has a statutory duty to review such applications and may not by administrative action delete the statutory permit requirement. Operators of public water supply systems also have a statutory duty to obtain DEQ permits before construction or modification of their systems; their failure to obtain such permits would cause any construction to be punishable by civil or criminal penalties. §§455B.45, 455B.49, The Code. During any period in which DEQ refuses to review such applications or issue permits, may a water supply system proceed with construction without the permit required by law? If the system proceeds in good faith believing that DEQ has rescinded the program, the state might well be estopped from bringing an enforcement action solely for failure to obtain the required permit. Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 14-16 (Iowa 1978) (agency estopped from removing pre-statutory, non-conforming billboard solely for failure to file permit application within statutory deadline when agency failed to provide necessary permit forms). To the extent that DEQ renders compliance with the statute impossible and that persons reasonably rely on DEQ's affirmative statement that a permit is not required, we believe such persons would have a defense to an action for civil penalties or criminal sanctions. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (Due Process Clause prohibits punishment for parading "near" a courthouse when police chief told them they could meet at certain distance); LaFave and Scott, *Handbook on Criminal Law* §47, pp. 365-369 (1972) (reliance on official interpretation of law by agency charged with enforcement). Obviously public water supply systems must continue to supply water and cannot conscionably be punished for doing so without a permit where the state makes it impossible to obtain one and advises them one is not required. However, more difficult questions may arise in cases where the necessity is less clear. To hold at the other extreme that one could construct a new water supply system without a permit and without complying with the standards specified by the statute would allow an administrative agency to totally abrogate a statutory requirement without authority to do so. While

penalties would not appear appropriate, the police power might yet require that such a system be later modified as necessary to meet reasonable requirements. Thus, we believe operators of water supply systems do expose themselves to risk if they proceed to construction, installation, or modification of water supply systems and ignore the statutory requirements.

Our conclusion that DEQ has a statutory duty to administer the water supply system creates a very serious problem for that agency and for all water supply systems in the state. Legislative action appears the only clear solution. The legislature must determine whether to provide funds for the program (or whether present funding is adequate) or whether to abolish the statutory duty. Unless or until such is done, the agency must, we believe, continue the program to the extent possible under existing funding.

As a practical matter, EPA's assumption of primary enforcement responsibility under the Safe Drinking Water Act insures Iowans that similar drinking water standards will be administered in Iowa. As a matter of law, however, such does not suspend DEQ's responsibility to perform those functions under state law. The federal statute specifically leaves state law intact. The relevant section, 42 U.S.C. §300g—3(e), states as follows:

> Nothing in this subchapter shall diminish any authority of a state or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems, but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter.

Thus federal assumption of primary enforcement responsibility under the Safe Drinking Water Act does not preempt any state laws.

While the legislature in enactment of those portions of chapter 455B relating to water supply standards was clearly seeking to insure compliance with the federal Safe Drinking Water Act, *see* §§455B.36(2), 455B.32(7), the legislature did not make enforcement of these statutory provisions contingent upon the state having primary enforcement authority under that federal act.

As to those functions relating to enforcement of the Safe Drinking Water Act, chapter 28E does authorize state agencies to jointly exercise powers with the federal government or other state agencies. §28E.3, Iowa Code. Chapter 28E does not relieve a public agency of an obligation imposed by law but allows substitution of the performance of a joint board or other entity created under a 28E agreement. §28E.7, The Code. One potential solution is a 28E agreement with the Environmental Protection Agency and University Hygienics Laboratory (which is to perform certain technical support functions under contract with E.P.A.) to jointly operate the water supply program.

Any such agreement must be drafted to avoid an unconstitutional delegation of state power to a federal agency.

> ...while a public board or body may authorize performance of ministerial or administrative functions by others, it cannot re-delegate matters of judgment or discretion.

Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555, 560 (Iowa 1972) (statute providing that school board "shall" make rules governing pupils did not authorize school boards to re-delegate power to promulgate athletic eligibility rules to athletic association). *See also* Op.Att'y.Gen. #80-4-12 (Peterson to Schroeder, April 21, 1980); *Wallace v. Commissioner of Taxation*, 289 Minn. 220, 184 N.W.2d 588 (1971); *People v. DeSilva*, 32 Mich. App. 707, 189 N.W.2d 362

(1971); 16 Am.Jur.2d, *Constitutional Law* §343 (legislature may not adopt prospective federal legislation).

In conclusion, it is our opinion that the legislature did not suspend operation of those sections of chapter 455B which require DEQ to administer and enforce a water supply program. That agency must therefore implement the statutes to the extent possible under the funding provided.

August 7, 1981

ADMINISTRATIVE LAW; STATE OFFICERS AND DEPARTMENTS; DEPARTMENT OF ENVIRONMENTAL QUALITY: Quorum and Voting Requirements: §§455B.4(3), 467A.4(3), 1981 Code. Statute requiring "a majority of voting members of the commission" as a quorum and to concur in any action requires a majority of the nine authorized voting positions on the commission and not just a majority of those present and voting. (Osenbaugh to Crane, Executive Director, Iowa Department of Environmental Quality, 8/7/81) #81-8-7

Mr. Larry E. Crane, Executive Director, Iowa Department of Environmental Quality: You have requested that this office interpret §455B.4(3), Iowa Code 1981, concerning quorum and voting requirements of the newly consolidated Environmental Quality Commission. That statute, as amended by Laws of the 68th G.A. (1980 Session), chapter 1148, section 7, provides as follows:

> A majority of the voting members of the commission shall constitute a quorum and the concurrence of a majority of the voting members shall be required to determine any matter relating to its powers and duties.

You ask whether "a majority of the voting members of the commission" means a majority of those present and voting or a majority of the total membership of the commission.

Prior to the recent amendment of chapter 455B, the work of the Department of Environmental Quality was governed by four commissions, §455B.4, 1979 Code, and an executive committee, §455B.6, 1979 Code. Those sections then required a "majority of each commission" or "a majority of the executive committee" to constitute a quorum or to determine any matter relating to its duties. Confusion arises, however, because the legislature in establishing the new Environmental Quality Commission amended these prior sections by requiring "a majority of *voting members of* the commission" for both a quorum and for action by the body.

If the statute stated "a majority of members of the commission," it would require the vote of a majority of the total membership of the commission and not just a majority of the quorum. *City of Hiawatha v. Regional Planning Commission of Linn County*, 267 N.W.2d 31 (Iowa 1978), holds that statutory language requiring "a majority vote of the planning commission" merely codifies the common law and is thus satisfied by a majority of the members present, assuming there is a quorum. [1] However, the court indicated that a statute requiring the

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[1] Dicta in this opinion calls into question the decisions in *Griffin v. Messenger*, 114 Iowa 99, 86 N.W. 219 (1901), and *Horner v. Rowley*, 51 Iowa 620, 2 N.W. 436 (1879), holding that the term "three-fourths of the council" meant three-fourths of the membership of the entire council and was not satisfied by votes of three-fourths of those present.

vote of a majority of the members of a board would require a majority of the full membership and not merely a majority of those present.

> Designating a proportion of "the members" of the particular body is the usual way in which a legislature expresses its intention that decisions of the body be made by the designated proporation of the whole membership. See *Carbon Coal Co. v. City of Des Moines*, 198 Iowa 371, 199 N.W. 170 (1924); *Thurston v. Huston*, 123 Iowa 157, 98 N.W. 637 (1904); *Strohm v. The City of Iowa City*, 47 Iowa 42 (1877); *Northwestern Bell T. Co. v. Board of Com'rs. of Fargo*, 211 N.W.2d 399 (N.D. 1973).

267 N.W.2d at 32. *See also* 1976 Op.Att'y.Gen. 163; *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975) ("a majority of members of the board" requires a majority of all members of the board and not merely a majority of those present).

Is this result different because the statute requires a majority of *voting* members? If the statute simply required concurrence of a majority of voting members to take action, we might well conclude that simply a majority of the quorum would suffice. Such is the common-law rule in the absence of statute, *Thurston v. Huston*, 123 Iowa 157, 159-161, 98 N.W. 637 (1904), and is accepted parliamentary procedure, Robert's Rules of Order Newly Revised (1971), §§1, 43 pp.3, 339; Op.Att'y.Gen. #79-8-24 (Ovrom to Patchett). However, this conclusion does not appear reasonable given that "a majority of the voting members of the commission" is also required for a quorum. As stated in Robert's Rules of Order Newly Revised, §39, p. 293:

> . . . a quorum in an assembly is the number of members entitled to vote who must be present in order that business can be legally transacted. The quorum refers to the number of members *present*, not to the number actually voting on a particular question.

A statutory quorum requirement based on a percentage of persons would thus be nonsensical.

The legislature has used the phrases "voting members" and "nonvoting members" in other agency enabling acts to distinguish between regular and exofficio members of multi-member boards. *See, e.g.*, §§93.2(2), 93.4 (Energy Policy Council); 455A.4 (Director of Department of Environmental Quality nonvoting member of Natural Resources Council); *see also* §§455B.6, 1979 Code. The enabling act for the State Soil Conservation Committee, which has eight "voting members" and four "ex officio nonvoting members", has the identical quorum and voting requirement as that considered here. §467A.4(1), (3), The Code. It appears clear that the legislative intent there is to require five votes (a majority of the eight possible votes) for any action. We conclude that the legislature intended the same result by using identical language in §455B.4(3).

Use of the phrase "voting members" in chapter 455B is confusing because the Environmental Quality Commission does not have ex officio members. However, its predecessor, the executive committee of the Department of Environmental Quality did, §455B.6, 1979 Code, and those state officers who were formerly ex officio members must still receive notice of commission meetings, §455B.4(6), 1981 Code. The term "voting members" could also be used to exclude the executive director, who is required to attend commission meetings and act as secretary, §455B.4(2). While the phrase "voting members" appears ambiguous in §455B.4(3), it is clearly used to distinguish regular from ex officio members in other agency enabling acts and in the identical provision in §467A.4(3). To insure uniform construction of identical procedural provisions, we believe the term "voting member" should be construed similarly in each of these statutes unless

clearly contrary legislative intent appears. *See* §4.6(4), The Code. This construction would require five of eight members for a quorum or to take action. As a quorum requirement this will generally be less stringent than the two-thirds of members eligible to vote" imposed on most state agencies by §17A.2(1), The Code. Our construction of §455B.4(3) would require five members for a quorum rather than six as would be required if §17A.2(1) applied.

We therefore conclude that §455B.4(3), 1981 Code, requires a majority of the membership of the entire commission to be present for a quorum. Assuming that a quorum is present, a majority of the entire commission is still required to vote affirmatively for any action by that commission. Thus, with the present nine-member commission, a minimum of five commissioners must be present to form a quorum, and a minimum of five affirmative votes are necessary in any case for any action by the commission.

August 7, 1981

CITIES AND TOWNS: Appointment and Hiring of Officers — §§372.4, 372.13(4), and 384.6(2), The Code 1981. A city is generally not bound by contracts made by its officers or agents who lack the requisite authority to so obligate the city. But a city may nevertheless ratify such contracts and bind itself thereto provided the contracts were within the city's general corporate powers and are not otherwise ultra vires. Richards to Tullar, Sac County Attorney, 8/7/81) #81-8-8(L)

August 11, 1981

COUNTIES; UNIFIED LAW ENFORCEMENT: 28E: §§28E.21—28, The Code 1981. A tax levy for purposes of a public safety fund is not authorized unless the proposition receives a majority vote in the respective subdivisions participating in a unified law enforcement district. (Fortney to Belson, Ida County Attorney, 8/11/81) #81-8-9(L)

August 11, 1981

IPERS: Chapters 97B, 442. School districts may not levy taxes in excess of the limitations of chapter 442 in order to meet obligations under the Iowa Public Employees' Retirement System, chapter 97B. (Appel to Brandt, State Representative, 8/11/81) #81-8-10

The Honorable Diane Brandt, State Representative: We are in receipt of your opinion request concerning the interrelationship between taxing provisions of the Iowa Public Employees Retirement Act, chapter 97B, The Code 1981, and the School Foundation Plan, chapter 422, The Code 1981.

Chapter 97B establishes the Iowa Public Employees Retirement System, or IPERS. Created in 1946, IPERS is a comprehensive system designed to enable employees "to care for themselves in retirement" and to "improve public employment in the state, reduce excessive personnel turnover, and offer suitable attraction to high grade men and women to enter public service of the state", §97B.2. In order to insure funding for the system, §97B.9(3) provides:

> Every political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed.

At the time IPERS was created, the state government was not providing massive levels of aid to public schools. In 1971, however, the legislature passed the School Foundation Plan, chapter 422, The Code 1981, which substantially increased the level of state aid to local school districts. In return for the infusion of state dollars, however, the legislature imposed upon local school districts a series of fiscal controls designed to limit local property taxes. *See* §422.1 *et seq.* The question before us is whether a school district may levy taxes pursuant to §97B.9(3) without regard to the levy limitations established in chapter 422.

The question was previously addressed in a cryptic attorney general's opinion in 1974. That opinion held that §97B.9(3) as a specific statute and that its terms prevailed over the more general school funding provisions in chapter 442. The state comptroller, however, has come to the exact opposite conclusion. The comptroller believes that the IPERS statute is more general than the school funding provisions and that the provisions of §97B.9(3) are subject to the fiscal restrictions contained in the School Foundation Plan.

The source of the confusion is clear. In one sense, §97B.9(3) is more general than chapter 442 in that it deals with all political subdivisions of the state, not simply school systems. On the other hand, however, chapter 97 deals narrowly with the financing of a state retirement plan, while chapter 442 is generally concerned with the entire gamut of expenditures of school districts. Thus, chapter 97 appears more general if the focus is on the number of units of government implicated, while chapter 442 is more general when approached from the viewpoint of the scope of financial transactions affected.

Where linguistic analysis of statutes is inconclusive, we must turn to legislative intent. In this regard, we cannot help but observe the comprehensive character of the school funding mechanism described in chapter 442. We note that the limitations in chapter 442 apply to all general fund expenditures made by school districts with three express exceptions. *See* §442.5, The Code 1981. Expenditures for IPERS are not among the express exceptions. We therefore conclude that the legislature intended chapter 442 limitations to apply to chapter 97 expenditures. To the extent the earlier opinion of the attorney general is inconsistent with the above analysis, it is withdrawn.

We might be somewhat more inclined to reach a different conclusion had §97B.9(3) been enacted after the passage of the School Foundation Plan. Such a history might have suggested an intent of the legislature — by authorizing all political subdivisions, including school districts, to levy an IPERS tax — to bolster school financial wherewithal. When IPERS was created, however, no statewide system of school finance existed. Thus, the sequence of statutes prevents any remedial interpretation.

You also ask what authority the state comptroller has to issue legal opinions on Code sections already interpreted by the attorney general. The comptroller has no express authority. Opinions of the attorney general should be "relied upon as the law until they are overruled, revised, withdrawn upon reconsideration or are upset by court decision." *See* Larson, R., *The Importance and Value of Attorney General Opinions*, 41 Iowa L.Rev. 351, 361.

August 11, 1981

MENTAL HEALTH: Liability of counties for patients transferred from state mental health institutes to county care facilities. §§227.11, 227.16, 230.1 and 230.15, The Code 1981. Under §230.15 a county is liable for 100 percent of the costs of care and treatment of a patient at a state mental health institute for 120 days; thereafter, the county's liability is limited to the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his/her own home. The reduced rate of liability for the care and treatment of mental health patients available under §230.15 is limited to the care and treatment provided at state mental health institutes. A county is entitled to receive five dollars per week in state aid for each patient transferred to a county care facility pursuant to §227.11. (Mann to Poppen, Wright County Attorney, 8/11/81) #81-8-11(L)

August 11, 1981

FOSTER CARE: §234.35; §234.36, The Code 1981. Our previous opinion stating that the state of Iowa is responsible for payment of foster care under §§234.35 and 234.36 was not changed in substance with the revision of the Juvenile Code (ch. 232, The Code 1981). The Department of Social Services may be liable for payment of court-ordered foster care expenses even when the department does not have custody or guardianship of a child. (Black to Reagen, Commissioner, Iowa Department of Social Services, 8/11/81) #81-8-12(L)

August 11, 1981

CONSTITUTIONAL LAW: State Taxation of Interstate Commerce. Art. I, §8, Cl. 3, U.S. Constitution; §307B.2, The Code 1981; H.F. 874 (69th G.A. 1st & 2nd Special Sessions 1981). The tax on diesel fuel consumed by railroads, as proposed in H.F. 874, does not violate the commerce clause of the U.S. Constitution. (Willits to Kinley, State Senator, 8/11/81) #81-8-13

The Honorable George R. Kinley, State Senator: You have requested an opinion of the attorney general on the constitutionality of H.F. 874, which passed the House of Representatives June 26, 1981, as it relates to taxing all users of diesel fuel for railroads in order to acquire and rehabilitate some railroad beds for a use which may directly benefit only a few. Specifically, your question could be phrased as follows:

> Does an excise tax on diesel fuel used by all railroads in a state, the purpose of which is to raise funds to retire bonds, the proceeds of which have been used to acquire and rehabilitate some railroad beds, constitute an unconstitutional burden on interstate commerce, in violation of the U.S. Constitution, Article I, Section 8, Clause 3?

Our opinion is that this tax would withstand constitutional scrutiny and would not be an unconstitutional burden on interstate commerce. At the outset, a review of pertinent provisions of H.F. 874, as it passed the House of Representatives, is appropriate. The legislation takes the form of amendments to existing statutes,

primarily chapter 307B, The Code 1981. [1] §307B.2, The Code 1981, would read as follows after amended by H.F. 874:

> The purpose of this chapter is to benefit the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economic and commercial development of the state and by promoting agricultural and industrial improvement. Access to adequate railway transportation facilities is essential to the economic welfare of the state. One purpose of this chapter is to preserve or provide for the citizens of Iowa those railway services now in existence or needed in the state which have a viable future but which for a variety of economic and legal reasons may not exist if the state does not provide the financing or other mechanisms referred to in this chapter. It is the intent of the chapter that any public ownership and control of railway facilities provided for in this chapter be transferred to private ownership as promptly as economically practicable subject to financing requirements. It is further intended that the authority created in this chapter be vested with all powers to enable it to accomplish the purposes of this chapter except the power to operate rolling stock.
>
> It is the further intent of this chapter and of the General Assembly that, in order to preserve rail competition and to provide for railway service in this state, the authority work primarily with railroad carriers already providing service in this state based upon their willingness and ability to meet these objectives.

Although too lengthy to set forth here, other sections of chapter 307B, The Code 1981, as amended by H.F. 874, authorize the issuance of bonds by the Railway Finance Authority to fund the purchase and rehabilitation of railroad beds in the state.

Section 19 of H.F. 874 creates a "Special Railroad Facility Fund." This fund is to be used to purchase or upgrade railroad right of way and trackage facilities (or to purchase general or limited partnership interests in a partnership to do the same) or to pay or secure bonds or other obligations of the authority issued to finance the purchase or upgrading of right of way and trackage facilities.

The funds placed into the "Special Railroad Facility Fund" are to be derived primarily from a new excise tax upon the use within this state of fuel to power railway vehicles. (§22, H.F. 874). Section 24, H.F. 874, imposes the tax:

> For the privilege of operating railway vehicles in this state, an excise tax is imposed at the rate of three cents per gallon beginning October 1, 1981 and is imposed at the rate of eight cents per gallon beginning July 1, 1982, upon the use of fuel for the propulsion of a railway vehicle within the state. The tax attaches at the time of use and shall be paid monthly to the department by the railroad company using the fuel. Fuel dispensed in this state shall only be through meters which have been approved for accuracy by the department of agriculture and sealed by the department. Fuel dispensed through sealed meters shall be presumed taxable unless the railroad company proves otherwise.

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[1] For an opinion on the constitutionality of chapter 307B, The Code 1981, the Railway Finance Authority, see Op.Att'y.Gen. #80-11-13, Hamilton to Drake. Other constitutional issues involved are addressed there.

Section 23(4) defines "railroad company" as a person responsible for the operation of a railway vehicle within this state. This definition is important because it makes clear that this tax applies to all railroad companies, whether exclusively in intrastate commerce, in both intrastate and interstate commerce, or solely in interstate commerce. There is no attempt to tailor a tax solely to fall on interstate commerce.

The final key provision is §26 of H.F. 874:

> For the purpose of determining a railroad company's tax liability, each railroad company required to obtain a license under this chapter shall file with the department a monthly report. The report shall be filed by the end of the month following the month of use. The report shall include the following information:
>
> 1. The total gallons of fuel dispensed in Iowa.
>
> 2. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used solely within the state during the reporting period.
>
> 3. The total gallons of fuel dispensed in Iowa for nontaxable purposes.
>
> 4. The total gallons of fuel dispensed in Iowa and placed in railway vehicles used within and without the state.
>
> 5. The total gallons of fuel dispensed outside Iowa and placed into railway vehicles traveling within and without the state.
>
> 6. Other information the director of revenue requires. The report shall be accompanied by a payment equal to the tax due. The taxable gallons of fuel shall be computed by adding the number of gallons of fuel dispensed in Iowa and placed into railway vehicles traveling solely within the state during the reporting period and the result of multiplying the total gallons of fuel used in railway vehicles traveling within and without Iowa by a fraction of the numerator of which is miles traveled in Iowa by railway vehicles traveling within and without Iowa, and the denominator of which is the total miles traveled by the same railway vehicles. The tax shall be computed by multiplying the taxable gallons times the per gallon tax rate.

In simple language, this formula in paragraph 6 above results in taxing only gallons of fuel used for travel in Iowa. This is a key point, because it is clear that no attempt is made to tax fuel used beyond Iowa's borders.

In 1977, the U.S. Supreme Court, in an unanimous opinion, greatly clarified the law regarding taxation of interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Prior to this case, there was some confusion as to the validity of a state tax imposed upon activities in interstate commerce.

Previous cases had held that a tax on the privilege of engaging in an activity in a state may not be applied to an activity that is part of interstate commerce. *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946). In *Complete Auto Transit*, the supreme court explicitly overruled *Spector (Complete Auto Transit* at 430 U.S. 289), saying that it had no relationship to economic realities and had come to operate only as a rule of draftsmanship, a triumph of form over substance. In overruling *Spector*, the court quotes with approval *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254; 58 S.Ct. 546, 82 L.Ed. 823 (1938): "[i]t was not the purpose of the commerce clause to relieve those engaged in

interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Complete Auto Transit*, at 430 U.S. 279.

In *Complete Auto Transit*, at 430 U.S. 287, the court adopted the following four-pronged test to determine whether a state privilege tax on interstate commerce is violative of the commerce clause:

1. Does the activity taxed have sufficient nexus with the state to justify a tax?

2. Does the tax discriminate against interstate commerce?

3. Is the tax fairly apportioned to local activities?

4. Is the tax fairly related to benefits provided by the state to the taxpayer?

These tests are appropriately applied to H.F. 874 since, as set out in §24 above, this tax is "[f]or the privilege of operating railway vehicles in this state," thus fitting within the "privilege tax" analysis of *Complete Auto Transit*.

In the question at hand, the first three questions can be handled with relative ease.

The activity taxed, the privilege of operating railway vehicles in this state, has a clear nexus, or connection, with Iowa since the railroads being taxed operate through Iowa.

The tax does not discriminate against interstate commerce since it applies to all railroads and all railway vehicles operated in Iowa, regardless of whether in intrastate or interstate commerce.

The portions of §26, H.F. 874, set out above provide that only fuel consumed within Iowa is taxed. The formula approach is ideally suited to fairly apportion a railroad's Iowa fuel consumption, thus insuring that the tax applies only to "local activities" and satisfying the third prong of the test.

The fourth prong of the test is the real crux of your question in this situation: is the tax fairly related to benefits provided by the state to the taxpayer? The argument suggested by your opinion request is that railroads, or at least some of the railroads paying the proposed taxes will not realize any direct benefits from the tax.

It is our opinion that such a direct benefit to a particular railroad is not necessary to meet the fourth prong of the test. [2]

On July 2, 1981, in the landmark case of *Commonwealth Edison Co. v. Montana*, ___ U.S. ___ No. 80-581 (1981), the U.S. Supreme Court upheld Montana's coal severance tax, which the court characterized as a general revenue tax, even

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[2] While we do not believe a "direct" benefit to a particular railroad is necessary, some individual railroads may benefit directly by, for example, acquisition or lease of some of the renovated beds themselves or by interlining or interchanging. The purpose statement in §2 of H.F. 874 states that it is the "intent... of the General Assembly that... the authority work primarily with railroad carriers already providing service in this state based upon their willingness and ability to meet these objectives."

though one-half of it went into a special trust fund. We would characterize the tax proposed in H.F. 874 as a general revenue tax, the proceeds of which are earmarked for the Special Railroad Facility Fund. [3]

In *Commonwealth Edison* the supreme court said:

> The relevant inquiry under the fourth prong of the *Complete Auto Transit* test is not, as court explained in *Wisconsin v. J.C. Penney Co., supra,* at 446 [emphasis added], 'the incidence of the tax *as well as its measure* [must be] tied to the earnings which the state... has made possible, insofar as appellants suggest, the amount of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the state before any tax may be levied on it [cite omitted]. Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the state that may properly be made to bear a 'just share of state tax burden,' [cites omitted]. As the government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. [Emphasis in original] slip op. at 14.

With these precedents, the court found the Montana coal severance tax to satisfy the fourth prong of the test since it is a percentage of the value of coal mined. This is a proper measure of the coal companies' activities within the state.

In the case of H.F. 874, the railroad companies' activity within the state is properly measured by the amount of fuel consumed in the state.

The court, in *Commonwealth Edison*, slip op. at 16, rejected arguments that the fourth prong of the test constitutionally requires a dollar for dollar relationship between taxes and benefits received:

> Appellants argue, however, that the fourth prong of the *Complete Auto Transit* test must be construed as requiring a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity, in order provide a mechanism for judicial disapproval under the commerce clause of state taxes that are excessive. This assertion reveals that appellants' labor under a misconception about a court's role in cases such as this. The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution [cites omitted]. In essence, appellants ask this court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.

The court, at 17, goes on to say:

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[3] When interpreting laws which both raise a tax and designate the expenditure of the tax receipts, the constitutionality of the taxation and the expenditure are considered separately, and one could be held to be constitutional, but not the other. *New York Rapid Transit Co. v. City of New York*, 303 U.S. 573 (1938); *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66 (1948).

> Furthermore, the reference in the cases to police and fire protection and other advantages of civilized society is not, as appellants suggest, a disingenuous incantation designed to avoid a more searching inquiry into the relationship between the value of the benefits conferred on the taxpayer and the amounts of taxes it pays. Rather, when the measure of a tax is reasonably related to the taxpayer's activities or presence in the state —from which it derives some benefit such as the substantial privilege of mining coal — the taxpayer will realize, in proper proportion to the taxes it pays, '[t]he only benefit to which it is constitutionally entitled... [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., at 522.

The purposes of chapter 307B, The Code 1981 as amended by H.F. 874, which are set out in §2 of H.F. 874, include benefiting "the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economic and commercial development of the state and by promoting agricultural and industrial development." These purposes would seem to fit within the language of the cases allowing taxes for "the benefits of a civilized society."

So, in summary, as to the fourth prong of the *Complete Auto Transit* case, we are of the opinion that this legislation satisfies the requirements of *Commonwealth Edison Co. v. Montana*, since the fuel tax on the railroads is proportional to their activity in the state and, thus, to their benefits.

The basic premise in your opinion request is that the fuel tax on fuel use in Iowa by railroads will not benefit all railroads. However, that premise is flawed. All railroads operating in Iowa enjoy services which government provides, such as police protection, fire protection, access to Iowa courts, and many more. In addition, a rational legislature could easily perceive that rehabilitation of railroad beds in Iowa would promote a more healthy Iowa economy for Iowa shippers and consumers which would be of benefit to all railroads operating in Iowa. Railroads will clearly obtain more benefit from a healthy Iowa economy buttressed by an enforced rail system than from a depressed economy contributed to in part by a deteriorated rail system. Thus, all railroads operating in Iowa are benefited and, by reason thereof, can be subject to a tax on the fuel they consume in Iowa.

Buttressing the view that the legislation as proposed is not facially invalid are the presumptions of constitutionality accorded legislative enactments. Many cases recite this proposition, and a pertinent one in the tax area is *Moorman Manufacturing Co., v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978). In that case, the U.S. Supreme Court affirmed the decision of the Iowa Supreme Court upholding the constitutionality of the Iowa single factor corporate income tax. The court's language is instructive:

> It is well settled, with notable exceptions not here involved, that all presumptions are in favor of the constitutionality of a regularly enacted statute.
>
> Where the constitutionality of a statute is merely doubtful this court will not interfere as it must be shown that legislative enactments clearly, palpably and without doubt infringe upon constitutional rights before an attack will be upheld.
>
> Moorman, as the attacking party, has the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provisions invoked and to point out with particularity the details of the alleged invalidity. To

sustain this burden it must negative every reasonable basis which may support the statute [cites omitted].

Keasling v. Thompson, 217 N.W.2d 687, 690 (Iowa 1974), states this principle:

'The judicial branch of the government has no power to determine whether legislative Acts are wise or unwise, nor has it the power to declare an Act void unless it is plainly and without doubt repugnant to some provision of the constitution. * * * [citing authority].'

In the field of taxation, it would appear the above principles somewhat understate the deference accorded the legislature. *Moorman*, at 743.

Supporting this view is the leading Iowa case of *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66 (1948), which also stands for the proposition that legislatures have wide discretion in the enactment of taxes and the classifications to which they apply.

In conclusion, it is our opinion that the tax enacted by H.F. 874, would not be an unconstitutional burden on interstate commerce.

August 12, 1981

STATE OFFICERS AND DEPARTMENTS: Inmate Transfer Boards, §217.22, §17A.2(2), §17A.4, §28A.2. Transfer Board established by §217.22 is an agency subject to the rulemaking provisions of the Iowa Administrative Procedure Act. Hearings conducted under §217.22, however, are not contested cases. Meetings of the transfer board are subject to the Open Meetings Law, §28A et seq. (Appel to Oakley, Administrative Rules Coordinator, 8/12/81) #81-8-14

Brice C. Oakley, Administrative Rules Coordinator: We are in receipt of your opinion request concerning §217.22, The Code. This section establishes a three-member involuntary hearing board to consider inmate appeals from decisions of the department to transfer that person out of state to another state or federal correctional institution. Specifically, you ask:

1. Should this board comply with the rulemaking provisions of chapter 17A, the Iowa Administrative Procedure Act (IAPA)?

2. Should its proceedings comply with the contested case provisions of the IAPA?

3. Is the board subject to the Open Meetings Law, chapter 28A, The Code?

Your first question is whether rulemaking provisions of the Iowa Administrative Procedure Act, §17A.4, are applicable to the board. In our view, the answer is yes. The provisions of §17A.4 apply generally to all agencies in state government. "Agency" includes "each board, commission, department, officer, or other administrative office or unit of the state", §17A.2. We think the statutorily created board in this instance squarely falls within the definition of agency.

Section 17A.2(7) outlines a series of exceptions to the general rulemaking requirements. Specifically, §17A.2(7) excepts from rulemaking procedures:

> A statement concerning only inmates of a penal institution, students enrolled in an educational institution, or patients admitted to a hospital, when issued by such an agency.

We do not think this exception, however, is implicated in the present situation. It applies only to rules promulgated by custodians or institutions themselves, not by independent boards such as that created under §217.22, The Code.

Having found that the Transfer Board is an agency under §17A.2(1) and that none of the exceptions under §17A.2(7) are applicable, we hold that the board must comply with the rulemaking procedures present in §17A.4, The Code.

II.

Section 217.22 states that an inmate who objects to transfer may request a "hearing" before the Transfer Board. It is not entirely clear whether the legislature intended a full-blown "evidentiary hearing", *see* §17A.2(2) (a contested case-type proceeding subject to §17A.13 procedures) or an argumentative-type hearing with lesser procedural protections.

The question is not entirely free from doubt. We note that the legislature has elsewhere used the term "informal hearing", *see* §24.28, The Code. This term, which suggests an intent to employ procedures less structured than a contested case, is absent in §217.22. And, the hearings focus on a particular individual and thus are not, in the broadest sense, legislative in character. Under these circumstances, a case could be made that §217.22 hearings are contested cases.

However, the Iowa Supreme Court in the recent case of *Langley v. Scurr*, May 13, 1981, held that even though due process required a hearing in prison disciplinary cases, *Wolff v. McDonnell*, 418 U.S. 539 (1974), such a hearing did not require an extensive or formal hearing. [1] If the Iowa Supreme Court is unwilling to find that the legislature intended contested case definition in §17A.2(2) to extend to apply to situations where due process requires a "hearing" in the prison disciplinary setting, we do not think the court would find a different legislative intent where a statute requires a "hearing" in the nondisciplinary transfer setting. Indeed, the prisoner's interest in a §217.22 transfer is less substantial than in prison disciplinary proceedings. For instance, in the disciplinary proceeding in *Langley*, good time and honor time credits were lost, a sanction that means more time in prison for the inmate. No similar result occurs under §217.22, but only the inconvenience that may result from a transfer. We therefore conclude that the Iowa Supreme Court would not find a legislative intent to include §217.22 hearings within the definition of contested cases. §17A.2(2).

III.

Finally, you ask whether the Transfer Board is subject to the Open Meetings Act. The answer to this question is clearly yes. Chapter 28A applies to all governmental bodies which includes "a board, council, commission, or other governmental body expressly created by the statutes of this state...", chapter 28A. The transfer body created by §217.22 plainly falls within this definition.

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[1] Since an evidentiary hearing is not generally required by constitution in transfer cases, *Meachum v. Fano*, 427 U.S. 215 (1976), §217.22 proceedings cannot be contested cases under a constitutional theory.

August 12, 1981

MUNICIPALITIES: Authority of fence viewers — Chapter 679, §§113.1, 113.3, 113.23, 359.17, 359.24, and 359.25, The Code 1981. The city council shall act as fence viewer in a partition dispute involving tracts of land wholly within a municipality. Such authority is not diminished by the fact that one of the tracts of land is owned by the city. Nevertheless, the council may prefer to submit the matter to arbitration as provided for in chapter 679. Also, upon written request a city shall be compelled to share in the cost of erecting and maintaining a partition fence by an adjacent property owner. (Walding to Angrick, Citizens' Aide Ombudsman, 8/12/81) #81-8-15(L)

August 12, 1981

COUNTY HOSPITALS: Prescription drugs to employees. §347A.1, The Code 1981. County hospitals organized under chapter 347A, The Code, may provide prescription drugs at cost to hospital employees and dependents as an employee fringe benefit. (Brammer to Larson, Winneshiek County Attorney, 8/12/81) #81-8-16(L)

August 12, 1981

INSURANCE: Passenger liability coverage on mopeds. Sections 321.275(2)(a), 321A.1(4), 321A.5(2), 321A.21(2)(b), 505.8, 515.109, 515A.3(1)(a), The Code 1981. In order to comply with the motor vehicle financial responsibility law, a liability insurance policy on a moped must provide coverage to the owner or operator for liability to a passenger thereon, even though it is unlawful to carry a passenger. Providing that coverage does not violate public policy. (Haskins to Comito, State Senator, 8/12/81) #81-8-17(L)

August 13, 1981

PUBLIC RECORDS: Examination and copying. §§68A.2, 68A.3, The Code 1981. A public body subject to chapter 68A may not charge an Iowa citizen a fee simply as a precondition to allowing examination of a public record governed by the chapter. A fee may, however, be charged to cover reasonable expenses incurred by the body in making information that is contained in electronic storage systems, such as magnetic tapes and cards, available to a citizen for examination and/or copying as a public record. This fee must represent only the actual costs involved in satisfying the request for examination and/or copies. An agency that has already translated a public record from an electronic storage system into a printed format must, upon request, make copies of the record in printed form available to a citizen of Iowa but may charge a reasonable fee for copying expenses. (Stork to Angrick, Citizens' Aide Ombudsman, 8/13/81) #81-8-18

Mr. William P. Angrick, Citizens' Aide Ombudsman: You have requested an opinion concerning public access to information contained in electronic storage systems of state agencies subject to Iowa's "Examination of Public Records" Act contained in chapter 68A, The Code 1981:

The basic questions are these: If a state agency maintains public records in sophisticated electronic storage systems, does the department or the custodial agent satisfy the public right of access to that information, as defined in 68A, if it provides the citizen access to the records in the sophisticated storage format in which they are maintained? Or, does chapter 68A require that public records be made available in a format that is readily useable and readable by the average citizen who normally does not have access to methods for ready and inexpensive translation of those records from electronic storage into printed form?

* * *

As a corollary to the above questions, if the custodial department at any time translates for its own use machine-stored records into printed format, must they provide a similar printed copy to a citizen upon request?

You base your request upon the following factual situations:

Section 321.199, Code of Iowa, mandates that the Department of Transportation (DOT), shall keep on file every application for a drivers license and suitable indexes containing, in alphabetical order:

1. All applications denied and on each thereof note the reasons for such denial.

2. All applications granted.

3. The name of every licensee whose license has been suspended or revoked by the department and after each such name and reasons for such action.

These records are kept for the DOT by the Office of Drivers License, Motor Vehicle Division. The director of that office has indicated that the department follows a procedure which appears in the Iowa Administrative Code. 820—[07,C] 15.1, for the release of these records. He has indicated to us that this procedure is as follows:

Any person wishing to acquire a listing of individuals revoked, suspended or cancelled by this office may purchase a copy of a magnetic tape listing of such individuals. The tape is produced weekly. The taped information is available in accord with the following procedures:

1. Request the listing, in writing, from this office.

2. Provide a check with the request, payable to the Treasurer, State of Iowa, in the amount of $35 per tape. Two such tapes are currently required to produce the listing for a total of $70.

3. Provide 2 reels of 1600 bpi magnetic tape at the time of the request.

4. Provide a name and address where the tapes are to be mailed. The tapes may also be picked up at this office.

If individual records are desired, a certified copy of the individual record is available from this office upon payment of a two dollar fee for each record requested along with a written request identifying the record(s) desired. Any individual record(s) may also be examined free of

charge in this office during normal working hours which are from 8 AM to 4:30 PM, Monday through Friday.

While such information may not be of utility to the average citizen, it is of value to insurance companies seeking the high-risk driver. Some companies and individuals have the equipment and capacity to routinely receive and translate information so available to a useable format, others do not.

As another example, this office was recently involved in a citizen's request for access to information maintained by the labor commissioner under section 89.5(3), The Code. That section requires the commissioner to maintain:

..."a complete and accurate record of the name of the owner or user of each steam boiler or other equipment subject to this chapter, giving a full description of the equipment, including the type, dimensions, age, condition, the amount of pressure allowed, and the date when last inspected."

This information is maintained on IBM magnetic (mag) cards. A spokesman for the commissioner has stated that it would be extremely expensive and time-consuming for them to translate that mag card information into a printed form. Therefore, they are willing to provide copies of the mag cards to the individual requesting them, which places the burden and cost of having the records translated into a useable form upon the citizen.

Section 68A.2, The Code 1981, provides:

Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46.

This language establishes the basic statutory authority of every citizen of Iowa to gain access to any and all information contained in public records, which are defined in §68A.1. Section 68A.2 ensures that public records may be examined as well as copied, which includes the right to make photographs or photographic copies of the records while in the possession of the lawful custodian.

Section 68A.3 provides the mechanism by which the examination and the copying of public records are to be accomplished:

Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record

> in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

Several salient aspects of this section should be noted. Both the examination and copying of public records must take place under the supervision of the records' lawful custodian or authorized deputy. A reasonable fee may be charged for such supervision. The lawful custodian must provide a "suitable place" for examination and copying; if, however, such work cannot practicably take place in the office of the custodian, another place may be employed, at the expense of the individual seeking examination and/or copying. The lawful custodian does have authority to adopt and enforce "reasonable" rules regarding examination and copying. Finally, if the lawful custodian maintains copy equipment, he/she must provide any person with a reasonable number of copies of any public record upon payment of a fee, which must not exceed the cost of providing the service.

No provision in chapter 68A stipulates how, or in what form, a state agency must maintain its public records. Since §68A.3 does authorize the adoption and enforcement of "reasonable rules" to protect the records against damage or disorganization, it appears that the General Assembly did intend to provide agencies with some discretion in deciding the most appropriate means for preservation of records. Consequently, chapter 68A does not preclude a state agency from maintaining its records on electronic storage systems, such as those involving magnetic tapes or cards. The question of who is responsible for the costs incurred in making such records available for individual inspection may be discussed in light of both the public purposes of chapter 68A and express provisions in §§68A.2 and 68A.3.

We observe that §68A.2 establishes two distinct rights concerning access to public records, i.e., the right to examine records and the right to copy such records. The Iowa Supreme Court has indicated that these rights are intended to remedy unnecessary secrecy in conducting the public's business. *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980). Such rights are therefore to be interpreted liberally to provide broad public access to public records. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980). Accordingly, it seems clear that the procedures of §68A.3 generally are intended to facilitate rather than to limit the rights of access to public records guaranteed to citizens of Iowa by §68A.2. Indeed, the rights established in §68A.2 would have little meaning if an agency could preclude its implementation by restricting access through, for example, the charging of a fee as a precondition to examination of any public record.

Section 68A.3 does, on the other hand, expressly authorize the imposition of reasonable fees for necessary expenses incurred during examination and copying of public records. The section specifies that fees may be charged (1) for supervision by a lawful custodian or deputy during examination and/or copying, (2) for provision of a suitable place to examine and/or copy if the office of the custodian is impracticable for such work, and (3) for the actual costs of providing copies of any public record. In addition to specific authorization for each of these three types of charges, §68A.3 states "All expenses of such work shall be paid by the person desiring to examine or copy." "Such work" is a term repeatedly used in §68A.3 and apparently refers back to the section's first sentence, which uses the terms "examination and copying" in reference to the rights established in §68A.2.

Section 68A.3 does not expressly prescribe a procedure for gaining access to information that is contained in electronic storage systems and therefore not readily available for individual inspection. The various provisions cited in §68A.3, however, generally do contemplate reimbursement to a lawful custodian

of public records for those expenses involved in making the records available to the public. By permitting fees to be charged under certain circumstances, §68A.3 does, to some extent, limit public access to public records. Nevertheless, this approach appears to reflect a legislative decision that, while chapter 68A was not intended to be a revenue measure, a lawful custodian of public records should not be obliged to incur expenses or have his/her office disrupted without reimbursement for such expenses or compensation for such disruption. 1968 Op.Att'y.Gen. 656. In any event, the types of charges permitted under §68A.3 are only those related to the *actual costs* of facilitating examination and/or copying of public records by citizens of Iowa. A lawful custodian of public records clearly may not otherwise condition the right of access under §68A.2 by payment of fees.

In light of the authority established in §68A.3, we advise that the procedure used by the Department of Transportation and the Labor Commissioner, as described in your opinion request, do appear to comport with the requirements and purpose of chapter 68A. The procedure for obtaining a complete listing of driver license revocations, suspensions, and cancellations does require an Iowa citizen to make payments for the tapes and costs incurred in producing transcription. Such payments do not, however, appear to be a precondition on the right of examination but rather reflect the costs incurred in copying the listing in the course of its acquisition by the citizen. Individual records may be examined without charge and also may be copied pursuant to payment of a fee. We do caution that the "two dollar fee for each record requested" must reflect the actual expenses of copying and/or supervision in order to be proper under §68A.3. Similarly, the procedure used by the Labor Commissioner, concerning information collected under §89.5(3) of the Code, does require the citizen to bear the entire cost of reproduction. Such procedure nevertheless does appear to fall within the provision in §68A.3 that "[a]ll expenses of such work [examination and copying] shall be paid by the person desiring to examine or copy."

You also inquire whether, if an agency has already translated certain information from an electronic storage system into a printed format (e.g., a typewritten page), the agency must provide a copy of the printed format to a citizen of Iowa upon request. For purposes of your inquiry, we presume the "printed format" constitutes a public record under chapter 68A. Section 68A.2 provides that, in addition to the right of examination of public records, Iowa citizens have the right to copy such records while they are in the possession of the lawful custodian. If the custodian maintains copy equipment at his/her office, he/she must, upon request, provide a citizen with a reasonable number of copies of any public record but only upon payment of a fee. §68A.3. The fee must reflect the actual cost incurred in making the copies. *Id.* On the other hand, if no such copy equipment is available, the lawful custodian must make arrangements for copying but may charge the requestor for "any necessary expenses" incurred thereby. *Id.* In either situation, a reasonable fee may also be charged for services rendered in supervising the examination and copying. *Id.* Accordingly, we conclude that an agency, which has a public record consisting of information that is or was contained in an electronic storage system, must allow an Iowa citizen to obtain a reasonable number of copies of the record. Nevertheless, the agency may charge the requestor a fee for expenses incurred in making such copies.

In summary, we conclude that a state agency may not charge a fee simply as a precondition to allowing examination of a public record governed by chapter 68A, The Code 1981. Pursuant to §68A.3, however, a state agency may charge an Iowa citizen a fee to cover reasonable expenses incurred in making a public record which is contained in electronic storage systems, such as magnetic tapes and cards, available to the citizen for examination and/or copying. The fee must represent only the actual costs imposed upon the agency in satisfying the request for examination and/or copies of the public record. An agency that has already translated a public record from an electronic storage system into a printed

format must, upon request, make copies of the record in printed form available to a citizen of Iowa but may charge a reasonable fee for copying expenses incurred thereby.

August 13, 1981

MENTAL HEALTH: Liability for the costs of care and treatment of disabled persons. 42 U.S.C. §§402 et. seq., 1381 et. seq., 1397 et. seq., 1397a(a)(1), 1397b(d)(1)(E), 1397c, 45 C.F.R. §§228.25, 228.26, §§222.2(5), 222.60, 234.6, 249, 252.1, 252.25 and 252.27, The Code 1981, §770—131.4, The Iowa Administrative Code. A county of legal settlement is legally responsible for the costs of necessary and legal health care services for a mentally retarded individual, in the absence of state or federal financial support. The term "mental retardation" refers to a condition characterized by three significant features: (1) significantly subaverage general intellectual functioning, (2) resulting in, or associated with, deficits or impairments in adaptive behavior, (3) with onset before the age of 18. The county of legal settlement is liable for the reasonable charges and expenses incurred in the relief and care of a poor person. To qualify for general relief a person must be a poor person within the meaning of §252.1, The Code 1981. A county board of supervisors has broad discretion in determining the amount of assistance necessary to meet the needs of a poor person. (Mann to Shirley, Dallas County Attorney, 8/13/81) #81-8-19(L)

August 13, 1981

PUBLIC RECORDS: City addressograph plates. Sections 68A.1, 68A.2, 68A.3, The Code 1981. An Iowa citizen may examine and obtain copies of the information contained on city addressograph plates either in the office of the lawful custodian of the plates or at some other suitable place. In either situation, the lawful custodian or an authorized deputy must maintain supervision of the plates and may charge a reasonable fee both for the supervision and any actual expenses incurred in making copies. The fact that the information on the plates may be used for political purposes does not bar examination and copying of the information under chapter 68A. (Stork to Cochran, State Representative 8/13/81) #81-8-20(L)

August 13, 1981

COUNTIES; TOWNSHIP TRUSTEES; TOWNSHIP CEMETERIES: §§359.30 and 359.33, The Code 1981; 69th G.A., 1981 Session, S.F. 130, §401(2)(c). Township trustees have the authority to levy a tax for maintenance of privately-owned cemeteries located within the township if such cemetery is used by the general public. The trustees are not required to levy a tax for such purposes, however, the board of supervisors can require such a levy. (Fortney to Van Gilst, State Senator, 8/13/81) #81-8-21(L)

August 13, 1981

COLLECTIVE BARGAINING; PUBLIC EMPLOYMENT RELATIONS ACT: Chapter 20, The Code 1981; 660 IAC §§4.6. The Public Employment Relations Act, contained in chapter 20 of the Iowa Code, does not expressly

authorize the transfer by an international union of employees from one local, which is the exclusive bargaining representative of the employees, to another local. Pursuant to rules of the Public Employment Relations Board, such a transfer is recognized by the board only following the filing of a petition for amendment of certification by either the public employer or the certified employee organization. In any event, a vote of the affected employees is not required unless the board determines that the proposed transfer raises a question of representation. A local that has been certified as the exclusive bargaining representative of the employees remains responsible for representation of those employees until otherwise notified by the board. (Stork to Connors, State Representative, 8/13/81) #81-8-22

The Honorable John H. Connors, State Representative: You have requested advice on the following matter:

> The Painters and Allied Trades Local Union #246, has organized several public employee bargaining units, which have been certified under the Iowa Public Employment Relations Act.
>
> 1. Can the International Union change these employees from Local #246 to another local without a vote of these employees?
>
> 2. Would not Local Union #246 still be responsible under the Iowa PERA for these employees?

Section 16 of the Iowa Public Employment Relations Act, contained in chapter 20 of the Iowa Code, provides that the Public Employment Relations Board must certify an employee organization as the exclusive bargaining representative for employees in an appropriate bargaining unit before an employer is obligated to bargain with the organization. Sections 14 and 15 of the Act require the board to certify an employee organization after a secret ballot election, supervised by the board, in which the organization receives a majority of the vote of the employees of the bargaining unit who vote.

Chapter 20 does not expressly establish a procedure for amendment of a board certification. The rules of the Public Employment Relations Board, however, provide as follows:

> 660—4.6(20) Amendment of unit or certification.
> 4.6(1) Petition. A petition for amendment of a board determined bargaining unit or amendment of a certification with respect thereto may be filed by the public employer or the certified employee organization. Such petition shall contain:
> a. Name and address of the public employee organization.
> b. An identification of the proposed amended unit or certification and a description of the proposed amended unit or certification.
> c. The names and addresses of any other employee organizations which claim to represent any employees affected by the proposed amendment or a statement that the petitioner has no knowledge of any other such organization.
> d. Job classifications of the employees as to whom the issue is raised and the number of employees, if any, in each classification.
> e. A specific statement of the petitioner's reasons for seeking amendment of the unit or certification and any other relevant facts.
>
> 4.6(2) Procedure — decision. Insofar as applicable, the rules set forth in 4.2(20) shall apply, except that the board may conduct an investigation and issue a decision and order without hearing. Where appropriate, such order

> may amend the certification of the affected employee organization(s) consistent with the decision.
>
> 4.6(3) Elections; when required. Where a question of representation is found to exist, no unit or certification shall be amended unless the employees sought to be added to the unit have chosen to be represented pursuant to a board-conducted election under chapter 5 of these rules.

660 IAC §4.6. Pursuant to this rule, the certification of an employee organization as the exclusive bargaining representative for employees may be amended without a vote of those employees *unless* the Public Employment Relations Board finds that a "question of representation" would result from such amendment. Upon such a finding, the board conducts an election by secret ballot according to procedures established by rule. *See* 660 IAC §5.2. The filing of the petition to amend the certification can be made only by the certified employee organization or the public employer.

The National Labor Relations Board has developed, and federal courts have adopted, certain standards for determining when an amendment of certification would raise a "question of representation." *E.g., American Bridge Division, U.S. Steel Corp. v. NLRB*, 457 F.2d 660, 77 LLRM 2877 (3rd Cir. 1972). These standards are as follows:

> (1) the certified union... does not oppose the amendment; (2) the bargaining unit remains the same; and (3) the members of the union... are given an opportunity to consider and vote on the question... through a democratic process and in accordance with the union's constitution and by-laws.

Id. These standards have recently been utilized in Iowa to determine that an amendment of a local union designation did not alter the identity of a union as an employees' exclusive bargaining representative and therefore did not present a "question of representation." PERB Case Nos. 1820, 1821 and 1822, *Chauffeurs, Teamsters & Helpers Local Union No. 238 and City of Waukon* (Hearing Officer Decision 1981). I have enclosed a copy of this decision for your convenience.

Accordingly, in response to your first question, we advise that the Public Employment Relations Act does not expressly authorize the transfer by an international union of employees from one local, which is the exclusive bargaining representative of the employees, to another local. Pursuant to rules of the Public Employment Relations Board, such a transfer is recognized by the board only following the filing of a petition for amendment of certification by either the public employer or the certified employee organization. A vote of the affected employees is, however, not required unless the board determines that the proposed transfer raises a "question of representation." In response to your second question, we advise that the local which has been certified as the exclusive bargaining representative of the employees does remain responsible for representation of those employees until otherwise notified by the board.

August 14, 1981

JUVENILE: Shelter care expenses may be reimbursable by the state under §234.35 and 234.36 but may not be reimbursable by the state as §232.141(2) expenses for which no provision is otherwise made by law except that preadjudicatory court ordered shelter care under §§232.21 and 232.78 are allow-

able 232.141(2) expenses. Juvenile mental health and treatment costs subject to the terms of §444.12(3) are not allowable as juvenile justice costs under §232.141(2). (Black to Royce, Administrative Rules Review Committee, 8/14/81) #81-8-23(L)

August 14, 1981

PUBLIC RECORDS: Definition of public records. §68A.1, The Code 1981. Packet of informational material prepared voluntarily by a city administrator for use by city council members at council meetings are public records under §68A.1 and therefore are subject to examination and copying under chapter 68A. (Stork to McDonald, Cherokee County Attorney, 8/14/81) #81-8-24

Mr. James L. McDonald, Cherokee County Attorney: You have requested an interpretation of "public records" as defined in §68A.1, The Code 1981. Your correspondence indicates that the city administrator in Cherokee, Iowa, publishes a meeting agenda prior to each meeting of the city council, in accordance with the Open Meetings Act contained in chapter 28A. The city administrator also prepares a packet of information about the specific items included in the agenda but delivers the packet only to city council members, the city attorney, and the mayor. Such a packet might contain, for example, census data, legislative bulletins, and reports from the police department. You indicate that the council members do not consider the packet to be a "pubic record" until acted upon by the council and that nondisclosure of the packet prior to each council meeting facilitates objective consideration of matters at the meeting. The packet, which generally consists only of information that is otherwise regarded as public under chapter 68A, is then made available for public inspection after each council meeting. In light of these facts, you inquire as follows:

> My specific question is whether or not a packet of informational material prepared voluntarily by the city administrator for use by the council members, city attorney and mayor in discussing matters that will be presented at the council meeting is a public record as defined in section 68A.1 of the 1981 Code of Iowa.

Section 68A.1 provides:

> Wherever used in this chapter, "public records" includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

The operation of this definition is contingent upon two distinct elements. First, it applies only to "records" or "documents". Second, such records or documents must be "of or belonging to" the entities named in the definition. Your opinion request raises an important and unresolved question as to precisely what these terms mean. A series of decisions by the Iowa Supreme Court do provide significant clarification in this regard and will be discussed in some detail. Additionally, since the individual terms mentioned are not defined by statute, we may construe them according to their generally accepted meanings and in light of the underlying purpose of chapter 68A.

The definition of "public records" in §68A.1 is considerably different from the corresponding common law definition, which depended upon the nature and

purpose of a particular record. In a case arising prior to the passage of chapter 68A but decided shortly after its effective date, the Iowa Supreme Court articulated a rather limited view of what constitutes a public record under common law:

> Section 622.46 does not define a public record or writing. We must look to the common law and to the decided cases to determine what is included within that term. This court has never passed on the question, and therefore resort must be had to decisions from other jurisdictions.
>
> There is no single definition of public record which is applicable in all situations and under all circumstances. Perhaps the one most generally used refers to a public record as one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. 45 Am.Jur. 420, Records and Recording Laws, #2. A similar, although somewhat more inclusive definition, is found in 76 C.J.S. Records §1, p. 112. The concept of public records has now generally been extended to embrace not only what is *required* to be kept but also what is *convenient* and *appropriate* to be preserved as evidence of public action. [Citation omitted.]
>
> Not every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status. [Citations omitted.]

Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833, 835 (1967). The issue in *Linder* was whether certain written appraisal reports were public records or writings under §622.46 of the 1966 Code, which provided that public officers must furnish to any person, upon demand and payment of legal fees, certified copies of such records or writings. The city clerk and director of urban renewal refused disclosure of the appraisal reports, which involved appraisals of urban renewal property prepared by a private company pursuant to resolution of the city council. In concluding that the appraisal reports were not public records or writings and therefore not subject to disclosure under §622.46, the public record or writing "is one which an officer is required by law to keep or which is intended to serve as a memorial and evidence of something written, said, or done by the officer or public agency." 152 N.W.2d at 836. Earlier opinions of this office have relied upon the *Linder* rationale officials are not public records under §68A.1. 1974 Op.Att'y.-Gen. 403 (notes of a school board meeting kept by the board's secretary become public records only when transcribed for submission to the board); 1972 Op.Att'y.-Gen. 616 (worksheets and notes prepared by Bureau of Labor inspectors are not public records).

Section 68A.1 does not define a public record in terms of either its nature and purpose or a custodian's reason for keeping it. Applicability of the section requires only the existence of "records and documents of or belonging to" various named public entities. This language is unquestionably broad. One commentator has in fact observed that the legislature could not have gone further in repudiating the restrictive, common law definition of public records as expressed in the *Linder* case and that the only relevant concern under §68A.1 should be whether a record or document is in the legal possession of a public official. Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records but were Afraid to Ask*, 57 Iowa L.Rev. 1163, 1169 (1972).

Subsequent to *Linder*, the Iowa Supreme Court decided two important cases which compared the definition of public records in §68A.1 with that provided in the *Linder* decision. *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976); *Howard v. Des Moines Register & Tribune Co.*, 283

N.W.2d 289 (Iowa 1979). In the former case, the court held that jury lists are public records under chapter 68A and observed that such lists come within both the definition of §68A.1 and "a more restrictive definition of [public records contained] in prior case law." The court cited language from the *Linder* decision as the more restrictive definition:

> "[A] public record or writing is one which an officer is required by law to keep or which is intended to serve as a memorial and evidence of something written, said, or done by the officer or public agency." *Linder v. Eckard*, 261 Iowa 216, 220, 152 N.W.2d 833, 836 (1967).

248 N.W.2d at 501. The court further observed that the provisions of chapter 68A do not make access to public records dependent on the identity of the person in possession of them. *Id.*

In the *Howard* case, the court, in a split decision, more clearly distinguished its definition of public records in *Linder* from that set forth in §68A.1. The *Howard* case involved an action for invasion of privacy by a former resident of a county home against a newspaper and its reporter. The plaintiff sought redress for disclosure in a newspaper story that she had been involuntarily sterilized while a resident of the home. One issue in *Howard* was whether certain documents contained in the working files of the governor's office were "public records" under §68A.1. Those documents included (1) letters and a statement to the governor prepared by a writer for a local daily newspaper (one Snyder), which letters detailed the writer's knowledge of problems existing at the Jasper County Home; (2) written statements by former nurses aides at the home (Blakely and Corso), which statements explained incidents at the home and provided information on the plaintiff's sterilization; and (3) other "data" left by the writer of the local daily newspaper. In its discussion of whether these documents were public records under §68A.1, the court observed that the statute provides a broader definition of public records than existed at common law and cited its decisions in *Osmundson* and *Linder* as comparative examples of this fact. The court then interpreted §68A.1 in relevant part as follows:

> To facilitate public scrutiny of the conduct of public officers, the statute generally permits public access to writings held by them in their official capacities, regardless of origin. *See MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961); 66 Am.Jur.2d *Records and Recording Laws* §19, at 354 (1973).
>
> * * *
>
> We limit our application of the statute in this case to the documents involved here. We have no occasion to determine whether the reach of the statute may be affected by constitutional provisions in other situations. *Cf. Sadler v. Oregon State Bar*, 275 Or. 279, 550 P.2d 1218 (1976) (holding statute which allowed public inspection of bar association records of complaints about attorney conduct did not substantially impair the inherent power of the judicial branch to regulate the bar).
>
> The auditor's records were required to be kept by statute, *see* §230.26, The Code 1966, and would have been deemed public records even before chapter 68A was enacted. *Linder v. Eckard*, 261 Iowa at 220, 152 N.W.2d at 836. They are well within the definition of public records in chapter 68A. *See Osmundson*, 248 N.W.2d at 501.
>
> The Snyder and Blakely documents which were filed in the governor's office also clearly come within the definition of public records in section 68A.1. Upon his acceptance of custody, the documents were in the lawful

> possession of his office and hence became documents "of or belonging to" the state. Furthermore, the documents are not exempted from disclosure by a specific statutory provision as section 68A.2 requires. No injunction was secured under section 68A.8, and no exemption under a section outside chapter 68A appears available.

283 N.W.2d at 299—300. Certain elements in the court's explanation are particularly significant. First, the court again compared the definition of public records under §68A.1, as interpreted in *Osmundson*, with the earlier and more restrictive common law view expressed in *Linder*. Second, the court held that writings prepared by private citizens but in the "lawful possession" of a public official clearly became documents "of or belonging to" the state under §68A.1. The court thereby suggests that simple lawful possession of a document by a public official, as opposed to an actual property interest, is sufficient to qualify the document as a public record under §68A.1. Finally, the court indicated that §68A.1 permits access to writings *held by* public officers, *regardless of origin*. Accordingly, a record or document need not be authored by a public officer in order to fall within the definition of §68A.1. Importantly, the court cited the *MacEwan v. Holm* decision as support for this proposition, a decision which the court had rejected in *Linder*. 152 N.W.2d at 836. The Oregon Supreme Court held in the *MacEwan* case that data relating to nuclear radiation sources collected by the state board of health in the course of its statutorily mandated study of radiation were "public records" under the Oregon public records law, which provided in part:

> 192.010 *Right to inspect public writings.* Every citizen of this state has a right to inspect any public writing of this state, except as otherwise expressly provided by statute.
>
> 192.030 *Officers to furnish opportunities for inspection of records.* All officers having custody of any state, county, school, city or town records shall furnish proper and reasonable opportunities for inspection and examination of records and files in their respective offices...

359 P.2d at 416-417, 423. The court in *MacEwan* reviewed various cases that took a narrower view of public records, including those cases that determined (1) a writing is not a public record unless it is intended to serve as a memorial of some official action or as evidence of something written, said or done; (2) only a writing representing "ultimate" official action is a public record, as contrasted with writings that are "incidental" to the administration of the affairs of an office; (3) preliminary data gathered in the course of a study or investigation or used by an agency in carrying out its duties does not constitute a public record; and (4) a writing must be one which is expressly required or authorized to be kept by law. 359 P.2d at 418—419. In rejecting these views of what constitutes a public record, the Oregon Supreme Court determined that writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public and observed as follows:

> For the purpose of deciding whether a writing is subject to public inspection, we regard all data gathered by the agency in the course of carrying out its duties, irrespective of its tentative or preliminary character, as falling within the definition of 'records and files.' The need for data to serve the purposes we have mentioned above may be just as great when the data are in a raw or tentative state as when they are fully digested and memorialized by some ultimate official action.

359 P.2d at 420.

In *Howard*, the Iowa Supreme Court did not expressly cite with approval all the reasoning set forth in *MacEwan*. Consequently, there is some question as to

whether the court would, for example, agree that the tentative or preliminary nature of a writing or paper makes no difference in determining its status as a "record" or "document" under §68A.1. Since the terms are not statutorily defined, they may be construed according to their context and approved usage. §4.1(2), The Code 1981. In any event, the terms "record" and "document" must be construed in connection with the remaining portion of the definition in §68A.1, i.e., "of or belonging to" one of the named public entities. *Webster's New Collegiate Dictionary* defines "of" as a function word to indicate "origin or derivation" as well as "belonging or a possessive relationship". The term "belonging to", on the other hand, means "to be the property of a person or thing." Accordingly, it appears that the operation of §68A.1 does not depend upon a public entity's ownership or derivation of a record or document but that it may also include simple possession. Such construction comports with the Iowa Supreme Court's view in *Howard*. 283 N.W.2d at 299—300.

Webster's New Collegiate Dictionary defines "record", as it would pertain to a public entity, as "an official document that records the acts of a public body or officer" and as "an authentic official copy of a document deposited with a legally designated officer." "Document" is defined as "an original or official paper relied on as the basis, proof, or support of something" and as "a writing conveying information." These definitions do not precisely identify whether every piece of paper, regardless of form, substance, or intended use, may qualify as a "record" or "document". Both definitions do suggest that a paper should have some degree of "official" status in order to constitute a "record" or "document". According to *Webster's*, "official" may mean "prescribed or recognized as authorized" or simply "of or relating to an office, position, or trust."

Together, these definitions infer that not all written information and material in the possession of a public officer or entity is automatically a "record" or a "document". Rather, such information and material should have some "official" quality in the sense that it be in a form that is comprehensible, convenient, and appropriate for public inspection. *See* 66 Am.Jur.2d, *Records and Recording Laws* §19, at 354 (1973). This section, which was cited with approval by the supreme court in *Howard*, 283 N.W.2d at 299, states in relevant part:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those entrusted with the affairs of government are honestly, faithfully, and competently performing their functions as public servants.
>
> To constitute a public record available for inspection a writing need only constitute a convenient, appropriate, or customary method of discharging the duties of the office by public officials; it need not be a document that is required by law to be kept as a memorial of official action.

An earlier opinion of this office in fact expressed doubt that the legislature intended every piece of paper in the possession of a public employee to be available for public inspection under §68A.1, unless specifically exempted by statute. Op.Att'y.Gen. #79-12-17. The opinion questioned, for instance, the logic of viewing a memorandum from a law clerk to a supreme court justice or a rough draft of an attorney general's opinion of a "public record". *Id.*

We observe that the purpose of chapter 68A is to remedy unnecessary secrecy in conducting the public's business. *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980). The chapter is to be interpreted liberally to provide broad public access to public records. *Id.* at 526. Accordingly, there is a presumption in favor of disclosure and exemptions from disclosure are to be narrowly

construed. *Id.* at 527. Specific exceptions from disclosure exist pursuant to the provisions of §§68A.2, 68A.7, and 68A.8.

In light of the public purpose of chapter 68A, the reasoning of the supreme court in *Osmundson* and *Howard*, and the express language of §68A.1, we advise that "public records" generally does include all "documents" and "records" in the possession of the public bodies identified in §68A.1. Nevertheless, we do not believe that every writing and piece of paper in the possession of a public official necessarily constitutes a record or a document. Given the definitions of these terms, we conclude that they are intended to refer to any comprehensible writing developed and/or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty. We do not suggest that a public body or official has authority to exercise discretion in classifying certain writings as "official" or "unofficial" and thereby to determine, on a case-by-case basis, what constitutes a public record under §68A.1. The test to be applied in a particular case is, rather, an objective one that takes into account the express language and purpose of chapter 68A as well as the practical necessities of a public official or body in conducting public business.

We recognize that nondisclosure of the informational material prepared voluntarily by the Cherokee City Administrator prior to each city council meeting may facilitate discussion of business at each meeting. The question of what constitutes a public record under §68A.1 does not, however, depend upon the nature of its preparation or the reason for its intended use. Moreover, chapter 68A does not permit a public body to delay examination of a public record unless an injunction is sought pursuant to §68A.8. The packets of informational material prepared by the Cherokee City Administrator for use at city council meetings do appear to be convenient, appropriate, or customary methods for the discharge of the council's public duties. Accordingly, in light of the analysis of §68A.1 presented above, we conclude that such packets do constitute records or documents of or belonging to the city under §68A.1 and are, therefore, public records subject to examination under chapter 68A.

August 14, 1981

MUNICIPALITIES: Financing of Industrial Projects. Sections 4.2, 4.4, 4.6, 153.34(10), 419.1(2), and 514B.1, The Code 1981; 320 IAC §30.4(153)-15; §1 S.F. 506; 1975 Session, 66th G.A., chapter 1219. Financing the construction of a dental clinic falls within the ambit of chapter 419. (Walding to Miller, State Senator, 8/14/81) #81-8-25(L)

August 14, 1981

COUNTIES AND COUNTY OFFICERS; COUNTY ATTORNEY: Chapter 336, §§336.2, 372.13, The Code 1981. An allegation of incompatibility of offices raises a question of conflict of duties. This question is resolved via a legal analysis of the statutory duties of the offices involved. An allegation of conflict of interest raises a question of divergence of loyalties. This question is resolved via an evidentiary analysis of the facts surrounding the conduct of the office holder. The position of county attorney is an office, however, the position of city attorney is not an office. The position is that of an employee. The position of county attorney is not incompatible with the position of city attorney. A conflict of interest is present in a situation in which the county attorney assumes the duty of enforcing municipal criminal ordinances where it is possible to charge a defendant under either state or municipal laws. (Fortney to Angrick, Citizens' Aide/Ombudsman, 8/14/81) #81-8-26

Mr. William P. Angrick, Citizens' Aide/Ombudsman: You have requested an opinion of the attorney general regarding the propriety of one individual serving as both county attorney and city attorney for a city within the county. You have indicated your belief that such dual service violates the doctrine of incompatibility of offices. While the potential for a conflict of interest may exist depending upon the facts of a particular case, we are of the opinion that an incompatibility of offices does not exist when the same individual serves as both county attorney and city attorney. Our conclusion is premised on two alternative rationales: first, the position of city attorney is not an "office" within the doctrine of incompatibility of offices, such that the doctrine applies; and second, if the position of city attorney is considered an "office" we see no incompatibility between a person occupying such office as well as the office of county attorney.

At the outset we note that this area is one which is characterized by a degree of confusion. Over recent years there has been a tendency by commentators to intertwine the concept of incompatibility with the concept of conflict of interest. Your present inquiry hopefully provides a vehicle to clarify this issue.

The doctrine of incompatibility holds that "if a person, while occupying one office, accepts another incompatible with the first, he ipso facto vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.'" *State v. White*, 257 Iowa 606, 133 N.W.2d 903, 904 (1965), citing *State v. Anderson*, 155 Iowa 271, 136 N.W. 128, 129 (1912). When is one office "incompatible" with a second? The *Anderson* court offered these comments:

> ...the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. [Citation omitted.] But that the test of incompatibility is whether there is an inconsistency in the function of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." [Citations omitted.] A still different definition has been adopted by several courts. It is held that incompatibility in office exists "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both." [Citations omitted.]

136 N.W. 128, 129.

A number of conclusions can be drawn from *Anderson*: conclusions which can be contrasted with the concept of conflict of interest. Incompatibility is not concerned with how a person performs in office or how a person executes the duties of the office. The doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder. Consequently, the question of incompatibility can be resolved by comparing the respective duties of the two offices in question and examining how the duties relate. In contrast, when one discusses conflict of interest one must look to how a particular office holder is carrying out his or her official duties in a given fact situation.

A conflict of interest generally develops whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service. The occurrence of a conflict may be defined either by statute or by common law rules. Op.Att'y.Gen. #81-6-12(L). An allegation of conflict of interest can only be decided through a sifting of the various facts surrounding a particular action or set of actions taken by an office holder. The allegation raises what can be characterized as an evidentiary question. An allegation of incompatibility, on the other hand, presents a legal question. This was best demonstrated in *State v. White*,

supra, a quo warranto action challenging the right of a person to serve as a member of a local school board and the county board of education at the same time. The trial court in *White* entered judgment on the pleadings, ruling that an incompatibility existed between the offices in question. The supreme court ruled that it was proper to resolve the question without the introduction of evidence, explaining that:

> [d]efendant's answer admitted all the allegations of the petition except that he denied the duties of the two offices are incompatible and further denied it is contrary to public policy to hold them both at the same time. He claims this denial made a fact issue and he should have been permitted to introduce evidence in support of his denial. The duties are defined by statute and as the trial court said: It is not a question of how the school laws are being applied, but rather what duties are imposed by the statutes, and whether the powers and duties of the two boards are incompatible. For that reason we hold it to be a legal question properly determined in a motion for judgment on the pleadings.

133 N.W.2d 903, 904.

Perhaps the clearest way to demonstrate the different approaches taken by the courts in resolving incompatibility and conflict of interest questions is to contrast *State v. White, supra*, an incompatibility case, with *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969), a conflict of interest case.

In resolving the incompatibility issue relating to the two school boards' positions, the *White* court did not look at how the office holder was performing his duties, rather the court was concerned solely with a determination of what those duties were. The court examined the relevant statutes and held that "these statutes show that a definite and clear incompatibility exists between the duties and powers of a local school board and a county board of education and it is contrary to public policy for one person to hold the offices concurrently." 133 N.W.2d 903, 905. To reach this conclusion, the court made the following observations:

> It is obvious that the curriculum of a school, the instruction in the schools, the transportation of pupils to school where required by law, the union or merger of school districts, the changing or adjusting of boundary lines of contiguous school corporations are important matters which are the concern of the board of directors of a community school district. The action of the board of such school district, however, in said matters is subject to review by the county board. Section 273.13, Par. 3, makes it a specific duty of the county board to approve the curriculum of the county school system in conformity with the course of study prescribed by the State Department of Public Instruction; Section 274.15 [273.18] Par. 7, makes it the duty of and grants the power to the county superintendent, under the direction of the county board, to supervise or arrange for supervision of instruction in the schools of the county school system; Section 273.13, Par. 7, and Section 289.9 [285.9] make it the specific duty of the county board to enforce all laws, rules and regulations of the Department of Public Instruction for the transportation of pupils to and from public schools in all school districts of the county, and if the community district board fails to arrange for such transportation, the county board may do so and the service provided must be paid for by the community board. Section 285.12 makes the county board an appellate body over disagreements between a school patron and the community board as to matters of transportation; and Section 290.1 makes the county superintendent, a person appointed by the county board for a three year term (and subject to not being reappointed at the end of that period), the appeal body for persons aggrieved by any decision or order of the community board.

> Section 274.37 makes any action of the board of directors of contiguous school corporations changing boundary lines subject to the approval of the county board; and Sections 274.42, 274.43 and 274.44 give the county board power to adjust boundary lines between districts under certain circumstances, and its decision is final. Section 274.46 gives the county board the power to determine matters of reimbursement for loss of taxes caused by adjustment of boundary lines provided for in section 274.42.
>
> It thus appears that in many important matters the community school board is subordinate to the county board and subject to its revisory power in some degree.

133 N.W.2d 903, 905.

In contrast with the foregoing purely statutory analysis utilized by the court in *White*, is the reasoning of the court in *Wilson*. In the *Wilson* case, certain city councilmen were determined to have conflicts of interest under the applicable statute because they had voted to bring a certain area within an urban renewal project when they knew that the area included property in which they had an ownership interest. The conflict of one councilman, however, was based entirely upon his employment by another public body, *i.e.*, the University of Iowa, which owned property in the urban renewal area and was "vitally interested" in the project. 165 N.W.2d 813, 821. This councilman had held various positions of trust and responsibility with the University. At the time he became a member of the city council, he was director of the alumni office. Soon after his election, he was made director of community relations for the University. The court noted that the University was openly in favor of the urban renewal project and would be beneficially affected by it. The court then concluded that the councilman-employee of the University did have a disqualifying interest under the conflict of interest statute, particularly because of his "position of influence as director of community relations, the very department with which the city would deal in case of matters of mutual interest to the University and the city." *Id.* at 823.

In contrast with the *White* analysis, the *Wilson* court did not find it necessary to analyze the statutory duties of the councilman involved with the urban renewal project. Instead, the court focused on the presence of irreconcilable loyalties, loyalties to the private employer and loyalties to the public he had been elected to serve. Referring to the common law prohibitions against conflict of interest by a public employee, the court in *Wilson* observed:

> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.
>
> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the *potential* for conflict of interest which the law desires to avoid. [Emphasis in original.]

165 N.W.2d 813, 819.

To summarize, an allegation of incompatibility of offices raises a question of conflict of duties. This question is resolved via a legal analysis of the statutory duties of the offices involved. An allegation of conflict of interest raises a question of divergence of loyalties. This question is resolved via an evidentiary analysis of the facts surrounding the conduct of the office holder.

Returning to the issue you have raised, the incompatibility doctrine is applicable only if both the position of county attorney and the position of city attorney are considered "offices." Our analysis leads us to conclude that the position of county attorney is an office, however, the position of city attorney is not an office. The position is that of an employee. The decisions in *State V. Anderson, supra,* and *State v. White, supra,* presuppose that the individual holds two offices. *See* Op. Att'y.Gen. #79-6-5. The incompatibility doctrine does not apply where the person holds one office and is merely employed by another body. 1968 Op.Att'y.Gen. 257.

The Iowa Supreme Court addressed the employee-officer distinction in *State v. Taylor,* 260 Iowa 634, 144 N.W.2d 289 (1966). The court stated:

> It is somewhat difficult to define with accuracy the term "public officer" as distinguished from an "employee". It has been wisely said that, although an office is an employment, it does not follow that every employee is an officer.... In the early case of *State v. Spaulding,* 102 Iowa 639, 72 N.W. 288, we fully considered this problem and set forth what we believed were the acceptable guidelines to be used in determining the status of one holding such a public position. We have never departed from them and they are applicable here. To summarize, five essential elements are required by most courts to make a public employment a public office. They are: (1) The position must be created by the constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The position must have some permanency and continuity, and not be only temporary and occasional. See *Hutton v. State,* 235 Iowa 52, 54, 55, 16 N.W.2d 18, (workman's compensation case). Also see annotations, 53 A.L.R. 595, 93 A.L.R. 333, 140 A.L.R. 1076, 5 A.L.R.2d 416, 417.

144 N.W.2d 289, 292.

The court has also stated that a public office is de jure in its creation. It is not established by de facto operation. *State v. Pinckney,* 276 N.W.2d 433 (Iowa 1979). The fact that a particular individual is accorded wide latitude and discretion in the performance of his duties does not convert a position of employment into a public office. *Id.* A public office is not created by practice. *Id.*

Applying the standards of *State v. Taylor,* we conclude that the position of city attorney is not an office. First, the position of city attorney is not created by the laws of Iowa. It is permitted to exist, but not required. Our review of the Code discloses no provision which can be said to establish the position, rather there are merely a number of sections which recognize that the position may exist. In this regard, we contrast §372.13(3) with §372.13(4), The Code. These sections provide:

> 3. The council shall appoint a city clerk to maintain city records and perform other duties prescribed by state or city law.
>
> 4. Except as otherwise provided by state or city law, the council may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms. The appointment of a city manager must be on the basis of that individual's qualifications and not on the basis of political affiliation.

The position of city clerk is created by statute. It satisfies the first *Taylor* test. The position of city attorney, if it exists at all in a particular municipality, exists only through the choice of the city council pursuant to §372.13(4). This is strik-

ingly dissimilar from the creation of the position of county attorney pursuant to chapter 336. Arguably, the position of city attorney is created "through authority conferred by the legislature." *Taylor*, at p. 292. This conclusion, however, conflicts with the decision in *State v. Pinckney, supra.* The position in question was that of liquor properties manager. This position was established and the position's duties defined by the director of the Iowa beer and liquor control department pursuant to a grant of legislative authority. However, the *Pinckney* court commented that the power of the director to create the position of properties manager "does not carry with it the authority to make this position a public office," 276 N.W.2d 433, 436. Similarly, the power of the city council to create the position of city attorney pursuant to §372.13(4) "does not carry with it the authority to make this position a public office."

Second, the Code reveals no grant of sovereign power to be independently exercised by a city attorney. As the *Pinckney* decision states, "it is the unsupervised exercise of sovereign power which is the hallmark of a public office." 276 N.W.2d 433, 436. The city council is given statutory authority to create the position of city attorney. No unsupervised sovereign power of the city is delegated to the city attorney.

As to the third prong of the *Taylor* test, the question is closer. The Code does, in a number of areas, define the duties of a city attorney. A review of these statutory duties reveals that they are quite narrow and in no manner do they encompass the scope of functions routinely performed by an attorney employed to represent an individual or a governmental unit. The city attorney is designated to represent the city civil service commission (§400.27), is a member of the board of trustees which manages the retirement funds for firemen and policemen (§§410.2 and 411.5), is designated to represent the city assessor and the board of review in all litigation dealing with assessments (§411.41) and is designated to conduct condemnation proceedings for the city (§472.2). When compared with the delineation of duties to be perfomed by the county attorney (§336.2), the foregoing duties assigned to the city attorney are sparse. They in no way encompass the range of services provided a municipality by a city attorney. However, these other customary functions are defined by practice or by contract. They are not statutorily defined as required by *Taylor*. We recognize, however, that the foregoing itemized duties are statutorily defined and we consequently recognize that the third factor of the *Taylor* test may be satisfied.

We have already addressed the fourth element, the performance of duties without supervision by a superior. A city attorney does not act independently. Rather he acts at the command and direction of his employer, the city council. He does not engage in independent decision-making on a routine basis. A critical exception to this relates to the area of prosecutorial discretion (discussed more fully below in regard to a potential conflict of interest). To the extent that the city attorney decides what charges should be filed in a criminal action, his charging decision is not subject to review by any superior. However, there is no statute which imposes enforcement of criminal laws on the city attorney. In other words, criminal law enforcement is not a statutory duty of the city attorney. Consequently, the fact that he is unsupervised in this function is of reduced significance in applying the *Taylor* analysis.

Fifth, and last, the position of city attorney does not have permanence and continuity. As pointed out previously, the city council has discretion whether to create the position. §372.13(4). Similarly, the council could rescind its action and eliminate the position. Moreover, the position of city attorney is not accorded the protections of civil service. §400.6(1). *See State v. Pinckney, supra.*

Based on the foregoing considerations, we conclude that the position of city attorney does not meet the criteria for a "public office" as set forth in *State v.*

Taylor, supra. We find it to be similar to the position of attorney for a school district. *See* Op.Att'y.Gen. #79-6-5. *Compare* to the discussion of a city zoning inspector in *State v. Taylor*, 144 N.W.2d 289, at 292—293.

Because we conclude that the position of city attorney is that of an employee, and not that of a public office, the doctrine of incompatibility does not apply. If we were to determine that the position was in fact a public office, we do not find a violation of the doctrine to occur if the same individual occupied the office of county attorney and the office of city attorney. The alleged incompatibility is analyzed by applying the approach utilized in *State v. White, supra*, regarding the two school board positions. There the court compared the statutorily defined duties of the two offices and found them incompatible, e.g., the county school board reviewed the decisions of the local school board. If we compare the statutory duties of the city attorney with those of the county attorney we are unable to find an incompatibility between the prescribed duties. Indeed, the duties are quite discrete. The statutory duties of the city attorney relate only to municipal matters, do not intrude on the province of the county attorney, and cannot be said to be subject to any "revisory power" of the county attorney. *See State v. Anderson, supra*, 129. The converse is equally true. No incompatibility exists.

While we are unable to find any incompatibility between the office of county attorney and the position of city attorney, we believe that the potential exists for a serious conflict of interest. The problem we foresee relates to the area of criminal law enforcement. In a prior opinion, 1976 Op.Att'y.Gen. 630, we held that the position of county attorney was incompatible with that of city attorney. While we reject that conclusion, a portion of the opinion correctly analyzes the potential conflict of interest. We quote:

> Many offenses, primarily traffic, encompass both local and state charges. How much money from the fines and court costs and where that money goes depends upon which charge the violator is convicted of. A county attorney represents the state whereas a city attorney represents the city. A possibility of divided loyalties exists. In addition, there are many instances where cities and counties are at odds over a variety of situations, many times resulting in discussions and cases involving city and county attorneys. A person in both positions would be serving two such masters at the same time. Although we are not saying that you personally have done anything wrong, for the very fact that you requested this opinion indicates your desire to comply with the law, we believe that the possibility of the above problem exists. It is the possibility of impropriety that the law desires to avoid. *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969).

1976 Op.Att'y.Gen. 630, 631.

Because of the very real potential for conflict described above, we believe it would be inappropriate for a county attorney, whose duties require him to enforce and prosecute criminal laws, to attempt enforcement of city criminal laws. Similarly, the county attorney should not engage in the performance of any legal work on behalf of the city if to do so would place him in a conflict with his required county duties. This is, of course, a question which generally must be addressed on a case-by-case basis. It also involves determinations of factual issues not readily addressed in an opinion of the attorney general. However, with regard to the narrow question of criminal law enforcement, we are able to state that a conflict of interest exists in a situation in which the county attorney assumes the duty of enforcing municipal criminal laws where it is possible to charge a defendant under either state or municipal laws.

In conclusion, an allegation of incompatibility of offices raises a question of conflict of duties. This question is resolved via a legal analysis of the statutory

duties of the offices involved. An allegation of conflict of interest raises a question of divergence of loyalties. This question is resolved via an evidentiary analysis of the facts surrounding the conduct of the office holder. The position of county attorney is an office, however, the position of city attorney is not an office. The position is that of an employee. The position of county attorney is not incompatible with the position of city attorney. A conflict of interest is present in a situation in which the county attorney assumes the duty of enforcing municipal criminal ordinances where it is possible to charge a defendant under either state or municipal laws.

Previous opinions which conflict with the conclusion that the position of county attorney is not incompatible with the position of city attorney are hereby withdrawn.

August 19, 1981

COUNTIES AND COUNTY OFFICERS; PUBLIC RECORDS: Iowa Const., Art. III, §39A, chapter 68A, The Code 1981, 69th G.A., 1981 Session, S.F. 130. The charging of a fee by a local official for the performance of a public function is in conflict with the County Home Rule Bill if such fee is not among the scheduled fees. The charging of a reasonable fee for a records search is permitted by chapter 68A if such fee is intended to cover the reasonable expenses of the search. (Fortney to Martens, Emmet County Attorney, 8/19/81) #81-8-27(L)

August 19, 1981

COUNTIES AND COUNTY OFFICERS; COUNTY COMPENSATION BOARD: Chapter 340A, §§340A.1, 340A.6, The Code 1981. A county may adopt a compensation schedule which includes cost of living adjustments. A county compensation schedule need not include cost of living adjustments for all offices. (Fortney to Zenor, Clay County Attorney, 8/19/81) #81-8-28(L)

August 21, 1981

SCHOOLS: Fees for courses and extracurricular activites: §§280.14, 282.6, 301.1, The Code 1981. Public schools may not charge fees for courses offered as part of their educational program, as such fees constitute tuition. Schools may not charge fees for extracurricular activities as no express or necessarily implied statutory authority exists for such fees. (Norby to Small, State Senator and Mullins, State Representative, 8/21/81) #81-8-29

The Honorable Arthur A. Small, Jr., State Senator; The Honorable Sue Mullins, State Representative: You have requested an attorney general's opinion regarding the ability of Iowa public schools to charge fees. Specifically, you are concerned with fees for elective courses, for driver education courses, and for extracurricular activities such as music, athletics and debate.

Your question requires consideration of two issues. First, does the collection of these fees constitute the charging of tuition, which is statutorily prohibited in Iowa? §282.6, The Code 1981. Secondly, do school districts have authority to charge such fees? This second question follows from the general proposition that

school districts possess only those powers expressly granted or necessarily implied by the Code. *Silver Lake Cons. Sch. Dist. v. Parker*, 238 Iowa 984, 29 N.W.2d 214 (1947). In other words, even if a particular fee could not be characterized as tuition, do school districts possess an express or necessarily implied power to charge the fee?

Two Code sections appear particularly relevant to the inquiry herein. First, §282.6, The Code (all references to the Code 1981 unless otherwise specified) prohibits the charging of tuition, stating in relevant part as follows:

> Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years..., provided, however, fees may be charged covering instructional costs for a summer school program. The board of education may, in a hardship case, exempt a student from payment of the above fees.

This section not only bars the charging of tuition, but expressly allows tuition for summer school classes. This allowance for summer school classes appears as the only authorization for tuition in the Code. Accordingly, this appears to strongly imply that prohibition of fees for courses which are offered as part of the curriculum during the regular school year should be broadly applied.

Secondly, §301.1 provides for school districts to sell textbooks and school supplies to students. This section is significant in that it appears to be one of a limited number of express statutory authorities for districts to charge fees. *See* §§280.10, 280.11. As there is only limited express authority to charge students fees, this may imply that other types of fees are not authorized.

Most states have prohibitions on the charging of tuition for public school attendance, or alternatively, a provision that public school education be provided for free. *See* Note: *Student Fees in Public Schools: New Statutory Authority*, 16 Washburn L.J. 439 (1977). In contrast to Iowa's statutory prohibition, however, many states have constitutional clauses requiring free education or prohibiting tuition. *See* Ind. Const., art. 8, §1; N.M. Const., art. XII, §1; Note: *School Law — The Constitutional Mandate for Free Schools*, 1971 Wis. L.J. 971, 973 (1971).

Regardless of the source of the prohibition of tuition, the initial stage of analysis requires arriving at a definition of this term. Unfortunately, the Iowa Supreme Court has not had the opportunity to consider the meaning of tuition with reference to course fees. A 1979 attorney general's opinion, however, considered whether a fee for certain tangible items constituted the charging of tuition. Op.Att'y.Gen. #79-12-22. This opinion concluded that tuition generally includes the cost of facilities and instruction, and would include the cost of tangible items necessary or essential to instruction.

"Tuition" is defined in *Webster's Third New International Dictionary* (1967), at p. 2461, in relevant context, as follows:

> tuition:... the price or payment for instruction (— has risen sharply). [1]

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[1] This definition is often relied upon by courts as an initial stage of analysis. *Chandler v. South Bend Comm. Sch. Corp.*, 160 Ind. App. 592, 312 N.E.2d 915 (1974). The need to resort to a dictionary definition appears as an indication of the lack of case law providing elaboration on the scope of tuition prohibitions. *See* Note: *School Law — The Constitutional Mandate for Free Schools*, 1971 Wis. L.Rev. 972, 979 (1971); *Concerned Parents v. Caruthersville*, 548 S.W.2d 554, 559 (Mo. 1977).

The courts of several states have applied tuition prohibitions and consequently have been required to formulate objective standards to define the scope of what must be provided in a tuition-free school.

In *Board of Education v. Sinclair*, 65 Wis. 2d 179, 222 N.W.2d 143 (1974), the court considered a Wisconsin constitutional requirement that schools be provided "free and without tuition". The court construed the prohibition on charging tuition to prohibit charges for instruction. The court extended this prohibition on fees for instruction to all courses credited toward graduation, rejecting the notion that the prohibition should extend only to courses required of all students, 222 N.W.2d at 148.

Cases which apply requirements of free education to challenged course fees appear more numerous than cases involving tuition prohibitions. These cases are instructive, however, in illustrating the various limits placed upon course fees. It appears that a requirement of free schools generally is interpreted to include a prohibition on course fees, in effect barring tuition. *See Cardiff v. Bismark Public School Dist.*, 263 N.W.2d 105, 113 (N.D. 1978); Note: *Student Fees in Public Schools: New Statutory Authority*, 16 Washburn L.J. 439, 442 (1977).

As noted above in *Sinclair*, it was held that a tuition prohibition required that all courses for academic credit must be provided for free. A similar result was reached in *Granger v. Cascade Co. Sch. Dist.*, 159 Mont. 516, 499 P.2d 780 (1972). In *Granger*, course fees including fees for music, shop and driver's education, were challenged pursuant to a constitutional requirement of free schools. The constitutional requirement was interpreted to prohibit fees for all courses for which academic credit is awarded. As in *Sinclair*, limiting the prohibition to courses required of all students was rejected. 499 P.2d at 785—786.

A result consistent with *Sinclair* and *Granger* was also reached in *Concerned Parents v. Caruthersville*, 548 S.W.2d 554 (Mo. 1977). In *Concerned Parents*, the court considered a constitutional requirement of "free public schools for public instruction". The challenged fees included fees for driver's education, art, home economics, band and typing. The constitutional provision was interpreted to bar fees for these or any courses in which academic credit is given, but the question of whether a fee might be charged for optional courses without academic credit was expressly reserved. 548 S.W.2d at 526 [2]

A contrasting result was reached in *Norton v. Bd. of Ed.*, 89 N.M. 470, 553 P.2d 1277 (1976). In *Norton*, course fees were challenged pursuant to a constitutional requirement of free schools. N.M. Const., art. XII, §1. The court concluded that this requirement only prohibited fees for courses required of all students, as determined by the state board of education, but did not prohibit fees for courses not required.

Only one authority disclosed by our research supports application of course fees in all instances. In *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 264 S.E.2d 106 (1980), both general instruction fees applicable to all students and fees for specific courses were challenged pursuant to a constitutional requirement of free public schools. N.C. Const., art. IX, §2(1). The court concluded that the require-

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[2] It is not stated in the *Concerned Parents* decision whether driver's education was offered for academic credit. This question was left to be determined on remand.

ment of free schools prohibited tuition but concluded that this prohibition was not violated as long as physical facilities and personnel salaries were provided from sources other than student fees. Accordingly, reasonable course fees were allowed. 264 S.E.2d at 113.

Accordingly, the requirement of tuition-free schools generally prohibits fees for instruction, but the extent of the prohibition does differ as discussed above. We now turn to the educational program in Iowa to determine how to meaningfully apply §282.6.

The educational program which must be offered in Iowa public schools is prescribed in §257.25, The Code. In addition, §321.178 requires that driver education be offered by all public schools. However, only four courses are required to be taken by all Iowa school students; American history, Iowa and U.S. government and physical education. §§257.25(6)(b) and (g). Beyond these courses, local districts have discretion to require particular courses, and to establish graduation requirements. §280.14, The Code. [3]

We believe that to effectively give meaning to §282.6, it must be interpreted to prohibit fees for instruction in any course offered by a public school except summer school. To limit this prohibition to courses required to be taken by statute would result in guaranteeing free instruction only in American history, U.S. and Iowa government and physical education, certainly an absurd result. Secondly, we believe it improper to connect the tuition prohibition to courses required of all students by a local board. This would in effect allow local school boards to vary the effect of §282.6 between districts. We also believe that the fact that §282.6 does provide for reasonable tuition for summer school strongly indicates that no course fees are allowed in other instances. In other words, if fees for elective courses were intended to be allowed, this would have been listed along with the summer school exception. In conclusion, we believe that fees for any course offered as a part of the educational program of a school district, including driver's education, are prohibited by §282.6.

There is not a great deal of authority concerning the propriety of fees for extracurricular activities. In *Vandevender v. Cassell*, 208 S.E.2d 436 (W. Va. 1974), a constitutional requirement of a "thorough and efficient system of free schools" was interpreted to not prohibit fees for extracurricular activities. 208 S.E. at 439. Similarly, in *Paulson v. Minidoka Co. School Dist.*, 93 Idaho 469, 463 P.2d 935 (Idaho 1970), an extracurricular activity fee, as long as it was only assessed of participants and not charged to students generally, was not considered to be prohibited by a constitutional requirement of free schools.

In *Sinclair*, a constitutional provision for schools which are "... free and without charge for tuition" was held to not prohibit extracurricular activities, the

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[3] The courses required to be offered by §257.25 are, however, extensive. For example, §257.25(6)(i) requires that "units of partial units in the fine arts shall be taught which may include art, music, and dramatics." Accordingly, if an activity such as marching band is conducted as a part of a music course for which academic credit is offered, any fee for this activity would have to be reviewed with regard to the tuition prohibition and as to possible limitation on extracurricular fees.

court stating that these activities are not necessary elements of education. 222 N.W.2d at 148. We assume that authorities discussed above which limited provisions for free schools to something less than the entire range of academic courses support the ability to charge fees for extracurricular activities. *Norton*, 533 P.2d 1277; *Sneed*, 264 S.E.2d 106.

In contrast, in *Bond v. Public Schools of Ann Arbor*, 178 N.W.2d 484, 383 Mich. 693 (1970), constitutional requirements that schools be free and without charge for tuition were held to prohibit fees for extracurricular athletics. The court determined that such a fee was prohibited under either of two standards, stating that extracurricular athletics are "necessary elements" of education, and also "integral, fundamental parts of education". 178 N.W.2d at 484—485, 488.

Review of these cases shows strong support for assessment of extracurricular fees, even where a constitutional requirement of free schools is applicable. It does appear that a requirement of free schools is applicable. It does appear that a requirement of free schools is generally more prohibitive of fees than a requirement that schools be free of tuition. *See Cardiff*, 263 N.W.2d at 113, Note: 16 Washburn L.J. at 442. With regard to the §282.6 prohibition of tuition, the status of extracurricular activities within Iowa public schools must be determined. In other words, whether extracurricular activities are a part of the educational program required to be offered by §257.25 is important in determining if fees for such activities are prohibited by §282.6. This question appears unclear. While there is no express requirement in §257.25 that extracurricular activities be offered, §280.14 strongly implies that such activities must be offered. Administrative rules promulgated by the Department of Public Instruction interpret the educational program to include extracurricular activities. 670 IAC 3.5(1), 3.5(2) and 3.6(1). In contrast, several attorney general's opinions, which concern financial questions, imply that extracurricular activities are not a part of the educational program. 1936 Op.Att'y.Gen. 375; 1936 Op.Att'y.Gen. 333; 1936 Op.Att'y.-Gen. 38. As discussed below, we believe that a prohibition of extracurricular activity fees exists on the basis that no affirmative authority exists for such fees. Accordingly, we do not determine here the question of whether such fees are prohibited by §282.6.

The discussion of whether affirmative authority exists to charge such a fee arises from the general proposition that school districts may exercise only those powers expressly given by statute or necessarily implied. *See Silver Lake Cons. Sch. Dist. v. Parker*, 238 Iowa 984, 29 N.W.2d 214 (1947). Although this general proposition appears widespread, 78 C.J.S. *Schools and School Districts*, §103, our research disclosed only one case which expressly discusses the question of the need for affirmative authority to assess a fee. In *Morris v. Vandiver*, 145 So. 228 (Miss. 1933), the court denied the ability of a school to assess athletic, library, and literary fees on the basis that no express or implied statutory authorization for such fees existed.

In the Iowa Code, there appear three express authorizations for assessing student fees. Section 301.1 provides for sale of school supplies and sale or rental of textbooks[4] to students by a school district. Additionally, §§280.10 and 280.11 provide express authority for school districts to charge students for eye and ear protective devices. These statutory provisions may not initially appear as a

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[4] Section 301.24 provides for an election to determine if free textbooks should be provided to students.

comprehensive scheme which would ordinarily imply exclusion of other types of fees. We believe, however, that the express listing of certain fees is significant in the context of school fees. Additionally, the sections expressly authorizing student fees provide for sale at cost of the appropriate items. We believe this provides additional support for strictly construing the ability of schools to charge fees. Accordingly, we conclude that the lack of express or implied authority to charge a fee for extracurricular activities requires the conclusion that such fee may not be charged. This does not mean, however, that fees which can appropriately be charged as school supply fees pursuant to §301.1 cannot be charged in connection with tangible items used in extracurricular activities.

In conclusion, we believe that course fees cannot be charged for elective courses or driver's education courses. Such a fee is prohibited by §282.6. We do not reach the question of whether fees for extracurricular activities are prohibited by §282.6. We believe, however, that such fees are impermissible as no affirmative statutory authority exists for assessment of such fees.

August 21, 1981

CONSTITUTIONAL LAW; HIGHWAYS; SCHOOLS: Iowa Const., art. III, §30 (1857); H.F. 850, 1981 Session, 69th G.A., §16. The appropriation for the construction of a street on state-owned property from a state primary highway to the sports arena of the University of Iowa pursuant to H.F. 850, 1981 Session, 69th G.A., §16 will serve public, not special, interests. Therefore, the appropriation does not violate Iowa Const., art. III, §30 (1857) which prohibits "local" or "special" laws regarding the establishment of highways. (Mull to Johnson, State Representative, 8/21/81) #81-8-30(L)

August 27, 1981

COUNTIES; COUNTY CARE FACILITY: Chapter 253, §§222.80, 230.15, The Code 1981. The liability of a resident of a county care facility is limited by the statutory authority of the county to charge for care. Any voluntary agreements between an individual and the county specifying terms for continued residence may be enforced by eviction only. (Morgan to Davis, Scott County Attorney, 8/27/81) #81-8-31(L)

August 27, 1981

STATE OFFICERS AND DEPARTMENTS: Conflict of Interest, chapter 68B, The Code. A blind person is not automatically disqualified from serving on the Iowa Commission for the Blind because of conflict of interest. Good judgment should be exercised, however, when a commissioner is faced with an issue in which the commissioner has a present, specific, and personal interest in the outcome. Recusal on a specific issue may be the solution on a case-by-case basis. (Appel to Taylor, Director, Commission for the Blind, 8/27/81) #81-8-31(L)

August 28, 1981

COUNTIES AND COUNTY OFFICERS; TAXES: §445.57, The Code 1981. Section 445.57 requires the county treasurer to apportion tax receipts only once each month and prohibits a more frequent apportionment. (Fortney to Carney, State Senator, 8/28/81) #81-8-33

The Honorable Clarence Carney, State Senator: You have requested an opinion of the attorney general regarding the apportionment of taxes pursuant to §445.57, The Code 1981. The section in question provides:

> On or before the tenth day of each month, the treasurer shall apportion all taxes collected during the preceding month among the several funds to which they belong according to the amount levied for each fund, and the interest and penalties thereon to the general fund, and shall enter the same upon his cash account, and report the amount of each tax and the interest and penalties collected on the same to the county auditor, who shall charge him in each fund with the same.

You inquire whether §445.57 prohibits a county from either apportioning taxes to the respective funds more frequently than once a month, or advancing a partial payment of taxes to the funds before the date designated in the statute. We understand that various school districts are interested in a more frequent apportionment of tax receipts in order to alleviate the cash flow problem being experienced by the districts. While we are sympathetic to the financial plight of the state's school districts, we are unable to concur in the statutory construction they advocate. It is our opinion that §445.57 requires the county treasurer to apportion tax receipts only once each month and prohibits a more frequent apportionment.

Chapter 445 provides a mechanism for the collection and distribution of taxes on real and personal property. An annual cycle is created which requires particular events to occur at particular points in time if the tax collection process is to operate successfully. A review of the chapter reveals numerous functions which are to be performed by county officers at designated times. [1] The apportionment of taxes pursuant to §445.57 is one of these functions.

One cannot review the provisions of chapter 445 without being left with the impression that the legislature made conscious decisions regarding the timing of the tax collection process. Given that the apportionment of taxes pursuant to

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[1] For example, §445.1 requires the county treasurer to mail a statement to each delinquent taxpayer not later than May 1; §445.8(1) requires the treasurer to enter delinquent personal taxes in the delinquent tax book after April 1 and before June 30; §445.8(2) requires the treasurer to publish a list of such delinquencies "not more than two weeks before the first Monday in June"; distress warrants are to be issued within 10 days of such publication pursuant to §455.8(3); §445.13 requires the auditor to deliver a special assessment tax list to the treasurer by July 31; §445.30 provides that tax liens attach to real property on June 30; §445.36 requires taxes to be paid between the first Monday in August and the following September 1; such taxes become delinquent if not paid by October 1 pursuant to §445.37; §445.40 provides that a penalty is imposed if personal property taxes are not paid by the first Monday in June; and §445.51 provides that delinquent taxes may not be turned over for collection prior to May 1.

§445.57 is a part of this process, we believe that the legislative determination that the apportionment occur "on or before the tenth day of each month" must be controlling. The use of the term "each month" implies a singular monthly occurrence, there being only one day each month which is the tenth day.

We recognize that it may be financially advantageous for local taxing bodies, such as school districts, to receive their share of the tax apportionment more frequently than once each month. If the money was apportioned twice monthly, the local taxing body would obtain the use of the tax receipts at an earlier date, thereby shifting the "time-value" [2] of the tax receipts from the county to the local taxing bodies. The practical effect of accelerating the apportionment would be to shift the right to earn and collect interest on the tax receipts from the county to the various tax funds. This conflicts with the intent of the General Assembly to ensure that the interest earned on tax receipts be paid to the county general fund. *See* §445.57.

Acts 1925 (41st G.A.), ch. 149, §2, repealed section 7232 of the 1924 Code and enacted present §445.57 as a substitute therefor. The repealed section required apportionment of both taxes and interest in contrast to the present section which requires that interest and penalties be allocated to the general fund. The earlier section provided:

> On or before the tenth day of each month the treasurer shall apportion all taxes and interest on the same collected during the preceding month among the several funds to which it belongs according to the number of mills levied for each fund and enter the same upon his cash account, and report the amount of each tax and interest collected on same to the county auditor who shall charge him in each fund with the same.

§7232, The Code 1924.

The change effectuated by Acts 1925 (41st G.A.), ch. 149, §2 represents a clear legislative intent to divert all interest earned on tax receipts from the tax funds in favor of the county general fund. Should the apportionment of tax receipts occur on a more frequent basis than once per month, the county general fund would suffer a loss in interest revenues. This would conflict with legislative intent.

In conclusion, §445.57 requires the county treasurer to apportion tax receipts only once each month and prohibits a more frequent apportionment.

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[2] By "time-value" of money we mean the economic concept that there is a financial value which can be assigned to the use or control of money over a particular period of time. In this case, the "time-value" is translated into the interest which accrues on the tax receipts while held by the county treasurer in an interest bearing account.

August 28, 1981

MENTAL HEALTH; SUBSTANCE ABUSE: Escort of substance abusers to treatment facilities. §§125.35 and 125.35(3), The Code 1981. There is no requirement that a Judicial Hospitalization Referee issue an order for the transport of a substance abuser to a substance abuse treatment facility under §125.35, The Code 1981. Persons other than peace officers may transport or escort a substance abuser to a proper facility under §125.35. Such person may use such force as is reasonably necessary to detain and transport the substance abuser to a facility. Reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the person charged with detaining the substance abuser, would have deemed necessary under the circumstances. (Mann to Kumpula, Assistant Dickinson County Attorney, 8/28/81) #81-8-34(L)

August 28, 1981

COUNTY AND COUNTY OFFICERS: Board of Supervisors, §§252.27, Code of Iowa, 1981, as amended by S.F. 130 of the 69th G.A., 96.19(6)(a)(6)(e), 85.16(2), 97.53, 613A.2, Code of Iowa, 1981. The board of supervisors may require persons receiving assistance, pursuant to chapter 252, The Code, to perform labor for the county as a condition for receipt of such relief. Such persons may be considered employees of the county under these circumstances. (Robinson to Beine, Cedar County Attorney, 8/28/81) #81-8-35(L)

August 28, 1981

MOTOR VEHICLES: Probationary Operator's Licenses. Sections 321.178, 321.189, The Code 1981; U.S. Constitution, Amendment XIV, Iowa Constitution, Art. I, §6. The §321.178(2) provision for probationary operator's licenses for those drivers between the ages of sixteen and eighteen does not apply to the operation of motorcycles. This provision is valid under the Fourteenth Amendment of the U.S. Constitution and Article I, §6 of the Iowa Constitution. (Dundis to Jochum, State Representative, 8/28/81) #81-8-36(L)

August 28, 1981

STATE OFFICERS AND DEPARTMENTS: Department of General Services — Authority for Iowa businesses to donate unneeded equipment and supplies to the state, §§18.15, 565.3, 565.4, 565.5, The Code. Any manufacturer or merchandiser may give their unneeded equipment and supplies to the state so long as the object and purpose of such gift is not against public policy or illegal. The state may then distribute such gifts to state agencies and charge such agencies reasonable service charges to cover the costs of distribution. (Swanson to McCausland, Director, Department of General Services, 8/28/81) #81-8-37(L)

August 28, 1981

CIVIL RIGHTS; VOLUNTEER WORKERS; CONFIDENTIALITY: Sections 601A.5(1), 601A.15(4), The Code 1981. The Civil Rights Commission may

utilize volunteer workers who sign an agreement to abide by statutory confidentiality requirements (Fleming to Reis, Civil Rights Division, 8/28/81) #81-8-38(L)

August 28, 1981

STATE OFFICERS AND DEPARTMENTS; CONFLICTS OF INTEREST; PUBLIC EMPLOYEES: U.S. Constitution, Fourteenth Amendment; §§4.1(3), 68B.2 (last unnumbered paragraph), 68B.2(5), 68B.4, 455B.4(1). Terms "wives" in definition of employee cannot be construed to include husbands for purposes of penal provisions of chapter 68B. Inclusion of wives but not husbands in prohibitions of §68B.4 results in an unconstitutional gender-based classification, thus the statute may be enforced against employees and officials but not against their spouses. The United States government and political subdivisions of the state are not individuals, associations, or corporations for purposes of §68B.4. The language the legislature used in §68B.4 bars employees of the Department of Environmental Quality from selling grain to an elevator subject to the department's regulatory authority. Corporations which are owned 10% or more by an employee are subject to all the sales restrictions of §68B.4 and it does not matter that the goods or services sold may be unrelated to the agency's regulatory function. (Valde to Crane, Executive Director, Department of Environmental Quality, 8/28/81) #81-8-39(L)

SEPTEMBER 1981

September 3, 1981

STATE OFFICERS AND DEPARTMENTS; ADMINISTRATIVE LAW: State Board of Educational Examiners; Professional Teaching Practices Commission. §§17A.2(2), 17A.11, 17A.19, 260.1, 260.23, 272A.6, The Code 1981. The "hearing" to determine violations of criteria of professional practices before the Professional Teaching Practices Commission and the "suspension or revocation hearing" before the State Board of Educational Examiners prescribed by §262A.6 are both "contested case" proceedings within the meaning of §17A.2(2). Principles of collateral estoppel will ordinarily limit the scope of the second hearing before the board. (Schantz to Bennett, Director, Professional Teaching Practices Commission, 9/3/81) #81-9-1

Mr. Don R. Bennett, Director, Professional Teaching Practices Commission, Grimes Building: We have received your request for an attorney general's opinion concerning disciplinary proceedings which are initiated [1] before the Professional Teaching Practices Commission (P.T.P.C.) created by chapter 272A, The Code 1981. Your questions arise from the dual hearing scheme established by §272A.6, which provides:

> The commission shall have the responsibility of developing criteria of professional practices including, but not limited to, such areas as: (1) Contractual obligations; (2) competent performance of all members of the teaching profession; and (3) ethical practice toward other members of the profession, parents, students, and the community. However, membership or nonmembership in any teachers' organization shall never be a criterion of an individual's professional standing. *A violation as determined by the commission following a hearing, of any of the criteria so adopted shall be deemed to be unprofessional practice and a legal basis for the suspension or revocation of a certificate by the state board of educational examiners.*
>
> *The commission, in administering its responsibilities under this chapter, after a hearing, shall exonerate, warn or reprimand the member of the profession or may recommend the holding of a certification suspension or revocation hearing by the state board of educational examiners.* [Emphasis added.]

This section authorizes the P.T.P.C. to promulgate as administrative rules criteria of professional practices. Where an alleged violation of a criterion is brought to the attention of the P.T.P.C. and it determines, after hearing, whether the violation occurred, it is granted the authority, without the necessity of further proceedings, to "exonerate, warn or reprimand" the certificate holder. However, if the P.T.P.C. regards a violation as more serious, it may recommend that the

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[1] Suspension or revocation proceedings may be initiated for certain causes before the Board of Education Examiners without involvement of the Professional Teaching Practices Commission. §260.23, The Code 1981.

State Board of Educational Examiners (hereinafter "Board") hold a certification suspension or revocation "hearing." [2] Only the board, which issues certificates in the first instance, is authorized to impose these more severe sanctions.

You have posed two specific questions concerning the nature of the second hearing before the board:

> 1. When the P.T.P.C. determines that a teacher has violated a professional criteria and this violation is referred to the board, must the board hold an evidentiary hearing concerning the violation, or is the board's review appellate in nature or otherwise limited?
>
> 2. Can the board's decision be delegated to its executive officer, the State Superintendent of Public Instruction, or must it be made by the board itself?

The relationship between the P.T.P.C. hearing and the board hearing is not expressly addressed by The Code. The starting point for analysis, however, would clearly be with the definition of a "contested case" in the Iowa Administrative Procedure Act, §17A.2(2):

> 'Contested case' means a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

The "hearing" which the P.T.P.C. must hold clearly is a "proceeding including but not restricted to... licensing in which the legal rights or duties of a party" are involved. In other words, the proceeding is an "adjudication" rather than "rulemaking" or other agency action. *See* Bonfield, *The Definition of Formal Agency Action Under the Iowa Administrative Procedure Act*, 63 Iowa L.Rev. 285, 287 (1977) (hereinafter "Bonfield"). Section 272A.6 does not employ the term "evidentiary hearing," i.e. it does not track exactly the language of 17A.2(2). However, whenever a statute expressly requires an agency to hold a "hearing" in the context of an adjudication, we conclude, as a matter of statutory construction, that absent a clear indication to the contrary, the statute should be interpreted in conjunction with §17A.2(2) to require "contested case" proceedings. As Prof. Bonfield states:

> However, when a statute on its face instructs an agency in an adjudicatory situation to provide a "hearing," an "evidentiary hearing," a "trial," a "trial-type hearing," an "opportunity to be heard" or the like, a requirement of a hearing satisfying the section 2(2) definition will be easy to find. Indeed, many provisions of the Iowa Code contain such language.

Bonfield, supra at 320.

The "hearing" before the P.T.P.C., therefore, is a "contested case." The question then arises whether, if the P.T.P.C. after the initial hearing recommends a suspension or revocation, the "certificate suspension or revocation hearing" before the board is also a contested case. By the same analysis employed above, we conclude that this second hearing is also a "contested case." We cannot easily

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[2] The State Board of Educational Examiners is composed of the same members as the State Board of Public Instruction. §260.1.

attribute a different meaning to the same term employed without special definition in the same statutory section.

We would be reluctant, however, to attribute to the legislature the intent to require the needless expense and inconvenience to all concerned of a second evidentiary hearing before the board which would routinely replow the same furrows previously turned before the P.T.P.C. Because we believe the doctrine of "collateral estoppel" is applicable here and will generally prevent that result, we are not uncomfortable with the conclusion that the board hearing is also a contested case.

The doctrine of collateral estoppel operates to preclude relitigation of issues actually litigated in a prior proceeding involving the same parties so long as the party against whom the estoppel would operate had a full and fair opportunity to litigate the issue in the former proceeding. 2 Davis, *Administrative Law*, §18.01 (1958 ed). Although courts were initially reluctant to apply the doctrine to administrative determinations, the prevailing view is now that collateral estoppel is generally applicable. K. Davis, *Administrative Law*, §18.02. Because the initial reluctance to employ the doctrine related to the frequent informality of agency proceedings, we believe the adoption of modern contested case procedures in the Iowa Administrative Procedure Act would prompt the supreme court of Iowa to adhere to prior holdings that res judicata principles apply to administrative rulings, *see, e.g., Maquoketa Comm. School Dist. v. George*, 193 N.W.2d 519 (Iowa 1972), possibly with occasional relaxation to prevent injustice. K. Davis, *Administrative Law*, §18.03 (1958 ed.).

This view receives some additional support from the language in 272A.6 that "a violation, as determined by the commission... shall be *deemed* to be unprofessional practice..." "Deem" is defined as follows in *Black's Law Dictionary* (Rev. 4th ed. 1968) at 504: "DEEM. To hold; consider; adjudge; condemn; determine; treat as if; construe." If a prior finding is "treated as if" correct in a second proceeding, it is treated as binding.

Thus, although the second hearing before the board is a "contested case," no evidence need be received on the question whether the respondent in fact committed an "unprofessional practice" if a finding to that effect has been made after a full and fair hearing before the P.T.P.C. An evidentiary hearing need not be held when there are no relevant facts in dispute. *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); Bonfield, *supra* at 330-32. To the extent the doctrine of collateral estoppel is applicable, factual questions previously decided are no longer "in dispute."

As Professional Bonfield points out, however, the fact that *some* material facts may no longer be disputed, does not foreclose the need for an evidentiary hearing with respect to *other* relevant issues not germane to the P.T.P.C. hearing. *Id.* at 331 n. 167. The parties may have inadequate incentive to explore factual matters, beyond the question of the particular violation in issue, which bear upon the appropriate disposition of the violation, i.e. upon whether suspension or revocation is appropriate. To the extent that the P.T.P.C. has not made findings on disputed matters relevant to disposition, the board should receive evidence on those issues. This result is also suggested by the characterization of the board proceeding as a "suspension or revocation hearing."

In answer to your second question, to the extent a second evidentiary hearing is required, the board may invoke the provisions of §17A.11 and have the hearing conducted by a single presiding officer rather than the full board.

In summary, the two "hearings" in a teaching certificate revocation or suspension proceeding are both "contested cases" within the meaning of §17A.2(2), but

the doctrine of collateral estoppel will ordinarily preclude relitigation in the second hearing before the board of the question whether an unprofessional practice was committed and other issues actually litigated in the first hearing before the P.T.P.C.[3] The board may delegate to a hearing officer the authority to preside over an evidentiary hearing relating to any remaining factual issues.

September 4, 1981

MUNICIPAL UTILITIES: Sinking Fund Protection of the Missouri Basin Electric Cooperative Association. Chapters 28E, 28F, 452, 453, 454, The Code 1981. Chapter 159, 67th G.A., First Session (1977). Member cities of the Missouri Basin Electric Cooperative Association may delegate custody of city funds to the association. The pooled funds are not "public funds" subject to the provisions of chapters 452 and 453, The Code 1981, and, thus, are not entitled to chapter 454, The Code 1981, sinking fund protection. (Willits to Baringer, State Treasurer, 9/4/81) #81-9-2

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[3] When the P.T.P.C., after holding a contested case hearing, determines to "exonerate, warn or reprimand" the certificate holder, that decision will clearly constitute "final agency action" within the meaning of §17A.19(1) and an aggrieved or adversely affected person or party must, pursuant to §17A.19(3), file a petition for judicial review within 30 days after issuance of the decision. This time limit is jurisdictional. *Neumeister v. City Development Board*, 291 N.W.2d 11, 13 (Iowa 1980). The question then arises whether, if the P.T.P.C. finds a violation and recommends the holding of a certificate suspension or revocation hearing, the certificate holder must seek judicial review within 30 days of the P.T.P.C. decision or risk waiving the right to challenge those factual findings. Put differently, the question is whether the *last* action taken *by the P.T.P.C.* in these proceedings constitutes "final agency action" within the meaning of §17A.19. We know of no court decisions resolving the ambiguity in the term "agency" as employed in §17A.19. However, we conclude that the considerations of judicial economy and deference to a coordinate branch of government which underline the "exhaustion of administrative remedies," requirements argue strongly for construing "agency" as referring to a genus rather than a species. In our opinion, then, a certificate holder need not seek judicial review of adverse factual findings by the P.T.P.C. within 30 days of its decision, but rather may seek judicial review of adverse findings or conclusions of either the P.T.P.C. or the board within 30 days of the board's final decision.

Because this question is not entirely free from doubt, a certificate holder may, from an abundance of caution, wish to file a petition for judicial review within 30 days of a P.T.P.C. decision. Any or all parties could then seek a stay pending the outcome of the board proceeding. If judicial review is still desired after the final decision of the board, review of the two decisions could be consolidated in the district court.

The Honorable Maurice E. Baringer, Treasurer of State: This opinion is rendered in response to your letter of January 16, 1981, wherein you questioned the legal status of the Missouri Basin Electric Cooperative Association (hereinafter MBMECA) in relation to the holding and characterization of funds received from municipalities. Specifically you wrote:

> I question if the Missouri Basin Electric Cooperative Association is a governmental body entitled to protection of its funds under chapter 454 (State Sinking Fund).
>
> Can member cities delegate custody of their city funds to the association?
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> Are the pooled funds 'public funds' subject to the provisions of chapter 452 and 453?

The threshold question to be considered is whether or not member cities may delegate custody of their city funds to MBMECA. Our office is of the opinion that the municipalities that are members of MBMECA may in this particular instance delegate custody of funds to the cooperative association, for the procurement of electrical power.

In 1977, curative legislation was enacted by the legislature that validated all proceedings leading to the establishment of MBMECA. In addition, the legalizing act formally recognized MBMECA to be a cooperative association authorized to operate under chapter 499 of the Code. Chapter 159, 67th G.A., First Session (1977). The Act provided in part:

> Section 1. That all proceedings heretofore taken in connection with the organization and providing for the operation of the cooperative association now known and identified as the 'Missouri basin municipal electric cooperative association' and all acts heretofore taken by said Missouri basin municipal electric cooperative association and its municipal members, including entering into said agreement between Missouri basin municipal electric cooperative association and its municipal members, first amendment thereto, and said transmission agreement between Missouri basin municipal electric cooperative association and northwest Iowa power cooperative, be and the same are hereby legalized, validated and confirmed, and said documents together are hereby declared to form a valid joint agreement pursuant to chapter three hundred ninety (390) of the Code, as amended.

Such curative types of legislation are to be given a liberal construction, according to Sutherland:

> A curative act is a statute passed to cure defects in prior law, or *to validate legal proceedings*, instruments, or acts of public and private administrative authorities.... Generally, curative acts are made necessary by inadvertance or error in the original enactment of a statute or in its administration. Action under the statute is usually taken in good faith and no rights are jeopardized by the validation of the prior good faith action. Because of the beneficent policy thus served by curative legislation, to sustain the reliability of official actions and secure operations formed in reliance thereon, *they are in reason entitled to liberal construction in order to achieve full function of their remedial purposes.* [Emphasis added.] 2 Sutherland, Statutory Construction, §41.11 (4th Ed. 1973).

See also, City of Muscatine v. Waters, 251 N.W.2d 544 (Iowa 1977).

With this in mind, we cannot say that the legislature intended to prohibit the municipalities from delegating custody of funds to MBMECA. In fact, even without attaching a liberal construction to the legalizing act, to hold that cities could not delegate funds would, in effect, render the whole statute a nullity. The primary concept of cooperative associations revolves around the practice of banding together in order to gain a more favorable bargaining position, or to obtain goods or services at a lower bulk rate. The legislature has acted to validate and legalize MBMECA as an organization authorized to procure electrical power from the Northwest Iowa Power Cooperative (NIPCO). It follows that the legislature intended to allow MBMECA reasonable means by which to do so [1]

The question of whether the pooled funds are "public funds" subject to the provisions of chapters 452 and 453 becomes more problematic. Chapter 452 basically provides procedures to be followed when public officials (i.e. treasurers) handle public funds. Chapter 453 provides procedures with regard to the deposit of such public funds. §453.1, The Code 1981 states:

> All funds held in the hands of the following officers or institutions shall be deposited in banks as are first approved by the appropriate governing body as indicated: For the treasurer of state, by the executive council; for the county treasurer, recorder, auditor, sheriff, township clerk, clerk of the district court, and judicial magistrate, by the board of supervisors; for the city treasurer, by the city council; for the county public hospital or merged area hospital, by the board of hospital trustees; for a memorial hospital, by the memorial hospital commission; for a school corporation, by the board of school directors; provided, however, that the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted

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[1] The Supreme Court of Iowa has, in the past, given deference to legislative policy decisions in the area of cities obtaining electrical power. In *Sampson v. City of Cedar Falls*, 231 N.W.2d 609 (Iowa 1975), the supreme court upheld the constitutionality of chapter 390, Code of Iowa (1975) and said.

> Plaintiffs also argue substantive due process — a city should not be allowed to enter into large, long-term agreements such as this one with cooperatives and business corporations. Iowa Const., Art. I, §9; U.S. Const. Amend. XIV, §1. To be sure, chapter 390 of the Code which allows this to be done is novel. Risks are inherent in ventures involving several participants. Cedar Falls may hold up its end of the project, but what if other participants become over-extended and the enterprise collapses? The project will be considerably different from Cedar Falls' present generating facility, which it wholly owns and controls. These risks are legislative considerations, however, and the General Assembly has spoken in chapter 390.
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> * * *
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> The legislature concluded that cities should be allowed to join the trend toward larger, jointly-owned facilities. We are not prepared to say chapter 390 contravenes the due process clauses. 231 N.W.2d at 613.

by section 452.10. The list of public depositories and the amounts severally deposited therein shall be a matter of public record. The term 'bank' means a bank or a private bank, as defined in section 524.103.

In the past, this office has on at least two occasions answered inquiries regarding the status of funds held by chapter 28E entities. Chapter 28E permits local and state governments to enter into agreements with other public agencies or with private agencies. In connection with these 28E agreements, the participating agencies may elect to create a separate legal entity. §28E.5(2), The Code 1981.

In 1974, this office held that public monies controlled by Regional Planning Commissions did not have to be placed in public depositories pursuant to chapter 453 of the Code, nor would the monies be afforded the protection of the State Sinking Fund (chapter 454). 1974 Op.Att'y.Gen. 743. In 1979, we held that funds held by a solid waste agency formed pursuant to chapter 28E are not generally subject to §453.1, The Code 1981, unless the funds are held by any official listed in §453.1.

In the instant case, in addition to being a legal cooperative association (*see* 1977 Session, 67th G.A., chapter 159 §1) the municipalities have formed an agreement pursuant to chapter 28E, The Code 1981 and chapter 28F, The Code 1981. The agreement, enacted June 25, 1981, states its purposes as:

a. The purchase, generation, transmission, distribution, sale and interchange of electric energy.

b. The establishment of programs for the safety and technical training of employees of public agencies.

c. The utilization of sources of funds for financing of lawful public improvements.

d. *The utilization of a separate legal entity for cooperative activity permitted by law.*

e. The joint financing of electric power facilities on behalf of municipal members pursuant to chapter 28E, Code of Iowa and chapter 28F, Code of Iowa as amended by Senate File 48.

2. Municipal members participating herein may contract with MBMECA for these purposes. [Emphasis added.]

The agreement specifically mentions the use of a separate entity. As such, the previous opinions issued by this office control. That is, the funds held by MBMECA are not subject to the provisions of chapter 452 and chapter 453.

In addition to the above argument, there exists another persuasive reason why MBMECA is a separate legal entity. The legalizing statute specifically recognizes that MBMECA constitutes a legal cooperative:

...Further, that said Missouri basin municipal electric cooperative association is hereby declared to constitute a legal cooperative association authorized to operate in accordance with its articles of incorporation and by-laws as they now exist and in accordance with provisions of chapter four hundred ninety-nine (499) of the Code. Chapter 159, 67th G.A., First Session 1977).

Section 499.2, The Code 1981, defines the term "association" as a *corporation* formed under the chapter. As a corporation, the clear rule in Iowa is that such

corporations are artificial persons in the law, a separate and distinct entity with the capacity to sue and be sued, to enter into contracts, etc. *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896 (Iowa 1980); *Wyatt v. Crimmins*, 277 N.W.2d 615 (Iowa 1979); *Briggs Trans. Co. Inc. v. Starr Sales Co.*, 262 N.W.2d 805 (Iowa 1978); *DeCook v. Environmental Sec. Corp. Inc.*, 258 N.W.2d 721 (Iowa 1977); *Appanoose County Rural Taxpayers Assoc. v. Iowa State Tax Com'n.*, 158 N.W.2d 176 (Iowa 1968). Since MBMECA, organized under chapter 499, The Code 1981, is defined as a corporation, then it follows that MBMECA is a separate legal entity. Therefore, as long as the funds are not held by any officials listed in §453.1, The Code 1981, then the funds are not subject to chapters 452 or 453, The Code 1981.

The final question presented, whether the funds are entitled to protection under chapter 454, The Code 1981, becomes academic as a result of the determination that chapters 452 and 453 do not apply in this situation. Chapter 454 gives protection to public deposits. §454.2, The Code 1981 states:

> The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in demand or time deposits in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds.

The protection extended by chapter 454 applies only to deposits made pursuant to chapter 453. 1974 Op.Att'y.Gen. 743, 745. Since it has been determined earlier that neither chapter 452 or chapter 453 applies in this particular situation, then the question whether sinking fund protection is available becomes moot. Stated another way, the funds of MBMECA are not entitled to chapter 454 protection.

September 4, 1981

DISSOLUTION OF MARRIAGE: Confidentiality of support record book. §598.22, The Code 1981. The support record book is a confidential record. The amount of unpaid support obligations may not be made public if this amount is calculated from data in the support record book. (Norby to Swartz, State Representative, 9/4/81) #81-9-3(L)

September 4, 1981

BEER AND LIQUOR CONTROL: §§123.1, 123.3(5), 123.95, The Code 1981. A caterer or other party who does not hold a liquor control license may not purchase liquor at a state liquor store and transport it to a licensed premises for service to members of a bona fide meeting or convention. This conclusion applies even if the nonlicensee does not make a profit on the liquor. (Norby to Gallagher, Director, Beer and Liquor Control Department, 9/4/81) #81-9-4(L)

September 11, 1981

CRIMINAL LAW: Uniform Citation and Complaint. §805.6, The Code 1981. To "deliver" within the meaning of §805.6(1)(a), The Code ("the officer shall deliver the original and a copy to the court where the defendant is to appear")

includes the mailing of the original and copy to the proper court. It is not necessary that the officer swear or affirm with right hand raised that the information contained in the citation and complaint is true and correct. A signature is sufficient to constitute "verification" within the meaning of §805.6(4), The Code 1981. (Martin to Lawton, Magistrate, Cass County, 9/11/81) #81-9-5(L)

September 11, 1981

MENTAL HEALTH: Entitlement of counties to a reduced rate of liability for mental health care. §§227.11, 230.15, 230.20, 230.20(5), The Code 1981; an Act of the Sixty-Ninth General Assembly, 1981 Session, Senate File 572, §§39 and 53(4); an Act of the Sixty-Ninth General Assembly, 1981 Session, House File 849, §§4 and 5. Section 230.15, The Code 1981, does not establish a reduced rate of liability for counties, but rather establishes a reduced rate of liability for mentally ill persons or others obligated for their support, who may be indebted to the county for monies advanced by the county for mental health care. Under §230.20(5), as amended, a county is entitled to a 20 percent reduced rate of liability for the costs of mental health care. (Mann to Templeman, Bureau Chief, Institutions/Hospital Schools, Division of Mental Health Resources, Iowa Department of Social Services, 9/11/81) #81-9-6(L)

September 15, 1981

MUNICIPALITIES: Tort Liability — §§419.3, 613A.1, 613A.2, 613A.4, 613A.7, 613A.8 and 613A.10, The Code 1981. Cities are obligated to defend and indemnify their officers, employees and agents for negligent acts within their scope of employment or duties. Municipalities are not generally responsible for the negligence of independent contractors. A municipality cannot seek indemnity from those it is obligated to defend under §613A.8. The municipality or the insurance carrier on whose policy it, or its officers, employees, and agents are named insureds has the obligation to defend and indemnify to the exclusion of the officers', employees' or agents' own insurance coverage. (Scott to DeKoster, State Senator, 9/15/81) #81-9-7

The Honorable Lucas J. DeKoster, State Senator: You have requested an opinion from this office regarding municipal liability. You specifically asked:

> 1. Cities that do not need a full-time city attorney often retain and "appoint" a lawyer in private practice for an hourly rate or retainer fee to perform the duties of city attorney. Generally, the lawyer is considered to be a "city official". This lawyer, while upon city business, is involved in an automobile accident. Section 613A.8, *Code of Iowa*, requires a city to "defend any of its officers, employees and *agents*, whether elected or appointed and, ...save harmless and indemnify such officers, employees and *agents* against any tort claim or demand, ...arising out of an alleged *act* or *omission* occurring within the scope of their employment or duties."
>
> a. Is the city obligated to defend, indemnify and save harmless its attorney?
>
> b. Cities retain architects, engineers, appraisers, real estate agents, etc. on the same basis as lawyers. Would they be treated any differently?

c. Would your opinion be any different if the lawyer in the course of his duties (approving the form of a permit, etc.) committed malpractice? Could the city in the event it was held liable seek indemnity from the attorney?

d. Bonding attorneys prepare and approve documents that obligate cities for repayment of millions of dollars. If a bonding attorney committed malpractice in the preparation of these documents, is the city liable? Could the city seek indemnification from the bonding attorneys if it is held liable?

2. Chapter 419, *Code of Iowa*, provides for the issuance of industrial revenue bonds. Section 419.3 provides, in part, that "Bonds and interest coupons... shall never constitute an indebtedness of the municipality within the meaning of any state constitutional provision or statutory limitation, and shall not constitute nor give rise to a *pecuniary liability* of the municipality or a charge against its general credit or taxing powers." Bonding attorneys draft the documents and render an opinion as to the merchantibility of the bonds. The city attorney, also, is required to give an opinion.

a. If the bonding attorney commits malpractice, is the city liable under section 613A.8?

b. If the city attorney commits malpractice, is the city liable under section 613A.8?

c. If the city is liable, could it seek indemnification against the bonding attorney and the city attorney?

d. If the city is liable and a judgment is rendered, the city is required to levy a tax to pay off the judgment under section 626.24, *Code of Iowa*. This levy is over and above any millage limitation. Does this then give rise to "a pecuniary liability" in violation of section 419.3? If so, which section prevails?

3. Another question involving similar factual situations is insurance and whose insurance company should bear the responsibility. *Franks v. Kohl*, 286 N.W.2d 663 (Iowa 1977) held that a city must defend and indemnify its employee even if the city was not a named defendant. (The case actually said the 60 day notice requirement applied to an employee even if the city was not joined.) *St. Paul Insurance Company v. Horace Mann Insurance Company*, 231 N.W.2d 619 (Iowa 1975) held that the school district's insurance company had the responsibility even if the teacher had coverage for the same thing. There was no indemnity or pro rata coverage. Lawyers and other professionals carry auto and malpractice insurance that covers them in each of the situations. The cities believe that the fee they pay is sufficient and they should not bear any liability or responsibility if the professional is negligent.

a. What carrier would be required to provide coverage?

b. Does chapter 613A decide the question of coverage?

"Tort" is defined in §613A.1(3) as a civil wrong resulting in injury, death or damage which includes negligence, error or omission, nuisance, breach of duty or denial of constitutional or statutory rights. "Officer" is defined in §613A.1(4) as including members of the governing body. Section 613A.2 imposes liability on a municipality for its torts and those of its officers, employees, and agents acting

within the scope of their employment or duties. A tort is within the scope of employment or duties if the act or omission reasonably relates to the business or affairs of the municipality, and the officer, employee, or agent acted in good faith, reasonably, and not opposed to the best interests of the municipality. "Employee" includes a person performing services for a municipality whether or not there is compensation. Section 613A.4 exempts four types of claims from coverage of the act. The remedy against the municipality shall be exclusive of any other action against an officer, employee or agent for the same subject matter.

A municipality can purchase liability insurance covering itself and its officers, employees, and agents. §613A.7. Independent of autonomous boards or commission of a municipality can do likewise. Officers, employees, and agents are defended pursuant to §613A.8, for acts or omissions within the scope of employment or duties. A municipality shall also indemnify them except in cases of malfeasance in office, willful and unauthorized injury, or willful or wanton neglect of duty. Finally, pursuant to §613A.10, the municipality can budget an amount to pay a judgment and levy a tax sufficient to pay the judgment.

With the above in mind, it is readily apparent that municipalities must defend, and in most cases, indemnify their officers, employees and agents. The issue thus becomes whether any of the individuals you listed are officers, employees or agents. Generally, that is a fact question which we are unable to answer. However, most often the issue with these individuals will be whether they are independent contractors.

Unlike §25A.2(3), the State Tort Claims Act, chapter 613A does not contain any language excluding contractors from the definition of "employee." Specifically, §613A.2 provides that a municipality is subject to liability for the torts of its officers, employees and agents. "Employee" includes one performing *services* for a municipality. "Agent" is not defined. "Service" has been defined as: the occupation or function of serving; the act of serving; a helpful act; useful labor that does not produce tangible commodity. *Webster's New Collegiate Dictionary*, p. 1051 (1979). In *Phillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977), "agency" was defined:

> Agency has been defined as a fiduciary relationship which results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control and, (2) consent by the latter to so act. *Dailey v. Holiday Distributing Corp.*, 260 Iowa 859, 867, 151 N.W.2d 477, 483 (1967) and authorities. See also *Walnut Hills Farms, supra*, 244 N.W. 2d at 780—781.

Whether the above referenced individuals can be considered to be employees or agents of a municipality is a fact question which must be determined with each case. In *Volkswagen Iowa City, Inc. v. Scott's Incorporated*, 165 N.W.2d 789, 792 (Iowa 1969), it was held:

> We have repeatedly pointed out the most commonly accepted indicia of the relationship of the employer-employee, frequently in determining whether a person rendering service to another is an employee or independent contractor. Our most recent decision of this kind as this is written is *Swain v. Monona County*, Iowa 163 N.W.2d 918, 921, quoting from *Nelson v. Cities Service Oil Co., supra*, 259 Iowa 1209, 1215, 146 N.W.2d 261, 264—265. The Nelson opinion in turn quotes from several earlier precedents, including *Schlotter v. Leudt supra*, 255 Iowa 640, 643, 123 N.W.2d 434, 436—437.
>
> The Schlotter and Nelson cases state: "The most important consideration in determining whether a person giving service is an employee or an

> independent contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service he is an independent contractor, if it is vested in the employer, such person is an employee."
>
> It may be well also to repeat from *Mallinger v. Webster City Oil Co.*, 211 Iowa 847, 851, 243 N.W. 254, 256—257 and many later precedents, including *Swain v. Monona County* and *Nelson v. Cities Service Oil Co.*, both supra, these commonly recognized tests of an independent contractor: "(1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer."

See also, Greenwell v. Meredith Corporation, 189 N.W.2d 901 (Iowa 1971).

Whether any of these individuals is an employee, agent or independent contractor will depend upon the facts of each case and the terms of any contract. There can be no doubt that architects, contractors, real estate agents and the like can be independent contractors. Those performing legal services for a municipality, be they city or bonding attorneys, can also be independent contractors. *See Dianis v. Waenke*, 29 Ill, App.3d 133, 330 N.E.2d 302, 310 (1975), and the cases cited therein.

Municipalities are generally not liable for the negligence of independent contractors. 13 E. McQuillen, *Municipal Corporations*, §53.75a (3rd Ed. 1977). See also, *Walker v. City of Cedar Rapids*, 251 Iowa 1032, 103 N.W.2d 727 (1960); *Teeters v. City of Des Moines*, 173 Iowa 473, 154 N.W. 317 (1916); *Prowell v. City of Waterloo*, 144 Iowa 689, 123 N.W. 346 (1909). However, a municipality can be liable for the acts or omissions of an independent contractor where there is work that is intrinsically dangerous, McQuillen at §53.76c; where the control of the work is reserved by the municipality, *Id.* at §53.76a; where there is a nondelegable duty, *Id.* at §53.76b; or where the contractor is employed to do an unlawful act, *Id.* at §53.76d. Thus, in *Prowell*, the city was held liable for the omission of the contractor to properly illuminate a barrier around its work.

We have been unable to find any cases regarding a municipality's responsibility to defend and indemnify independent contractors. Obviously, if a municipality is not liable for the negligence of an independent contractor on the basis that said contractor was not its employee or agent, it would not be responsible for the defense and indemnity of that contractor. We cannot make such a conclusory statement for those instances where a municipality is liable for the negligence of an independent contractor. However, we believe that in most instances municipalities which are liable for the negligence of independent contractors would not have to defend and indemnify them. We are somewhat reserved in this last statement because of the language used in *Porter v. Iowa Power and Light Co.*, 217 N.W.2d 221 (1974).

There, the city contracted with a general contractor for a public improvement. An employee of the general contractor was killed while performing work under the contract. The city had also contracted with an engineering firm to prepare the plans and specifications and generally supervise the project to make sure that the quality and quantity of the work met the specifications. Throughout the opinion the court referred to the engineering firm as the "agent" of the city. No discussion

was made whether the engineering firm was an independent contractor nor was there any discussion about the city's liability in relation to the engineering firm. Even though we do not know whether the word "agent" was used for want of a better term, or because the engineering firm actually met the test of an agent, one can logically conclude that there may be instances where a person or firm normally considered to be an independent contractor is, in fact, an agent of a municipality at a given point in time. If that is that case, then §613A.8 requires the municipality to defend and indemnify.

The defense and indemnity of officers, agents and employees is limited by the requirement that the acts or omissions be within the scope of employment or duties. This is applicable for all such officers, employees, and agents, including attorneys. The provisions of *chapter 613A* do not distinguish between types of torts, except for those listed within §613A.4. There is nothing within that chapter which limits or exempts medical malpractice. Similarly, there is nothing therein that limits malpractice by an attorney. This does not necessarily mean, however, that any legal malpractice is automatically something for which a municipality can be held responsible.

City attorneys can be retained on a full-time basis, in which situation they would be considered employees. If retained on a part-time basis it is possible that the city attorney could be an independent contractor. If retained on a piecework or case-by-case basis, they would most likely be independent contractors.

Bonding attorneys are normally retained by the city only, for individual bond issues. In those instances they would probably be independent contractors. In a small number of cases the bonding attorneys are retained by the companies that issue the bonds for the city for sale to the ultimate purchasers. If that is the case, the city would not be responsible for their conduct. The opinions of the bonding attorneys are intended to notify the issuers and the ultimate purchasers of the marketability of the bonds, in addition to informing the city that compliance with all legal requirements has been met. Bonding attorneys can therefore be liable to the ultimate purchasers.

Normally, legal malpractice concerns, acts or omissions of an attorney in dealing with a client. *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978). It is not necessarily evident that a citizen is the client of a city attorney. The city, including its officers, employees, agents, departments, commissions, boards and agencies are the clients of a city attorney. The clients of the bonding attorney are most probably the ultimate purchasers of the bonds in addition to the city. The real issue would be whether the city or bonding attorney, or the city through the acts of the attorney, owed a duty to the individual bringing the suit.

In *Brody v. Ruby*, supra, it was held that absent special circumstances, an attorney can be liable for consequences of professional negligence only to a client. In *Bickel v. Mackie*, 447 F.Supp. 1376 (N.D. Iowa 1978), *aff'd.* 590 F.2d 341 (8th Cir. 1979), it was held that negligence is an improper standard upon which to base liability of an attorney to an adverse party. The key appears to be privity. *See Brody* and cases cited therein. We cannot state conclusively whether a city attorney, and therefore a municipality, could be held liable for his or her acts or omissions affecting a third party. Ordinarily, there would be no liability; however, the municipality would have to defend an attorney who is an officer, agent or employee against a suit even if the suit is groundless. *See* §613A.8. If a bonding attorney commits malpractice, he or she would probably be held liable to a purchaser of the bond, and may also be liable to the city for indemnity or contribution since bonding attorneys most often would be considered independent contractors.

In conjunction with your questions, you also ask whether the municipality can seek indemnity from the city attorneys, bonding attorneys, and others if the city is obligated to defend and indemnify them. In other words, if the city defends a named employee or agent and either pays a judgment or settles, can it then seek indemnity from that employee or agent? In *St. Paul Ins. v. Horace Mann Ins.*, 231 N.W.2d 619 (Iowa 1975), the court held that the right of a municipality (in that case a school district) to recover back from the employee for that employee's negligence was eliminated by §613A.8. Thus, "[o]ne who must indemnify another cannot at the same time claim contribution from that person." St. Paul Ins. Companies v. Horace Mann Ins., at p. 625; *Employers Mutual Casualty Company v. Hanshaw*, 176 N.W.2d 653, 655 (Iowa 1970). The answer to that question is therefore in the negative. Obviously, if the individual is not an employee or agent of the city, nothing would prohibit the city from seeking indemnity or contribution other than any exceptions to indemnity that are contained in the common law.

Related to the above question is one concerning insurance coverage. You ask which insurance carrier is responsible for defense of the action against an agent or employee if both the employee or agent and the municipality have insurance coverage. The same issue was raised in the *St. Paul* case. There, the school district had insurance coverage under chapter 613A covering both itself and its employees. The teacher in question also had his own policy. The issue was whether the school district's insurance carrier could seek contribution from the teacher's carrier. It was held, for the reason stated above in answer to the previous question, that St. Paul, insurer of the school district, could not seek contribution from Horace Mann, insurer of the teacher. We believe that there is another reason for the court's decision. The municipality has the statutory obligation to defend and indemnify its employees and agents as set forth in §613A.8. It can do this on its own, or it can be covered by an insurance policy. By virtue of §613A.8 an employee or agent is not obligated to defend him or herself for negligence occurring within the scope of employment. If the employee or agent is not so obligated or responsible, neither could that employee's or agent's insurance carrier be so obligated. In fact, §613A.7 specifically provides for insurance coverage of municipalities, their agents and employees, as a means of meeting the obligations contained within §613A.8.

The issue of primary insurance coverage emerges sharply for those professionals such as attorneys, engineers and architects who are employed on a part-time or project basis. Such person will ordinarily carry malpractice insurance themselves, but a municipal policy may also be written broadly enough apparently to include them. Needless litigation and premium expense could be avoided if the legislature would specify in 613A with greater precision then we may in this opinion, whether and when it wishes such persons to be included within the 613A umbrella.

Finally, you question the application of §194.3(1). That section provides that industrial revenue bonds and interest coupons shall never constitute an indebtedness of a city nor shall they give rise to a "pecuniary liability" of the city. If those city employees and agents handling these bonds are negligent, causing damage to another, and the city must pay a judgment or settlement because of that negligence, you inquire whether the judgment or settlement, or the tax levied to pay off the same, constitute a "pecuniary liability" as that term is used within §419.3(1). We do not believe that the language of §419.3(1) can be used as a bar to payment of a judgment or settlement within chapter 613A. Section 419.3(1) is intended to prevent a city's revenues from being spent to pay off the bonds contained within that chapter. Nowhere in that chapter is there any indication that a city, its employees or agents are not liable for negligence in regard to the issuance of those bonds. We cannot state that the legislature intended to limit tort liability by virtue of §419.3(1).

September 16, 1981

COUNTIES; SHERIFFS: Iowa Constitution, Art. III, §39A; §§344.2 and 693.4, The Code 1981; 1981 Session, 69th G.A., S.F. 130, §§300(4) and 423(3). Radios purchased for a sheriff's department pursuant to §693.4, The Code 1981, may be funded either by a line item in the sheriff's appropriation or as a separate appropriation from the general fund. (Hayward to McKean, State Representative, 9/16/81) #81-9-8(L)

September 18, 1981

JUVENILE LAW: Authority of a peace officer forcibly to enter a parent's residence to execute an ex parte temporary removal order issued under section 232.78. Sections 232.78, 232.79, 232.95, 232.96(10), 804.1, 804.8, 804.15, 808.1, 808.5, 808.6, 808.7, The Code 1981. Based upon the temporary removal scheme, the court's authority to remove a child and transfer custody and the inherent police power of the state, the legislature intended that a peace officer, in the execution of a temporary removal order may (1) use such reasonable force as the peace officer reasonably believes to be necessary to effect the temporary removal or to defend any person from bodily harm while making the temporary removal, and (2) use such force as is reasonably necessary to enter the residence of the child or child's parent, guardian or custodian, where he or she has reasonable cause to believe the child is present, after identifying himself or herself and demanding admittance for execution of the temporary removal order and such demand is not satisfied. (Hege to Daniel Jay, State Representative, 9/18/81) #81-9-9

The Honorable Daniel J. Jay, State Representative, House of Representatives: You have requested an opinion:

> about the need to clarify the rights that a law enforcement officer has to forcibly enter a residence and remove a child under an ex parte order for removal entered by a juvenile referee or for that matter by any judicial officer of this state.

For the purposes of this opinion, we assume the requirements of §232.78 and most importantly, subsection 1(b), "the child's immediate removal is necessary to avoid *imminent danger* to the child's *life or health*;" have been satisfied before the ex parte temporary order is issued. We further assume the temporary removal order is executed by a district court or juvenile court judge. Section 231.3, The Code 1981. *See* Op.Att'y.Gen. #81-1-1, the authority of the juvenile court referee.

At the outset, it is important to note the constitutionally protected interest of family integrity that is impacted by the temporary removal scheme. *Alsager v. District Court of Polk County*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd. per curiam*, 545 F.2d 1137 (8th Cir. 1976); *Roe v. Conn*, 417 F.Supp. 769 (N.D. Ala. 1976). In the context of a CHINA proceeding, the Supreme Court of Iowa has accepted and utilized this precept:

> The legislative intent is that children be kept in their homes when possible. §232.1. The integrity of the family must be taken seriously. See In Interest of Wall, 295, N.W.2d 455, 457 (Iowa 1980)...

In Interest of Blackledge, 304 N.W.2d 209, 214 (Iowa 1981).

Measured against this constitutionally protected right is the state's interest and duty to prevent the abuse of children. *Alsager*, 406 F.Supp. 10, 22.

> The state's interest in protecting children is not absolute, however. It must be balanced against the parents' countervailing interest in being able to raise their children in an environment free from government interference. Moreover, in determining the 'compelling' nature of the state's child protection interests when a parental termination is undertaken, an understanding of the mechanics of Iowa law is essential. Even in a case of clear child abuse, Iowa law has vitiated the need for prompt termination action through its child neglect statute, §§232.2(15), 232.33, Iowa Code. That law sanctions the immediate, albeit temporary, removal of a child from the parents' home in cases of maltreatment. The court's ruling today as to the adequacy of Iowa's termination standards is no way intended to restrict the state's ability to take swift action when necessary to prevent imminent harm or suffering to a child.

Alsager, at 22.

> The state of Alabama, on the other hand, does have a legitimate interest in protecting children from harm as quickly as possible. Normally, before instrusion into the affairs of the family is allowed, the state should have reliable evidence that a child is in need of protective care.

Roe, at 778.

Section 232.78 provides the authority for the issuance of an ex parte court order to which you refer. With regard to a law enforcement officer's powers upon execution of the order, subsection 1 provides:

> 1. The juvenile court may enter an ex parte order directing a peace officer to remove a child from his or her home...

As you note, this section provides little express guidance as to the officer's authority to execute the temporary removal order. This is in contrast to the authority specifically provided for in the execution of an arrest or search warrant. Sections 804.1, 804.8, 804.15; 808.1, 808.5, 808.6, 808.7, The Code 1981.

In addition to authorizing the "removal" of a child, the temporary removal scheme, pursuant to subsection 1(a), indicates that the removal is not limited by parental consent. Section 232.78(1)(a); *See*, also §232.79(1), The Code 1981. Moreover the temporary removal order must specify the facility to which the child is removed. Section 232.78(2), The Code 1981. Upon the temporary removal hearing which the juvenile court is mandated to provide:

> Where the child is in the custody of a person other than the child's parent, guardian or custodian as a result of action taken pursuant to section 232.78 or 232.79...
>
> ... the court may "remove the child from home and place the child... or in the custody of a suitable person or agency." Sections 232.95(1), (2)(a), The Code 1981. Finally, subsequent to the adjudication, but prior to any disposition, the court may remove the child and transfer custody. Section 232.96(10), The Code 1981. Given the foregoing, it appears by clear implication that the temporary removal scheme contemplates state intervention into the family prior to notice and hearing where there is imminent risk of danger of the child's life or health.
>
> An analogy to arrest warrants, which are grounded upon the same police power of the state, is instructive. Section 804.8 allows a peace officer to use

any justifiable force to effect an arrest or prevent bodily harm to any person while making an arrest. Section 804.8, The Code 1981. Similarly, §804.15 allows a peace officer entry to a private residence to effect an arrest.

804.15 Breaking and entering premises — demand to enter. If a law enforcement officer has reasonable cause to believe that a person whom the officer is authorized to arrest is present on any private premises, the officer may upon identifying himself or herself as such, demand that he or she be admitted to such premises for the purpose of making the arrest. If such demand is not promptly complied with, the officer may thereupon enter such premises to make the arrest, using such force as is reasonably necessary. [C51, §§2843, 2848; R60, §4554; C73, §4206; C97, §5201; C24, 27, 31, 35, 39, §13473; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, §804.15]

Section 804.15, The Code 1981.

It is the conclusion of this office, based upon the temporary removal scheme, the court's authority to order removal, and the commonality of police power foundation in arrest warrants and temporary removal orders, that the legislature intended a peace officer to have the authority while executing a temporary removal order:

a. to use such force as the peace officer reasonably believes to be necessary to effect the temporary removal or to defend any person from bodily harm while making the temporary removal, and

b. to use such force as necessary to enter the residence of the child or child's parent, where he or she has reasonable cause to believe the child is present, after identifying himself or herself and demanding admittance for execution of the temporary removal order and such demand is not satisfied.

See §§804.8, 804.15, The Code 1981.

One other matter is of import. Section 232.79(3) grants a good faith immunity to an officer who removes a child pursuant to that provision. Section 232.79(3), The Code 1981.

While peace officers are understandably concerned with their authority to execute a temporary removal order, the lack of authority suggested in your request would render impotent the temporary removal scheme expressly provided, would emasculate the court of the authority expressly provided and would thwart the inherent police power of the state. Such an absurd result was never intended by the legislature. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1971).

In summary, it is our opinion that in executing a temporary removal order, §232.78, a peace officer.

a. is justified in the use of reasonable force, which the peace officer reasonably believes to be necessary to effect the temporary removal or to defend any person from bodily harm while making the temporary removal, and

b. may use such reasonable force, as necessary to enter the residence of the child or child's parent, where he or she has reasonable cause to believe the child is present, after identifying himself or herself and demanding admittance for execution of the temporary removal order and such demand is not satisfied.

September 21, 1981

MUNICIPALITIES: Mayor's Compensation. §§4.2, 4.4, 4.6, and 372.13(8), The Code 1981; §368A.21, The Code 1973. The word "term," as used in §372.13(8), The Code 1981, refers to the term of the mayor, not that of the council. A council may not legislate a midterm change in the compensation of a mayor. (Walding to Halvorson, State Representative, 9/21/83) #81-9-10(L)

September 22, 1981

MENTAL HEALTH: Proper procedure for billing counties where legal settlement of a resident of a state hospital-school changes. Sections 4.1(36), 222.60, 222.61, 222.62, 222.63, 222.64, 222.68, 222.70, and 222.16, The Code 1981.

Sections of chapter 222, which provide a procedure for the billing of a county of legal settlement for the care, treatment training and habilitation of a resident of a state hospital-school, are *in pari materia* and must be considered together.

The determination of legal settlement is properly made pursuant to the provisions of §252.16 of The Code. Ordinarily, one's legal settlement does not change during periods of commitment to state institutions. Pursuant to §252.16(3), a resident of a state institution is precluded from accruing time to meet the one year residency requirement for establishing legal settlement. However, the legal settlement of a mentally retarded resident of a state institution changes with that of his/her parents.

The word "whenever" as used in §222.62 generally refers to the future and means "at what time". Thus, at either the time of initial application and admission of a person to a state hospital-school, or subsequent thereto, the board of supervisors or a court may determine whether a person's legal settlement is in its county. The superintendent of a state hospital-school is duty bound to submit all charges for the cost of care, treatment, training and habilitation of a resident of a state hospital-school to the county certified as county of legal settlement. The county certified as county of legal settlement must be billed until a disputed legal settlement is determined pursuant to §222.70. Reverse certification is not the proper procedure for disputing a finding of legal settlement and it is ineffective for the purpose of causing any change in a hospital-school's billing procedure. It must be presumed that county officials make legal settlement decisions in accordance with appropriate law. Section 222.68 imposes an initial reimbursable responsibility upon the county of admission or commitment for the limited cost of admitting or committing a person to a state hospital-school. (Mann to Reagen, Commissioner, Department of Social Services, 9/23/81) #81-9-11

Dr. Michael V. Reagen, Ph.D., Commissioner, Iowa Department of Social Services: You requested an opinion of the attorney general on the proper billing procedure to be utilized by state hospital-schools for the mentally retarded when the legal settlement of residents of such hospitals changes.

You asked several specific questions and they shall be responded to in the order presented.

I. SECTIONS 222.61, 222.62, and 222.63, 1981 CODE OF IOWA PROVIDE A PROCEDURE FOR BILLING THE COUNTY OF LEGAL SETTLEMENT. ARE ALL THREE SECTIONS ONE PROCEDURE THAT MUST BE READ TOGETHER?

Chapter 222 of the Iowa Code provides a scheme for the provision of care and treatment of mentally retarded residents of Iowa. Under §222.60, The Code 1981, responsibility for the costs of such care and treatment is statutorily imposed upon the county of legal settlement of a mentally retarded patient at a state hospital-school, or upon the state when the patient's legal settlement is unknown. Sections 222.61, 222.62, and 222.63, The Code 1981, requires that a person's legal settlement be determined when such person applies for admission to a state hospital-school, and that notification of the determination be given to the county of legal settlement. Those provisions read as follows:

> 222.60 Costs paid by county or state. All necessary and legal expenses for the cost of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the commissioner of the department of social services, shall be paid by either:
>
> 1. The county in which such person has legal settlement as defined in section 252.16.
>
> 2. The state when such person has no legal settlement or when such settlement is unknown.
>
> 222.61 Legal settlement determined. When the board of supervisors of any county receives an application on behalf of any person for admission to a hospital-school or a special unit or when any court issues an order committing any person to a hospital-school or a special unit, the board of supervisors or the court shall determine and enter as a matter of record whether the legal settlement of the person is:
>
> 1. In the county in which the board of supervisors or court is located.
>
> 2. In some other county of the state.
>
> 3. In another state or in a foreign country.
>
> 4. Unknown.
>
> 222.62 Settlement in another county. Whenever the board of supervisors or the court determines that the legal settlement of the person is other than in the county in which the board or court is located, the board or court shall, as soon as determination is made, certify such finding to the superintendent of the hospital-school or the special unit where the person is a patient. The superintendent shall charge the expenses already incurred and unadjusted, and all future expenses of the patient, to the county so certified until said legal settlement shall be otherwise determined as provided by this chapter.
>
> 222.63 Finding of settlement — objection. Said finding of legal settlement shall also be certified by the board of supervisors or the court to the county auditor of the county of legal settlement. Such auditor shall lay such notification before the board of supervisors of his county whereupon it shall be conclusively presumed that the patient has a legal settlement in said

county unless the county shall, within six months, in writing filed with the board of supervisors or the court giving such notice, dispute said legal settlement.

Essentially, this inquiry presents a question of statutory construction, and familiar principles of construction apply. The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Iowa State Education Association v. Public Employees Relations Board*, 269 N.W.2d 446 (Iowa 1978); *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978). In doing so, one must look to what the legislature said, rather than what it might have or should have said. *Interest of Clay*, 246 N.W.2d 263 (Iowa 1976); *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976). In seeking the meaning of law, the entire act should be considered and each section construed with the act as a whole and all parts thereof construed together; the subject matter, reason, consequence and spirit of the enactment must be considered, as well as the words used, and the statute should be accorded a sensible, practical, workable and logical construction. *Matter of Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975). When statutes relate to the same subject matter or to clearly allied subjects they are said to be *in pari materia* and must be construed, considered and examined in the light of their common purpose and intent so as to produce a harmonious system or body of legislation. *Iowa Department of Transportation v. Nebraska-Iowa Supply*, 272 N.W.2d 6 (Iowa 1978); *Matter of Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975).

Accordingly, we must advise that these statutory provisions address the same subject matter and must, therefore, be read together.

II. IF YES, DOES THIS PROCEDURE APPLY AT ANY TIME OTHER THAN AT THE TIME OF APPLICATION FOR ADMISSION?

The procedure referred to is the procedure prescribed by §§222.61, 222.62 and 222.63, for the determination of, certification of, and objections to a finding of legal settlement. Section 222.61 requires that when an application for admission to a state hospital-school is made, the board of supervisors or a court of the county receiving the application must determine and enter as a matter of record the legal settlement of the applicant. If the applicant's legal settlement is in another county, §222.63 requires that the board of supervisors or court must so certify their finding to the county of legal settlement. A county receiving such certification may object to the same.

The question, then, is whether this procedure applies only to an initial application for admission to a state hospital-school, or whether it would also apply to situations where an applicant's legal settlement changes after his/her admission to a state hospital-school.

The determination of legal settlement is properly made pursuant to the provisions of §252.16, The Code 1981. *State v. Story County*, 207 Iowa 1117, 224 N.W. 232 (1929); Op.Att'y.Gen. #80-3-5. Ordinarily, one's legal settlement does not change during periods of commitment to state institutions. *State v. Clay County*, 226 Iowa 885, 285 N.W. 229 (1939); *State v. Story County*, 207 Iowa 1117, 224 N.W. 232 (1929); *Scott County v. Townsley*, 174 Iowa 192, 156 N.W. 291 (1916); *Polk County v. Clarke County*, 171 Iowa 558, 151 N.W. 489 (1915). Pursuant to §252.16(3), an inmate of a state institution is precluded from accruing time to meet the one year residency requirement for establishing legal settlement. *Audubon County v. Vogessor*, 228 Iowa 281, 291 N.W. 135 (1940); 1976 Op.Att'y.-Gen. 400; 1974 Op.Att'y.Gen. 51; 1964 Op.Att'y.Gen. 453; 1964 Op.Att'y.Gen. 457.

However, pursuant to §252.16, The Code 1981, the legal settlement of a mentally retarded minor changes with that of his/her parents. Op.Att'y.Gen. #80-3-5.

Consequently, the legal settlement of a mentally retarded minor may change subsequent to his/her admission to a state hospital-school for the mentally retarded.

The question, then, is whether the board of supervisors or a court would be required or permitted to examine anew the legal settlement of a mentally retarded resident of a state hospital-school, and certify its new findings of legal settlement to the county determined to be the patient/resident's county of legal settlement.

We conclude that such a procedure is required. We rely on the statutory language for this conclusion. Pertinent portions of §222.62 state that "*whenever* the board of supervisors or the court determines that the legal settlement of the person is other than in the county in which the board or court is located" they shall certify such finding to the superintendent of the hospital-school, and §222.63 requires that certification be given to the auditor of the county determined to be county of legal settlement. The word "whenever" may be used as an adverb or a conjunction. When used as an adverb, it is defined to mean "at whatever time" or "no matter when". When used as a conjunction it is defined to mean "at any or all times that" or "in any or every instance which". Either as an adverb or conjunction the word "whenever" cannot be defined as a restrictive word. It generally refers to the future and means "at what time". *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954); *Gage v. United States*, 101 F.Supp. 765 (Ct. Cl. 1952); *People v. Merhige*, 212 Mich. 601, 180 N.W. 418 (1920); cf. *Lincoln National Life Ins. Co. v. Fischer*, 235 Iowa 506, 17 N.W.2d 273 (1945). Thus, at either the time of the initial application and admission of a person to a state hospital-school, or subsequent thereto, the board of supervisors or a court may determine whether a person's legal settlement is in its county.

III. SECTION 222.62 ALONE, APPEARS TO DIRECT THE SUPERINTENDENT, UPON RECEIPT OF THE CERTIFICATION TO START BILLING "THE COUNTY SO CERTIFIED". IS THIS REGARDLESS OF WHETHER THE CERTIFICATION UNDER SECTION 222.63 HAS BEEN GIVEN?

Pursuant to §222.62, the board of supervisors of a court is required to certify its finding that a patient/resident's legal settlement is in another county to the superintendent of a state hospital-school as soon as the legal settlement determination is made. Upon such certification, "the superintendent *shall* charge the expenses already incurred and unadjusted, and all future expenses of the patient, to the county so certified" until legal settlement is otherwise determined. The word "shall" imposes a duty. §4.1(36), The Code 1981. Consequently, the superintendent is duty bound to submit all charges to the county certified as the county of legal settlement. This is true irrespective of whether said county receives the certified notice provided for in §222.63. The superintendent's statutory duty to bill the county certified as county of legal settlement is independent of statutory questions relating to notice. Said county will then have actual notice of the legal settlement determination as a result of the billings and will be responsible for all expenses of the patient until legal settlement is otherwise determined.

In reaching the above conclusion, we specifically overrule that portion of a prior opinion of this office, 1970 Op.Att'y.Gen. 603, which concluded that the county of legal settlement of a minor at the time of his/her admission to a state hospital-school must continue payment for the minor's care and treatment until it is assumed by the county so certified as county of legal settlement, either voluntarily or by litigation.

IV. CAN THE BOARD OF SUPERVISORS OF THE COUNTY SO CERTIFIED DISPUTE THE CERTIFIED DETERMINATION OF LEGAL SETTLEMENT AND UNDERTAKE ITS OWN INVESTIGATION OF THE PATIENT/RESIDENT'S LEGAL SETTLEMENT, AND THEN CERTIFY ITS FINDINGS TO THE SUPERINTENDENT WHO IS THEN OBLIGATED TO BILL THE COUNTY SO CERTIFIED?

It is clear that a county certified as county of legal settlement may dispute such certification and may raise formal objections thereto. This right is provided by §222.63, The Code 1981.

However, the procedure for raising such an objection does not include reverse certification, but rather it requires that a written objection be filed with the certifying county within six months of receipt of the notice of certification. §223.63, The Code 1981. Failure to file such an objection in the manner prescribed will result in a conclusive presumption that the patient/resident's legal settlement is in the county of original certification. Thus reverse certification would be an ineffective procedure that could not cause any billing changes by the superintendent of the hospital-school, nor affirmatively affect the legal settlement issue. We, therefore, advise that, should reverse certification be attempted, the superintendent should ignore such certification and continue to bill the county originally certified as county of legal settlement until the dispute is resolved pursuant to the requirements of §222.70, The Code 1981.

In reaching the above conclusion, we do not mean to suggest that a county, once certified as county of legal settlement of a patient/resident, is precluded from certifying a change in the patient/resident's legal settlement in perpetuity. For example, if the legal settlement of the parents of a minor patient/resident should again change, and thereby again cause a change in the minor's legal settlement, a county should then be free to follow the certification procedures of §§222.62 and 222.63. This, however, would not be a reverse certification, but rather would be an original certification caused by a change in circumstances.

V. THERE IS NO PROCEDURE SPECIFIED FOR HOW THE BOARD OF SUPERVISORS OR THE COURT DETERMINES THAT A PERSON'S LEGAL SETTLEMENT IS IN ANOTHER COUNTY. IS THERE ANY OBLIGATION TO TAKE SOME REASONABLE STEPS TO INVOLVE THE OTHER COUNTY?

The determination of legal settlement is properly made pursuant to the provisions of §252.16, The Code 1981. *State v. Story County*, 207 Iowa 1117, 224 N.W. 232 (1929); Op.Att'y.Gen. #80-3-5. While making a determination of legal settlement may be a complex matter requiring the compilation and examination of all relevant facts, and an application of the standards set forth in §252.16, we cannot presume that county officials are incompetent to make such determinations, or that they would make such a determination in bad faith. A rebuttal presumption of regularity attends the official acts of governmental bodies. *Anstey v. Iowa State Commerce Commission*, 292 N.W.2d 380, 390 (Iowa 1980). We, therefore, conclude that a county board of supervisors or a court may make a legal settlement determination independent of the involvement of a county subsequently certified as county of legal settlement of a state hospital-school resident.

VI. WHICH COUNTY IS TO BE BILLED WHEN THE CERTIFIED COUNTY DISPUTES THE CERTIFICATION? DOES §222.62 REQUIRE THE SUPERINTENDENT TO BILL THE CERTIFIED COUNTY REGARDLESS OF ANY DISPUTE IT RAISES? CAN THE DEPARTMENT ADOPT A POLICY UNDER §222.64 WHEREBY LEGAL SETTLEMENT IS DECLARED UNKNOWN AND NEITHER COUNTY IS BILLED UNTIL A DETERMINATION IS MADE?

As previously discussed in Divisions III and IV hereof, upon receipt of certification of legal settlement, the superintendent of a state hospital-school is required to submit all charges for the care, treatment, training, and habilitation of a mentally retarded resident to the county certified as county of legal settlement. The clear language of the statute directs that all "expenses already incurred and unadjusted, and all future expenses of the patient" be charged "to the county so certified until said legal settlement shall otherwise be determined as provided by this chapter." §222.62, The Code 1981. In our opinion, this section means that the county certified as county of legal settlement must be billed until a disputed legal settlement is settled pursuant to §222.70, The Code 1981.

Further, it is our opinion that the Department of Social Services is precluded from adopting any billing policy inconsistent with the procedure outlined in §222.63. Administrative agencies have only such power as is specifically conferred or necessarily implied by statute. *Iowa Department of Social Services v. Blair*, 294 N.W.2d 567 (Iowa 1980).

Finally, we see no conflict between the billing procedure outlined in §222.62, and the responsibility for the initial cost of admission fixed by §222.68, The Code 1981. In our view, the language of §222.68 imposes an initial responsibility upon the county from which a person is admitted or committed for the limited "cost of admission or commitment" of a person to a facility. Such county may be reimbursed by the county of legal settlement once that determination is made. On the other hand, §222.62, pursuant to §222.60, provides a billing scheme for all expenses of care, treatment, training and habilitation of mentally retarded persons. We see nothing in §222.68 which permits billing the county from which a person is admitted or committed for anything greater than the costs of admission or commitment, unless said county is also the county of legal settlement.

SUMMARY

In summary, sections of chapter 222, which provides a procedure for the billing of a county of legal settlement for the care, treatment, training and habilitation of a resident of a state hospital-school are *in pari materia* and must be considered together.

The determination of legal settlement is properly made pursuant to the provisions of §252.16 of The Code. Ordinarily, one's legal settlement does not change during periods of commitment to state institutions. Pursuant to §252.16(3), a resident of a state institution is precluded from accruing time to meet the one year residency requirement for establishing legal settlement. However, the legal settlement of a mentally retarded minor who is a resident of a state institution changes with that of his/her parents.

The word "whenever" as used in §222.62 generally refers to the future and means "at what time". Thus, at either the time of initial application and admission of a person to a state hospital-school, or subsequent thereto, the board of supervisors or a court may determine whether a person's legal settlement is in its county. The superintendent of a state hospital-school is duty bound to submit all

charges for the cost of care, treatment, training and habilitation of a resident of a state hospital-school to the county certified as county of legal settlement. The county certified as county of legal settlement must be billed until a disputed legal settlement is determined pursuant to §222.70. Reverse certification is not the proper procedure for disputing a finding of legal settlement and it is ineffective for the purpose of causing any change in a hospital-school's billing procedure. It must be presumed that county officials make legal settlement decisions in accordance with appropriate law. A county board of supervisors or a court may make a legal settlement determination independent of the involvement of a county subsequently certified as county of legal settlement of a state hospital-school resident. Section 222.68 imposes an initial reimbursable responsibility upon the county of admission or commitment for the limited cost of admitting or committing a person to a state hospital-school.

September 24, 1981

GAMBLING: Qualified Organizations: Third Party Contracts — Chapter 99B, The Code 1981, as amended by 1981 Session, 69th General Assembly, Senate File 519. A qualified organization cannot legally contract with a third party to operate games for pay. Games authorized under section 99B.7 may only be conducted by non-paid, volunteer help. (Richards to Comito, State Senator, 9/24/81) #81-9-12

The Honorable Richard Comito, State Senator: You have requested an opinion of the attorney general regarding the legality under chapter 99B, The Code 1981, as amended by 1981 Session, 69th General Assembly, Senate File 519, of certain operating procedures of "qualified organizations" holding limited, fourteen day gambling licenses. You have specifically raised the following question for our consideration: "Is it lawful for a person wishing to conduct games as a limited licensee under section 99B.7 to obtain a limited license under the section and then contract with a third party for the actual operation of games during the fourteen days for which the license is valid?"

The limited license to which you refer is expressly created by section 99B.7(3)(a), The Code 1981. That section provides in pertinent part:

> [U]pon submission of an application accompanied by a licensee fee of fifteen dollars, a person may be issued a limited license which shall *authorize the person to conduct all games and raffles pursuant to this section* at a specified location and during a specified period of fourteen consecutive calendar days. A limited license shall not be issued more than once during any twelve-month period to the same person, or for the same location. [Emphasis added.]

Of course, the authority to conduct games under a limited license is subject to the same operational limitations as apply to a two-year license.

One such limitation which you note in your letter prohibits all persons from receiving or having "any fixed or contingent right to receive, directly or indirectly, any profit, remuneration, or compensation from or related to a game of skill, game of chance or raffle...'. Section 99B.7(1)(b), The Code 1981. This provision was discussed in a prior opinion of this office in which we concluded that the practice of paying persons to operate games authorized under section 99B.7 was improper and illegal. Op.Att'y.Gen. #80-12-21. There we said:

> [T]he legislature's intent in legalizing gambling in the context of 'charitable fund raising' is clear. In creating the qualified organization privilege, the legislature never intended thereby to create a bingo 'business' or 'industry.' This is apparent from the obvious meaning of section 99B.7(1)(b). Qualified organization gambling was meant to be conducted by concerned volunteers, not by *persons hired for pay*. The practice of remunerating or compensating persons, either directly or indirectly, from the gambling receipts violates section 99B.7(1)(b).

Op.Att'y.Gen. #80-12-21 at page 3 [emphasis added]. The recently revised rules of the Department of Revenue reflect this view. According to the pertinent part of amended regulation 730 I.A.C. §94.3, effective October 21, 1981:

> Reasonable expenses shall not exceed twenty-five percent of the net receipts. Expenses allowed within the twenty-five percent limitation will be the license fee, taxes, promotion expense, equipment (prorated), overhead expense, and other expenses incurred exclusively and directly as a result of the gambling activity. Wages or other forms of compensation, either direct or indirect, are not an allowed expense.

We are convinced that this applies as much to limited licenses as it does to two-year licenses. Thus, although section 99B.7 does not expressly prohibit a licensee from contracting with a third party to conduct games, such an arrangement whereby a third party is compensated or remunerated for these services violates section 99B.7(1)(b) and is not legal. The contract would contemplate an unlawful gambling situation and would be absolutely void and unenforceable. *See State ex rel. Turner v. Drake*, 242 N.W.2d 707, 710 (Iowa 1976); *Sipe v. Finarty*, 6 Iowa 394 (1858). In short, it is not lawful for any qualified organization, whether licensed for two years or only fourteen days, to contract with a third party to operate games for pay.

September 24, 1981

COUNTIES; CIVIL DEFENSE; DISASTER SERVICES: §§4.1(36) and 29C.9, The Code 1981. A county board of supervisors is required to participate in local civil defense planning. Political subdivisions are each accorded one vote in the joint administration of civil defense. The joint administration does not have the authority to impose a particular level of financial assessment on any of the participating subdivisions. (Fortney to Strittmatter, Jones County Attorney 9/24/81) #81-9-13(L)

September 25, 1981

STATE OFFICERS AND DEPARTMENTS: Merit Commission; Seniority. §§19A.1, 19A.3, and 19A.9. The terms "seniority in service" in §19A.9(14) refer only to service, or time, spent by a state employee in a position covered by the merit system established in chapter 19A. (Pottorff to Miller, Commissioner of Public Safety, and Van Winkle, Director, Merit Employment Department, 9/25/81) #81-9-14

Mr. William D. Miller, Commissioner, Department of Public Safety; Fran Van Winkle, Director, Iowa Merit Employment Department: You have jointly requested an opinion on the following matter:

> Do the terms 'seniority in service' used in §19A.9(14), (*Code of Iowa*) (1981) refer to time served in merit classified positions or to time served in state employment generally?

You indicate that the Department of Public Safety is interested in changing the classification of certain of its employees. These employees presently are not included within the state merit system because they are exempted as peace officers under §19A.3(15). In making the classification change, however, the department wants the employees to be credited under the merit system for all the time they have spent in the exempt positions. The employees would thereby be assured of not losing any rights of seniority for the purpose of determining priority in layoffs and re-employment.

The state merit system was created in 1967. 1967 Session, 62nd G.A., chapter 95. Its purpose is "to establish for the state of Iowa a system of personnel administration based on the merit principles and scientific methods governing the appointment, promotion, welfare, transfer, layoff, removal and discipline of its civil employees, and other incidents of state employment." §19A.1, The Code 1981. The merit system established in chapter 19A was made applicable to all employees of the state and to all positions in state government with certain listed exceptions. §19A.3.

The statute establishes the Merit Employment Department, headed by a Merit Employment Commission. §19A.4. The commission is directed to employ a director who acts as executive head of the department. §§19A.5, 19A.8.

The Merit Employment Commission is required by §19A.9 to adopt and amend rules for the administration and implementation of the merit system established in chapter 19A. These rules must address layoffs and re-employment by providing:

> 14. For layoffs by reason of lack of funds or work, or organization, and for re-employment of employees so laid off, *giving primary consideration in both layoffs and re-employment to performance record and secondary consideration to seniority in service.* Any employee who has been laid off may keep his or her name on a preferred employment list for one year, which list shall be exhausted by the agency enforcing the layoff before selection of an employee may be made from the register in his or her classification. Employees who are subject to contracts negotiated under chapter 20 which include layoff provisions shall be governed by the contract provisions. [Emphasis supplied.]

The terms "seniority in service" are not further defined in chapter 19A. [1]

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[1] To fulfill this statutory mandate, the Merit Employment Commission enacted 570 IAC §11.1(3) which provides, in part:

> e. Employees in the layoff unit shall be laid off in accordance with a retention point system computed to the nearest hundredth decimal place (point .005 to be rounded up) which shall be made up of a combination of points for length of service and performance evaluation of all employees in the class of positions in the organizational unit or units affected. Length of service and performance evaluation points shall be calculated as follows:
>
> (1) Length of service credit shall be allowed at a rate of one-half point for each thirty calendar days of service. For the purpose of computing length of service credits, the appointing authority shall include all continuous service with the state of Iowa between the date of original appointment to a permanent position and the date of layoff. Approved leaves of absence without pay, suspensions with pay, and layoffs for periods exceeding fourteen consecutive days shall not be counted; however, the periods of service immediately following such leaves of absence and layoffs shall be

Commissioner Miller suggests that under chapter 19A service in the merit employment system is denoted by the terms "classified service" and service in state employment generally is denoted by the lone term "service." The use of these terms in chapter 19A, however, is not consistent. Section 19A.1 provides, in part, that "[a]ll appointments and promotions to positions in *the state service* shall be made solely on the basis of merit and fitness, to be ascertained by competitive examinations, except as hereinafter specified" in §19A.3. [Emphasis added.] This use of the term "service" does refer to state employment generally. Section 19A.9(15), in contrast, directs the Merit Employment Department to adopt and amend rules to provide "[f]or imposition, as a disciplinary measure, of a suspension from *the service* without pay for not longer than thirty days." [Emphasis added.] Since this section concerns rules for discipline by the Merit Employment Department, this use of the term "service" refers only to employment in the merit employment system. The fact that the term "service" rather than the terms "classified service" appears in §19A.9(14), therefore is not determinative.

Construction of these terms is aided by reference to §19A.3. This section clearly indicates the merit employment system has limited coverage and excepts enumerated employees and positions from its scope. These exceptions include peace officers employed by the Department of Public Safety. §19A.3(15).

The Iowa Supreme Court has commented on the limited coverage of chapter 19A. In *Peters v. Iowa Employment Security Commission*, 235 N.W.2d 306, 310 (Iowa 1975), the court observed as follows:

> We are required to construe chapter 19A as a whole, giving effect to every part, in ascertaining the intent of the legislature. We should avoid strained, impractical or absurd results; and we should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather

(Footnote, Cont'd.)

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counted. An employee who is returned to duty following approved military duty shall have all periods of military service counted as continuous service. Breaks in service, where the employee is off of the payroll of an agency for more than fourteen days shall be considered as a new employment. Permanent employees working less than full-time shall receive pro rata service credit.

(2) Performance evaluation credit commencing November 1, 1970, shall be allowed at a rate of two points for each month of service rated as satisfactory under a performance evaluation plan approved by the commission. An additional two points shall be added for each month of service during which performance is rated one or more levels above satisfactory. No credit shall be allowed for service rated less than satisfactory. No credit shall be given for the month in which employment is commenced and full credit shall be given for the last month in which employment is evaluated regardless of actual days worked. All employees shall be evaluated at least annually pursuant to rule 13.2(19A); in the event the employee was not evaluated in accordance with rule 13.2(19A), such service shall be considered satisfactory service in accordance with rule 13.5(19A). All employees included in a layoff unit shall be evaluated forty-five days prior to the date of layoff. Performance evaluations shall cover the entire period between the current evaluation and the previous evaluation or the date such evaluation should have been made in accordance with rule 13.2(19A).

(3) Reduction in force retention points shall be the total of the length of service credit points and the performance evaluation credit points.

than one which will defeat it. *Iowa Nat. Indust. Loan Co. v. Iowa State, Etc.*, 224 N.W.2d 437, 440 (Iowa 1974). Examined in light of these principles, it is manifest from the provisions of chapter 19A that the legislature intended to bring all state employees not specifically expected into a unitary merit system. Inherent in this objective is the precept that all merit system employees should receive equal pay for equal work. The legislature provided for a uniform position classification and pay plan 'so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area.' §19A.9(1), The Code. This ideal could not be achieved by letting departments or agencies otherwise covered go their own way in classifying positions and developing pay plans. That is one of the evils sought to be remedied by the legislation.

The limited coverage of chapter 19A, as stated in §19A.3 and acknowledged by the court, indicates that the statutory duty to adopt rules for the administration and implementation of the merit system under §19A.9 must be read in conjunction with the objective of chapter 19A to establish a merit system for only those state employees not specifically excepted. *See* §§19A.1, 19A.3. Since the system itself applies only to state employees not specifically excepted, it follows that rules to administer and implement the system also would apply only to employees not specifically excepted.

The rules of the merit employment system generally would apply to previously exempt employees who, following a classification change, become merit system employees. *See* §§19A.1, 19A.3, 19A.9. In order to credit these new employees for all the time previously spent in exempt positions, however, the Merit Employment Department would be required to apply its own rules, promulgated under §19A.9(14), to evaluate both the "performance record" and the "seniority" served in employment outside the merit employment system. In our opinion, this application of the rules would exceed the scope of the authority intended under §19A.9(14).

Accordingly, we advise that the terms "seniority in service" in §19A.9(14) refer only to service, or time, spent by a state employee in a position covered by the merit system established in chapter 19A. The terms, therefore, do not include employment in positions not governed by the merit system, as enumerated in §19A.3.

September 29, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Health — Confidentiality of Vital Statistics, §§144.43, 68A.2, H.F. 413, Laws, 69th G.A., The Code. Repeal by the General Assembly of statutory provisions relating to confidentiality of vital statistics does not constitute breach of contract. (Swanson to Gentleman, State Senator, 9/29/81) #81-9-15(L)

September 29, 1981

COUNTIES AND COUNTY OFFICERS: County benefits to the poor and work requirements. Section 1039, S.F. 130, 69th G.A., §252.27, Code of Iowa; Article III, §39A, Iowa Constitution; §96.19(6)(a)(6)(e), Code of Iowa; chapters 85, 85A, 85B, and 250, Code of Iowa. The county may require the poor to render reasonable labor as a condition of receiving benefits under chapter 252, Code of Iowa. The county, under the County Home Rule Amendment, may require veterans who are poor to render reasonable labor as a condition for receiving benefits under chapter 250, Code of Iowa. Such a person would not be an employee under §96.19(6)(a)(6)(e), The Code, but would be an employee for purposes of chapters 85, 85A, and 85B, The Code. (Robinson to Casper, Madison County Attorney, 9/29/81) #81-9-16(L)

OCTOBER 1981

October 5, 1981

HEALTH: Local and county boards. Employment practices. §§135.11(15), 137.6, chapter 400, The Code 1981. Employment practices of local boards must meet the requirements of the Iowa Merit Employment Department or the civil services provisions outlined in chapter 400. Unless the local board receives federal funding, the Iowa Merit Employment Department exercises no oversight function over the board's employment practices. The Department of Health may, pursuant to §135.11(15), adopt rules to aid in the enforcement of §137.6. The consequences of a board's failure to comply with §137.6 include loss of federal funding, intervention by the Department of Health pursuant to administrative rules, and lawsuits brought by aggrieved parties. (Brammer to Pawlewski, Commissioner of Public Health, 10/5/81) #81-10-1(L)

October 5, 1981

GENERAL ASSEMBLY: Legislative Council; Legislative Service Bureau. Section 2.58, The Code 1981. The Legislative Council is afforded statutory authority to allocate the work of the Legislative Service Bureau. The June 29, 1981, reaffirmance of a work priority policy for the bureau did not infringe upon the obligation of the council to make reasonable provision for bureau services to individual legislators. (Schantz to Priebe, State Senator, 10/5/81) #81-10-2(L)

October 6, 1981

ELECTIONS; SPECIAL ELECTIONS; NOMINATION OF NONPARTY CANDIDATES: Chapter 43, §§43.2, 43.3; chapter 44, §§44.1, 44.4; chapter 45, §§45.1, 45.4; chapter 49, §§49.1, 49.31, 49.32, 49.36; chapter 69, §69.14. Procedures for filing nominations for nonparty candidates under chapters 44 and 45 are applicable to special elections. (Pottorff to Whitcome, Director of Elections, 10/6/81) #81-10-3(L)

October 8, 1981

COMMERCE COMMISSION; GRAIN WAREHOUSES AND DEALERS' LICENSES: Financial Statements Required on Previous Fiscal Year for New Licenses. §§3.7, 542.3, 542.5, chapters 542 and 543, The Code 1981, and H.F. 841, 1981 Session, 69th G.A. The Commerce Commission's requirement that financial statements received after July 1, 1981, comply with H.F. 841 does not, in effect, force compliance with the Act prior to July 1, 1981. A statute does not operate retroactively merely because part of the requisites of its action is drawn from a time antecedent to its passage. (Willits to Diemer, State Representative, 10/8/81) #81-10-4(L)

October 8, 1981

COUNTIES AND COUNTY OFFICERS: Veterans Affairs Fund; Legal Residence in the County. Section 250.1, The Code 1981. The county commission in determining whether a veteran has a legal residence in the county should consider matters relating to his true, fixed, and permanent home and place of habitation. That place to which, whenever he is absent, he has an intention of returning. Consideration should also be given to where the year-round residence is, voter registration, place of filing tax returns, property ownership, drivers license, car registration, employment, and marital status. (Robinson to Kauffman, 10/8/81) #81-10-5(L)

October 13, 1981

PUBLIC EMPLOYMENT; CONFLICT OF INTEREST: An apparent conflict of interest generally exists in a situation in which a member of an AEA board of directors makes programming decisions regarding a student if those decisions impact on whether that student will be eligible to continue receiving services purchased from the board member's employer. Such board member should abstain from participation in that particular decision. (Fortney to Clements, State Representative 10/13/81) #81-10-6(L)

October 13, 1981

AGRICULTURE: Authorized Farm Corporation. Sections 172C.1(8) and 172C.1(9), The Code 1981. An "authorized farm corporation" is not required to receive any specified percentage of its gross revenues from farming. Nor is an "authorized farm corporation" required to be founded solely for the purpose of farming. Finally a corporation formed for a general purpose, which subsequently becomes engaged in the business of farming, does not qualify as an "authorized farm corporation." (Walding to Rush, State Senator, 10/13/81) #81-10-7(L)

October 14, 1981

FARM CORPORATIONS: Acquisition of Agricultural Land by a Pork Processor for Nonfarming Purposes. §§172C.1, 172C.4, 455B.12, 400 IAC 4.5(4). The purchase of approximately 1,500 acres of agricultural land by a corporate pork processor for the purpose of disposing of the wastewater from its hog slaughtering and processing plant in compliance with §455B.12, The Code 1981. (Willits to Bestmann, Director of the Iowa Development Commission, 10/14/81) #81-10-8

Mr. William J. Bestmann, Director, Iowa Development Commission: You have requested our opinion on the effect of chapter 172C, The Code 1981, Corporate or Partnership Farming, on the plans of a large meat packing concern, Iowa Beef Processors, Inc., (IBP), which is considering a plant location in eastern Iowa for slaughtering and processing hogs.

THE FACTUAL BACKGROUND

The proposed plant would slaughter approximately 4,000,000 hogs annually. This process would require about 800,000,000 gallons of water per year. Iowa Department of Environmental Quality (DEQ) regulations require treatment and disposition of industrial waste in a manner that does not pollute lakes, streams or groundwater. The economically and environmentally preferred method of treatment is anaerobic digestion and subsequent irrigation of surrounding land with the wastewater. In addition to four anaerobic lagoons, two ponds with a total capacity of 450,000,000 gallons are required to handle the volume of water required for a plant of the size proposed.

Approximately 130 acres of land will be required for the plant itself, grounds, parking, etc. Another 100 acres will be required for the distribution of the large volume of treated wastewater as crop irrigation water. It is anticipated that alfalfa and corn will be the crops irrigated, since they have the highest water consumption.

The actual farming will be contracted for with local farmers on either a cash or crop share lease basis, as is customary in the community. IBP will not farm the land itself, but will be responsible, of course, for managing the wastewater disposal through irrigation.

OPINION REQUESTED

This proposed ownership of land by IBP for disposal of wastewater from a hog processing plant raises a question under chapter 172C, The Code 1981, as to whether the proposed use of land violates the restrictions on corporate ownership of Iowa farm land. Specifically, the question is:

> Does the ownership of agricultural land by a pork processor corporation for the purpose of disposing of wastewater from its slaughtering and processing plant constitute the use of agricultural land for a nonfarming purpose within the meaning of §172C.4(4), The Code 1981?

APPLICABLE STATUTES AND REGULATIONS

Section 172C.4, The Code 1981, in pertinent part, provides:

> No corporation... shall, either directly or indirectly, acquire or otherwise obtain or lease any agricultural land in this state. However, the restrictions provided in this section shall not apply to the following:
>
> * * *
>
> 4. Agricultural land acquired by a corporation for immediate or potential use in nonfarming purposes.
>
> * * *
>
> 12. Any corporation... violating the provisions of this section shall upon conviction, be punished by a fine of not more than fifty thousand dollars and shall divest itself of any land acquired in violation of this section within one year after conviction.

Another pertinent statute is §455B.12, which requires the Iowa DEQ to set air quality control standards. A portion of those standards are at 400 IAC §4.5(4):

> 4.5(4) Criteria for approval of other anaerobic lagoons.
>
> a. New anaerobic lagoons will be approved only for the meat products industry or the rendering plant industry.
>
> * * *
>
> c. Lagoons designed to treat more than 100,000 gpd.
>
> (1) The sulfate content of the water supply shall not exceed 100 mg/1.
>
> (2) *The anaerobic lagoon shall be located no less than three-fourths of a mile from the nearest occupied premise or public use area.*
>
> (3) The design loading rate for the total lagoon volume shall not be less than ten pounds nor more than twenty pounds of biochemical oxygen demand (five day) per thousand cubic feet per day.
>
> This rule is intended to implement section 455B.12, The Code. [Emphasis added.]

OPINION

It is our opinion that, in this limited factual situation, acquisition of approximately 1,500 acres of agricultural land by a corporation for the purpose of disposing of the wastewater from a hog slaughtering and processing plant in compliance with §455B.12, The Code 1981, constitutes the use of agricultural land for a nonfarming purpose within the meaning of §172C.4(4), The Code 1981.

RATIONALE

At the outset, it should be noted that §172C.4, The Code 1981, is a penal statute. As set forth above, it provides for both a fine of up to $50,000 and divestment of land acquired in violation of the section. Where the primary purpose of a statute is expressly enforceable by fine, imprisonment or other punishment, the statute is always construed as penal. 3 Sutherland, *Statutory Construction* §59.01. Penal statutes are to be strictly construed. Doubts, if any, should be resolved in favor of persons on whom statutory fines are sought to be imposed. *State v. Kool*, 212 N.W.2d 518 (Iowa 1973); *State v. Garland*, 250 Iowa 428, 94 N.W.2d 122 (1959); 73 *Am.Jur.2d* Statutes §293; 3 Sutherland, *Statutory Construction* §59.03. Nothing can be read into penal statutes by implication. 73 *Am.Jur.2d* Statutes §295. In the interpretation of a penal statute, care must be observed not to extend the statute to offenses not embraced within its language, merely because they involve the same mischief which the statute aimed to suppress. 73 *Am.Jur.2d* Statutes §303. Thus, in construing this penal statute care must be taken not to extend it to situations not clearly covered.

In construing a law of doubtful application, the policy which induced its enactment, or which was designed to be promoted thereby, is a proper subject for consideration. 73 *Am.Jur.2d.* Statutes §153. The primary object is to arrive at the legislative intent and what was the legislative intent when the statute was enacted. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977); *Selken v. Northland Ins. Co.*,

249 Iowa 1046, 90 N.W.2d 29 (1958) *State ex rel. True v. City of Council Bluffs*, 230 Iowa 1109, 300 N.W. 264 (1941); 73 *Am.Jur.2d.* Statutes §145. The spirit of a statute should be considered. *Bookhurt v. Greenlease-Lied Motor Co.*, 215 Iowa 1359, 244 N.W. 721 (1932).

Legislative history is largely non-existent for Acts of the Iowa General Assembly. The journals provide only the bare facts of procedure. No committee reports, remarks of members, or explanations of bills are included. Thus, the intent of the General Assembly must be ascertained from the language of chapter 172C, The Code 1981, itself and from external sources.

One writer has noted that "a significant number of states impose limitations on corporate or foreign ownership or operation of farms. These restrictions have been imposed as a reaction to changes in farming patterns in an effort to protect the family farm." 2 J. Davidson, *Agricultural Law* 120 (1981). Fear of an eventual corporate monopoly in agricultural lands also has contributed to legislation restricting farm incorporation. 7 Harl, *Agricultural Law* §51.04 (1980).

As these secondary sources and as a reading of the statute itself indicate, the desire of the legislature to prevent takeover of Iowa agriculture by large corporations seems to have been the primary rationale for passage of chapter 172C, The Code 1981. The intent was to foster and nourish the traditional family farm base of agriculture in Iowa. To that end, an exception was placed in the statute to allow family farm corporations to own and operate Iowa farms. §172C.1(8), The Code 1981. Likewise, there is an exception for authorized farm corporations with twenty-five or fewer shareholders, all of whom must be natural persons. §172C.1(9), The Code 1981. These exceptions for family and smaller corporations are indicative of a legislative intent to prevent large-scale corporate acquisition of Iowa farm land for the purpose of farming.

We conclude that the acquisition of land by IBP in this factual situation does not come within the object sought to be obtained by the legislature in enacting chapter 172C, The Code 1981. IBP is not acquiring this land for farming. It is acquiring it, in the language of §172C.4(4), The Code 1981, "for immediate or potential use in nonfarming purposes," to wit, distribution of wastewater. Any farming is incidental to that primary purpose. This purpose is found not just by the stated intent of IBP, but by objective facts. This is not just a guise to purchase farm land. Again, for emphasis, IBP's *purpose* in obtaining the agricultural land appears to be entirely nonfarming in nature: distribution of wastewater.

This conclusion is buttressed by consideration of the interplay of §§172C.4 and 455B.12, The Code 1981. As set out above, DEQ rules promulgated pursuant to §455B.12 require that anaerobic lagoons of the size proposed be located at least three-fourths of a mile from the nearest occupied premise or public use area. Thus, depending on the configuration of the land acquired, IBP would be required by state regulation to have a minimum of approximately 1,500 acres under its control to insure a three-fourths mile buffer from the nearest occupied premise or public use area.

Unless statutes are in direct conflict, they will be read together and, if possible, harmonized. *Hardwick v. Bublitz*, 253 Iowa 49, 111 N.W.2d 309 (1962); *Iowa-Nebraska Light & Power Co. v. City of Villisca*, 220 Iowa 238, 261 N.W. 423 (1935). In construing a statute, all provisions of the Act of which it is a part and other pertinent statutes must be considered. *Maguire v. Fulton*, 179 N.W.2d 508 (Iowa 1970).

Since §455B.12, The Code 1981, and the administrative rules promulgated thereunder require at least three-quarters mile separation between anaerobic

lagoons of this size and occupied premises or public use areas, §172C.4, The Code 1981, should, if possible, be construed in a manner which permits the two statutes to be harmonized. Because the only way IBP can actually insure the necessary buffer is through ownership or leasing of agricultural land, it would be incongruous, to say the least, to interpret one statute to prohibit what another requires. Because §172C.4(4), The Code 1981, can be interpreted to allow the purchase of this farm land for a nonfarming purpose, it should be so interpreted in order to give effect to both statutes.

This reasoning dovetails with the primary purpose argument. An additional reason for acquiring the farm land is compliance with state distance requirements on anaerobic lagoons. When coupled with the need for an assured place to irrigate with the wastewater, it is apparent that the purpose for purchasing the farm land is not farming.

VERTICAL INTEGRATION

We should also note in this opinion that there is no ambiguity in the Iowa law prohibiting vertical integration by beef or pork processors. It is unlawful for any processor of beef or pork to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. Section 172C.2, (The Code 1981) provides:

> In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, to own, control or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. However, this section shall not preclude a processor or limited partnership from contracting for the purchase or feeding of hogs or cattle, provided that where the contract sets a date for delivery which is more than twenty days after the making of the contract it shall.
>
> 1. Specify a calendar day for delivery of the livestock; or
>
> 2. Specify the month for the delivery, and shall allow the farmer to set the week for the delivery within such month and the processor or limited partnership to set the date for delivery within such week. This section shall not prevent processors or educational institutions from carrying on legitimate research, educational, or demonstration activities, nor shall it prevent processors from owning and operating facilities to provide normal care and feeding of animals for a period not to exceed ten days immediately prior to slaughter, or for a longer period in an emergency. Any processor or limited partnership which owns, controls, or operates a feedlot on August 15, 1975 shall have until July 1, 1985 to dispose of the property.

Thus, while IBP could raise crops on the land it has purchased, it could not feed hogs or cattle for slaughter.

CONCLUSION

In our opinion, the purchase of approximately 1,500 acres of agricultural land by a corporate pork processor for the purpose of disposing of the wastewater from its hog slaughtering and processing plant and to conform to the requirements of §455B.12 and 400 IAC 4.5(4) constitutes the use of agricultural land for a "nonfarming purpose" within the meaning of §172C.4(4). This opinion should not be construed as applicable to other contexts in which it may become difficult to

separate an "incidental" use from the "primary purpose" of the purchase and in which other statutory provisions supporting the use are not present.

Chapter 172C, The Code 1981 was enacted to encourage and aid the family farm. Iowa is the largest hog-producing state, with about 25% of the national production. Several Iowa pork packaging plants have closed recently. Iowa farmers need packing plants to process their swine production. We do not think it was the intent of the General Assembly that chapter 172C, The Code 1981, be interpreted to prevent the construction of another packing plant for Iowa-produced swine. Rather, the basic goal of encouraging Iowa pork production, most of which is truly family-farm based, is fostered by providing additional markets for Iowa swine.

October 14, 1981

COUNTIES AND COUNTY OFFICERS: Iowa Constitution, Art. III, §39A; §§19A.3, 79.1, 332.3(10), 340A.1, The Code 1981, Senate File 130, §323(1)(o). The board of supervisors has the authority to establish a sick leave policy for elected officials which would permit payment for accrued sick leave. The board may also establish a policy whereby it provides hospitalization and major-medical insurance coverage for elected officials. (Fortney to Tullar, Sac County Attorney, 10/14/81) #81-10-9(L)

October 15, 1981

MENTAL HEALTH: Emergency Detention Procedures. U.S. Const., Art. I, §10; U.S. Const. Amend. 5 and 14; Iowa Const., Art. I, §§9 and 21; ch. 229, §§229.1(8), 229.1(9), 229.1(10), 229.6, 229.11, 229.11(2), 229.11(3), 229.21(3), 229.22(1), 229.22(2), 602.5, 602.32, 602.60 and 602.61, The Code 1981. The term lack of "immediate access to the courts" within the meaning of §229.22(1) means the unavailability of an opportunity to forthwith, without delay, physically convey communications to the court regarding a proposed involuntary commitment. It may result from the unavailability of a district court judge or judicial hospitalization referee, or from physical forces preventing communications with the court. Section 229.21(3) presumes that a referee will act only when no district court judge is accessible in the county. The immediate access to the courts' requirement of §229.22(1) will be satisfied if a district court judge or judicial hospitalization referee is available in another county in the same judicial district and such judge or referee can be reached without appreciable delay. Judges and referees may exercise their jurisdiction under chapter 229 in counties other than their county within the judicial district, when either consented to by the parties, authorized by the chief judge of the district, or when necessary.

The term "nearest available facility" within the meaning of §229.22(2) refers to any public or private facility which is closest in distance and is equipped and staffed to provide inpatient care to the mentally ill, except the Iowa Security Medical Facility at Oakdale, and except that jails and related type facilities may only be used in actual emergencies when no other secure facility is available. Public and private facilities as defined by chapter 229 do not have a right to decline the admission of persons delivered to such a facility for emergency mental health care pursuant to §229.22(2).

Under §229.22(2) a peace officer has a duty to deliver a mentally ill person detained pursuant to §229.22(2) to the nearest available facility. The officer

has a further duty to clearly articulate the facts and circumstances which caused him/her to believe that the patient was mentally ill, and because of that mental illness was likely to physically injure him/herself or others if not immediately detained. (Mann to Tullar, Sac County Attorney, 10/15/81) #81-10-10

Mr. Lon R. Tullar, Sac County Attorney: You requested an opinion of the attorney general on several questions relating to the procedures for emergency involuntary commitment of persons considered to be seriously mentally impaired under chapter 229, The Code 1981. Specifically, you asked the following questions:

1. My first questions have to do with what does "immediate access to the district court" mean:

a. If the judicial hospitalization referee is not available, does section 229.22 apply if a district court judge is sitting in Sac County?

b. If the judicial hospitalization referee is not available, and if there is no district court judge sitting in Sac County, do we have to try to locate a judicial hospitalization referee or district court judge sitting in a neighboring county which could be reached probably within the hour?

2. Assuming that the emergency procedure of section 229.22 applies:

a. What is the "nearest available facility as defined in section 229.11, subsections 2 and 3"? Sac County has a hospital right in Sac City which appears to qualify, however, in the past they have refused to accept such persons. Does a hospital which has the capability of preserving a mentally ill person's life have the unqualified right to refuse admittance of the mentally ill person? If they do, does this mean an officer would then have to take the mentally ill person to the next nearest hospital and seek admittance there, etc.?

b. Or, does the police officer have the discretion simply to take the mentally ill person to the State Mental Institution for our area which is approximately 45 minutes away? Intertwined with this question and the questions of point a. above, is whether or not the officers should take the individual to the Mental Health Institute after being refused at the local hospital and not stopping at the hospitals between?

3. Once the peace officer has found a hospital:

a. What are the extent of his duties or obligations? It appears that section 229.22 requires that he "describe the circumstances of the matter [why the mentally ill person was brought to the hospital in the first place] and to the chief medical officer", and that's the end of his obligation.

b. In practice though, it appears that the officers are being "coerced" into going before the local magistrate. Does the hospital have this right?

c. If the hospital has the right to coerce the officers in this way, do they have the right to refuse to go before the local magistrate, judicial hospital referee or district court judge?

d. If the officers can also refuse any further assistance to the mentally ill person, and the mentally ill person is released by the hospital, who is

going to be liable for any injury that might thereafter happen to the mentally ill person?

We will respond to your questions in the order presented.

I. WHAT DOES THE TERM "IMMEDIATE ACCESS TO THE DISTRICT COURT" MEAN WITHIN THE MEANING OF §299.22(1)?

The emergency procedure for hospitalizing the mentally ill is found in §229.22, The Code 1981. Use of the emergency procedure is permitted where, among other things, there is no immediate access to the district court. The language of §229.22(1) reads as follows:

> 1. The procedure prescribed by this section shall not be used unless it appears that a person should be immediately detained due to serious mental impairment, but that person cannot be immediately detained by the procedure prescribed in sections 229.6 and 229.11 *because there is no means of immediate access to the district court.* [Emphasis added.]

In reviewing this section we apply familiar rules of statutory construction. The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have or should have said. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976); *Steinbeck v. Iowa District Court*, 224 N.W.2d 469 (Iowa 1974). In statutory construction, one must seek a meaning which is both reasonable and logical and try to avoid results which are strained, absurd, or extreme. *State v. Berry*, 247 N.W.2d 263 (Iowa 1976).

Applying the foregoing principles, we now examine §229.22(1). The statute makes it clear that emergency commitment procedures should only be utilized when the regular commitment procedures under §§229.6 and 229.11 are unavailable because there is no means of "immediate access to the courts". The work "immediate", when applied to legal proceedings, does not exclude all intervals of time, but means such time as is reasonably sufficient in which to accomplish the act to which it is applied; it means to do a thing forthwith, without delay. *Emmons v. Ingebretson*, 279 F.Supp. 558 (N.D. Iowa 1968); *Gates v. Knosby*, 107 Iowa 239, 77 N.W. 863 (1899); *Davis v. Simmon*, 14 Iowa 154 (1862). The term "access to the courts" includes at least the physical fact of imparting knowledge or notice, that is, the right to have one's communication physically transferred to the court. *United States v. Commonwealth of Pennsylvania*, 247 F.Supp. 7 (E.D. Pa. 1965). We, therefore, conclude that the lack of "immediate access to the courts" within the meaning of §229.22(1) means the unavailability of an opportunity to forthwith, without delay, physically convey communications to the court regarding a proposed involuntary commitment. In such cases, resort to the emergency detention procedures of §229.22 may be had.

A lack of immediate access to the courts may result from the unavailability of a judicial hospitalization referee or district court judge, or from physical forces preventing communications with the court. On the other hand, if either the referee or a district court judge is available, and there are no physical forces preventing a party's communications from reaching the court, there will be no lack of immediate access within the meaning of §229.22. For it is clear from a reading of §229.21(3), The Code 1981, that both district court judges and judicial hospitalization referees may exercise jurisdiction over civil commitment cases. In fact, §229.21(3) presumes that a referee will act only when "no district court judge is accessible in the county". Benzanson, *Involuntary Treatment of the Mentally Ill in Iowa; The 1975 Legislation*, 61 Iowa L.Rev. 261, 367 (1975).

We further advise that the term "immediate access to the courts" within the meaning of §229.22(1) will be satisfied if a judge or referee is available in another county in the same judicial district and such judge or referee can be reached without appreciable delay. We reach this conclusion because judges and referees may exercise their jurisdiction under chapter 229 in counties other than their county within the judicial district, when either consented to by the parties, authorized by the chief judge of the district or when necessary. 1976 Op.Att'y.-Gen. 833, relying on §§602.5, 602.32, 602.60 and 602.61, The Code 1975; Cf., *Kinsey v. Clark*, 215 Iowa 765, 246 N.W. 840 (1933); *Gumbert v. Sheehan*, 200 Iowa 1310, 206 N.W. 604 (1925); *Tait v. Crissman*, 158 Iowa 220, 139 N.W. 461 (1913); Op.Att'y.Gen. #80-3-4; C.J.S. *Courts* §91 (1940).

II. WHAT DOES THE TERM "NEAREST AVAILABLE FACILITY" MEAN AS DEFINED BY §229.11(2) and (3)?

When emergency detention procedures are utilized under §229.22(2), peace officers are authorized to take a person to the "nearest available facility" for appropriate treatment. Pertinent portions of §229.22(2) read as follows:

> 2. In the circumstances described in subsection 1, any peace officer who has reasonable grounds to believe that a person is mentally ill, and because of that illness is likely to physically injure himself or herself or others if not immediately detained, may without a warrant take or cause that person to be taken to the nearest available facility as defined in section 229.11, subsections 2 and 3.

The "nearest available facility" for purposes of §229.22(2) is a facility as defined by §229.11(2) and (3). Sections 229.11(2) and (3) provide respectively that a person may be detained "in a suitable hospital" and "in a public or private facility... which is suitably equipped and staffed" for mental health care, provided that jails and related facilities are only used in actual emergencies when no other secure facility is accessible. See also Sup.Ct.R. for Hosp. Ment. Ill 15. The word "hospital" is a defined term under §229.1(1), and it refers to either a public or private hospital. Public and private hospitals are terms defined by §229.1(8) and (9), as follows:

> 8. "Public hospital' means:
>
> a. A state mental health institute established by chapter 226; or
>
> b. The state psychiatric hospital established by chapter 225; or
>
> c. Any other publicly supported hospital or institution, or part thereof, which is equipped and staffed to provide inpatient care to the mentally ill, except that this definition shall not be applicable to the Iowa security medical facility established by chapter 223.
>
> 9. "Private hospital" means any hospital or institution not directly supported by public funds, or a part thereof, which is equipped and staffed to private inpatient care to the mentally ill.

It seems clear from a review of the above provisions that the "nearest available facility" under §229.22(2) is any public or private facility which is closest in distance and is equipped and staffed to provide *inpatient care* to the mentally ill, except the Iowa Security Medical Facility at Oakdale, and except that jails and related type facilities may only be used in actual emergencies when no other secure facility is available.

A more troubling question is whether a facility may refuse to admit a patient detained under §229.22(2). There is no obligatory language in §229.22(2) which requires the facility to admit such a patient. Nevertheless, we resolve this question in favor of requiring admission. It is our opinion that the legislature did not intend for facilities to be able to reject the admission of emergency mental health patients. We do not believe that the legislature would dictate that emergency mental health patients be taken to the nearest available facility and intend at the same time that the facility be able to exercise a right to decline admission. Accordingly, we conclude that facilities do not have that right.

We further conclude that there are no constitutional infirmities in this legislative approach. The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 89 (Iowa 1977). While arguments may be raised that require a "private facility to admit mental patients over the facility's objections may impair the facility's obligations of contracts in violation of Iowa Const., Art. I, §21, and U.S. Const., Art. I, §10, and further may deprive the facility of due process of law in violation of Iowa Const., Art. I, §9, and U.S. Const. Amend. 5 and 14, we do not believe that such arguments can be sustained. Freedom of contract is both a liberty and a property right which is protected against arbitrary or unreasonable restraint, but this freedom is not absolute. 16A C.J.S. *Constitutional Law* §575 (1956). It is subject to the police power of the state to enact laws essential to the public safety, health, or morals. To justify the state in exercising such authority, it must appear the public interest requires such interposition and that the means are reasonably necessary for accomplishing the purpose and not unduly oppressive to individuals. It is, thus, a fundamental precept of constitutional law that matters within the police power of the state relating to public health may be regulated by the legislature. *Green v. Shama*, 217 N.W.2d 547 (Iowa 1974); Cf., *McGrory v. Board of Trustees*, 232 N.W.2d 262 (Iowa 1975), citing with approval 16A C.J.S. *Constitutional Law* §353 (1956).

III. WHAT IS THE EXTENT OF A PEACE OFFICER'S OBLIGATION WHO DELIVERS A MENTAL PATIENT TO A FACILITY FOR EMERGENCY CARE?

The duties and obligations of a peace officer under §229.22(2) are spelled out as follows:

> The peace officer who took the person into custody, or other party who brought the person to the hospital, shall describe the circumstances of the matter to the chief medical officer. If the chief medical officer finds that there is reason to believe that the person is seriously mentally impaired, and because of that impairment is likely to physically injure himself or herself or others if not immediately detained, the chief medical officer shall at once communicate with the nearest available magistrate as defined in section 801.4, subsection 6.

It seems clear from a reading of the statute that the peace officer's duty is to deliver the mental patient to a facility, and thereafter, "describe the circumstances of the matter to the chief medical officer" of the facility. This, we believe, imposes a duty upon the peace officer to clearly articulate the facts and circumstances which caused him/her to believe that the patient was mentally ill, and because of that mental illness was likely to physically injure him/herself or others if not immediately detained. Once this task is completed, the peace officer's responsibilities under §229.22(2) cease. It remains for the chief medical officer of the facility to make initial treatment decisions, to determine if there is reason to believe that the person is seriously mentally impaired, and to communicate with

the nearest available magistrate. None of these tasks are statutorily imposed upon the peace officer.

Your final question about liability for any injury that may happen to the mental patient involved does not supply sufficient facts for us to properly analyze it. We, therefore, decline to comment on it.

In summary, the term lack of "immediate access to the courts" within the meaning of §229.22(1) means the unavailability of an opportunity to forthwith, without delay, physically convey communications to the court regarding a proposed involuntary commitment. It may result from the unavailability of a district court judge or judicial hospitalization referee, or from physical forces preventing communications with the court. Section 229.21(3) presumes that a referee will act only when no district court judge is accessible in the county. The immediate access to the courts requirement of §229.22(1) will be satisfied if a district court judge or judicial hospitalization referee is available in another county in the same judicial district and such judge or referee can be reached without appreciable delay. Judges and referees may exercise their jurisdiction under chapter 229 in counties other than their county within the judicial district, when either consented to by the parties, authorized by the chief judge of the district, or when necessary.

The term "nearest available facility" within the meaning of §229.22(2) refers to any public or private facility which is closest in distance and is equipped and staffed to provide inpatient care to the mentally ill, except the Iowa Security Medical Facility at Oakdale, and except that jails and related type facilities may only be used in actual emergencies when no other secure facility is available. Public and private facilities as defined by chapter 229 do not have a right to decline the admission of persons delivered to such a facility for emergency mental health care pursuant to §229.22(2).

Under §229.22(2) a peace officer has a duty to deliver a mentally ill person detained pursuant to §229.22(2) to the nearest available facility. The officer has a further duty to clearly articulate the facts and circumstances which caused him/her to believe that the patient was mentally ill, and because of that mental illness was likely to physically injure him/herself or others if not immediately detained.

October 15, 1981

AERONAUTICS: Section 330.17, The Code 1981. A city, county, or township may not establish an airport commission under section 330.17 if it does not have a property interest in an airport. (Baty to Kassel, Director of Department of Transportation, 10/15/81) #81-10-11(L)

October 15, 1981

TAXATION: Real Property Taxation of the Common Areas or Elements of Condominiums, §499B.11, The Code 1981. Real property taxes for the common elements or areas of a condominium are not levied separately on the common elements or areas but, rather, are levied as a part of each unit or apartment on a fractional share or percentage basis so that each unit or apartment bears a portion of the real property taxes regarding the common elements or areas. (Kuehn to Chiodo, State Representative, 10/15/81) #81-10-12(L)

October 15, 1981

TAXATION: Accrual and Rate of Inheritance Tax Extension Interest. Section 450.6, The Code 1981, as amended by 1981 Session, 69th G.A., H.F. 734 and S.F. 555. In the event that an extension for payment of inheritance tax is granted by the director of revenue for an estate of a decedent dying before July 1, 1981, interest begins to accrue at the rate set forth in §1(2) of H.F. 734 on January 1, 1982, or at the expiration of twelve months from the date of the decedent's death, whichever occurs the later. In the event that the decedent dies on or after July 1, 1981, such extension interest begins to accrue from the expiration of nine months from the date of the decedent's death. (Griger to Kudart, State Senator, 10/15/81) #81-10-13(L)

October 16, 1981

MUNICIPALITIES: Urban Renewal, Public Bidding; Chapters 384, 403, The Code. Cities may forego public bidding when they undertake agreements designed to further urban renewal projects pursuant to chapter 403, the Code. (Appel to Chiodo, State Representative, 10/16/81) #81-10-14(L)

October 21, 1981

CLERKS; CRIMINAL PROCEDURE; CLERK OF COURT: There is no docketing fee for indictable criminal cases; the docketing fee for appeals of simple misdemeanors should be taxed as a part of the costs by the clerk rather than being collected when the notice of appeal is filed. (Williams to O'Brien, Court Administrator, Supreme Court of Iowa, 10/21/81) #81-10-15(L)

October 23, 1981

MUNICIPALITIES: Civil Service. Sections 4.1(22), 4.1(36)c, 400.6, and 400.11, The Code 1981. The chief of police is not one of the positions which may be temporarily filled according to the provisions of chapter 400. "Vacancy" as used in chapter 400 does not include the situation where the person occupying the position in question is on sick leave, regardless of the duration. Also, the twenty-day requirement in chapter 400 is to be construed in accordance with the terms of §4.1(22). Finally, the appointive power granted to a person or body to temporarily fill a vacancy is permissive or discretionary, rather than mandatory. (Walding to Junkins, State Senator, 10/23/81) #81-10-16(L)

October 23, 1981

COURTS; JUDICIAL MAGISTRATES: Accessibility to and retention of electronic recordings. §§631.11(3); 631.11(5); Ia.Rules Cr.Proc. 2(4)(g)(1); 2(4)(f), The Code. In civil proceedings electronic recordings may be removed from courthouse for transcription under supervision of magistrate. Electronic recordings in criminal proceedings may not be removed. The clerk of district court is responsible for destruction. (Swanson to Tullar, Sac County Attorney, 10/23/81) #81-10-17(L)

October 23, 1981

MOTOR VEHICLES: Minors' school licenses. Section 321.194, The Code 1981; DOT Reg. 820—[07,C]13.5(2)b; DPI Reg. 670—6.11(257). School Administrators do not have discretion under §321.194, The Code 1981, to deny the issuance of statements of necessity based on criteria wholly unrelated to those specified in that section, and administrative rules promulgated under it. The Iowa Department of Transportation does not possess statutory authority for accepting minors' school license applications without a statement of necessity. (Dundis to Angrick, Citizen's Aide/Ombudsman, 10/23/81) #81-10-18(L)

October 23, 1981

PENALTIES: Reserve Peace Officers, Unified Law Enforcement—§§28D.4(2), 28E.1, 28E.21, 80B.21, 80B.2, 80D.1, 80D.6, 80D.8, and 80D.9, The Code 1981. Because a regular peace officer force is a condition precedent to the establishment of a reserve peace officer force, a peace officer who is the sole member of a law enforcement agency must be certified as a regular officer, pursuant to chapter 80B, The Code 1981, rather than as a reserve officer, pursuant to chapter 80D The Code 1981. Local governments including a county, portion of a county, cities, or any combination thereof, may establish a unified law enforcement district pursuant to §§28E.21—28E.28, The Code 1981, for the joint exercise of their law enforcement authority. Law enforcement agencies may exchange officers and employees pursuant to chapter 80D, The Code 1981, however, if such exchange includes reserve peace officers, the receiving agency must have an existing regular peace officer force. (Hayward to Binneboese, State Representative, 10/23/81) #81-10-19(L)

October 26, 1981

PUBLIC OFFICIALS AND EMPLOYEES; CONFLICTS OF INTEREST: Chapter 68B, §68B.7; Chapter 610, §§610.1, 610.23, 610.24. Section 68B.7 prohibits an official or employee of a state agency from appearing before the agency within a period of two years after termination of service or employment only with respect to matters in which the official or employee was "directly concerned" or "personally participated." This prohibition does not violate due process or equal protection. This prohibition, furthermore, does not infringe on the jurisdiction of the Iowa Supreme Court to regulate the practice of law. (Pottorff to Pope, State Representative, 10/26/81) #81-10-20

The Honorable Lawrence E. Pope, State Representative: You have requested an opinion concerning the meaning of §68B.7, The Code 1981. Your inquiry notes that the first paragraph of the section states in part: "No person who has served as an official or employee of a state agency shall within a period of two years after the termination of such service or employment appear before such state agency or...". Specifically, you inquire as follows:

1. Does the above-quoted language impose an absolute ban on appearances by former employees within a two-year period, or is the above-quoted language to be read in conjunction with the remainder of the paragraph, and therefore constitutes a ban only when the former employee was "directly concerned" or "personally participated" in a matter during his or her term of employment?

2. Does section 68B.7, Code of Iowa, run afoul of the due process guarantees of the U.S. and/or Iowa Constitutions?

3. Does section 68B.7, Code of Iowa, run afoul of the equal protection guarantees of the U.S. and/or Iowa Constitutions?

4. As to attorneys, does section 68B.7, Code of Iowa, infringe in an unconstitutional fashion or otherwise on the exclusive jurisdiction of the Iowa Supreme Court to regulate the practice of law in Iowa in light of chapter 610, Code of Iowa, and the court's inherent powers?

It is our opinion that §68B.7 prohibits an official or employee of a state agency from appearing before the agency within a period of two years after termination of service or employment only with respect to matters in which the official or employee was "directly concerned" or "personally participated." This prohibition does not violate due process or equal protection. This prohibition, furthermore, does not infringe on the jurisdiction of the Iowa Supreme Court to regulate the practice of law.

Section 68B.7 specifically provides as follows:

> Ban for two-year period after service. No person who has served as an official or employee of a state agency shall within a period of two years after the termination of such service or employment appear before such state agency or receive compensation for any services rendered on behalf of any person, firm, corporation, or association in relation to any case, proceeding, or application with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment.
>
> No person who has served as the head of or on a commission or board of a regulatory agency or as a deputy thereof, shall within a period of two years after the termination of such service receive compensation for any services rendered on behalf of any person, firm, corporation, or association in any case, proceedings, or application before the department with which he so served wherein his compensation is to be dependent or contingent upon any action by such agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit, or in promoting or opposing, directly or indirectly, the passage of bills or resolutions before either house of the General Assembly.

Your inquiry focuses on the first paragraph of this section.

In construing this language, we observe the principles that each part of a statute is presumed to have a purpose and that a statute should be reasonably construed in its entirety to effect its purpose. *Iowa Department of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 11 (Iowa 1978). The first paragraph in this section is composed of one sentence that should be construed in its entirety. This sentence sets forth two specific prohibitions. Within two years after termination of his or her service or employment with a state agency, a state official or employee shall not: (1) appear before such state agency; or (2) receive compensation for any services rendered on behalf of any person, firm, corporation, or association. The sentence continues with the phrase "in relation to any case, proceeding, or application with respect to which such person was directly concerned and in which he [or she] personally participated during the period of his [or her] service or employment."

In order to construe the entire sentence to effect the purpose of the statute, the final phrase "in relation to any case, proceeding, or application with respect to

which such person was directly concerned and in which he [or she] personally participated..." should be interpreted as limiting both appearances before state agencies and receipts of compensation. The purpose of chapter 68B generally is to proscribe conduct "deemed inimical to the interests of the state and the public." 1978 Op.Att'y.Gen. 826, 828. If §68B.7 were construed to proscribe a person from all appearances before a state agency for a period of two years after termination of service or employment regardless of any previous concern or participation in pending issues, the statute could proscribe conduct which does not impinge on the interests of the state or the public. This construction of the statute would not effect the purpose of §68B.7. In our opinion, therefore, §68B.7 prohibits an official or employee of a state agency from appearing before the agency within a period of two years after termination of service or employment only with respect to matters in which the official or employee was "directly concerned" or "personally participated."

You inquire whether this limitation on appearances before state agencies violates due process under either the United States or Iowa Constitutions. We observe the principles that the state is vested with police power to provide for the public health, safety, morality, and general welfare. *Richards v. City of Muscatine*, 237 N.W.2d 48, 57 (Iowa 1975). Due process does not limit the exercise of the state's police power to forward these ends unless the state acts in a manner which is arbitrary, unreasonable, or improper. *Grubbs. v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 97 (Iowa 1977). In our opinion, the limitation on appearances before state agencies by former officials or employees of the agencies promotes the general welfare by preventing conflicts of interest. The statute is narrowly drafted to reach specified conduct with a definite time period. These limitations do not appear to impose restrictions which are arbitrary, unreasonable, or improper. If this statute were challenged in a court of law, therefore, we consider it unlikely the court would rule that §68B.7 violates due process.

You also inquire whether this limitation on appearances before state agencies violates equal protection under either the United States or Iowa Constitutions. We observe the principle that equal protection "does not require that all laws shall apply alike to all citizens of the state. It is sufficient if an enactment applies to all members of a class, providing the classification is not purely arbitrary but rests upon a reasonable basis." *Grubbs v. Iowa Housing Finance Authority*, 255 N.W.2d at 95. It is apparent that §68B.7 applies only to the class of persons who are former officials or employees of a state agency and whose service or employment terminated within the preceding two years. This classification, however, may rest upon the justification that former officials or employees who have recently terminated their employment with an agency are likely to encounter conflicts of interest in appearing before the agency on matters in which they previously were "directly concerned" or "personally participated." In our opinion, this justification constitutes a rational basis for treating such former officials or employees as a class under §68B.7. If this statute were challenged in a court of law, therefore, we also consider it unlikely the court would rule that §68B.7 violates equal protection.

You finally inquire whether this limitation on appearances before state agencies may be applied to attorneys without infringing on the "exclusive jurisdiction" of the Iowa Supreme Court to regulate the practice of law under either chapter 610 of the Code or the court's inherent powers.

Chapter 610 addresses the regulation of attorneys and counselors in Iowa. This chapter is composed of forty-nine separate statutes. §610.1—610.49, The Code 1981.

We observe that three statutes in chapter 610 vest the Iowa Supreme Court with authority to regulate attorneys. Sections 610.1, 610.23 and 610.24, respectively, provide:

610.1 Admission to practice. The power to admit persons to practice as attorneys and counselors, in the courts of this state, or any of them, is vested exclusively in the supreme court which shall adopt and promulgate rules to carry out the intent and purpose of this chapter.

* * *

610.23 Revocation of license. The supreme court may revoke or suspend the license of an attorney to practice law in this state.

610.24 Grounds of revocation. The following are sufficient causes for revocation or suspensions:

1. When he has been convicted of a felony. The record of conviction is conclusive evidence.
2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with or in the course of his profession.
3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.
4. Doing any other act to which such a consequence is by law attached.
5. Soliciting legal business for himself or office, either by himself or representative. Nothing herein contained shall be construed to prevent or prohibit listing in legal or other directories, law lists and other similar publications, or the publication of professional cards in any such lists, directories, newspapers or other publication.

These sections are concerned only with admission to practice and revocation or suspension of a license on specified grounds. None of these sections vest the court with "exclusive jurisdiction" over conflicts of interest in the practice of law.

A review of the remaining sections of chapter 610 similarly reveals no authority which would vest the court with "exclusive jurisdiction" over this subject. In our opinion, therefore, §68B.7 does not infringe on the "exclusive jurisdiction" of the Iowa Supreme Court under chapter 610.

We separately consider your inquiry whether §68B.7 infringes on the court's inherent powers. We recognize that, in addition to the statutory authority over attorneys set out in chapter 610, the Iowa Supreme Court has inherent constitutional power to discipline attorneys within the state. *Committee on Professional Ethics v. Gartin*, 272 N.W.2d 485, 487 (Iowa 1978). This power includes the enforcement of the Iowa Code of Professional Responsibility. *In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976). We note that the Iowa Code of Professional Responsibility does generally address the subject of conflicts of interest, although it does not specifically prohibit appearances by former officials or employees before state agencies. *Iowa Canons of Professional Ethics*, No. 5.

We observe that §68B.7 does not purport to be a professional disciplinary statute. The statute broadly states that "[n]o person . . . shall" commit the prohibited acts. §68B.7, The Code 1981. These terms would include attorneys as well as other groups of former officials or employees. The statute, however, does not provide for professional discipline upon a violation of its terms.

We point out that attorneys, like other persons within the state of Iowa, are subject to a wide range of statutes under the Code which place limitations on their conduct. Some of these statutes may be violated in the course of professional activity. *See, e.g.*, §719.3(2) (inducing a witness to fail to appear when subpoenaed). Unless such statutes, minimally, purported to impose professional disci-

pline, however, we do not perceive any infringement on the court's inherent power to discipline attorneys within the state. We conclude, therefore, that §68B.7 does not infringe on the court's inherent power.

In summary, we advise that §68B.7 prohibits an official or employee of a state agency from appearing before the agency within a period of two years after termination of service or employment only with respect to matters in which the official or employee was "directly concerned" or "personally participated." This prohibition does not violate due process or equal protection. This prohibition, furthermore, does not infringe on the jurisdiction of the Iowa Supreme Court to regulate the practice of law.

October 23, 1981

BANKS; HOLDING COMPANIES CONTROL: Section 524.1803, The Code 1981; 12 U.S.C. §§1817 and 1842. No bank holding company shall make any offer to purchase or acquire, directly or indirectly, the voting shares of any state or national bank without extending the same offer to owners of all outstanding shares of the bank not owned or controlled by the holding company. The mechanism of disclosure may vary so long as it reasonably apprises the shareholders of the current price offered except in those instances where federal and state securities law and federal banking law applies. (Hagen to Huston, State Superintendent of Banking, 10/23/81) #81-10-21(L)

October 23, 1981

MENTAL HEALTH; COUNTIES AND COUNTY OFFICERS: Investigation of mental patient's ability to pay for mental health care. §§4.1(36)(a), 230.1, 230.15, 230.25(1), 230.26, The Code 1981. County board of supervisors has an affirmative duty to investigate the ability for a mental health patient to pay, or others liable for the patient's support, to pay for mental health care. The board is not required to direct the county auditor to index a patient's name where the board finds that the patient or others liable for the patient's support is able to pay for mental health care, but is required to direct the auditor not to index a patient's name where the board finds an inability to pay. The county auditor is required to automatically index a patient's name in the county's account book, unless pursuant to §230.25(1) the board of supervisors directs that the patient's name not be indexed. (Mann to Bloom, Montgomery County Attorney, 10/23/81) #81-10-22(L)

October 28, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Health. Division of Vital Records and Statistics. Sections 144.13, 144.15, 144.45, The Code 1981. Certified copies of birth certificates issued by the Department of Health must show the date of registration. The department may not, in lieu of the date of registration, certify that the registration was timely and that the certificate was not a delayed registration. (Freeman to Pawlewski, Commissioner of Public Health, 10/28/81) #81-10-23(L)

October 24, 1981

MENTAL HEALTH: County Liability for Costs of Care of Mental Patients Admitted to Private Hospitals. §§229.22, 230.1, 230.11, 230.18, 444.12, 444.12(2), 444.12(3), The Code 1981. County of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under §229.22, The Code 1981. The county of admission or commitment is liable for the costs of care and treatment of mental patients treated at a private facility under §229.22, The Code 1981, where the legal settlement of the patient is in another state or is unknown. Statutory liability for the costs of care and treatment of a mental patient without legal settlement is only imposed upon the state when such persons are treated at state hospitals. (Mann to Davis, Scott County Attorney, 10/28/81) #81-10-24(L)

October 30, 1981

COUNTIES AND COUNTY OFFICERS; COLLECTIVE BARGAINING: §§20.28, 344.8—10, The Code 1981. County officers are prohibited from expending funds in excess of their authorized appropriation. Projected deficits in an office's appropriation can be covered by a transfer of funds. The transfer must be pursuant to a properly adopted resolution of the board of supervisors. (Fortney to Kenyon, Union County Attorney, 10/30/81) #81-10-25(L)

October 30, 1981

MUNICIPALITIES: Civil Service. Sections 4.2, 4.4, 4.6, 341A.9, 400.1, 400.2, 400.3, 400.6, 400.6(1)a-f, 400.6(2)a-c, 400.7, and 400.8(1), The Code 1981. Retention of position with full civil service rights, under chapter 400, is provided for a person in: (1) any position, supervisory or nonsupervisory, in the police or fire department; and (2) a nonsupervisory position in any other department if: (a) held on April 16, 1932, or (b) held after said date after qualifying in competitive examination. Eligibility for appointment to a supervisory position in departments other than police or fire, under chapter 400, is provided for a person in said position after qualifying in competitive examination. To the extent that on-the-job performance and oral examinations aid the civil service commission in determining applicants' qualifications for particular civil service positions, such performance and examinations may be made part of the original entrance examination. (Walding to Junkins, State Senator, 10/30/81) #81-10-26

The Honorable Lowell L. Junkins, State Senator: This opinion is in response to your request dated July 20, 1981, regarding the establishment of a civil service system. Specifically, you have asked:

1. When establishing a civil service system, does section 400.7 allow a city to retain all employees, supervisory or nonsupervisory, regardless of years of service, without requiring examination?

2. If it is your opinion that an examination is required, may the city provide for on-the-job performance and oral examinations?

The applicable chapter of the Code is chapter 400. Proper consideration of your questions, however, first warrants an examination of municipal participation, mandatory and optional, in civil service and the scope of the act.

As noted, municipal participation in civil service is either mandatory or optional. Mandatory participation is required of cities with a population of eight thousand or more if they have a paid fire department or paid police department. *See* §400.1, The Code 1981. In such cities, the mayor, with council approval, is required to appoint a three-member civil service commission. The qualifications of such commissioners, we should note, are provided for in §400.2, The Code 1981. Optional participation is provided for cities with a population of less than eight thousand. *See* §400.3, The Code 1981. The cities which choose to participate, however, must adopt the provisions of chapter 400. The cities which opt to participate are required either to appoint a civil service commission or to provide the council with the powers and duties of the commission.

The scope of the act is equally dependent upon the size of the community. In particular, application of chapter 400 differs between cities with a population of more than fifteen thousand and all other cities (i.e. cities with a population of fifteen thousand or less). *See* §400.6, The Code 1981. In the former, the provisions apply to all appointive officers and employees. Exempt from coverage are a few select positions. *See* §400.6(1)a-f, The Code 1981. In the latter, however, the provisions apply only to members of the police and fire departments. Exemption is provided for chiefs of police, several maintenance and clerical positions, and casual employees. *See* §400.6(2)a-c, The Code 1981. As a result, coverage under the act is narrower in the case of cities with a population of 15,000 or less. The intent, of course, is to avoid placing too great a burden on smaller communities.

I. PREFERENCE BY SERVICE

With the foregoing presented, attention is now directed to your first inquiry. Provision for "grandfathering in" incumbents is provided for in chapter 400. *See Romaine v. Civil Service Commission*, 181 N.W.2d 431 (Iowa 1970). In particular, §400.7, The Code 1981, provides in part:

> Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter on April 16, 1937, in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.
>
> Persons in nonsupervisory positions, appointed without competitive examination, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they fail to pass such examination they shall be replaced by successful applicants.
>
> Provided, that persons who have heretofore been certified by the commission as eligible for appointment to any position in which they are regularly serving on said date, and persons regularly serving on said date in any position with civil service rights by reason of long and efficient service rendered prior to October, 1924, shall retain such position and shall have full civil service rights therein without further examination. Other persons regularly serving in supervisory positions in departments other than police or fire on April 16, 1937, shall be eligible for appointment to said positions after qualifying in competitive examination.

Generally, statutes are to be liberally construed with a view to promote their objects and assist the parties in obtaining justice. *See* §4.2, The Code 1981. It is

presumed that a just and reasonable result is intended and that public interest is favored over any private interest. *See* §4.4, The Code 1981. If a statute is ambiguous, the following may be considered in determining the legislative intent: (1) The object sought to be obtained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the preamble or statement of policy. *See* §4.6, The Code 1981.

When a statute is construed, a court is required to consider the language used, the object to be accomplished, and to place a reasonable construction on the statute which will best effect its purpose. *See State v. One Certain Conveyance*, 211 N.W.2d 297 (Iowa 1973); The court should also consider all parts of a statute together without according undue importance to single or isolated portions. *See Osborne v. Edison* 211 N.W.2d 696 (Iowa 1973); *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969). A duty exists to seek out and give effect to legislative intent, *Jones v. Iowa State Highway Commission*, 207 N.W.2d 1 (Iowa 1973), but that intent should be as shown by what the legislature said rather than what it should or might have said, *Lindstrom v. Aetna Life Ins. Co.*, 203 N.W.2d 623 (Iowa 1973). The manifest intent of the legislature prevails over the literal import of the words used, *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692 (Iowa 1973), however, ordinary rules of grammar can be used as an aid to the interpretation, *Dingman v. City of Council Bluffs*, 249 Iowa 1121, 90 N.W.2d 742 (1958); *Zilske v. Albers*, 238 Iowa 1050 29 N.W.2d 189 (1947). In addition, meanings of various words are to be construed in connection with associated words and given an interpretation in accord with the legislative intent expressed therein. *See State v. Bauer*, 236 Iowa 1020, 20 N.W.2d 431 (1945). *See also, Smith v. City of Fort Dodge*, 160 N.W.2d 492 (Iowa 1968). Of course, these rules have no application unless the statute in question is ambiguous, obscure or reasonable minds may and do disagree or be uncertain as to the meaning. *See Janson F. Fulton*, 162 N.W.2d 438 (Iowa 1968).

We find that the wording in unnumbered paragraph one of §400.7 is ambiguous and that reasonable minds can disagree or be uncertain as to its meaning. A quick reading of that part of the statute in question leaves two impressions: (1) "which is within the scope of this chapter on April 16, 1937, in any city, who has then five years of service in a position or positions within the scope of this chapter" modifies "any position in the police or fire department" and "a nonsupervisory position in any other department," or (2) "which is within the scope of this chapter on April 16, 1937, in any city, who has then five years of service in a position or positions within the scope of this chapter" modifies only "a nonsupervisory position in any other department." The former interpretation leads to the conclusion that a person in any position in the police or fire department, supervisory or nonsupervisory, or in a nonsupervisory position in any other department retains the position with full civil service rights if in such position as of April 16, 1932. Conversely, the latter interpretation leads to the conclusion that retention of position with full civil service rights is provided for a person in any supervisory or nonsupervisory position, held when civil service was enacted, in the police or fire department, or in a nonsupervisory position, held as of April 16, 1932, in any other department.

In our judgment, the latter interpretation is the correct interpretation. Our rationale is threefold. First, the rule of "last antecedent" generally prevails where the modifying phrase succeeds the provision or clause in question. It is stated in 2A Sands, *Sutherland Statutory Construction*, §47.33, p. 159 (4th ed. 1973), which supercedes the more frequently cited 2 Horack, *Sutherland Statutory Construction*, §4921 (3rd ed. 1943):

> Referential and qualifying words and phrases, where no such contrary intention appears, refer solely to the last antecedent, which consists of 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.

Accordingly, the modifying phrase "grandfathering in" a person in service as of April 16, 1932, absent an impairment of the meaning of the sentence, refers solely to the last antecedent, "a nonsupervisory position in any other department."

Second, the consequences of the particular constructions is relevant. Under the former interpretation, retention of position with full civil service rights is provided for a person in (1) any position, held as of April 16, 1932, in the police or fire department, supervisory or nonsupervisory, or a nonsupervisory position, held on said date, in any other department; and (2) all nonsupervisory positions, not held on said date, after qualifying in competitive examination. Eligibility for appointment to a supervisory position in departments other than police or fire, under the former interpretation, is provided for a person in said position after qualifying in competitive examination. Such an interpretation results in a discontinuity. No provision is made for any supervisory position in the police or fire department.

Conversely, retention of position with full civil service rights, under the latter interpretation, is provided for a person in: (1) any position, supervisory or nonsupervisory, in the police or fire department; and (2) a nonsupervisory position in any other department if: (1) held on April 16, 1932, or (b) held after said date after qualifying in competitive examination. Eligibility for appointment to a supervisory position in departments other than police or fire, under the latter interpretation, is provided for a person in said position after qualifying in competitive examination. Such an interpretation does not produce a discontinuity. Accordingly, the latter interpretation is more consistent with the general scheme of the act.

Finally, a legislative preference for public safety officers has been shown when enacting civil service systems. For instance, when civil service was provided for deputy county sheriffs, the legislature "grandfathered in" all persons then holding such a position. *See* §341A.9, The Code 1981. Since all ninety-nine counties adopted civil service for deputy sheriffs ninety-nine counties adopted civil service for deputy sheriffs simultaneously, the preference for those in service at the time was inclusive. Simultaneous adoption of civil service, however, has not occurred at the municipal level. In fact, two avenues avail nonparticipating municipalities which wish to adopt civil service: mandatory participation, as result of an increase in population, and optional participation. Only the latter interpretation provides for inclusive preference for public safety officers. Such a preference, it should be noted, is defendable on the ground that it is difficult to attract experienced personnel to public safety positions, especially in smaller communities.

Accordingly, retention of position with full civil service rights, under chapter 400, is provided for a person in: (1) any position, supervisory or nonsupervisory, in the police or fire department; and (2) a nonsupervisory position in any other department if: (a) held on April 16, 1932, or (b) held after said date after qualifying in competitive examination. Eligibility for appointment to a supervisory position in departments other than police or fire, under chapter 400, is provided for a person in said position after qualifying in competitive examination.

II. ORIGINAL ENTRANCE EXAMINATION

Your second inquiry concerns the nature of the original entrance examination. Section 400.8(1), The Code 1981, provides:

> The commission shall at such times as shall be found necessary under such rules, including minimum and maximum age limits, as shall be prescribed and published in advance by the commission and posted in the city hall, hold *examinations for the purpose of determining the qualifications of applicants for positions under civil service*, other than promotions, which *examinations shall be practical in character and shall relate to such matters as will fairly test the mental and physical ability of the applicant to discharge the duties of the position to which the applicant seeks appointment.* Provided, however, that such physical examination of applicants for appointment to the positions of policeman, policewoman, police matron or fire fighter shall be held under the direction of and as specified by the boards of trustees of the fire or police retirement systems established by section 411.5. An applicant shall not be discriminated against on the basis of height, weight, sex, or race in determining physical or mental ability of the applicant. Reasonable rules relating to strength, agility, and general health of applicants shall be prescribed. The costs of the physical examination required under this subsection shall be paid from the trust and agency fund of the city. [Emphasis added.]

The standard which a civil service commission must follow when designing an examination, as the underscored portion of the aforementioned language makes evident, is that the examination determine the applicants' qualifications for particular civil service positions. Such an examination shall be practical. In addition, the examination shall test the applicants' mental and physical ability to discharge the duties of the position.

The Iowa Supreme Court has stated concerning the civil service commission that "a wide discretion must necessarily be allowed in the performance of its duties." *Jenny v. Civil Service Commission*, 200 Iowa 1042, 1044, 205 N.W. 958, 959 (1925). Of course, the civil service commission cannot act arbitrarily, capriciously, or unreasonably. *See Patch v. Civil Service Commission*, 295 N.W.2d 460, 464 (1980). In defining the limitations of a civil service commission's power, it has been said that a commission's actions must be upheld if there are any fair or reasonable grounds to sustain its actions. *See Zicherman v. Department of Civil Service*, 40 N.J. 347, 351, 192 A.2d 566, 568 (1963); *Walters v. Clark*, 53 App.Div.2d 1012, 1013, 386 N.Y.S.2d 586, 587 (1976), as cited in *Patch v. Civil Service Commission, supra*. Accordingly, a civil service commission has a wide discretion in designing an examination to determine the qualifications of applicants for particular civil service positions.

Specifically, you have made inquiry as to on-the-job performance and oral examinations. To the extent that such performance and examinations aid the civil service commission in determining applicants' qualifications for particular civil service positions, they may be made a part of the original entrance examination.

In summary then, retention of position with full civil service rights, under chapter 400, is provided for a person in: (1) any position, supervisory or nonsupervisory, in the police or fire department; and (2) a nonsupervisory position in any other department if: (a) held on April 16, 1932, or (b) held after said date after qualifying in competitive examination. Eligibility for appointment to a supervisory position in departments other than police or fire, under chapter 400, is provided for a person in said position after qualifying in competitive examination. To the extent that on-the-job performance and oral examinations aid the

civil service commission in determining applicants' qualifications for particular civil service positions, such performance and examinations may be made a part of the original entrance examination.

October 30, 1981

SCHOOLS: Taxes, levy for cash reserves. Chapter 298, The Code; 1981 Session, 69th G.A., H.F. 414, §1. The maximum amount which may be levied for cash reserves is the amount by which 7.5% of total expenditures for the preceding school year, including salaries contracted for the immediately following July and August, exceeds the district's actual cash balance on June 30 of that school year. (Norby to Gratias and Hutchins, State Senators, 10/30/81) #81-10-27

The Honorable Arthur L. Gratias, State Senator; The Honorable C. W. Hutchins, State Senator: You have requested an opinion of the attorney general concerning the calculation of the amount which may be levied by a school district to create or supplement cash reserves pursuant to 69th G.A., 1981 Session, H.F. 414, §1 (to be codified in chapter 298, The Code. [1] This section provides as follows:

> *NEW SECTION:* If a school district has a cash reserve of less than seven and five-tenths percent of its total district expenditures for a school year remaining on June 30 of that school year, including salaries encumbered under contract for the next following July and August, the board of directors may certify for levy by the following March 15, a tax on taxable property in the school district at a rate that will provide a cash reserve, pursuant to section 8.6, subsection 4, paragraph c, of not to exceed the seven and five-tenths percent amount. The tax levy authorized in this subsection is in addition to any other tax levy authorized for a school district.

Your question essentially concerns the definition of "cash reserves". This amount is important, as the maximum amount of the levy for cash reserves will be the amount which, when added to existing cash reserves, will equal the statutory maximum of 7.5% of expenditures and encumbered salaries. The amount of the levy could be calculated as follows:

> 7.5% of total district expenditures
> (including encumbered salaries)
>
> - existing cash reserves
>
> = the maximum amount which may be levied
> pursuant to H.F. 414

Unfortunately, neither H.F. 414 nor any other Code section expressly defines cash reserves. House File 414 simply provides for calculation of cash reserves pursuant to §8.6(4)(c), The Code. Prior to the present year, the comptroller's office and the school districts had relied on §8.6(4)(c) as an authorization to levy a tax for

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[1] All references are to The Code 1981 unless otherwise specified.

cash reserves. *See* Op.Att'y.Gen. #80-12-18. The formula outlined in §8.6(4)(c) for calculation of the amount to be received from property taxes is as follows:

Estimated expenditures

\+ required cash reserve

\- all estimated or actual unencumbered balances at beginning of the year

\- estimated income from all sources other than property taxes

= the amount to be received from property taxes.

When this section was used as an authorization for levy of a separate tax for cash reserves, the amount of the levy was not limited to any definite amount. [2] Accordingly, there was no need to define cash reserves. The essential question herein, therefore, appears to us to be arriving at an appropriate calculation of existing cash reserves.

The difficulty with making a calculation of existing cash reserves is that, although some districts have been making such a levy, accounting practices have not been employed which would allow a present determination of the remaining balance of these funds. Revenue from the cash reserve levy was not accounted for separately from the general fund. Spending of funds levied as cash reserves was not limited, therefore, except to the extent that spending from the entire general fund is limited by the authorized expenditure limit. §442.5(2). While H.F. 414 places a maximum limit on the amount of the cash reserve, it does not place any control on spending of these funds. Accordingly, several problems remain which prevent a clear solution to implementation of H.F. 414. To illustrate these problems, a review of the school finance system is necessary.

Prior to the present year, §8.6(4)(c) had been relied upon as authorization for a levy for cash reserves. An attorney general's opinion issued on December 12, 1980, stated that this section did not constitute authorization for a distinct tax levy in addition to the levy authorized in chapter 442, The Code. Op.Att'y.Gen. #80-12-18. In this opinion, the purpose of a levy for cash reserves, as then in practice, was discussed as follows:

> A levy for cash reserves is a levy of an additional amount of revenue for a school district's general fund, rather than creation of a separate and distinct fund. While such a levy will increase the cost to the taxpayers in a year when such a levy is made, the district is subject to a maximum limitation on expenditures during each school year. §442.5(2), The Code 1979. The availability of additional reserves would, however, be beneficial in several ways. The presence of additional reserves might eliminate the need for a school to borrow funds during the periods when receipt of tax revenues is not sufficient to meet current expenditures. In addition, the presence of a reserve balance would allow a school to spend up to their maximum limit even if current receipts, whether from property taxes or state aid, were insuffi-

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2 The desired amount of the levy for cash reserves was simply added to the authorized tax levies in arriving at the total amount of property tax levied.

cient to fund the authorized level of expenditure. [3] For example, the recent 3.6% decrease in state aid to school districts might be replaced in full or in part from cash reserves, thereby allowing a district to spend up to their maximum limitation despite this cut in state aid.

In addition to these comments, we believe several additional points will help to clarify the nature of the levy for cash reserves as practiced in past years and the problems faced in attempting to calculate the existing balance of cash reserves.

Iowa school districts are subject to a limit on general fund expenditures which may be made in one year. §442.5(2). As discussed above, tax revenues are not likely to equal the amount of authorized expenditures in any one year or over a period of years. The amount by which the authorized expenditures limit exceeds actual expenditures, the "actual unspent balance from the preceding year", [4] is automatically added to the authorized expenditure limit for the next year. §442.5(2). Accordingly, even if current tax revenues fall below the limit of authorized expenditures, a school may spend up to that limit through borrowing or from general funds moneys accumulated from sources other than current tax revenues. These other moneys might have accumulated from several sources, including revenue collected through past levies for cash reserves. Accordingly, the levy for cash reserves was a "reserve" in name only, and was really only a method by which the total levy was increased beyond the limits created by chapter 442. House File 414, by simply authorizing a levy pursuant to §8.6(4)(c), does not aid in calculating existing cash reserves nor create a separate fund for cash reserves. The amount that might be levied is therefore unclear, and nothing prevents spending of this revenue for normal operating expenses as long as the authorized expenditure limit is not exceeded.

Having discussed what appears to us as potential problems created by the levy for cash reserves, both in the past and pursuant to H.F. 414, we turn to the question of defining existing cash reserves, and therefore, the amount which may be levied to bring this amount to the maximum of 7.5% of expenditures and encumbered salaries.

In devising their form for calculation of the levy for cash reserves, the comptroller's office has provided the following formula:

1. General Fund Expenditures

   \+ July and August salaries

   = Total commitment.

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[3] An illustration of this problem is presented by the personal property and livestock tax replacement funds. §§427.12 and 427A.17, The Code 1981. The full amount of these payments due to the school districts from the state is used in calculating the amount of the foundation tax levy. §§442.2(2) and 442.2(3), The Code 1981. The legislature may, however, appropriate less than the amount necessary, resulting in a proration of replacement funds among taxing districts. §§423.17(5) and 427A.12(8). The legislature has, however, taken action to allow school districts to recover the amount lost due to proration of the property tax replacement fund. 1980 Session, 68th G.A., chapter 1076, §9 [amending §442.2(2)].

[4] This sum is often referred to as the carryover balance.

2. Total Commitment

× .075

= Maximum cash balance [Maximum cash reserve balance]

3. Maximum Cash Balance

- Actual cash balance [Existing cash reserves]

= Maximum cash reserve levy

Accordingly, the comptroller's office has assumed that the actual cash balance on June 30 is equal to existing cash reserves.

This conclusion is subject to several criticisms. The actual cash balance would be composed of funds received from a number of sources, not just past levies for cash reserves. In fact, there exist many districts which have never made a levy for cash reserves, yet they have a positive actual cash balance. All that can really be said of the actual cash balance is that it consists of all general fund moneys, from any source, which have not been spent. While this amount could include moneys from past levies for cash reserves, it could also include foundation state aid or tax revenues which were not spent, or possibly an authorized transfer from the schoolhouse fund to the general fund. §278.1(5). Again, uncertainty arises in that there has not been a separate accounting of disbursements of revenues received from the cash reserve levy nor does H.F. 414 provide for a separate accounting in the future.

A second method of calculating existing cash reserves has been suggested to our office by several sources, including the Department of Public Instruction (D.P.I.). For purposes of discussion, we will refer to this method of calculation as the D.P.I.'s interpretation. Under the D.P.I.'s interpretation, the actual unspent balance from the previous year is subtracted from the actual cash balance to arrive at a figure for existing cash reserves. Initially, this method of calculation might appear proper in that an amount equal to the actual unspent balance may be spent by a district as normal general fund expenditures in the following year as this amount is added to the authorized expenditure limit pursuant to §442.5(2). Accordingly, since this amount may be spent for normal operating expenses if revenue is available, or through borrowing, it is argued that this amount should not be considered as part of existing cash reserves. We believe the problem with this argument is that it assumes that school districts are intended to be funded at the level of the authorized expenditure limit. As discussed above, chapter 442 does not guarantee funding at this level. Providing that schools *may* spend at the level of authorized expenditures is not a guarantee of funding at that level. But if H.F. 414 is interpreted according to this second method of calculation, it will have the effect of allowing districts to gather the amount by which authorized expenditures have exceeded actual revenue received for all years since creation of the foundation program. We do not believe such a drastic departure from established practice is created by H.F. 414. In other words, we do not believe that in attempting to create a cash reserve equal to 7.5% of one year's expenditures, the legislature intended to fully fund districts at the level of authorized expenditures, particularly in light of unrepealed statutes which clearly show that revenue will not equal authorized expenditures. *See* §§423.17(5), 427A.12(8) and 442.2(2), The Code 1981.

Examination of the effect of these two methods of calculation demonstrates their varied outcomes and the potentially large levy if the D.P.I.'s interpretation were implemented. Actual figures from two districts are used:

District A

Actual cash balance	=	$ 75,769
Actual unspent balance	=	32,490
Expenditures and encumbered salaries	=	359,382

District A (Comptroller's interpretation)

Expenditures		359.382
× .075		.075
= Maximum cash reserve	=	26,944
Existing cash reserve		
- (actual cash balance)	-	75,769
= Maximum levy for cash reserves	=	(48,825)

No levy could be made for cash reserves:

District A (D.P.I. interpretation)

Actual cash balance		74,769
- Actual unspent balance	-	32,490
= Existing cash reserve	=	43,279
Maximum cash reserve (same as in Comptroller's interpretation)	=	$ 26,944
- Existing cash reserve	-	43,279
= Maximum levy for cash reserve	=	(16,335)

Still no levy for cash reserves, but application of the D.P.I. results in a much smaller existing cash reserve balance.

District B

Actual cash balance		632,179
Actual unspent balance		1,019,867
Expenditures and encumbered salaries		2,862,279

District B (Comptroller's interpretation)

Expenditures and encumbered salaries × .075	×	.075
= Maximum cash reserve	=	214,671
- Existing cash reserve (actual cash balance)	-	632,179
= Maximum levy for cash reserves	=	(417,508)

No levy for cash reserves.

District B (D.P.I. interpretation)

Actual cash balance		632,179
- Actual unspent balance	-	1,019,867
= Existing cash reserve	=	(387,688)
Maximum cash reserve (same as in method 1)		214,671
- Existing cash reserve	-	(387,688)
= Maximum levy for cash reserve	=	602,359

A levy for cash reserves of $602,359 might be made. This would in effect create a levy equal to 7.5% of actual expenditures and encumbered salaries, and in addi-

tion, the amount by which the authorized expenditure limit exceeds actual expenditures.

Having discussed the various aspects of the levy for cash reserves and these two methods of calculation, we believe that the solution to this problem is not readily apparent. We believe the H.F. 414 does exhibit an intent to adopt the method of levy in practice prior to our opinion finding that practice unauthorized. Accordingly, we believe the characteristics of the past practice are of value in reaching our conclusion here, particularly the following:

1. The fact that amounts collected through past levies were not accounted for or controlled separately from the general fund.

2. H.F. 414 does not create mechanisms for separate control of funds levied as cash reserves.

Accordingly, we see no principled means to implement an accounting of cash reserves separate from other general fund moneys. We cannot agree with the D.P.I. method of calculation, as it has the effect of making H.F. 414 a funding device. We do not believe that H.F. 414 can be interpreted as a guarantee of funding at the level of the authorized expenditure limit. We, therefore, agree with the comptroller that the actual cash balance on June 30th equals the existing cash reserve balance for the purpose of calculating the allowable maximum cash reserve levy. A levy for cash reserves may be made, therefore, only if the actual cash balance on June 30th is less than 7.5% of actual expenditures for the preceding year, including salaries for the following July and August. The maximum levy allowable is the amount by which 7.5% of these expenditures and salaries exceed the district's actual cash balance on June 30th.

NOVEMBER 1981

November 3, 1981

CONSTITUTIONAL LAW; GOVERNOR; ITEM VETO: Iowa Constitution, Art. III, §§16 and 29. Section 24 of H.F. 875, 69th G.A., 1981 Session is unconstitutional as it is not germane to the subject of the bill. If §24 were found to be germane to H.F. 875, the exercise of the governor's item veto power with respect to §24 was valid. (Fortney to Welden, State Representative, 11/3/81) #81-11-1

The Honorable Richard W. Welden, State Representative: You have requested an opinion of the attorney general regarding Governor Robert Ray's exercise of an item veto with respect to §24 of House File 875, adopted by the 1981 Session of the Sixty-ninth General Assembly. It is our opinion that §24 must fail as it is not germane to the subject of House File 875. In the alternative, should §24 be found germane, we are of the opinion that the governor properly exercised his item veto authority.

House File 875 is entitled "An Act relating to the compensation and benefits for public officials and employees by specifying salary rates and ranges and providing salary adjustments, increasing mileage reimbursement rates for public officers and employees, providing reimbursement for interview and moving expenses, making coordinating amendments to the Code, and appropriating funds." House File 875 is unquestionably an appropriation bill.

Following passage of House File 875, the bill was transmitted to the governor. On June 19, 1981, the governor transmitted the bill to the secretary of state accompanied by an item veto message. [1] The item veto was exercised against §24 of House File 875 which provided as follows:

> It is a condition of the appropriations made in this Act that mileage expense reimbursement rates or payments shall not be negotiated or included in a proposed collective bargaining ageement under chapter 20 during the biennium beginning July 1, 1981 and ending June 30, 1983.

You have inquired whether the veto in question "was a proper use of the item veto power and whether the fact that the condition on the appropriation was contained in a separate section would make it any more subject to veto than if it was contained in the appropriating sentence of each individual appropriation." [2]

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[1] The governor's exercise of his item veto authority was based on his belief that it was inappropriate to effect a substantive change in Iowa's collective bargaining law in the context of an appropriation bill. He also believed that the restriction imposed by §24 would create legal and practical difficulties for the state's collective bargaining agents. *See* letter from Robert D. Ray to Secretary of State Mary Jane Odell dated June 19, 1981.

[2] The changes in the amount of authorized mileage reimbursements permitted by the Code are found in §§22 and 23 of House File 875. However, the sections do not appropriate any money from the general fund. Travel expenses are paid from funds appropriated to the individual agencies and departments in their respective appropriation bills.

end file 11/1

The authority of the governor to exercise a veto is found in Iowa Constitution, article III, §16. If the governor wishes to veto a bill he or she must disapprove the measure as a totality. The only exception to this rule is found in Amendment 4 of the 1968 Amendments which authorized the item veto of appropriation bills. The Amendment reads:

> The governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the secretary of state in the case of an appropriation bill submitted to the governor for his approval during the last three days of a session of the General Assembly, and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the governor's objections, in the same manner as provided for other bills.

Prior to addressing the appropriateness of the governor's item veto of §24, we feel compelled to examine an issue you did not raise, the germaneness of §24 to House File 875. While we generally do not address issues not presented to us, we do so in this instance as the germaneness question is dispositive.

Iowa Constitution, article III, §29 provides:

> Every Act shall embrace but one subject, and matters properly connected therewith which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.

The foregoing section has been interpreted to allow a single Act to embrace a number of provisions so long as these provisions relate to one general topic and this topic is indicated in the title. A liberal test has been formulated for review which requires only that all parts of an Act be reasonably connected and not incongruous with the subject expressed in the title of the Act. In *Long v. Supervisors of Benton County*, 258 Iowa 1278, 142 N.W.2d 378, 381 (1966), the test regarding multiple subjects was expressed as follows:

> To constitute duplicity of subject, an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection or relation to each other. All that is necessary is that the Act should embrace some one general subject, and by that is meant, merely, that all matters treated therein should fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of or germane to one general subject.

Historically, the vast majority of Acts challenged under art. III, §29 have been upheld. *See Yost, Before a Bill Becomes Law — Constitutional Form*, 8 Drake Law Review 66, 67. A number of Acts, however, have been found to be partially or totally void under art. III, §29. *See State v. Nickelson, 169 N.W.2d 832 (Iowa 1969); National Benefit Acc. Ass'n. v. Murphy*, 222 Iowa 98, 269 N.W. 15 (1936); *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190 (1935); *Chicago R. I. and P. Ry. Co. v. Streepy*, 207 Iowa 851, 224 N.W. 41 (1929); *In re Breen*, 207 Iowa 65, 222 N.W. 426 (1928); *Des Moines Nat. Bank v. Fairweather*, 191 Iowa 1340, 181 N.W. 459 (1921); *State v. Bristow*, 131 Iowa 664, 109 N.W. 199 (1906); *Rex Lumber Co. v.*

Reed, 107 Iowa 111, 77 N.W. 527 (1898); *Williamson v. City of Keokuk*, 44 Iowa 88 (1876). *Also see State v. Chenoweth*, 226 Iowa 217, 284 N.W. 110 (1939); 1976 Op.Att'y.Gen. 149.

Section 24 is, by its own terms, a condition of an appropriation. The difficulty presented by the germaneness issue is quite simply that the condition contained in §24 is not germane or related to the appropriations contained in House File 875. The bill appropriates money from the general fund and the salary adjustment fund for the purpose of adjusting the salaries of state officers and employees in recognition of increases in the cost of living. While the bill also adjusts the rate of mileage reimbursement authorized for public employees, House File 875 does not appropriate any money for travel expenses. Funds to reimburse state employees for travel expenses, including mileage, are included in the appropriations made to the individual departments and agencies of state government. A condition of an appropriation such as that contained in §24 would clearly be germane to such appropriations to state departments. We would then be presented with a situation wherein a condition related to mileage expense reimbursement rates would be a separate item in an appropriation bill including the appropriation for mileage reimbursement. The condition would be germane to the accompanying appropriation. That is not, however, the situation with §24 and House File 875. Section 24 contains a condition related to mileage reimbursement, but the accompanying appropriation relates to salary adjustment. As such, §24 is not germane to the appropriation contained in House File 875. In reliance on Iowa Constitution, article III, §29, we must conclude that §24 of House File 875 is void because it is not germane to the accompanying appropriation.

If, for the sake of argument, we were to posit the belief that §24 is germane to House File 875 such that there is no constitutional infirmity, we are of the opinion that the exercise of the governor's item veto power was valid. We base this conclusion on the premise that the governor simply excised an "item" in an appropriation as is generally required when vetoing a condition on an appropriation, we believe that the condition in §24, being unrelated to the appropriations contained in House File 875, can be excised without striking the appropriations. The only limitation which the supreme court has placed on the use of the item veto with regard to a condition on an appropriation is that the governor also veto the appropriation which the "condition conditions." As discussed above, the appropriations contained in House File 875 do not appropriate funds for mileage reimbursement. As such, there is no "underlying appropriation" which the governor must veto when exercising his veto with regard to §24.

The key Iowa Supreme Court case interpreting article III, §16 of the Iowa Constitution is *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1976). In that case, the court *inter alia* considered the validity of an item veto of a sentence in a bill which limited the use of a general services appropriation. The governor attempted to veto a provision which declared that "funds appropriated by this section shall not be used to supplement the construction of new buildings." *See* 229 N.W.2d at 708.

The supreme court held that the item veto was invalid. The court noted that the provision "was a condition or restriction, . . . upon the purpose or use of the money appropriated. In imposing the conditions or restrictions, the legislature exercised the authority which is inherent in its power to appropriate." 229 N.W.2d at 710. In reaching its conclusion that the item veto was invalid, the *Welden* court placed primary reliance on *State ex rel. Teachers and Officers of Industrial Institute and College v. Holder*, 76 Miss. 158, 23 So. 643 (1898). Section 73 of the legislative article of the Mississippi Constitution, like Iowa's item veto amendment, permitted veto of part of an appropriation bill. The *Welden* court quoted extensively from the *Holder* decision and the quoted language is instructive. We quote:

> Every bill of the character in question has three essential parts: The purpose of the bill, the sum appropriated for the purpose, and the conditions upon which the appropriation shall become available. Suppose a bill to create a reformatory for juvenile offenders, or to build the capitol, containing all necessary provisions as to purpose, amount of appropriation, and conditions; may the governor approve and make law of the appropriation, and veto and defeat the purpose or the conditions or both, whereby the legislative will would be frustrated, unless the vetoed purposes or conditions were passed by a two-thirds vote of each house? This would be monstrous. The executive action alone would make that law which had never received the legislative assent. And after all, and despite pragmatic utterances of political doctrinaires, the executive in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power. If the governor may select, dissent, and dissever, where is the limit of his right? Must it be a sentence or a clause or a word? Must it be a section, or any part of a section, that may meet with executive disapprobation? May the governor transform a conditional or a contingent appropriation into an absolute one, in disregard and defiance of the legislative will? That would be the enactment of law by executive authority without the concurrence of the legislative will, and in the face of it. The true meaning of section 73 is that an appropriation bill made up of several parts (that is, distinct appropriations), different, separable, each complete without the other, which may be taken from the bill without affecting the others, which may be separated into different parts complete in themselves, may be approved, and become law in accordance with the legislative will, while others of like character may be disapproved, and put before the legislature again, dissociated from the other appropriations. To allow a single bill, entire, inseparable, relating to one thing, containing several provisions all complementary of each other, and constituting one whole, to be picked to pieces, and some of the pieces approved, and others vetoed, is to divide the indivisible; to make of one, several; to distort and prevert legislative action, and by veto make a two-thirds vote necessary to preserve what a majority passed, allowable as to the entire bill, but inapplicable to a unit composed of drivers complementary parts, the whole passed because of each.

76 Miss. at 181—182, 23 So. at 645, cited at 229 N.W.2d 706, 711.

The court held that "if the governor desires to veto a legislatively-imposed qualification upon an appropriation, he must veto the accompanying appropriation as well", 229 N.W.2d at 713, citing Note, 18 Drake L.Rev. 245, 248, 249, 250 to the effect that:

> . . . an appropriation bill is a measure before a legislative body authorizing an expenditure of public funds and stipulating the amount, the manner in which that amount is to be expended, the purpose of the various items of expenditure and any other matters germane to the appropriation. . . . If any part could be disapproved, the residue which would become law might be something not intended by the legislature and against the will of the majority of each house. *It is obvious that the item veto power does not contemplate striking out conditions and restrictions alone as items, for that would be affirmative legislation, whereas the governor's veto power is a strictly negative power, not a creative power.* [Emphasis in original.]

If we examine House File 875, given particular attention to §24, and do so in light of the principles articulated in *Holder*, we see that §24, while arguably in a "condition", does not condition the appropriations made by the bill. *Holder* held that "every bill of the character in question has three essential parts: The purpose

of the bill, the sum appropriated for the purpose, and the conditions upon which the appropriation shall become available." *Holder* at 645. The purpose of House File 875 was to increase the salaries and mileage expense reimbursement rates of public officers and employees. Moneys were appropriated to increase the salaries. Increased reimbursement was authorized, however, no additional funds were appropriated for that purpose. The condition in §24, relating to the permissible items of a collective bargaining process, while a valid legislative concern, does not relate to the appropriation of a cost of living raise for state employees. It may relate to the funds appropriated to state agencies to fund mileage reimbursement, but those funds were appropriated in bills other than House File 875.

The presence or absence of §24 does not in any manner affect the purposes underlying the appropriations contained in House File 875. The concern of the *Holder* court, as recognized by the Iowa Supreme Court in *Welden*, was that the executive would, through the use of his or her item veto authority, change the complexion of a piece of legislation such that the final form of the bill accomplished purposes not authorized by the legislature. It is this concern which prompts the courts to require that the governor veto both the appropriation and the condition placed on it, not simply veto the condition. In House File 875, the legislature has attempted to prevent the exercise of the item veto by placing the condition on mileage reimbursement in House File 875, §24 and placing the money appropriated for that reimbursement in various other bills. These other bills may have been passed and approved well in advance of the passage of House File 875.

We are not unmindful of the express language of §24 to the effect that the condition contained in said section is "a condition of the appropriations made in this Act." However as discussed above, the appropriations made in House File 875 do not include any funds to reimburse public employees for mileage expenses. The condition, while ostensibly placed on the Act's salary adjustment appropriations are unrelated to those appropriations. Unless a condition in an appropriation bill is germane to the appropriations made by that bill, the condition becomes a separate item of the bill subject to the governor's item veto powers. Only if the condition is related to the accompanying appropriations must the governor veto both the condition and the appropriation if he wishes to strike the condition.

In conclusion, §24 of House File 875 is void because it is not germane to the subject of the bill. Alternatively, if §24 is germane to the bill, the exercise of the governor's item veto authority with regard to said section is valid.

November 3, 1981

NURSES: Disclosure of information; emergency searches. Sections 125.2, 125.33, 140.3, and 140.4, The Code 1981. If a student approaches a school nurse seeking advice in seeking an abortion, or if a school nurse becomes aware that a student has a venereal disease, is an alcoholic, or is taking a controlled substance, the school nurse is not required by law to inform the student's parents of these circumstances. If a school nurse searches the purse of a student who is unconscious and who appears to have taken an overdose of a controlled substance in an attempt to determine the substance taken, he/she would generally not be liable for the tort of invasion of privacy. (Norby to Illes, Board of Nursing, 11/3/81) #81-11-2(L)

November 3, 1981

PUBLIC EMPLOYEES; RETIREMENT AGE: Chapter 70, §70.2; Chapter 97B, §§97B.45, 97B.46. The requirement that peace officers and firefighters cease employment at age sixty-five as provided in §97B.46(3) prevails over the veterans preference prohibiting disqualification from employment on account of age as provided in §70.2. (Pottorff to Hansen, State Representative, 11/3/81) #81-11-3(L)

November 3, 1981

NOTARY PUBLIC: Discretion accorded notaries public in exercising their powers. §§77.1, 77.11, The Code. A notary public may decline the exercise of notarial services. Reasonable discretion is allowed in the exercise of powers and duties of notaries public. (Swanson to Angrick, Citizens' Aid, 11/3/81) #81-11-4(L)

November 3, 1981

MOTOR VEHICLES; DEALERS AND WHOLESALERS: Definition of motor vehicle dealer under §321.238(12) of the Iowa Code. §§321.1(38), 321.238(12), 322.4, 322.5, 322.6, 322.7, 322.28, 322.29, The Code 1981. A person licensed as a wholesaler under chapter 322 of the Iowa Code can be a dealer for the purposes of the §321.238(12) exemption from inspections as long as he or she meets the definition of "dealer" supplied by §321.1(38). (Dundis to Rush, State Senator, 11/3/81) #81-11-5(L)

November 4, 1981

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse; Licensing and Enforcement Authority. House File 821, Acts of the 69th G.A., 1981 Session, §125.13, The Code 1981. Section 12 of House File 821 grants authority to the Department of Substance Abuse to inspect unlicensed facilities and to seek injunctive relief, but only if the facility or program is receiving state dollars. The term "state dollars" appears to refer only to a direct legislative appropriation. The amendments to chapter 125, The Code, contained in House File 821 do not directly affect the department's licensure mandate found in §125.13(1), The Code, although as a practical matter, the department may not be authorized to use its enforcement powers against an unlicensed facility that is not receiving state funds. The department's monetary liability is contingent on the terms of any contract between the director and the facility. The department has no implied enforcement power over unlicensed facilities or programs that are not receiving state dollars. (Brammer to Riedmann, Dept. of Substance Abuse, 11/4/81) #81-11-6(L)

November 16, 1981

JUDGES; JUDICIAL RETIREMENT SYSTEM: Chapter 602, §602.31; Chapter 605A, §§605A.3, 605A.4, 605A.8; Chapter 97B, §97B.69. Section 602.31, which precludes persons who become district associate judges after

January 1, 1981, from participation in the Judicial Retirement System, does not violate equal protection. (Pottorff to Doyle, State Senator, 11/16/81) #81-11-7

The Honorable Donald Doyle, State Senator: You have requested an opinion concerning the impact of §602.31, The Code 1981, on the retirement system for district associate judges in Iowa. You note that persons who became district associate judges before January 1, 1981, may elect to retire under the Judicial Retirement System established in chapter 605A of the Code rather than the Iowa Public Employees' Retirement System established in chapter 97B of the Code. Under §602.31, however, persons who become district associate judges after January 1, 1981, "shall be a member of the Iowa public employees' retirement system as long as the person continues to hold office as a district associate judge." §602.31, The Code 1981. You specifically inquire whether this statutory limitation on the membership of district associate judges in the Judicial Retirement System violates equal protection under the constitution of either the United States or the state of Iowa.

In order to respond to your constitutional question, it first is necessary to examine the legislative background of the Judicial Retirement System and of the participation of district associate judges. The Judicial Retirement System established in chapter 605A, The Code 1981, was created in 1949. 1949 Session, 53rd G.A., chapter 235. Membership in the system was originally open to judges of the municipal, superior, and district courts, and the supreme court. §§605A.3, 605A.4, 605A.8, The Code 1950. Specific references to district associate judges were added by amendments in 1972. 1972 Session, 64th G.A., chapter 1124, §182. [1] Membership in the system is optional and is activated by filing a written notice. §605A.3, The Code 1981.

In 1979, the legislature limited the membership of district associate judges in the Judicial Retirement System by amending chapter 602, The Code 1981. Section 602.31 was amended by adding the final sentence which provides:

> 602.31 Salary, expenses, retirement. The annual salary of each district associate judge, payable from the general fund of the state of Iowa, shall be a sum set by the General Assembly. District associate judges shall also receive from the state their actual and necessary expenses in the performance of their duties in accordance with section 605.2. District associate judges who were municipal court judges prior to July 1, 1973, and who are members of the judicial retirement system under chapter 605A shall remain members thereof; but the state of Iowa, instead of the city and county, shall deduct four percent from their salaries for the judicial retirement fund and shall contribute the public's portion to the judicial retirement fund. *A person who becomes a district associate judge on January 1, 1981, by virtue of section 602.28 or who is appointed to the office of district associate judge after January 1, 1981, shall be a member of the Iowa public employees' retirement system as long as the person continues to hold office as a district associate judge.* [Emphasis supplied.]

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[1] Membership was extended to judges of the Court of Appeals in 1976. 1976 Session, 66th G.A., chapter 1241, §56.

1979 Session, 68th G.A., chapter 1022, §8. Under this amended language, persons who became district associate judges by operation of law on January 1, 1981, and persons who are appointed to the position of district associate judge after January 1, 1981, shall be members of the Iowa Public Employees' Retirement System established in chapter 97B.

The requirement that persons who become district associate judges after January 1, 1981, participate in the Iowa Public Employees' Retirement System effectively precludes parallel participation in the Judicial Retirement System. Membership in the Judicial Retirement System terminates membership in the Iowa Public Employees' Retirement System. §97B.69(1), The Code 1981. In order to comply with the statutory mandate of §602.31, therefore, persons who become district associate judges after January 1, 1981, must be members only of the Iowa Public Employees' Retirement System.

In determining whether the statutory membership limitation imposed in §603.21 violates equal protection, we observe the principle that equal protection "does not require that all laws shall apply alike to all citizens of the state. It is sufficient if an enactment applies to all members of a class providing the classification is not purely arbitrary but rests upon a reasonable basis." *Grubbs v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 95 (Iowa 1977). We note that judicial magistrates are similarly limited to membership in the Iowa Public Employees' Retirement System. §602.54, The Code 1981. The true class distinction, therefore, is a distinction based on rank. Judicial magistrates and recently designated district associate judges are precluded from membership in the Judicial Retirement System while previously designated district associate judges and judges of the superior courts are provided with the option of membership in the Judicial Retirement System.

In order to determine whether this classification rests upon a reasonable basis, it is necessary to determine whether it is conceivable that the legislative classification bears a rational relationship to an end of government which is not constitutionally prohibited. *See Grubbs v. Iowa Housing Finance Authority*, 255 N.W.2d at 95. It is conceivable that the legislature created the Judicial Retirement System in order to provide greater benefits to judges and, thereby, attract qualified appointees for permanent positions in the judicial system. The positions of judicial magistrate and district associate judge, however, are not commonly permanent positions. Rather, these positions often reflect a high rate of turnover. The legislature could have determined, therefore, that the benefit of membership in the Judicial Retirement System would be more effectively extended only to appointees to the superior court benches.

The fact that membership in the Judicial Retirement System remains optional for those district associate judges appointed before January 1, 1981, does not detract from this legislative purpose. Section 602.31 was amended in 1979, but the effective date to cut off participation of district associate judges in the Judicial Retirement System was delayed until 1981. This delay may be an attempt to "grandfather in" district associate judges who were appointed under the expectation that they would be afforded membership in the Judicial Retirement System.

In our opinion, the foregoing analysis could constitute a reasonable basis for the legislative classification created under §602.31. If this statute were challenged in a court of law, we consider it unlikely the court would rule that §602.31 violates equal protection.

November 16, 1981

SCHOOLS: Employment of spouses of school board members. Sections 277.27, 279.29 and 279.30, The Code 1981. The spouse of a school board member may not be employed by the district as a substitute teacher. (Norby to DeKoster, State Senator, 11/16/81) #81-11-8(L)

November 18, 1981

COUNTIES; OFFICIAL NEWSPAPERS; PUBLICATION OF NOTICES: §§349.1—2 and 618.3—4, The Code 1981. If a newspaper, once designated as an official county newspaper, changes ownership and changes its name, said newspaper continues as an official newspaper for the balance of the year it was so designated, despite the fact that it ceased publication during a five-month period. However, such paper is not eligible to be designated an official newspaper in future years until it has completed two years of regular publication beginning with the issue following the break in publication. (Fortney to Mahaffey, Poweshiek County Attorney, 11/18/81) #81-11-9(L)

November 24, 1981

COUNTIES; HOME RULE; PLATS: Art. III, §39A, Constitution of Iowa, §§409.1, 409.5, 409.14, chapter 358A. Under Home Rule, a county may redefine subdivision more restrictively than in §409.1. Before Home Rule, county's power to regulate subdivision was limited to its zoning power. If local government does not require bond for future improvements by developer, it may have no recourse. (Ewald to Stanek, Office for Planning and Programming. 11/24/81) #81-11-10(L)

November 25, 1981

REVENUE: State Tax Records — Confidentiality: Sections 422.20 and 422.72(1), The Code 1981; Iowa R.Cr.P. 3(4)(e) and 5(6); 730 IAC §38.6. Tax records of the department of revenue are declared confidential by law for the purpose of maximizing revenue by assuring taxpayers that their revelations to the department will be kept secret. An order is "judicial" if it involves the exercise of a judicial discretion and affects in some measure the rights of parties and the final result of a litigation. A subpoena is a judicial writ or process under the seal and censure of the court but does not rise to a "judicial order." A grand jury subpoena issued under rule of criminal procedure 3(4)(e) and a prosecuting attorney's subpoena issued under rule of criminal procedure 5(6) are not "judicial orders" within the meaning of revenue rule 730 IAC §38.6 adopted pursuant to section 422.72(1), The Code 1981. Neither subpoena is sufficient to authorize disclosure of tax information in the possession of the department of revenue which is declared to be confidential under sections 422.20 and 422.72(1), The Code 1981. (Richards to Bair, Department of Revenue, 11/25/81) #81-11-11 But see *State v. Schomaker*, Iowa Supreme Court 10/19/18.)

Mr. Gerald D. Bair, Director, Department of Revenue: You have requested an opinion of the attorney general on the question of whether a grand jury or prosecuting attorney's subpoena is a "judicial order" that would authorize the

release of tax return information otherwise declared to be confidential under sections 422.20 and 422.72, The Code 1981. Your request poses the following specific questions:

1. Is a subpoena, either civil or criminal, considered to be a judicial order?

2. Is a grand jury subpoena, pursuant to R.Cr.P. 3(e) [*sic*], considered to be a judicial order?

3. Are the above mentioned subpoenas sufficient to allow disclosure under sections 422.20 and 422.72 and their requirement that the material may not be divulged except as "provided by law"?

4. Are the above mentioned subpoena provisions sufficient to allow disclosure under the provision of section 422.72, Code of Iowa, and rule 730—38.5(422) [*sic*] IAC, providing that a "judicial order" must be obtained?

5. Is the provision requiring application to and approval of the court under Iowa R.Cr.P. 5(6) sufficient to allow disclosure under the provisions of sections 422.20, 422.72 and rule 730—38.5(422) [*sic*] IAC?

Before answering your queries, we will first analyze the confidentiality provisions of chapter 422, The Code 1981, and revenue rule 730 IAC §38.6 formerly rule 730 IAC §38.5 which you have referred to in questions four and five.

The general policy against disclosure of information from state tax returns and the sanctions for improperly doing so are stated in section 422.20(1), The Code 1981:

> It shall be unlawful for any present or former officer or employee of the state to divulge or to make known in any manner whatever *not provided by law* to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any persons *except as provided by law*; and it shall be unlawful for any person to print or publish in any manner whatever *not provided by law* any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a serious misdemeanor. If the offender is an officer or employee of the state, such person shall also be dismissed from office or discharged from employment. Nothing herein shall prohibit turning over to duly authorized officers of the United States or tax officials of other states state information and income returns pursuant to agreement between the director and the secretary of the treasury of the United States or the secretary's delegate or pursuant to a reciprocal agreement with another state.

[Emphasis added.] This policy is extended to federal tax information in section 422.20(2). These prohibitions apply not only to officers and employees of the department of revenue, but to all "present or former" officers and employees of the state.

However, not all divulgences are prohibited. By its very terms the act does not apply to divulgences "provided by law." For example, the last sentence of section 422.20(1) exempts from these sanctions the release of such information to federal

or other state tax officials under certain conditions. Other such exemptions "provided by law" are contained in section 422.72(1), The Code 1981:

> It is unlawful for the director, or any person having an administrative duty under this chapter, or any present or former officer or other employee of the state authorized by the director to examine returns, to divulge in any manner whatever, the business affairs, operations or information obtained by an investigation under this chapter of records and equipment of any person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy of a return or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law.* However, the director may authorize examination of such state returns and other state information which is confidential under this section, if a reciprocal arrangement exists, by tax officers of another state or the federal government. *The director may, by rules adopted pursuant to chapter 17A, authorize examination of state information and returns by other officers or employees of this state to the extent required by their official duties and responsibilities.* Disclosure of state information to tax officers of another state is limited to disclosures which have a tax administrative purpose and only to officers of those states which have laws that are as strict as the laws of this state protecting the confidentiality of returns and information. The director shall place upon the state tax form a notice to the taxpayer that state tax information may be disclosed to tax officials of another state or of the United States for tax administrative purposes. The department shall not authorize the examination of tax information by officers and employees of this state, another state, or of the United States if the officers or employees would otherwise be required to obtain a judicial order to examine the information if it were to be obtained from another source, and if the purpose of the examination is other than for tax administration. However, the director of revenue may provide sample individual income tax information to be used for statistical purposes to the legislative fiscal bureau. The information shall not include the name of mailing address of the taxpayer or the taxpayer's social security number. Any information contained in an individual income tax return which is provided by the director shall only be used as a part of a data base which contains similar information for a number of returns. The legislative fiscal bureau shall not have access to the income tax returns of individuals. Each request for individual income tax information shall contain a statement by the director of the legislative fiscal bureau that the individual income tax information received by the bureau shall be used solely for statistical purposes. This subsection does not prevent the department from authorizing the examination of state returns and state information under the provisions of section 252B.9. This subsection prevails over any general law of this state relating to public records.

[Emphasis added.] Pursuant to the rule-making mandate of section 422.72(1) highlighted above, the department of revenue has adopted regulation 730 IAC §38.6 which provides:

> Information deemed confidential. Section 422.20 and 422.72 apply generally to the director, deputies, auditors, agents, present or former officers and employees of the department. Disclosure of information from a taxpayer's filed return or report or other confidential state information by department of revenue personnel to a third person is prohibited under the above sections. Other persons having acquired information disclosed in a taxpayer's filed return or report or other confidential state information, will be bound by the same rules of secrecy under these sections as any

> member of the department and will be subject to the same penalties for violations as provided by law. The director may disclose state tax information including return information to tax officials of another state or of the United States for tax administrative purposes provided that written reciprocal agreements exist.
>
> The director may further disclose information to the child support recovery unit of the social services department where such information has been requested pursuant to section 252B.9, The Code. *All other state agencies will be required to obtain judicial order from a court of competent jurisdiction.*
>
> This rule is intended to implement sections 422.20 and 422.72, The Code.

[Emphasis added.] It is the terms "judicial order" in this rule which are at the focus of your questions.

The purpose served by these confidentiality provisions was identifed in a prior opinion of this office as "to promote accurate and complete reporting of information to the agency by insuring to the taxpayer that the agency will not disclose any secrets." 1976 Op.Att'y.Gen. 679. And as we noted in another opinion, 1976 Op.Att'y.Gen. 569, this purpose is similar to that embodied in the confidentiality statutes of the United States Tax Code, 26 U.S.C. §6103. *See, e.g., Crown Cork & Seal Co. v. Pennsylvania Human Relations Commission*, 463 F.Supp. 121, 122-123 (E.D.Pa. 1979) ["Section 6103 is the Internal Revenue Code's confidentiality provision... [I]t assures taxpayers that the returns and information which they supply to the government in connection with the assessment and payment of taxes will not become public knowledge."]. And as with the state's laws, the federal act does not foreclose all releases. Paragraphs (c) through (o) of 26 U.S.C. §6103 allow for disclosure to various agencies and individuals. The federal apparatus for the release of tax information is exact and thorough. The federal act obviously recognizes both the aforementioned tax policy interests as well as the interest of other federal agencies to further and promote the federal laws under their direction. For example, under section 6103(i)(1) other federal officers and employees may receive otherwise confidential tax information for purposes of nontax, criminal investigations and prosecutions upon an ex parte order of a federal district court. An order will issue only upon a factual showing that (1) there is reasonable cause to believe, upon reliable information, that a specific criminal act has been committed; (2) there is reason to believe that the requested tax information is "probative evidence" of a matter in issue; (3) the requested information cannot reasonably be obtained from other sources unless it is the most probative evidence of a matter in issue; and (4) the disclosure would not identify a confidential informant or seriously impair a civil or criminal tax investigation. With these general comments in mind, we turn to an examination of your specific questions.

The subpoena power of grand jurie in Iowa is contained in rule of criminal procedure 3(4)(e). The rule provides in pertinent part: "The clerk of the court must, when required by the foreman of the grand jury or prosecuting attorney, issue subpoenas including subpoenas duces tecum for witnesses to appear before the grand jury." [Emphasis added.] The obvious purpose of grand jury subpoenas is to secure the appearance of witnesses before it to assist in the execution of its investigative duties specified in rule of criminal procedure 3(4)(j). A similar investigative subpoena power is conferred directly upon prosecuting attorneys in Iowa under rule of criminal procedure 5(6). That rule states:

> *The clerk of the district court,* on written application of the prosecuting attorney and *the approval of the court,* shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpoenas shall direct the

> appearance of said witnesses before the prosecuting attorney at a specified time and place. Such application and *judicial order of approval* shall be maintained by the clerk in a confidential file until a change is filed, in which event disclosure shall be made, unless the court in an in camera hearing orders that it be kept confidential. The prosecuting attorney shall have the authority to administer oaths to said witnesses and shall have the services of the clerk of the grand jury in those counties in which such clerk is regularly employed. The rights and responsibilities of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

[Emphasis added.] These criminal investigative subpoenas should be contrasted with civil discovery subpoenas under Iowa Rule of Civil Procedure 155; civil trial subpoenas under section 622.63, The Code 1981; administrative subpoenas under sections 17A.13 and 622.81, The Code 1981; and criminal trial subpoenas under Iowa Rule of Criminal Procedure 14. We note that in all these listed instances subpoenas issue without affirmative action by the court. The only exception appears to be the prosecuting attorney's subpoena under rule of criminal procedure 5(6) which requires a "judicial order of approval" before the clerk of the district court can issue same.

A subpoena is, of course, a writ or process issued under the seal and censure of the court. According to Mr. Webster it is "a writ commanding a person designated in it to appear in court under a penalty for failure." *Webster's New Collegiate Dictionary*, 1160 (1976). "Subpoenas and subpoenas duces tecum have well defined and universally understood meanings and each is a mandate lawfully issued under the seal of the court by the clerk thereof." *Bowles v. Gantner & Mattern Co.*, 64 F.Supp. 383, 385 (S.D. Cal. 1946). The district court generally has no direct contact or involvement with subpoenas unless they are resisted or disobeyed. *See, e.g.*, Iowa Rules of Civil Procedure 123 and 155(c); sections 622.76, 622.84 and 665.2(4), The Code 1981; and Iowa Rule of Criminal Procedure 14(5). As noted earlier the crucial issue is whether subpoenas as so defined constitute "judicial orders."

The terms "judicial order" are not expressly defined in Iowa law. They have been defined as an order "which involves exercise of judicial discretion and affects final result of litigation." *Black's Law Dictionary*, 986 (4th rev. ed. 1968), citing *Happy Coal Co. v. Brashear*, 263 Ky. 257, 92 S.W.2d 23, 27 (1935):

> Certain acts of a court final in their nature are called judgments. [Citation omitted.] It is only from such that appeals can be prosecuted to this court. [Citation omitted.] Other court actions not final in their nature are called orders. [Citation omitted.]
>
> Some orders involve the exercise of judicial discretion, for example, one requiring a pleading to be verified or to be made more specific, striking matter from a pleading, ruling on a demurer, etc.
>
> Such orders in some measure affect the final result of the litigation, though they do not of themselves fix the rights of the parties, and may be called judicial orders.
>
> Other orders involve the exercise of an administrative discretion only, as orders setting a cause for hearing on a particular day, fixing a time for court to convene or adjourn, calling a special term, extending a term, etc. Such orders do not in any sense determine or adjudicate any issue or issues involved in the litigation and may be called administrative orders.

This definition is in line with pronouncements by the Iowa Supreme Court defining "judicial functions" for purposes of deciding the availability of certiorari under Iowa Rule of Civil Procedure 306. For example, in *Curtis v. Board of Supervisors of Clinton County*, 270 N.W.2d 447, 449 (Iowa 1978), the supreme court stated the following standard:

> 'Judicial functions' include acts which are judicial or which resemble judicial acts. An inferior tribunal exercises a judicial function when (1) the questioned act involves a proceeding in which notice and opportunity to be heard are required, *or (2) a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law.* However, the mere exercise of judgment or discretion is not alone sufficient. *Buechele v. Ray*, 219 N.W.2d 679, 681 (Iowa 1974). [Emphasis added.]

Applying this meaning of "judical order" to that of "subpoena" and in response to your questions, we are of the opinion that subpoenas including grand jury subpoenas under rule 3(4)(e) and prosecuting attorney's subpoenas under rule 5(6) are *not* judicial orders. The mere issuance of such subpoenas by a clerk of the district court does not require the exercise of judicial discretion nor does it affect in some measure the final result of a litigation or the rights of parties. We believe the requirement of the court's approval in rule 5(6) at most involves "the exercise of an administrative discretion only" since such approval does "not in any sense determine or adjudicate any issue or issues involved in the litigation." *Happy Coal Co. v. Brashear*, 92 S.W.2d at 27. Our conclusion with respect to grand jury subpoenas is directly supported by a recent decision of the Colorado Supreme Court. In *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978), the supreme court affirmed the order of trial court sustaining the motion of the attorney general to quash a grand jury subpoena duces tecum for certain tax records filed with the Colorado Department of Revenue. Reviewing section 39-21-113(4)(A), Colo. Rev. Stat. (1973), which, like sections 422.20 and 422.72, The Code 1981, declares tax information to be confidential, the court concluded that the grand jury subpoena merely issued over the signature of the clerk of court was not a "judicial order" that would allow disclosure.

In sum, an order is "judicial" if it involves the exercise of a judicial discretion and affects in some measure the rights of parties and the final result of a litigation. A subpoena is a judicial writ or process under the seal and censure of the court but does not rise to a "judicial order." A grand jury subpoena issued under rule of criminal procedure 3(4)(e) and a prosecuting attorney's subpoena issued under rule of criminal procedure 5(6) are not "judicial orders" within the meaning of revenue rule 730 IAC §38.6 adopted pursuant to section 422.72(1), The Code 1981. Neither subpoena is sufficient to authorize disclosure of tax information in the possession of the department of revenue which is declared to be confidential under sections 422.20 and 422.72(1), The Code 1981.

November 25, 1981

COUNTIES: Operation of maintenance vehicles. Chapter 321, section 321.233. Road maintenance workers are exempt from complying with the law of the road as set out in chapter 321 only if the road has been officially closed to traffic. (Gregersen to Renken, State Representative, 11/25/81) #81-11-12(L)

DECEMBER 1981

December 11, 1981

MUNICIPALITIES: Police and Fire Pensions. Section 411.6(12)(a) and (c), The Code 1981. Computation of the annual readjustment of pensions is provided for in chapter 411. In the event the rank or position held by a retired or deceased police or fire official at the time of retirement or death is subsequently abolished, the board of trustees for the police and fire retirement systems are authorized to compute the adjustment of the member's pension. Two possible elements to consider in the adjustment of pensions, in such cases, are suggested. Finally, step increases based upon a reclassification of the salary scale are not to be used in the recomputation of pensions. (Walding to O'Kane, State Representative, 12/11/81) #81-12-1(L)

December 11, 1981

STATUTES; EFFECTIVE DATE: Chapter 3, §§3.1, 3.7. The specification of an alternative effective date in the title of an Act is insufficient to contravene the effective date statutorily provided in §3.7. (Pottorff to Pope, State Representative, 12/11/81) #81-12-2(L)

December 16, 1981

HIGHWAYS: Section 309.22, The Code 1981. For purposes of this section a work project would be classified as "construction" if the work constitutes a significant improvement to the existing facility. The project would be classified as "maintenance" if the work consists of preserving or upkeeping the highway. (J. Miller to Welsh, State Representative, 12/16/81) #81-12-3(L)

December 24, 1981

SCHOOL FINANCE; STAMPED WARRANTS AND ANTICIPATORY WARRANTS: §§74.1, 452.10, 453.10, The Code 1981. Warrants may be stamped or anticipatory warrants issued while funds are invested if the investments were made in good faith and without negligence. These warrants should generally not be considered arbitrage bonds for purposes of federal taxation. (Norby to Baringer, Treasurer, 12/24/81) #81-12-4

Mr. Maurice E. Baringer, Treasurer, State of Iowa: You have requested an opinion of the attorney general concerning school finance. Your question essentially concerns whether a school district may borrow money to pay current expenses when district funds are invested, or must invested funds be withdrawn to pay current expenses. Your question arises from the following circumstances.

School districts may issue warrants for payment of their obligations. §§291.1 and 292.12 (all references are to The Code 1981, unless otherwise stated). If a warrant is presented for payment when sufficient funds are not available for

payment, procedures provided for in chapter 74 apply. Through these procedures, commonly known as "stamping" warrants, the school district borrows money at a rate established pursuant to chapter 74A. Similarly, §74.1(2) provides for issuance of anticipatory warrants when it is determined that there will not be sufficient funds on hand to meet obligations. When sufficient funds are available, these warrants must be called and paid pursuant to §§74.5 and 74.6. A district may stamp warrants or issue anticipatory warrants, however, only if sufficient funds are not available to meet the district's current obligations.

School districts also have authority to invest funds pursuant to chapters 452 and 453. Section 452.10 provides for investment of funds "not currently needed for operating expenses in notes, certificates, bonds, or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefore; or in savings accounts in banks".

The list of possible investments contains some which could provide for a penalty for early withdrawal. If other district funds are not sufficient to pay current expenses it may be financially advantageous to the district to stamp warrants or issue anticipatory warrants rather than to withdraw invested funds. Accordingly, the question arises as to whether a district may borrow through these procedures while funds are invested. Stated conversely, are these invested funds "on hand" or available within the meaning of §§74.1(1) and (2), which would require withdrawal, or may a district borrow while funds are invested. In addition to the questions raised by the Iowa Code, the prospect of a district borrowing funds while other funds are invested raises a question of federal tax law. The interest to the holder of a stamped warrant or anticipatory warrant is ordinarily exempt from federal tax. 26 U.S.C. §103(a). If, however, these warrants are determined to be "arbitrage bonds", as defined in 26 U.S.C. §103(c)(2), the interest earned would be subject to federal taxation.

The situation raised by your question necessarily arises subsequent in time to the making of investment decisions by the school treasurer. Section 452.10 requires investment of funds not needed for current operating expenses, necessary requiring the school treasurer to estimate in advance the amount of funds which should be invested. Section 452.14 provides, however, that any violation of §452.10 constitutes a fraudulent practice. In addition, legal action upon the treasurer's bond conceivably could be maintained for the expense created by the treasurer's investment decisions. The treasurer cannot, however, be held accountable on the basis of hindsight. The treasurer is not subject to liability if he/she acted in good faith and without negligence in making investments based on the evidence known at the time of acting. *See Town of Danbury v. Reidmiller*, 208 Iowa 879, 226 N.W. 159 (1929); *Hansen v. Ind. Sch. Dist. of Holstein*, 155 Iowa 264, 135 N.W. 1090 (1912). Similarly, we do not believe that funds invested in good faith and without negligence must be considered available to pay current expenses.

A situation analogous to the question considered here was discussed in *Unification Church v. Clay Central School District*, 253 N.W.2d 579 (Iowa 1977). In *Unification Church*, the court considered §297.22, The Code 1973, which provided for sale of school property with appraised value below certain levels by vote of the school board. Property of greater value could be sold only if approved by the electors of the district. In *Unification Church*, property which had been appraised at a value below the amount requiring an election was subsequently sold at auction for an amount above the level requiring an election. The court held that the value limits in §279.22 applied to appraised value, not value determined at sale, and refused to void the sale made pursuant to the auction.

We believe that *Unification Church* is significant in showing that decisions must be made based on information known at the time of acting, such as the decision to proceed with a sale involved in that case or the investment decisions considered herein. Reversal of decisions on the basis of subsequent events which cannot be predicted with absolute certainty could have detrimental effects on a district's financial operations. Accordingly, we believe that the Code does not prohibit the stamping of warrants or issuance of anticipatory warrants while funds are invested, if withdrawal of invested funds would have a negative financial impact, provided that the decision to invest was made in good faith and without negligence in light of the facts known at the time of investment. In other words, the Code does not require that such invested funds be considered available to pay current obligations within the context of §§74.1(1) and (2).

As noted initially, the prospect of borrowing funds while funds are invested raises a question of federal tax law. Stamped warrants or anticipatory warrants of a school district constitute "obligations" of a political subdivision of the state. *See State Bank of Albany v. U.S.*, 276 F.Supp. 744 (N.D.N.Y. 1967). Ordinarily, the interest earned on such obligations is excluded from gross income and not subject to federal income tax, 26 U.S.C. §103(a). If, however, stamped warrants or anticipatory warrants are issued while funds are invested, this raises the possibility that these warrants could be characterized as "arbitrage bonds". Interest earned on arbitrage bonds is subject to federal taxation. 26 U.S.C. §103(c)(1). An arbitrage bond is defined in 26 U.S.C. §103(c)(2) as follows:

> (2) Arbitrage bond — For purposes of this subsection, the term "arbitrage bond" means any *obligation* which is issued as part of an issue all or a major portion of the proceeds of which are *reasonably expected* to be used directly or indirectly—
>
> (A) to acquire securities (within the meaning of section 165(g)(2)(A) or (B)) or obligations (other than obligations described in subsection (a)(1) or (2)) which may be reasonably expected at the time of issuance of such issue, to produce a yield over the term of the issue which is materially higher (taking into account any discount or premium) than the yield on obligations of such issue, or
>
> (B) *to replace funds which were used directly or indirectly to acquire securities or obligations described in subparagraph (A).* [Emphasis supplied.]

Stamped warrants or anticipatory warrants issued while district funds are invested raises the possibility of characterization as an arbitrage bond under §102(c)(2)(B) as the borrowed funds are used to replace funds used to acquire investments which are "obligations". *See* 26 C.F.R. 1.103-13(b)(1)(B). [1]

Application of 26 U.S.C. §103 and federal regulations in the determination of whether characterization as an arbitrage bond is appropriate requires resolution of factual questions. As we cannot determine factual questions in an attorney general's opinion, nor conceive of all possible factual situations which might arise, we cannot provide a definitive answer to this question. We believe, however, that stamping of warrants or issuance of anticipatory warrants while funds

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[1] "Securities" is defined in 26 U.S.C. [1] 105(g)(2)(A) and (B). Securities cannot be acquired by school districts as they are not included in the list of permissible investments contained in §§452.10 and 453.10. These permissible investments do, however, fall within the federal definition of "acquired obligation". See 26 C.F.R. 1.103-13(b)(4)(i) and (iii).

are invested will generally not result in circumstances calling for characterization as an arbitrage bond. Having inadvertently created the need to replace funds used to acquire an obligation (the investment) with funds gained through issuance of an obligation (the stamped or anticipatory warrant) several exceptions will be likely to show that the result should not be characterized as an arbitrage bond.

First of all, an exception is provided for obligations issued for only a temporary period. *See* U.S.C. §103(c)(4). Regardless of the difference in the rate received on the investment and that paid on the warrant, it is not treated as an arbitrage bond if the warrant is called within six months. 26 C.F.R. 1.103-14(b)(3)(i). As §§74.5 and 74.6 require that stamped warrants be called when sufficient funds are available to pay them, it appears unlikely that a six-month period will be exceeded.

Secondly, characterization as an arbitrage bond is improper unless the yield on the acquired obligation is materially higher than the rate paid on the issued obligation. 26 U.S.C. §103(c)(3); 26 C.F.R. §1.103-13(b)(5). The measurement of "materially higher" is spelled out in 26 C.F.R. §1.103-13(b)(5). This determination requires comparison of the rate paid on the stamped or anticipatory warrant and the rate received on funds invested.

In conclusion, both aspects of your question will involve factual determinations. We believe, however, that in most instances Iowa law would not require taxation of interest earned on stamped warrants or anticipatory warrants.

December 24, 1981

MOTOR VEHICLES: Operating while intoxicated — section 321.281 and 1981 Session, 69th G.A., S.F. 514 §6. There are no license revocation provisions for convictions under the *per se* law as is written in amended section 321.281. Since the *per se* law for sections 321.283, 321.560 and 321B.7. In addition, no financial responsibility has to be filed under section 321A.17 for deferred judgment revocations under amended section 321.281. (Miller to Kassel, DOT and Miller, DPS, 12/24/81) #81-12-5

Mr. Raymond L. Kassel, Director, Department of Transportation; William D. Miller, Department of Public Safety: We have received your request for an attorney general's opinion asking eight questions regarding the interpretation of newly amended section 321.281, The Code 1981, through 1981 Session, 69th G.A., S.F. 514, §6.

1—2. In your first two questions, you asked whether chapter 321B, The Code 1981, would be applicable to the newly amended section and whether any administrative procedures are available if a person arrested under the new section refuses to submit to a chemical test.

The procedures provided for in chapter 321B, The Code 1981, are not applicable unless the accused has been arrested for Operating a Motor Vehicle While Under the Influence of an Alcoholic Beverage (hereinafter, OMVUI). *State v. Musso*, 309 N.W.2d 154, 155 (Iowa Ct.App. 1981); *State v. Ransom*, 309 N.W.2d 156, 158 (Iowa Ct.App. 1981). If the accused has been arrested for OMVUI, the results of the chemical test would be admissible at trial on a charge of operating a

motor vehicle upon the public highways of this state while having thirteen hundredths or more of one percent by weight of alcohol in the blood (hereinafter, *per se* offense) since such a charge would be a "proceeding arising out of acts alleged to have been committed by [the accused] while operating a motor vehicle upon a public highway..." §321B.10, The Code 1981. The same would be true of the accused's refusal to submit to a chemical test.

The *per se* offense is a separate and distinct crime from the crime of OMVUI, 1981 Session, 69th G.A., S.F. 514, §6 (second unnumbered paragraph), and thus, the provisions of chapter 321B cannot be invoked on the basis of an arrest for the *per se* offense. As a result, the administrative procedures applicable under chapter 321B would not be available to the state.

The solution to this problem is to instruct officers desiring to apply the provisions of chapter 321B to arrest the accused for OMVUI. Such an arrest would not limit the prosecuting attorney's power to charge the *per se* offense and the revocation procedures set forth in chapter 321B would be applicable to the defendant. It should be noted that if a formal charge (information or indictment) is filed charging OMVUI it cannot be amended to charge the *per se* offense since such a charge constitutes a separate and distinct offense. *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981). The prosecuting attorney may file a new information charging the *per se* offense and dismiss the OMVUI charge if the time for speedy indictment has not expired. Since the time period for speedy indictment runs from the date of the arrest for the offense charged in the information, this is another reason why the officer should not make the initial arrest for the *per se* offense.

3. In your third question, you stated that the newly amended section 321.281 provides that "the offense of operating a motor vehicle under the influence of alcohol is an offense separate and distinct from the offense of operating a motor vehicle while having thirteen hundredths or more of one percent by weight of alcohol in the blood." It was then asked for a person who is convicted of the latter, does the Department of Transportation have the authority to suspend that person's driver's license under section 321.281, for driving while having thirteen hundredths or more of one percent by weight of alcohol in the blood?

All crimes in this state are set out in statute, and "in defining crimes, as in all other legislation, the legislature is its own lexicographer." *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977). It is also clear "that penal statutes are to be interpreted strictly with doubt therein being resolved in favor of the accused." *State v. Welton*, 300 N.W.2d 157, 160 (Iowa 1981). The court in *Welton*, 300 N.W.2d at 160, went on to state that "when a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its expressed terms."

The penalty for violation of the *per se* law is set out below:

> Whoever operates a motor vehicle upon the public highways of this state while having thirteen hundredths or more of one percent by weight of alcohol in the blood shall, upon conviction or a plea of guilty, be guilty of a serious misdemeanor for the first offense and shall be imprisoned in the county jail for not less than two days; be guilty of an aggravated misdemeanor for the second offense and shall be imprisoned in the county jail for not less than seven days; and be guilty of a class "D" felony for a third offense and each offense thereafter.

Unlike the OMVUI law, no license revocation provisions have been provided for under the *per se* law. The OMVUI law under section 321.281 not only provides for fines and imprisonment, but also allows the court to "provide as to the period

during which a new license shall not be issued to the defendant, provided said period shall not be less than one hundred twenty days for conviction of a first offense of *operating a motor vehicle while under the influence of an alcoholic beverage....*" [Emphasis added.]

The legislature made it abundantly clear that the *per se* law is separate and distinct from the OMVUI law. Since they are separate and distinct offenses, each has its own penalties. The penalty provision provided under the OMVUI law does not apply to the *per se* law unless it is specifically referred to. As stated by the court in *State v. Flack*, 101 N.W.2d 535, 251 Iowa 467 (1960), "the legislative intent is expressed by omission as well as inclusion."

The same is true of other statutes which refer to the OMVUI law. Section 321.209, The Code 1981, is the section which gives the Department of Transportation the authority to revoke the license of driving privileges of an individual convicted of certain offenses. Subsection 321.209(2), The Code 1981, provides for the revocation of anyone "driving a motor vehicle while under the influence of an alcoholic beverage, a narcotic, hypnotic or other drug, or any combination of such substances." This obviously refers only to the OMVUI law and not the *per se* law as passed in S.F. 514.

The only penalty provisions referred to by the *per se* law are designated in the first unnumbered paragraph of section 6 of S.F. 514. That provides for the jail sentence and the classification of the crime as either a serious misdemeanor, aggravated misdemeanor or class "D" felony. No where does the *per se* law ever refer to the license revocation penalties as set out under the OMVUI law. The Department of Transportation, therefore, has no authority to revoke the license or driving privileges of any person convicted under the *per se* law.

4. In your fourth question, you asked whether the Department of Transportation has the authority to revoke a person's driver's license for an indefinite period of time pursuant to section 321.283, The Code 1981, following a conviction under the *per se* law?

The same reasoning would apply here as in the answer to question three. Basically, the OMVUI and the *per se* laws are separate offenses. Section 321.283 only pertains to a conviction "for operating a motor vehicle while under the influence of an alcoholic beverage." *See*, subsection 321.283(2). It does not refer in any way to the *per se* law. Therefore, the court upon convicting a person under the *per se* law would not have the authority under section 321.283 to require enrollment in a drinking driver's school. Since there is no enrollment in the school under the *per se* law, the Department of Transportation has no authority to require an indefinite revocation of driving privileges under subsection 321.283(4).

Until the legislature specifically applies the *per se* law to section 321.283, the department will not have the authority to revoke a driver's license pursuant to the *per se* law under this section.

5. In your fifth question, you asked whether the Department of Transportation can require payment of a license reinstatement fee for those individuals who have been revoked as a result of a deferred judgment under amended section 321.281.

First of all, a person can have his or her driving privileges revoked for having obtained a deferred judgment under with the OMVUI or the *per se* law. Senate File 514 provides that "if the court defers judgment pursuant to section 907.3 *for an offense under this section*, the court shall order the revocation of the defendant's license to operate a motor vehicle for a period not less than thirty days nor more than ninety days..." [emphasis added]. By speaking of "an offense under

this section," the legislature is referring to both the OMVUI and the *per se* laws. Both are separately referred to under newly amended section 321.281.

Your question, however, refers to the required reinstatement fees for licenses revoked under the deferred judgment provision of amended section 321.281. Section 321.191, The Code 1981, specifically defines which classification of license reinstatement will require the higher fee. They are licenses which have been suspended or revoked pursuant to sections 321.209, 321.210, except subsection 4 thereof, and 321B.7. The reinstatement fees for licenses suspended or revoked under these sections are twenty dollars if the person is served personally or ten dollars if the person is served through the mail.

Section 321.191 does not provide for any reinstatement fees for a license revoked as a result of a deferred judgment pursuant to amended section 321.281. This would apply to a deferred judgment revocation under either the OMVUI or the *per se* law. However, as a result of the revocation of the driver's license, a new license would have to be issued. The standard fee for a new license as set out in the first unnumbered paragraph of section 321.191 would apply.

6. In your sixth question, you asked what effect would the *per se* law have on the habitual offender law pursuant to section 321.555 The Code 1981. It was also asked whether a conviction under the new *per se* law would allow the department to count that conviction as one of the three offenses within a six-year period for a person to qualify for license barment under subsection 321.555(1) and section 321.560, The Code 1981?

The *per se* law would have an effect on the habitual offender law with regard to subsection 321.555(2). Subsection 321.555(2) requires a one-year bar of driving privileges for "six or more of any separate and distinct offenses within a two-year period in the operation of a motor vehicle which are required to be reported to the department by section 321.207 or chapter 321C..."

The *per se* law would be a violation under section 321.281 which would be required to be reported to the Department of Transportation. Consequently, it would count as one of the six offenses within a two-year period which would result in a one-year bar of driving privileges under section 321.560.

The second half of your question deals with subsection 321.555(1). Subsection 321.555(1) defines an habitual offender as any person who accumulates convictions, as follows:

> Three or more of the following offenses, either singularly or in combination, within a six-year period:
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> a. Manslaughter resulting from the operation of motor vehicle.
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> b. *Driving a motor vehicle while under the influence of an alcoholic beverage or a controlled substance as defined in section 204.101.*
>
> c. Driving a motor vehicle while operator's or chauffeur's license is suspended or revoked.
>
> d. Perjury or the making of a false affidavit or statement under oath to the department of public safety.
>
> e. *An offense punishable as a felony under the motor vehicle laws or any felony in the commission of which a motor vehicle is used.*

f. Failure to stop and leave information or to render aid as required by section 321.263. [Emphasis added.]

Three or more of any of the above-mentioned violations in subsection 321.555(1) would result in a two to six year bar of driving privileges pursuant to section 321.560. The *per se* law would not be counted as one of the violations under subsection 321.555(1) unless it became classified as a third offense.

A third offense under the *per se* law would be classified as a felony. *See*, 1981 Session, 69th G.A., S.F. 514, §6 (first unnumbered paragraph). It would therefore qualify for a two to six year bar as a felony under paragraph 321.555(1)(e). However, because the OMVUI and *per se* offenses are separate and distinct, they cannot accumulate together. That is, a person cannot be convicted of a second offense OMVUI if the only prior conviction under section 321.281 was for a first offense *per se* violation. It would be possible that there could be five convictions under section 321.281 before the final conviction would be classified as a third offense under either the OMVUI or *per se* offense.

7. In your seventh question, you asked if a person receives a deferred judgment pursuant to section 907.3, The Code 1981, for an offense under section 321.281, does the department have the authority to require the filing of proof of financial responsibility as required under section 321A.17, The Code 1981?

Section 321A.17 requires the proof of financial responsibility by a licensee upon the suspension or revocation of driving privileges based upon "a conviction or a forfeiture of bail." A final conviction, however, does not occur when the court defers judgment.

Section 907.3 allows the court, with consent of the defendant, to defer judgment or defer sentence. The court in *Iowa Beer and Liquor Control Dept. v. McBlain*, 263 N.W.2d 226 (Iowa 1977), has held that a deferred sentence is not a final conviction. The court stated with regard to a deferred sentence in *McBlain*, 263 N.W.2d, at 227, that "no conviction of any such charge was obtained against that employee. He was given a deferred sentence; if he successfully completes his probation, the only record that the charge ever existed will be in the court administrator's office." A deferred judgment, like a deferred sentence, is not a final conviction. The court in *State v. Anderson*, 246 N.W.2d 277, (Iowa 1976), stated that "when judgment is deferred under §789A.1 (now §907.3), The Code, the adjudication of guilt is deferred as well as the sentence."

The Department of Transportation can only act under section 321A.17 when it receives the record of a conviction or a forfeiture of bail. Under either a deferred judgment or a deferred sentence, the department will not receive the record of the licensee's final conviction. The department will not receive such a record unless the licensee fails to complete the terms of the deferred judgment or sentence. Financial responsibility will not be required until a final conviction is received.

8. In your final question, you asked whether the Department of Transportation is required to set up hearing procedures to determine each case individually regarding the issuance of a temporary driving permit under the deferred judgment revocations. If so, it was then asked if the department is required to issue stay orders pending the outcome of the departmental hearing.

Senate File 514 states that the Department of Transportation "may" issue a temporary driving permit for a person whose license is revoked because of a deferred judgment. By using the word "may," the legislature intended such action by the department to be directory in nature rather than mandatory. *See*, Sands, *Sutherland Statutory Construction* §57.03 (4th Ed. 1973). However, this

does not mean the department must establish hearing procedures to determine each case individually.

The wording used in S.F. 514 is nearly identical to that used in subsection 321.283(6). There it states that a person whose driver's license has been suspended or revoked "may be issued a temporary driving permit by the department restricted to driving to and from his home, place of employment, in his employment and the location of the required course." Senate File 514 states that a person "may be issued a temporary driving permit by the department, restricted to and from the person's home, place of employment, and in the person's employment...." As can be seen, the pertinent phrases are nearly identical. It could be assumed that the legislature intended the department to handle the restricted licenses under the deferred judgment revocations in the same manner as it handles them now under section 321.283.

At the present time, the department's procedure for issuing temporary restricted licenses under section 321.283 is established pursuant to rule 820—[07,C] 13.14(321) IAC. There, the criteria necessary to obtain the temporary restricted license can be issued without the need to go through an administrative hearing. However, the rules do provide for such a hearing if one would be requested by the licensee.

The same procedure could be established for the deferred judgment revocations by promulgating the appropriate set of rules. Those rules, of course, could be very similar to those now in existance under rule 820—[07,C] 13.14(321) IAC.

If the department does not establish this type of procedure, an individual hearing will have to be provided for all those requesting temporary restricted licenses under deferred judgment revocations. Chapter 17A, The Code 1981, would dictate a similar hearing procedure now being used for section 321.210 license suspensions. However, the department would not have to issue a stay order of the revocation pending the outcome of the administrative hearing because the license would have already been revoked by the court as a result of the deferred judgment. Therefore, there would be no license for the stay order to protect pending the outcome of the departmental action.

December 24, 1981

STATE OFFICERS AND DEPARTMENTS: Medical Care For Indigents. §§255.8, 255.16, 255.28 and 255.29, The Code 1981. The formula for determining a county's quota of indigent patients that may be admitted and treated at University Hospitals at state expense under §255.16 is dependent upon the annual appropriation to the hospital for its implementation. A ceiling of 110 percent of a county's quota exists on the state's financial liability under §255.16. Section 255.16 does not impose a limit on the number of indigent patients that may be admitted and treated at University Hospitals. Where the number of indigent patients admitted to University Hospitals exceeds 110 percent of a county's quota determined pursuant to §255.16, the costs for the care and treatment of such patients shift to the county. (Mann to Welsh, State Representative, 12/24/81) #81-12-6(L)

December 24, 1981

STATE OFFICERS AND AGENCIES: §217.3, The Code 1981, 69th G.A., 1981 Session, S.F. 566. Discusses the procedures for reorganizing the

Department of Social Services. (Fortney to Reagen, Commissioner, Department of Social Services, 12/24/81) #81-12-7(L)

December 24, 1981

BONDING: Municipalities. Section 24.26—34, 76.1—2, 384.2, 4, 5, 16, 24, 26 and 32 and 403.19. Estimated debt levies may not be certified for those bonds not yet authorized prior to April 1 but may be made for bonds that are issued. Municipalities may calculate estimated debt levies for bonds authorized but not yet issued or sold but no debt service fund may be created until the bonds are in fact issued. All of these calculations are subject to review by taxpayer protest and/or by the auditor. (Hagen to Rush, State Senator, 12/24/81) #81-12-8(L)

December 24, 1981

COUNTIES AND COUNTY OFFICERS: Section 340A.6, The Code 1981; §906(2), chapter 117, Laws of the 69th General Assembly, 1981 Session. The board of supervisors cannot return the recommended compensation schedule to the county compensation board for reconsideration. The board of supervisors may not disapprove the recommended compensation schedule and allow the current compensation schedule to be carried over through the next fiscal year. If the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the equal percentage factor applies to the new annualized schedule. (Fortney to Stromer, Speaker, House of Representatives and Steven S. Hoth, Des Moines County Attorney, 12/24/81) #81-12-9

The Honorable Delwyn Stromer, Speaker, House of Representatives; Steven S. Hoth, Des Moines County Attorney: You have requested an opinion of the attorney general regarding the authority of the county board of supervisors in matters relating to the compensation of elected county officers. You have posed three specific questions with regard to §906(2), chapter 117, Laws of the 69th General Assembly, 1981 Session. You inquire as follows:

1. Can the board of supervisors return the recommended compensation schedule to the county compensation board for reconsideration?

2. Can the board of supervisors disapprove the recommended compensation schedule and allow the current compensation schedule to be carried over through the next fiscal year?

3. If the board of supervisors wishes to reduce the amount of the recommended compensation schedule, does the equal percentage factor apply to only the raise or reduction amounts utilized by the county compensation board or to the new annualized schedule?

Section 906(2) provides:

> Annually during the month of December, the county compensation board shall transmit its recommended compensation schedule to the board of supervisors. The board of supervisors shall review the recommended compensation schedule and determine the final compensation schedule for the elected county officers which shall not exceed the recommended compensation schedule. In determining the final compensation schedule if the board

> of supervisors wishes to reduce the amount of the recommended compensation schedule, the annual salary or compensation of each elected county officer shall be reduced an equal percentage. A copy of the final compensation schedule adopted by the board of supervisors shall be filed with the county budget at the office of the state comptroller. The final compensation schedule takes effect on July 1 following its adoption by the board of supervisors.

We begin our analysis with the recognition that §906(2) is substantially a reenactment of the second unnumbered paragraph of former §340A.6, The Code 1981, which was repealed by chapter 117, §1244. The changes made in §340A.6 when reenacted in §906(2) can best be described as grammatical. They effect no substantive changes. [1]

Given the fact that §906(2) represents a reenactment of former §340A.6, second unnumbered paragraph, we place great weight on our former opinions rendered prior to the General Assembly's passage of chapter 117. We presume that the legislature was aware of the construction we had placed on §340A.6 and was employing the relevant statutory terms in the same sense as the prior statute. *Hubbard v. State*, 163 N.W.2d 904 (Iowa 1969); *Martin v. City of Oskaloosa*, 126 Iowa 680, 102 N.W. 529 (1905). With this in mind, we turn to our primary opinion on the construction of §340A.6, the forerunner of §906(2).

In 1978 Op.Att'y.Gen. 111, we were presented with an opinion request that put forth the proposition that the second unnumbered paragraph of §340A.6 "seems to allow the board of supervisors only two alternative actions for determining the final compensation schedule of salaries. One option would be to accept the compensation board's recommendations, and the second option would be to reduce all of the recommended salaries by an equal percentage." In posing her questions, the opinion requestor commented that "there has been considerable controversy over this issue, with boards of supervisors taking action other than what the law seemingly allows. Some of the actions taken by various boards of supervisors have been to adjust individual salaries as opposed to adjusting all salaries by an equal percentage, adjust the increase in salary as opposed to adjusting the recommended annual salary, or in some cases the board of supervisors has done both." Given the framework in which the earlier opinion was rendered, there can be little doubt that the result there would be controlling of the situation you posit. While we seldom quote at length from earlier opinions, we believe that the comments of our predecessor concisely present the options available to a board of supervisors when establishing county officers' compensation. We quote:

> We agree with your conclusion that §340A.6 allows the board of supervisors only two alternative actions for determining the final compensation schedule of salaries. The board of supervisors may (1) accept the recommendations of the county compensation board as submitted; or (2) *the board may determine that lower salaries or compensation should be fixed, and if it does so, it must reduce the recommended salary or compensation of EACH OFFICER BY AN EQUAL PERCENTAGE.*
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> Accordingly, it is our view that the boards of supervisors are not empowered by the act to adjust recommended salaries by reducing the recommended increase by 100% for each of the elected officials, *nor are they*

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[1] Compare the introductory clause of each section's first sentence, as well as the grammar of the final sentences of the respective sections. There are no other changes made.

empowered to adjust the recommended salaries or compensation of some county officers and not other county officers. If the board of supervisors act in a manner which is inconsistent with the provisions of the statute, it is our opinion that such acts are ultra vires and void. Where the legislature provides the manner of compensation, the boards of supervisors are obliged to follow the statute. [Emphasis supplied.]

We have reaffirmed this prior opinion on a number of occasions, most recently Op.Att'y.Gen. #81-6-7.

Based on the foregoing, we answer your questions as follows:

1. The board of supervisors cannot return the recommended compensation schedule to the county compensatiosn board for reconsideration.

2. The board of supervisors may not disapprove the recommended compensation schedule and allow the current compensation schedule to be carried over through the next fiscal year.

3. If the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the equal percentage factor applies to the new annualized schedule.

December 30, 1981

COUNTIES AND COUNTY OFFICERS; CHIEF DEPUTY SHERIFF; TERMINATION: Acts 1981, S.F. 130, §§320(4), 651(7), 902(2); §§341A.7, 341A.12, The Code 1981. A chief deputy sheriff may be terminated pursuant to §§651(7) and 902(2) of 1981 Acts, S.F. 130. Such termination is not made pursuant to §320(4) of said Act. Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name. (Fortney to Mullins, State Representative, 12/30/81) #81-12-10(L)

December 30, 1981

COUNTIES; REAL PROPERTY; SUBDIVISION PLATTING: §§409.9, 409.12, The Code 1981. Chapter 409 of the Code requires that an abstract of title accompanying a subdivision plat be filed with the county recorder, however, the abstract need not be entered on record. (Ovrom to Glaser, Delaware County Attorney, 12/30/81) #81-12-11(L)

December 31, 1981

PUBLIC FUNDS; DEPOSITS: Iowa Const. Art. VIII, §3; chapters 453, 454, §§4.7, 4.11, 452.10, 453.1, 453.5, 524.103, 534.11(10); Title I of the Housing and Community Development Act of 1974, Public Law 93-383. The Iowa Code requires that public funds must first be proffered to approved banks except where the public funds are to be deposited not more than 14 days. Once the

funds are deposited, public funds not needed for current operating expenses may be invested pursuant to section 452.10, The Code 1981, so long as said investment is not in contravention of Article VIII, section 3, the Iowa Constitution. In certain limited instances, federal legislation providing federal funds may preempt this proffer requirement. (Hagen to Priebe, State Senator, 12/31/81) #81-12-12(L)

JANUARY 1982

January 8, 1982

SCHOOLS: Gifts of School Property. §§291.13, 297.5, The Code 1981; §297.22, The Code 1981, as amended by 1981 Session, 69th G.A., chapter 93, p. 269. Where a school district board conveys real estate to another governmental unit by gift, as provided by section 297.22, it does not hold power to spend school funds to demolish school buildings to satisfy the wishes of the donee of the gift because such expenditure would not be for a school purpose. (Fleming to Cady, Franklin County Attorney, 1/8/82) #82-1-1(L)

January 11, 1982

JUVENILE LAW: Commingling of Juvenile Offenders with Non-offender in a juvenile correctional facility. 1981 Session, 69th G.A., chapter 11, §2(1); Sections 4.7, 4.11, 232.2(5), (11), (32), (43), .52(2)(e), .102(4), chapter 242, chapter 244, section 244.15, The Code 1981; The Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 USC §5633(12) (Supp. 1981); 46 Fed. Reg. 44413, §31.304(b), (c), (f), (g), (h), (i) (Sept. 3, 1981). With the passage of 1981 Session, 69th G.A., chapter 11, §2(1), state law allows the placement of an offender, secure program and a non-offender, non-secure program together upon the Toledo campus of the Iowa Juvenile Home. Such action, however, would present a conflict with the federal law prohibiting the housing of offenders with non-offenders in a juvenile correctional facility. Compliance with the federal act may be shown in one of two ways. The offender population may be housed in the same non-secure manner in which non-offenders are handled and the facility would then not fall within the definition of juvenile "correctional" facility. Alternatively, a determination might be requested from the Office of Juvenile Justice and Delinquency Prevention, Department of Justice, Washington, D.C., to hold that the two programs (secure and non-secure) are not considered as to be a "set of buildings" constituting a "facility", but instead be treated as two separate entities for compliance purposes. (Brent Hege to Commissioners, The Advisory Commission on the Appropriate Uses of the Women's Correctional and Juvenile State Institutions, 1/11/82) #82-1-2(L)

January 11, 1982

COURTS; CIVIL PROCEDURE; PAUPERS OR INDIGENTS: Use of in forma pauperis status by prisoners in small claims cases. §§606.7(3), 606.15(1), 631.1, and 631.2(2), The Code 1981. The clerk of court may not automatically refuse to waive filing fees and court costs in civil actions for money judgments, including small claims cases, but may do so where the court denies the petition to proceed in forma pauperis. (Mann to Short, Lee County Attorney, 1/11/82) #82-1-3(L)

January 12, 1982

COUNTY OFFICERS; COUNTY ATTORNEY: §§135C.24 and 222.18, The Code 1981, Acts, 69th G.A., 1981 Session, chapter 117, §756. The county

attorney is responsible for opening guardianships and conservatorships under the provisions of §§135C.24(5) and 222.18, The Code 1981, and such responsibility is a mandatory duty. The responsibility for continued handling of these matters after the estate is open is not the personal obligation of the person occupying the office of county attorney when the guardianship or conservatorship is established; rather, it is the responsibility of the office of county attorney, such responsibility being carried out by the current occupant of the office (Fortney to Shepard, President, Iowa County Attorneys Association, Inc., 1/12/82) #82-1-4(L)

January 15, 1982

IOWA CONSUMER CREDIT CODE: Excluded transactions under public utilities. Chapters 537 and 476, The Code. Transactions which fit the §537.1202(3) exclusion are excluded from the entire Iowa Consumer Credit Code, chapter 537, The Code. The Iowa State Commerce Commission regulates utilities with respect to charges for services, charges for delayed payment and discounts for early payment. Therefore, transactions under public utilities regulated by the ISCC are excluded from the ICCC. (McFarland To Bruner, State Representative, 1/15/82) #82-1-5

The Honorable Charles Bruner, State Representative: You wrote to this office on October 26, 1981, requesting an attorney general's opinion on the scope of the public utilities exemption from the *Iowa Consumer Credit Code* (ICCC), chapter 537, The Code. Section 537.1202 of the ICCC provides, in part:

> This chapter does not apply to:
>
> * * * *
>
> (3) transactions under public utility or common carrier tariffs if a subdivision or agency of this state or of the United States regulates the services involved, the charges for delayed payment, and any discount allowed for early payment.

More specifically, you asked the following regarding the above ICCC subsection:

> Does this provision provide a total exclusion from the ICCC? Specifically, are regulated utilities subject to the provisions of Article 7, the Debt Collection Practices Act, or does the above exclusion exempt them from that portion of the Act?

Transactions under public utilities which are subject to the §537.1201 exclusion by having charges for services, charges for delayed payments *and* discounts for early payments regulated by a subdivision or agency of the state or the United States, are excluded from the entire ICCC including Article 7, the *Debt Collection Practices Act.* The language in §537.1202, "this *chapter* does not apply to... ," means that the enumerated exclusions are exempt from all provisions of chapter 537, not just provisions dealing with rates, charges and discounts [emphasis added]. Similarly, transactions under public utilities which are not regulated in each respect stated in §537.1202 are generally subject to all provisions of the ICCC if those transactions fit the §537.1301(11) definition of consumer credit transactions.

The Iowa State Commerce Commission (ISCC) regulates all rates and charges for public utility services by authority granted in chapter 476, The Code. The Iowa Supreme Court in *Truner v. Iowa Electric Light and Power*, 240 N.W.2d 912 (Iowa 1976), held that late payment rates and charges fall within the general category of "rates, charges, scedules, service, regulations, or anything done or omitted to be done by any public utility" referred to in §§476.3 and 476.4 (formerly §§490A.3 and 490A.4) and, therefore, are subject to regulation by the ISCC. Discounts for early payment must be built into tariffs filed by utilities under §476.4 since §476.5 prohibits a public utility subject to rate regulation from charging greater or less compensation for its services than that prescribed in its tariffs. Discounts from early payment, therefore, are also subject to ISCC regulation.

In summary, because of the first sentence of §537.1202, transactions under public utilities which fit the §537.1202(3) exclusion are excluded from the entire ICCC. The issue of inclusion in or exclusion from the ICCC is determined by whether the state of Iowa or the United States regulates transactions under the utilities in the areas of charges for services, charges for delayed payment and discounts for early payment. The ISCC regulates public utilities as they are defined in §476.1 in each of the above respects.

January 15, 1982

JUVENILE LAW: Separation of juveniles from adults in facilities used or intended for the detention of adults. The Juvenile Justice and Delinquency Prevention Act of 1974, as amended. 42 USC §5633(a)(12), (13) (Supp. 1981); Sections 232.22, 356.3, The Code 1981; 46 Fed. Reg. 44,410, §31.303 (Sept. 1981); IAC 770—15, *et. seq.* (effective February 1, 1982). These three statutory provisions, as well as the administrative rules promulgated under their authority, require the separation of juveniles from adults when juveniles are detained in adult jails and lock-ups. Generally, the provisions encourage as complete a separation as possible of the juvenile and adult populations. The mandates prohibit regular contact of juveniles with adults in an adult facility. They allow only incidental or haphazard contact between juveniles and adults and then only while under staff supervision. The separation required prohibits sight and conversational sound or communication between juveniles and adults. Finally, the juvenile's confinement area or cell must be in a room entirely separated from the adult population in addition to the sight and conversational sound separation. (Hege to Reagen, Commissioner, Department of Social Services, and George, Director, Iowa Crime Commission, 1/15/82) #82-1-6

Mr. Richard George, Executive Director, Iowa Crime Commission; Dr. Michael V. Reagen, Commissioner, Iowa Department of Social Services: You have jointly requested an opinion of this office as to the interpretation of sections 232.22, 356.3, The Code 1981, and the federal statute, Public Law 93-415, 42 USC 5601, *et. seq.* The subject matter of each of these statutes provides a mandate that juveniles shall be "separated" from any adult detainees in any facility intended or used for the detention of adults. Your specific request is for an operational definition of the meaning of "separation" within the context of Iowa's adult jails and lock-ups.

Historically, the philosophical commitment of separating adults and juveniles in jails dates back to the "child-saver" movement of the late 1800s and 1900s. The same movement later gave impetus to the creation of a separate juvenile court, child labor laws, compulsory education laws, and a host of others designed to

promote and protect the interests of children in this state. Chapters 92, 231, 232, 299, The Code 1981; *See*, generally, Platt, *The Child Savers: The Invention of Delinquency* (1969).

The separation of juveniles and adults in adult jails and lock-ups followed a similar course:

> The juvenile justice system has been moving historically towards the removal of children from adult jails (or lock-ups). This proposition, that children not be placed or held in adult jails, is an extension of the logic that initially created a separate juvenile justice system....
>
> Reformers in the late 19th Century viewed with alarm the general practice of subjecting juveniles and adults to the same treatment in the criminal justice system. One manifestation of this practice was the confinement of children in adult jails. The solution of this perceived abuse of children was the creation of special juvenile justice systems (including courts and institutions) for the handling of juveniles. By 1920, most states followed the early example of Illinois and established a separate juvenile system in some form.

Arthur D. Little, Inc., *Removal of Juveniles From Adult Jails and Lock-Ups: A Review of State Approaches and Policy Implications*, p. 3 (March 1981). (Prepared for the Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice).

Iowa followed the national trend and implemented a separate juvenile court system in 1913. 30 G.A., chapter 11, §§1, *et. seq.*; §§254-a13, *et. seq.*, The Code 1913. The section requiring separation of minors and adults in jails, now section 356.3, pre-dated even the juvenile court system and was enacted in 1897. 26 G.A., chapter 105, §§2, 4; §5638, The Code 1897.

Given that Iowa has supported and required by statute, separation of juveniles from adults in adult jails, your question seeks an answer to what "separation" is presently required by the statutes under scrutiny.

Your request identified three statutory provisions, one federal and two state, which address or are implicated in defining "separation".

The federal statute, the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, Public Law 93-415, 42 USC 5601, *et. seq.* (1981), is generally a funding and grant statute placing substantive standards upon states which wish to receive federal funds. *See, Pennhurst State School v. Halderman*, ____ U.S. ____, 101 S.Ct. 1531, ____ L.Ed.2d ____ (1981). Iowa has been receiving funds from the Office of Juvenile Justice and Delinquency Prevention since 1975. (Attachment to Opinion Request.)

The pertinent provision of the JJDP Act mandating separation is as follows:

> (a) In order to receive formula grants under this part, a state shall submit a plan for carrying out its purposes consistent with the provisions of section 3733(a)(1), (3), (5), (6), (8), (10), (11), (12), (15), and (17) of this title. In accordance with regulation established under this subchapter, such plan must—
>
> (12)(A) provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, or such nonoffenders as dependent or neglected children, shall not be placed in juvenile detention or correctional facilities; and

(B) provide that the state shall submit annual reports to the Associate Administrator containing a review of the progress made by the state to achieve the deinstitutionalization of juveniles described in subparagraph (A) and a review of the progress made by the state to provide that such juveniles, if placed in facilities, are placed in facilities which (i) are the least restrictive alternatives appropriate to the needs of the child and the community; (ii) are in reasonable proximity to the family and the home communities of such juveniles; and (iii) provide the services described in section 5603(1) of this title:

(13) *provide that juveniles alleged to be or found to be delinquent and youths within the purview of paragraph (12) shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges;* [Emphasis added].

42 USC §5633(a), (12) and (13), (1981).

Proposed federal regulations implementing §5633(a)(13) state:

(g) Contact with incarcerated adults. (1) Pursuant to Section 223(a)(13) of the JJDP Act the state shall:

(i) Describe its plan and procedure, covering the three-year planning cycle, for assuring that the requirements of this section are met. *The term regular contact is defined as sight and sound contact with incarcerated adults, including inmate trustees. This prohibition seeks as complete a separation as possible and permits no more than haphazard or accidental contact between juveniles and incarcerated adults.* In addition, include a timetable for compliance and justify any deviation from a previously approved timetable.

(ii) In those isolated instances where juvenile criminal type offenders remain confined in adult facilities or facilities in which adults are confined, the state must set forth the procedures for *assuring no regular sight and sound contact between such juveniles and adults.* [Emphasis added.]

46 Red. Reg. 44,410, §31.303[g][1][i] (Sept. 1981).

The statutes of state law, which you have identified, provide:

356.3 Minors separately confined. Any sheriff, city marshall, or chief of police, having in his or her care or custody any prisoner under the age of eighteen years, *shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer,* if suitable buildings or jails are provided for that purpose, unless such prisoner is likely to or does exercise an immoral influence over other minors with whom he or she may be imprisoned.

A person under the age of eighteen years prosecuted under chapter 232 and not waived to criminal court shall be confined in a jail only under the conditions provided in chapter 232.... [Emphasis added.]

Section 356.3, The Code 1981.

...2. A child may be placed in detention as provided in this section only in one of the following facilities:
a. A juvenile detention home.

b. Any other suitable place designated by the court.

c. *A room in a facility intended or used for the detention of adults* if there is probable cause to believe that the child has committed a delinquent act, and if:

(1) The child is at least fourteen years of age; and

(2) The child has shown by his or her conduct, habits, or condition that he or she constitutes an immediate and serious danger to himself or herself or to another, or to the property of another and a facility or place enumerated in paragraph "a" or "b" of this subsection is unavailable, or the court determines that the child's conduct or condition endangers the safety of others in the facility; and

(3) *The facility has an adequate staff to supervise and monitor the child's activities at all times*; and

(4) *The child is confined in a room entirely separated from adults....*

... 4. No child shall be detained in a facility under subsection 2, paragraph "c" for a period in excess of twelve hours without the written order of a judge or a magistrate authorizing such detention. [S13, §254-a24; SS15, §254-a16; C24, 27, 31, 35, 39, §3633; C46, 50, 54, 58, 62, §232.17; C66, 71, 73, 75, 77, §232.17—232.19; C79, §232.22; 68GA, chapter 56, §4, chapter 1012, §22]....

Section 232.22(2), (4), The Code 1981.

Administrative rules promulgated pursuant to the Iowa statutes also address the separation mandate:

770—15.13(356,356A) Standard operating procedures manual. Pursuant to the authority of sections 356.5 and 356.36, The Code, each county shall establish and the jail administrator shall ensure compliance with a standard operating procedures manual requiring at a minimum, the following specifications: (I)....

15.13(1) Admission and classification.

... b. *With the exception of incidental contact under staff supervision, the following classes of inmates shall be kept separate by architectural design barring conversational and visual contact from each other:*

(1) *Juveniles and adults.* (Pursuant to section 356.3, The Code.)

(2) Females from males (exception — alternate jail facilities). (Pursuant to section 356.4, The Code.)... [Emphasis added.]

IAC 770—15.13(1)(b)(1) (effective February 1, 1982).

15.13(2) Security.

a. Supervision of inmates.

(1) Twenty-four-hour supervision of all inmates shall be provided pursuant to section 356.5(6), The Code. (1MO)

(2) When staff is not within the confinement area of the jail a staff person shall be in a position to hear inmates in a life-threatening or emergency situation; or a calling device to summon help will be provided. (1MO)

(3) At least hourly visual inspections of individual inmates shall be made and documented, which may be accomplished by television surveillance. When television monitoring is used, there shall be personal observation every four hours excepting at times of emergency. (I)

(4) *Inmates considered to be in physical jeopardy because of physical or mental condition or those held pursuant to chapter 232, The Code, shall be checked more frequently than on an hourly basis.* (I)

(5) No employee or visitor of one sex shall enter a housing unit occupied by the other sex unless advance notice has been provided except in case of an emergency. (Does not apply to alternate jail facilities.) (I)

(6) When there are women in the jail population, a female employee shall be on the premises in accordance with section 356.5(6), The Code. (Does not apply to alternate jail facilities.) (I) [Emphasis added.]

IAC 770—15.13(2) (effective February 1, 1982).

The statutes and rules implicate two aspects of the jail: the physical construction of the room or cell in which a juvenile is confined or placed, section 232.22(c)(4), The Code 1981, and the programming or activities (separation of the juvenile's person from adults) provided within the facility as a whole, 42 USC §5633(a)(13), "in any institution in which they have regular contact with adult persons"; 46 Fed. Reg. 44,410 (Sept. 1981) — "regular contact defined as sight and sound contact with incarcerated adults", "permits no more than haphazard or accidental contact between juveniles and incarcerated adults"; Section 356.3, The Code 1981, "shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer", section 232.22(2)(c)(3), The Code 1981, "facility has an adequate staff to supervise and monitor the child's activities at all times"; IAC 770—15.13(1)(b)(1), "with the exception of incidental contact under staff supervision, the following classes of inmates shall be kept separate by architectural design barring conversational and visual contact from each other: (1) Juveniles and adults".

Several principles can be gleaned from these statutes and rules. First, the separation required is defined in terms of prohibiting sensory contact and communication by sight and hearing. [1] 46 Fed. Reg. 44,410 (Sept. 1981) — "sight and sound contact"; IAC 770—15.13(1)(b) — "barring conversational and visual contact from each other". Secondly, these provisions apply to *all* visual contact, which is difficult to qualify, while verbal communication is specified to prohibit only conversational volume contact. This implies that a jail or lock-up need not be totally sound proof to prevent all verbal communication. Thirdly, only "regular" contact is prohibited, 42 USC §5633(a)(13); haphazard, accidental or incidental contact under staff supervision is not prohibited. 46 Fed. Reg. 44,410 §31.303[g][1][i] Sept. 1981); IAC 770—15.13(1)(b)(1).

Because these statutes and rules by necessity are general, their application to specific factual situations may be helpful to jail administrators and inspectors.

Booking Room

The statutes and rules would not require a separate booking room for juveniles and adults.

The function of the booking room is generally for administrative purposes for the admission and discharge of inmates. The booking room will normally be the

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[1] In most instances, prohibiting sight and sound contact will necessarily preclude physical (tactile) contact. Indeed, section 232.22(2)(c)(4), requires physical separation specifically ("in a room entirely separated from adults").

first place a person is taken after arrest if not released on pre-trial. Information must be obtained and recorded before admission to the jail is completed. IAC 770—15.22. Searches are performed. Personal property and contraband are removed from the inmate. Fingerprints may be taken. Section 232.148, The Code 1981. The inmate will be assigned to a cell and taken there for confinement. The booking room will subsequently be the last contact an inmate has upon discharge from the facility.

The booking room contact by juveniles with adult inmates is not prohibited because it meets the two required criteria: incidental contact and personal supervision by staff or officer. The contact is incidental because it depends on such things as time and manner of arrest or taking into custody, possibility of pre-trail release, and scheduled court appearances. In short, most of the variables that would result in contact between a juvenile and adult in a booking room will be uncontrolled by jail personnel. Secondly, it would be extremely rare for jail staff not to be present on such a contact. Therefore, it would be one under supervision.

Cell Blocks and Cells, IAC 770—15.2(3), (4).

The statutes and rules have an obvious impact upon placement of juveniles and adults in cells, cell blocks, day rooms, multiple occupancy cells, dormitories, and detention areas of jails. IAC 770—15.2(3)—(8).

It is clear that an adult inmate and a juvenile may not be placed in the same cell. Section 232.22(2)(c)(4), The Code 1981. Also prohibited is the placement of an adult and juvenile in separate, but contiguous cells, constituted of bars only and not solid walls. This would meet neither the requirement of "incidental contact under staff supervision" nor the requiring separation "by architectural design barring conversation and visual contact with each other". Sections 356.3; 232.22(2)(c)(4), The Code 1981; IAC 770—15.13(1)(b)(1). Solid walls and doors would comply with the visual separation requirement, while sound proofing material may remedy the conversational contact criteria.

Similarly, placement of juveniles and adults in a dormitory setting, IAC 770—15.2(8), would be precluded because of the "regular contact" and no sight and sound separation. 42 USC §5633(a)(13)(1981); Sections 356.3, 232.22(2)(c)(4), The Code 1981; 46 Fed. Reg. 44,410, §31.303[g][1][i] Sept. 1981); IAC 770—15.13(1)(b)(1).

Another commonplace example of jail construction, especially in less populated rural areas, would be four to eight cells in a single cell block on the same floor of the facility. Obvious sight and conversational sound problems are presented if the cells are in a line adjacent to each other, on one side of the block, with cell doors opening onto a common hall running down the length of the other side of the cell block. For eight cells, it is not uncommon to have two groups of four adjacent cells, each group placed on opposite sides of the block, with cell doors opening onto a common hall running down the middle of the block. These examples assume only cell bars and not solid walls and doors. Enclosing and sound proofing at least one cell, for use by a juvenile, would comply with the sight and conversational sound requirement. The incidental contact could be satisfied by choosing the cell closest to the cell block exit. This would prevent having to take the juvenile by the adult cells presenting potential juvenile/adult contact, when the juvenile must be removed from the cell block for activities, services, court appearances or discharge from the facility. Furthermore, if the cell block is not full, it would be wise to place the adults in cells as far away as possible from the juvenile cell. This would further insure sight and conversational sound separation as well as preventing "regular" contact between juveniles and adults.

Further, if the jail facility has more than one floor, it would be wise to separate juvenile cells and adult cells by placing on different floors. Similarly, if more than one wing exists, juveniles and adults could be separated accordingly. These alternatives in placement would insure the maximum in sight and conversational sound separation while minimizing the incidental contacts occurring under staff supervision.

Services and Programming

The Iowa rules provide that jails shall provide for leisure time activities for inmates.

> 770—15.18(356,356A) Inmate activities. Provision shall be made for leisure time activities that may include, but are not limited to, the following; exercise areas (both indoor and outdoor, whenever possible), television and radio, table games, hobby craft items, library religious services, movies, canteen or commissary, and education programs.

IAC 770—15.18

Moreover, these services must be provided on a nondiscriminatory basis.

> 15.1(6) Equal opportunity. Facilities, programs, and services shall be available on an equitable basis to both males and females even though each standard does not specify that it applies to both males and females.
>
> 15.1(7) Nondiscriminatory treatment. Each jail administrator shall ensure that staff and inmates are not subject to discriminatory treatment based upon race, religion, nationality, handicap, sex or age.

IAC 770—15.1(6), (7).

The requirements of sight and conversational sound separation and limiting contacts between juveniles and adults to those of an incidental nature will have an effect on the provision of services when juveniles are confined with adults in an adult jail or lock-up. The limitation will prevent the provision of these services or activities to both adults and juveniles simultaneously in the same physical location. To do so would be a failure to comply with sight and conversational sound separation and constitute regular contact between juveniles and adults.

Generally, two methods of programming and scheduling would be available to avoid violation of the separation statutes and rules.

First, the facility, be it a day room, exercise area, hobby craft area or dining area, could be time-shared by each population. By scheduling each group to use the facility at different times, no regular contact nor sight and sound separation problems should occur. Furthermore, the programming schedules could be progressively rotated so that equal access or discriminatory treatment claims are ameliorated.

The second alternative, probably less desirable for cost effectiveness reasons, would be to have separate facilities for simultaneous use by each population. This would meet the separation requirements and, if the facilities and activities are substantially similar, should avoid equal access and discrimination problems.

One other solution may be possible. Certain services or activities may lend themselves to performance in the inmate's individual or multiple occupancy

cells. Those cells must comply with the separation requirements and the performance of additional activities, such as dining or hobby crafts, would pose no danger of violation of separation principles.

It is impossible to anticipate all potential questions raised by the jail separation requirements. However, by applying the general criteria of the restrictions to the specific jail, and seeking and considering physical plan and programming alternatives most facilities should be able to meet the mandates of the statutes and rules.

One final statute should be noted for your attention. While the present statutes and rules allow juveniles to be placed in adult jails, albeit separated from adults, the 1980 amendments to the Juvenile Justice and Delinquency Prevention Act will require removal of juveniles from adult jails by December, 1985. Juvenile Justice and Delinquency Prevention Act §233[a][14](1974) (amended 1981)[to be codified as 42 USC §5633(a)(14)(1982)]; 46 Fed. Reg. 44,410, §31.303(h)(1)(Sept. 1981). Thereafter, adult jails and lock-ups may not be used to incarcerate juveniles,[2] if the state is to be in compliance with the federal act and continue the receipt of federal funds.

In summary, three statutory provisions place restrictions on the incarceration of juveniles in adult jails and lock-ups: a federal statute, the Juvenile Justice and Delinquency Prevention Act §223(1)(13), 42 USC §5633(a)(13)(1981); Iowa's statutory provision on jails, section 356.3, The Code 1981; and Iowa's Juvenile Justice Act, section 232.22(2), The Code 1981. Administrative rules have been promulgated under both the federal and state statutes and generally provide greater specificity than the statutes. 46 Fed. Reg. 44,410 §31.303[g][1][i] (Sept. 1981); IAC 770—15.13(1).

These statutes and rules generally encourage as complete a separation of the juvenile from the adult population as possible. The mandates prohibit regular contact of juveniles with adults in an adult facility. They allow only incidental or haphazard contact between juveniles and adults and then only while under staff supervision. The separation required prohibits sight and conversational sound contact or communication between juveniles and adults. Finally, the juvenile's confinement area or cell must be in a room entirely separated from the adult population, in addition to the sight and conversational sound separation.

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[2] At the present time, certain exceptions and waivers to compliance are being developed by the Officer of Juvenile Justice and Delinquency Prevention. Exceptions currently under proposed rule making are: exemptions for jails in low pupulation density areas, juvenile accused of serious crime against person, no existing alternative placement, county not served by regional or local juvenile facility. 46 Fed. Reg. 29444, §31.703(a)(1)(g)(4) (June 1, 1981).

January 15, 1982

STATE OFFICERS AND DEPARTMENTS: Merit Commission; Layoffs; Affirmative Action. Chapter 19A, §19A.9(14). Section 19A.9(14) does not preclude the Merit Employment Commission from promulgating an affirmative action layoff rule. The specification that primary and secondary consideration, respectively, be given to "performance record" and "seniority in service" does not exclude consideration of additional, tertiary factors which are reasonably related to the layoff rules. Affirmative action is reasonably related to layoff rules as a means to ensure that seniority-based layoffs do not disproportionately impact on recent hiring gains made through affirmative action programs. (Pottorff to Van Winkle, Director, Merit Employment Department, 1/15/82) #82-1-7(L)

January 15, 1982

MUNICIPALITIES: State Building Code. Chapter 103A, The Code 1981; §§103A.3(4), 103A.3(7), 103A.7, 103A.10(1), 103A.10(2)(b), 103A.10(3), 103A.10(4), 103A.12, 103A.19, 103A.22(1), and 103A.22(2), The Code 1981; Acts, 69th G.A., 1981 Session, chapter 117, §303. Three options avail a governmental subdivision in the selection of a building code. It can: (1) adopt the state building code, without alteration; (2) adopt or enact any building regulation, provided the regulations comply with certain provisions of the state building code which have statewide effect; and (3) elect not to provide for a building code. Thus if a city permits a county building code to apply within the incorporated area of the city, pursuant to §303, Acts, 69th G.A., 1981 Session, chapter 117, it is not required to adopt or enact a separate building code under chapter 103A of the Code. Once a building code is adopted or enacted, however, the governmental subdivision has the responsibility to enforce its building code. The prescribed manner in which a building code is administered and enforced, including the designation of a local building department, is the prerogative of the governmental subdivision. Hence, county enforcement of a building code relieves a city of any responsibility to enforce the building code, assuming the county has accepted responsibility for enforcement within the incorporated area. (Walding to O'Kane, State Representative, 1/15/82) #82-1-8(L)

January 18, 1982

GENERAL ASSEMBLY; CONSTITUTIONAL LAW: Redistricting. Amendment 14, *United States Const.*; Article II, §1, Art. III, §§4, 5, 6, 34, 35 and 36, *Iowa Const.*; §§42.4(8), 43.11, chapter 721, The Code 1981; S.F. 581. The redistricting procedures enacted in 1980 and the redistricting legislation enacted in the 1981 Second Special Session authorize an incumbent elected for a term commencing in January, 1981, who is the only incumbent residing in that even-numbered district, to change residences in order to acquire holdover states whether or not the district from which the senator was elected is contiguous with the new district the senator seeks to represent. No substantial constitutional challenge to the redistricting provisions may reasonably be anticipated. The General Assembly may amend these provisions to limit "leapfrogging" in this session. (Miller and Schantz to Schroeder and Bruner, 1/18/82) #82-1-9

The Honorable Laverne Schroeder; The Honorable Charles Bruner, State Representatives: We are in receipt of your opinion requests concerning whether an incumbent state senator who has resided in a new even-numbered district may constitutionaly retain the seat and, if so, whether an incumbent state senator may change his residence into an otherwise vacant even-numbered district and continue to serve in the senate without being required to stand for election.

More specifically, Representative Schroeder posed the following questions:

> Specifically, I am asking if an incumbent senator elected for a four-year term commencing January, 1981, may complete that term under the following circumstances:
>
> (1) When the senator's residence in his old district is also contained in his new district.
>
> (2) When the senator's residence at the time of his election was in his old district but not contained in the new district, but the senator established residency elsewhere in his old district by April 2, 1982, in an area that is also contained in the new district.
>
> (3) When the senator's residence at the time of his election was not contained in his new district, but the senator establishes residency in his new district by April 2, 1982, and
>
> a. his new district has some points in common with his old district, but the senator elected to reside at some place other than the intersecting areas of his new and old districts, or
>
> b. his new and old districts have no points in common.
>
> These questions all assume that the new district is an even-numbered district and that no other incumbent resides in the district. The questions are also presented in graphic form to assist you in understanding them.

Representative Bruner joins in your request and asks the following additional questions:

> First, if a retiring member of the Iowa Senate moves from his or her own district into a noncontiguous even-numbered district inhabited by a senator who would otherwise be a holdover senator, does that force an election? It would seem to me that a political party could recruit senators from their own party who were planning to retire to move into an opposing party members holdover senate district simply to force an election. Would a senator who made such a move for the sole reason of forcing an election be liable under any criminal statute?
>
> Second, would a senator be able to claim one district as a holdover district (having established or maintained residency in that district as of April 2, 1982) and then seek a senate seat in another district, intending to resign the first senate seat if elected in the second district? It would seem to me that a senator could find himself or herself in a holdover senate seat which was nevertheless unfavorable from a long-range perspective and prefer to represent a more favorable district.

Initially, these questions require consideration of §42.4(8), The Code 1981, enacted in 1980 as part of a package preparing for redistricting in the next session. This section provides:

8. Each bill embodying a plan drawn under this section shall include provisions for election of senators to the General Assemblies which take office in the years ending in three and five, *which shall be in conformity with article III, section 6 of the Constitution of the state of Iowa.* With respect to any plan drawn for consideration in the year 1981, those provisions shall be substantially as follows:

a. Each odd-numbered senatorial district shall elect a senator in 1982 for a four-year term commencing in January, 1983. If an incumbent senator who was elected to a four-year term which commenced in January, 1981, or was subsequently elected to fill a vacancy in such a term, is residing in an odd-numbered senatorial district on April 2, 1982, that senator's term of office shall be terminated on January 1, 1983.

b. Each even-numbered senatorial district shall elect a senator in 1984 for a four-year term commencing in January, 1985.

(1) If one and only one incumbent state senator is residing in an even-numbered senatorial district on April 2, 1982, and that senator was elected to a four-year term which commenced in January, 1981 or was subsequently elected to fill a vacancy in such a term, the senator shall represent the district in the senate for the Seventieth General Assembly.

(2) Each even-numbered senatorial district to which subparagraph (1) of this paragraph is not applicable shall elect a senator in 1982 for a two-year term commencing in January, 1983. [Emphasis added.]

The General Assembly reenacted a functionally identical provision in §4 of S.F. 581, the Redistricting Bill adopted in the 1981 Second Special Session, 1981 Iowa Legis. Session, #4 at 1020—21. That section provides in pertinent part:

2. Each odd-numbered senatorial district established by section 41.2, which the General Assembly adopts by reference, and section 2 of this Act shall elect a senator in 1982 for a four-year term commencing in January, 1983. If an incumbent senator who was elected to a four-year term which commenced in January, 1981, or was subsequently elected to fill a vacancy in such a term; is residing in an odd-numbered senatorial district on April 2, 1982, that senator's term of office shall be terminated on January 1, 1983.

3. Each even-numbered senatorial district established by section 41.2, which the General Assembly adopts by reference, and section 2 of this Act shall elect a senator in 1984 for a four-year term commencing in January, 1985.

a. If one and only one incumbent state senator is residing in an even-numbered senatorial district on April 2, 1982, and that senator was elected to a four-year term which commenced in January, 1981 or was subsequently elected to fill a vacancy in such a term, the senator shall represent the district in the senate for the Seventieth General Assembly.

b. Each even-numbered senatorial district to which paragraph "a" of this subsection is not applicable shall elect a senator in 1982 for a two-year term commencing in January, 1983. [Emphasis added.]

The emphasized portions of both provisions plainly manifest a legislative intent to permit holding over by some incumbent senators, in contrast to a reapportionment plan whereby all senators must stand for reelection, either for a two-year term or a four-year term. Cf. *In re Legislative Districting of General*

Assembly, 193 N.W.2d 784, 791 (1972) (the plan adopted by the supreme court for the 1970s). Because the General Assembly was obviously aware that the new senate districts would depart substantially from the districts in place for the 1980 elections, there can be no doubt that it intended to permit holding over by senators whose residence at the time of the 1980 election placed them and only them in a new senate district.

These provisions do not expressly address, either to permit or to forbid, the question of whether an incumbent senator may change residence in order to acquire holdover status. However, we note that these statutes expressly impose only two conditions for holding over: (1) election to a four-year term commencing in January, 1981 and (2) residence in an even-numbered senatorial district on April 2, 1982 (the deadline for filing nomination papers for a senate seat subject to election in 1982, §43.11, The Code 1981).

The selection of the condition that a person merely be a resident at a specified future date rather than, say, a condition that the person have resided in the new district at the time of the 1980 election or some other past date, obviously supports the inference that the General Assembly intended to permit incumbents to make at least some changes in residence in order to avail themselves of the holdover provisions.

Drawing this inference is also supported by the policy considerations underlying the holdover provision. Article III, §6 of the Iowa Constitution, as amended in 1968, provides that "Senators shall be classified so that as nearly as possible one-half of the members of the senate shall be elected every two years." The first unnumbered paragraph of §42.4(8) expressly provides that the holdover provisions are intended to implement article III, §6. Because permitting incumbents to make some changes of residence would increase the number of incumbents who could holdover, this construction of the language is the one which appears to foster the purpose of promoting continuity of membership in the upper house from one General Assembly to the next, which underlies the holdover provisions.

As your questions note, however, it may be one thing to permit an incumbent senator to move to a new residence in his old district which is also in a new district different from that of his old residence, a somewhat different thing to permit an incumbent senator to move outside of his old district into the new district when the two districts overlap, and a quite different thing to permit an incumbent senator to "leapfrog" from an old district in southwest Iowa into a vacant new district in northeast Iowa. Statutory linedrawing reflecting these differences might properly have been included in the redistricting legislation. However, it is not the proper function of this office, nor of the courts, to draw lines in statutes which do not by express language or fair implication contain them. *See, e.g., Cedar Rapids Steel Transportation v. Iowa State Commerce Comm.*, 160 N.W.2d 825, 830 (Iowa 1968), *cert. denied* 394 U.S. 918 (1969). Thus, if it is a fair inference from the language of the statute that some changes in residence were intended, we can only conclude that all changes in residence are permissible.

We believe that this inference should be drawn unless it is necessary to invoke the rule that statutes should be construed to avoid calling into question their constitutionality. It is to constitutional considerations, then, that we now turn.

A number of constitutional provisions have potential application to the issue at hand. The Fourteenth Amendment to the Constitution of the United States requires that most state offices filled by election be based on a districting scheme that reflects the one-person, one-vote principle. The United States Constitution, however, does not directly guarantee the right to vote in state elections nor require that a particular office be chosen by election. *Snowden v. Hughes*, 321

U.S. 1 (1944). Article III, §§34—36 of the Iowa Constitution require reapportionment of the General Assembly on a decennial basis to comply with constitutional requirements.

Article III, section 5 of the Iowa Constitution and art. III, §34 plainly require that senators be chosen by election from districts. Section 5 requires that a senator shall have had an actual residence of sixty days in the district he may have been chosen to represent at the time of his election and that a senator's term be four years, but art. III, §35 provides that "(t)he reapportioning authority shall, where *necessary* in establishing senatorial districts, shorten the term of any senator prior to completion of the term." As previously noted, art. III, §6 provides senators are to be classified so that, as nearly as possible, one-half of the members of the senate are elected every two years.

Any provision that permits holding over of incumbents in the context of redistricting will result in the incumbent representing persons who did not have an opportunity to cast a vote for or against the senator in the previous election. If the more extreme hypothetical forms of "leapfrogging" are authorized, a senator could represent a district none of whose voters cast a ballot in his or her election. The issue is whether this significant policy concern also raises a serious question under the Iowa Constitution.

Article II, §1, as amended in 1970, guarantees the right of suffrage to every citizen of the United States of the age of twenty-one years who meets residency requirements "at all elections which are now or hereafter may be authorized by law."

A rather thorough search has revealed no decisions in Iowa or elsewhere considering the application of right to vote provisions to the more extreme hypothetical fact patterns discussed above. However, a leading Iowa case and several federal decisions provide guiding principles of analysis.

In *Selzer v. Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962), the supreme court of Iowa considered a reapportionment act, which among other things, included new counties in existing districts, thereby including citizens in the district who had not voted for the incumbent. This was challenged as a violation of Art. II, §1. The court responded clearly:

> There is no violation of section 1, article II of the Iowa Constitution.
>
> The voters in the attached counties have the right to vote in 'all elections which are now or hereafter may be authorized by law.'
>
> For the purpose of interim 'representation' the counties are attached to districts. This attachment will continue only until there is a senatorial election in the new district of which they are a part. As soon as there is a senator to be elected from their district, they can vote. Until there is an election or some one or some thing to vote for, the question of the right to vote is academic but not real. There is no denial of a right to vote until there is an election. There is no disenfranchisement as to a particular office when there is no vacancy to be filled. The constitution does not say a voter is entitled to vote for every office in our national or state government at every election. It does say he is entitled to vote at all elections authorized by law. That simply means he is entitled to vote on candidates and propositions submitted to the voters in his voting precinct.

113 N.W.2d at 732.

The court also addressed the relationship of a senator to the voters:

> A senator represents either the people of the state as a whole, as suggested by the trial court, or the people within the district existing during his tenure of office. He is not a mere mouthpiece for those who voted for him. He is a legislative representative of the people exercising his authority for the welfare and protection of all. We cannot think any member of the senate would be so narrow as to confine his representation solely to those who voted for him or those counties assigned to him.

113 N.W.2d at 731.

Although the facts of *Selzer* arguably do not extend beyond toleration of a senator representing persons who had not participated in his or her election to the extent necessary to affect meaningful reapportionment, the analysis is not so limited. The right to vote is only applicable to elections authorized by law, the court held. The General Assembly had not authorized an election and was not required to schedule an interim election prior to the expiration of the term merely because district boundaries had been changed. Under this analysis, then, the right to vote simply does not come into play.

Moreover, the *Selzer* court's discussion of art. III, §6, requiring that, as nearly as possible, only half the senate be subject to election every two years, appears to insulate holdover provisions from attack on the ground that they are arbitrary or irrational. The court quoted with apparent approval from an article by Stoyles and Kennedy, "Constitutional and Legal Aspects of the Plan." 39 Iowa L.Rev., #4 (1954):

> The principle of continuity of the senate was intended to be secured by two provisions in section 6 of article III of the Iowa Constitution: (1) In the beginning a classification of senators was to be made by lot so that 'as nearly one-half as possible, shall be elected every two years.' (2) When the number of senators should thereafter be increased, the new senators were to be annexed by lot to one of the two classes, 'so as to keep them as nearly equal in numbers as practicable.' It is manifest that the constitutional architects intended that the provision assuring a retention of one-half the members of the senatorial body from one General Assembly to the next should be a permanent feature. Moreover, the provision for holdover of half the senate remains intact as a matter of both the letter and the principle of the constitution.

Because the holdover provisions may be expected to result in greater continuity, they seem rationally related to a legitimate constitutional purpose.

Nor do we believe the residency requirement for senators imposed by art. III, §5 poses a constitutional obstacle to "leapfrogging." That provision has previously been interpreted by this office according to its plain language to be applicable only at the time of election and thus not to preclude a senator elected from a district in southwest Iowa from continuing to represent that district even though the senator may have moved to northeast Iowa since the election. 1974 Op.Att'y.Gen. 459; Op.Att'y.Gen. #79-8-1. Holdover "leapfrogging", of course, differs in that electors from a noncontiguous district would have had no opportunity to vote for an incumbent who moves into a vacant district, but, as discussed above, this objection has not been given constitutional significance by the courts.

Therefore, unless the supreme court of Iowa were thoroughly to reconsider the *Selzer* decision, we think it unlikely that a serious constitutional attack could be mounted against the holdover provisions. Because we have located no decisions contrary to *Selzer* and several consistent with its principles, *see, e.g., Ferrell v.*

State of Oklahoma ex. rel. Hall, 339 F.Supp. 73, 82 (W.D. Okla. 1972) *aff'd* 406 U.S. 939 (1972); *Stout v. Bottorff*, 249 F.Supp. 489, 494-95 (S.D. Ind. 1965), we have no basis for anticipating reconsideration. Accordingly, we cannot invoke the rule that statutes should be construed to avoid constitutional doubts and we must conclude that the holdover provisions permit changes of residency without limitation.

With that in mind, we turn to the situations posited by Representative Bruner.

First, the question is raised whether a senator, otherwise planning to retire, who moves into a noncontiguous, even-numbered district inhabited by a senator who would otherwise holdover, violates any criminal statutes. We know of none. As previously noted, the holdover provisions impose two conditions: (1) election for a term commencing in January 1981, and (2) residence of one and only one incumbent in the district as of April 2, 1982. If those conditions are not satisfied, an election is required. §42.4(8)(b)(2), The Code 1981. A senator who changes residence is not required to file an affidavit that he or she will in fact serve the remaining term or stand for election if one is required. Nor does it appear that such conduct would violate any other oath or affidavit previously sworn. Thus, we can foresee no violations of chapter 721, Official Misconduct, or other criminal statutes.

Second, you ask whether a senator could claim one district as a holdover by establishing residency in that district as of April 2, 1982 and then seek election in another district in the 1982 general election.

Neither the fact of holding another office, including that of senator, nor of residing in another district as of April 2, 1982, would preclude *candidacy* for a senate seat in the 1982 general election. Prior opinions of this office have made clear that a person need not be a resident of the district he seeks to represent in order to be a candidate for nomination at the *primary* election. 1974 Op.Att'y.Gen. 459, 469; 1972 Op.Att'y.Gen. 437; 1968 Op.Att'y.Gen. 154. So long as the candidate actually resides in the district 60 days prior to the general election, he or she is eligible for the office.

The remaining issue, however, is whether a person who intends on April 2, 1982, to move subsequently into another district, would qualify as a "resident" in the holdover district. Neither chapter 42 nor S.F. 581 contain a definition of the expression "is residing in" and the concept of residence generally is ambiguous in the sense that it may refer to the concept of "domicile," the one place a person intends as a permanent home, or to the one or more places a person may be connected to physically and legally. The qualifications for the office of state senator employ the term "actual residence." The Iowa Supreme Court has construed this phrase to mean physical presence rather than permanent intention. Under this meaning of "is residing in," an incumbent could satisfy both the holdover condition and the residence requirement for seeking a new senate seat. Of course, were the incumbent to prevail in the general election, the holdover seat would be "ipso facto" vacated. *State ex rel. LeBuhn v. White*, 257 Iowa 606, 133 N.W.2d 903 (1965); 1976 Op.Att'y.Gen. 6, 17. We find no present obstacle to either of the strategems hypothesized.

In conclusion, we would merely note again that we must ascertain legislative intent as best we can from the statutory language employed and the apparent purpose of the provisions. Whether, under the pressure of evaluating highly complex redistricting legislation, all members of the General Assembly actually focussed on the full implications of the language employed, we cannot be certain. Nor is it for us to evaluate whether the more extreme forms of "leapfrogging" hypothesized are at all likely to occur as a practical matter.

We do advise, however, that the Iowa Constitution, in our opinion, poses no obstacles to modification of the holdover provisions by amendment this session. That art. III, §6 does not require maximizing the opportunity for holding over we may infer from the fact that the supreme court plan for the 1970s made no provision for holding over at all. *In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 791 (1972). And, although art. III, §35 arguably precludes wholesale amendment of the legislative districts themselves, a question we need not resolve, we are satisfied that it presents no barrier to amendment of §42.4(8), The Code 1981 or S.F. 581.

January 19, 1982

STATE OFFICERS AND DEPARTMENTS: Department of Health. Mobile Home Parks — Licensure. Sections 135D.1(2), 135D.2, The Code 1981. A tract of land which is subdivided and sold in individual lots to private buyers with each lot containing a double-wide mobile home upon it and where all services, including street work, are dedicated to the city, where the city will own and maintain water and sewer lines and provide upkeep for the streets, and where water, sewer and refuse disposal services will be provided by the municipality, a mobile home park subject to the licensure provisions of chapter 135D, The Code, does not exist. (Freeman to Pawlewski, Commissioner of Public Health, 1/19/82) #82-1-10

Norman L. Pawlewski, Commissioner of Public Health: An opinion was asked of our office from your division of disease prevention with respect to chapter 135D, The Code, concerning the licensure of mobile home parks. The situation posited in the request involved a developer who owns a tract of land. The developer plans to subdivide the land into individual lots and equip each lot with a double-wide mobile home. He will sell each lot with the mobile home to individual private owners. Once the lots plus homes are sold, the developer will no longer retain any equity in the lots or the mobile homes, nor would he bear any responsibility for the provision of services. All services, including the street work, are dedicated to the city; the city will own and maintain water and sewer lines and provide upkeep for the streets. Water, sewer, and refuse disposal services are provided by the municipality. The question asked is whether this tract of land with mobile homes upon it is subject to licensure under chapter 135D and, if so, who is the licensee.

To answer this question, it is necesary to examine chapter 135D, The Code 1981. In resolving questions involving statutory construction, the polestar in ascertaining meaning is legislative intent. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Legislative intent is determined by construing the statute in its entirety and not from any one particular provision. *City of Des Moines v. Elliott*, 267 N.W.2d 44, 45 (Iowa 1978).

Section 135D.2 provides in part that "[n]o person, firm or corporation shall establish, maintain, conduct or operate a mobile home park within this state without first obtaining an annual license therefor from the state department of health." A "mobile home park" is defined by section 135D.1(2) in part as follows:

> *[A]ny site, lot, field or tract of land upon which two or more occupied mobile homes are harbored, either free of charge or for revenue purposes,* and shall include any building, structure, tent, vehicle or enclosure used or intended for use as part of the equipment of such mobile home park.

> The term "mobile home park" shall not be construed to include mobile homes, buildings, tents or other structures temporarily maintained by any individual, educational institution, or company on their own premises and used exclusively to house their own labor or students.

A mobile home park exists when one finds:

1. Any site, lot, field or tract of land
2. Upon which two or more occupied mobile homes are harbored
3. Either free of charge or for revenue purposes.

In the situation posited by you, once the developer sells each subdivided tract of land, each subdivision constitutes "any site, lot, field, or tract of land," thus meeting element number one above. Each site, lot, or tract, however, houses only one mobile home, which is not consistent with element number two. Likewise, the mobile home located on each of these tracts of land are maintained for private ownership purposes and not free of charge or for revenue purposes, thus not satisfying element number three. Consequently, these individual tracts of land, containing only one mobile home each, do not constitute mobile home parks subject to the licensure requirements of chapter 135D.

The situation posited by you is essentially the same as where a developer sells lots of land with houses already built upon the individual lots, such lots having been carved from a larger tract of land originally owned by the developer. Nothing in chapter 135D indicates an intent on the part of the legislature to license privately-owned tracts of land with only one mobile home located on each tract.

Certainly one can make the argument that the "lot" or "tract" of land in this situation is the original tract purchased by the developer and that, despite subdivision and private ownership of each subdivision, the fact that more than one mobile home is located on this particular, larger tract of land renders the area a mobile home park subject to 135D licensure. This type of analysis could be taken even further to say that a city constitutes a tract of land and where a privately-owned mobile home is located on a privately-owned lot on the east side of the city and another privately-owned mobile home is located on another privately-owned lot on the west side of the city, a mobile home park exists. While technically possible, such interpretation is beyond the intent of 135D. In construing statutes, impractical, absurd results are to be avoided. *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 532 (Iowa 1980).

To conclude that the situation posited by you constitutes a mobile home park for purposes of section 135D.1(2) does not result in a sensible construction of that provision once individual landowners become responsible for their own tracts of land and the one mobile home located thereon. Furthermore, section 135D.2 implies that a mobile home park shall have an operator, whether that operator is a person, firm or corporation. In your case, there is no operator; no one person is responsible for the provision of services to other mobile home owners located in the area any more than in the case where individual home owners live in a particular subdivision, relying upon the municipality for the provision of certain services. Here, complaints with sewer systems, water systems or conditions of streets would be filed directly with the city by the individual landowner. Maintenance of property belongs to no one but the individual property owner.

In addition to the above, even if the original, undivided area owned by the developer were viewed as a "tract" or "lot" for purposes of section 135D.1(2), the mobile homes contained thereon are not harbored "free of charge" or "for revenue

purposes." The fact that individual landowners live in the mobile homes owned by them does not mean they are living "free of charge." One need pay for space used by him or her only when one does not own said space. Furthermore, while the sale of the mobile homes results in revenue to the developer, once the sale is complete, the mobile homes are no longer being harbored for revenue purposes.

One might argue that a "tract" or "lot" of land is an area fixed by boundaries. *Webster's Third New International Dictionary Unabridged* (1967) defines a "lot" as a measured parcel of land having fixed boundaries and designated on a plot or survey." A "tract" is defined as "a precisely defined or definable area of land." One could argue that chapter 135D contemplates defining boundaries somewhat in accordance with ownership. Likewise, the term "harbor" implies ownership. Webster's defines "harbor" as "to give shelter or refuge to" or "to keep possession of." Thus, where one person purchases five subdivided lots housing five mobile homes on each lot and draws revenue from the occupants of those homes, then that person possesses a "tract" of land containing five mobile home spaces and harboring five mobile homes from which he or she draws revenue, thus necessitating the receipt of a license under chapter 135D.

Apparently the general intent of chapter 135D is to provide assurances through the licensure process to those persons who live in mobile homes and are dependent upon an operator or operators for certain services that said services will be properly provided to them. The protection of private landowners who maintain their mobile homes independent of the control of any other person or persons seemingly is not a function of 135D. This conclusion is somewhat buttressed by the fact that when land is subdivided and sold in smaller portions, that subdivision often is subject to subdivision laws which provide a certain measure of protection to the buyer. *E.G.*, chapter 409, The Code.

In summary, it is our conclusion that the situation noted above does not constitute a mobile home park subject to the licensure provisions of chapter 135D. Insofar as this opinion is viewed to be in conflict with OAG #76-12-10, that opinion is overruled.

January 19, 1982

STATE OFFICERS AND DEPARTMENTS: Department of Health. Practices of Audiology and Hearing Aid Fittings. Sections 147.151(5), 147.152(2), 154A.1(4), 154A.19, The Code 1981. Whether a particular activity falls within the scope of the practice of audiology or hearing aid fitting can be fairly determined only by evaluating a questioned activity in light of statutory language. The provisions of the division governing the practice of audiology and the provisions of chapter 154A governing the practice of hearing aid dealers contemplate overlapping activities by audiologists and hearing aid dealers. Whether certain activities are overlapping can be determined, again, only by evaluating such activities in light of statutory language. (Freeman to Pawlewski, Commissioner of Public Health, 1/19/82) #82-1-11(L)

January 27, 1982

CONSERVATION; CONSTITUTIONAL LAW; CRIMINAL LAW: Boat Inspections; Search and Seizures. *U.S. Const.* amend IV. *Iowa Const.* art. I, §8. §106.20, The Code 1981. Boat inspections under §106.20, The Code 1981, are

searches and seizures controlled by the United States and Iowa Constitutions. Warrantless inspections may be conducted (1) with the consent of the owner or custodian of the boat, (2) with probable cause and exigent circumstances arising from the mobility of most small craft, (3) incident to a lawful arrest, (4) with reasonable and articulable suspicion that the boat is not in compliance with applicable safety regulations (a reasonable and articulable suspicion of other violations would justify a short stop for questioning but not an inspection), (5) without consent, probable cause or a reasonable suspicion when (a) the location of the inspections is readily visible to the boating public, (b) signs are posted giving boaters advance warnings of the inspections, (c) the inspections are carried out by uniformed officers present in sufficient numbers to show the police power of the state and conduct a systematic inspection, (e) the inspections are carried out at the direction of policymaking supervisory officials pursuant to neutral standards and criteria, and (e) the inspections are conducted in a manner minimizing the discretion of inspectors, and (6) the inspection is a periodic inspection mandated by law, such as the annual inspection required in §106.20, conducted at an inspection station. Otherwise, warrantless inspections of boats are likely unconstitutional. (Hayward to Wilson, Conservation Director, 1/27/82) #82-1-12

Mr. Larry Wilson, Director, Iowa Conservation Commission: Your office has requested the opinion of the attorney general concerning the circumstances under which conservation officers may make warrantless inspections of vessels on Iowa's lakes and rivers pursuant to §106.20, The Code 1981, for purposes of detecting violations of safety equipment requirements. The resolution of this question is not a simple one. Neither is the question necessarily susceptible to a conclusive or singular answer. The search and seizure provision of the United States Constitution and the Iowa Constitution require or do not require a warrant, or require or do not require probable cause or at least a reasonable suspicion of wrongdoing, depending on the circumstances attendant to a particular search or inspection. In this sense, the Fourteenth Amendment to the United States Constitution and article I, §8, of the Iowa Constitution are the parameters which serve as referents for the determination of the precise authority accorded to conservation officers by §106.20, The Code 1981.

We understand that the purpose of this opinion is to provide guidance to the conservation commission so that it may determine how best to guide its water safety enforcement program. Thus, this opinion should not be construed as indicating whether any search already conducted would or would not meet minimal constitutional requirements. Until recently there had been few reported cases concerning safety inspections of boats, or even automobiles. Recent pronouncements by the Iowa Supreme Court and the United States Supreme Court concerning automobile inspections have, we understand, caused the commission to request our advice as to the applicability of this case law to boat searches. Because this opinion is designed to provide future guidance for general application to boat searches, our approach has been not to determine what is arguably the constitutional minimum required but instead to outline what we believe to be the better course to insure that no violation of constitutional protections occur.

I. *The Applicable Statutes and Regulations*

The authority of conservation officers to inspect private vessels in question is derived from §106.20, The Code 1981, which states *in toto*:

> Any person having, upon any waters of this state under the jurisdiction of the commission, any vessel, either for hire or offered for hire, must have such vessel and all its appurtenances annually inspected.
>
> Every such owner shall file in the office of the commission, an application for inspection of such vessels on a blank furnished by the commission for that purpose.
>
> Officers appointed by the commission shall have the power and authority to determine whether such vessel is safe for the transportation of passengers or may determine and designate the number of passengers or cargo, including crew, that may be carried and determine and designate the number of passengers or cargo, including crew, that may be carried and determine whether the machinery, equipment and all appurtenances are such as to make said vessels seaworthy, were used, and such other matters as are pertinent.
>
> After such vessels have been inspected as provided herein, a current inspection seal or tag shall be issued by the commission and shall be kept posted in a conspicuous place upon or in such vessel. Any inspection seal or tag shall be in effect only for the calendar year for which the inspection seal or tag is issued.
>
> Private vessels may also be inspected to determine their seaworthiness at any time by representatives of the commission.

The question raised concerns the last sentence of that section allowing representatives of the Iowa Conservation Commission to inspect private vessels *at any time* "to determine their seaworthiness." The term "seaworthy" encompasses more than the vessel's capability to remain afloat.

> This adjective, applied to a vessel, signifies that she is properly constructed, prepared, manned, equipped, and provided for the voyage intended. A seaworthy vessel must, in general be sufficiently staunch and equipped with appropriate appurtenances to allow it to safely engage in the trade for which it was intended. *Black's Law Dictionary.* (1212 5th Ed. 1979)

This, along with the third unnumbered paragraph of §106.20, makes it clear that the inspections may entail a check that the vessel is properly equipped with the required safety devices.

Section 106.9, The Code 1981, sets forth a detailed list of required safety equipment.

It also states in pertinent part:

> 3. Every vessel shall carry and exhibit such other lights required by the rules and regulations of the (conservation) commission.
>
> * * * *
>
> 11. The (conservation) commission is hereby authorized to make rules and regulations modifying the equipment requirements contained in this section to the extent necessary for the safety of operations and passengers.
>
> * * * *

* * * *

Also, §106.3, The Code 1981, states in pertinent part:

> The state conservation commission is hereby authorized to adopt, promulgate, and enforce such rules and regulations as may be necessary to carry out the provisions of this chapter.

Pursuant to this authority, the Iowa Conservation Commission has promulgated several rules regarding mandatory safety equipment on private vessels. 290 IAC §§27.1—27.13. These rules generally concern fire extinguishers, lighting and buoyant safety equipment.

II. *Applicable Rules of Statutory Construction.*

The ultimate purpose of any exercise of statutory construction is to ascertain the intent of the General Assembly, its purpose for the enactment of the provision in question, and to give effect to that intent or purpose whenever possible. *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978). In doing so, the preamble of a statute should be considered. *Peffers v. City of Des Moines*, 299 N.W.2d 675 (Iowa 1980). Because the legislature would not intend to enact a void statute, whenever a statute is susceptible to two interpretations, one of which is constitutional and one of which is not constitutional, the former will be the favored construction. *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (Iowa 1966). In other words, a statute will be given effect to the extent it is consistent with the constitution. Statutes are presumed to be constitutional unless clearly, palpably and undoubtedly demonstrated to be otherwise. *State v. Henderson*, 269 N.W.2d 404 (Iowa 1978).

III. *Application of the Rules of Statutory Construction to §106.20, The Code 1981.*

The legislature's intent and purpose in the enactment of chapter 106, The Code 1981, is manifest in §106.1, The Code 1981, which states:

> It is the policy of this state to promote safety for persons and property in and connected with the use, operation and equipment of vessels and to promote uniformity of laws relating thereto.

It is clear that the legislature intended this chapter to provide the conservation commission with the widest possible latitude to protect the safety of the boating public. It should be equally clear that the legislature did not intend that the commission's latitude in this regard extend beyond the limits set by the constitution, thereby rendering the safety program, at least in part, unenforceable.

The Fourth Amendment to the United States Constitution and article I, §8, of the Iowa Constitution state in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated....

By virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the search and seizure provisions of the Fourth

Amendment are applicable to the states. *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The constitutional prohibition against unreasonable searches and seizures is intended to protect people rather than property. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). As a result, the crux of any constitutional analysis of a search is the reasonable expectation of privacy which the person subject to the search has in the area searched. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). If a person has no such expectation of privacy, than a search would not be unconstitutional.

A person has no expectation or privacy in items left open to public view. *Latham v. Sullivan*, 295 N.W.2d 472, 476 (Iowa App. 1980). Therefore, to the extent a conservation officer can observe a safety equipment violation from a vantage point open to the public, that inspection would not constitute a "search" in the constitutional sense.

Certain activities have been historically subject to government regulation and inspection that no reasonable expectation of privacy attaches to them. Two examples would be firearms, *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), and liquor, *Collonade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970). Another is mining, *Donovan v. Dewey*, ____ U.S. ____, 101 S.Ct. 2534 (1981). However, each of these exceptions to the generally presumed expectation of privacy arises in the course of a particularized occupation. The supreme court has refused to state that the sole fact that the government has decided to regulate an industry for purposes of promoting safety in effect eliminates a person's reasonable expectation of privacy. *Marshall v. Barlow's Inc.*, 436 U.S. 315, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). It is also important to note that *Biswell* and *Collonade Catering* involve commercial enterprises. When a businessman enters a regulated industry, he accepts the burdens as well as the benefits of his trade and consents to the restrictions placed on that activity. *Marshall v. Barlow's Inc.*; *Almeida — Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2533, 37 L.Ed.2d 596 (1973). Persons using boats on Iowa's rivers and lakes are not generally doing so as a commercial enterprise. Therefore, the diminished expectation of privacy attached to some commercial enterprises is not applicable to them. See *Klutz v. Beam*, 374 F.Supp. 1129 (W.D. N.C. 1973).

An analogy might be drawn between the authority of the United States Coast Guard to inspect vessels flying the American flag anywhere at sea and the inspection authority at issue here. In *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc), the court upheld warrantless safety inspections of such ships. But in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), the court stated that such searches would not be constitutional if less intrusive means were available. In *Piner*, the court held that the warrantless inspection of a private vessel was unreasonable because it was conducted at night. The court reasoned that daylight searches were less intrusive. To the extent the *Warren* court was discussing the inspection of a commercial vessel, it is arguable that the *Biswell* and *Collonade Catering, Corp.* rationale of historically regulated business enterprises' lack of a reasonable expectation of privacy was applicable. Also, the treaty obligations application to the Coast Guard's inspections, and the extreme difficulty, indeed impossibility, of inspecting ocean going vessels in the same manner as motor vehicles (discussed below) distinguish the circumstances faced by the Coast Guard from those faced by the conservation commission. It is, therefore, highly unlikely that a proper analogy can be drawn from the decision in *United States v. Warren*, to the question posed in this opinion. This possible exception to the general warrant requirement must, consequently, be viewed as inapposite to that question.

Private boat owners have a reasonable expectation of privacy in their boats, *Klutz v. Beam*, 374 F.Supp. 1129 (W.D. N.C. 1978), therefore, the inspections authorized by §106.20, The Code 1981, are "searches" as that term is used in constitutional law. The language of the United States and Iowa Constitutions, of course, does not prohibit all searches. It proscribes "unreasonable" ones.

The bare fact that an inspection is conducted as a part of a regulatory scheme aimed at the protection of the public health or safety does not mean that the inspection, absent a warrant, is reasonable. Municipal building inspections to check for compliance with fire, sanitation and structural regulations must be carried out in accordance with an administrative search warrant unless the custodian of the building being inspected gives his or her consent. *Camera v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). The same principle applies to the inspections of a workplace to check for occupational safety and health regulation violations. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

There can be no question that the state of Iowa has an important interest in the safety of persons using its lakes and rivers. However, that interest is no greater than the interest in the safety of persons at work, in apartment buildings or in other commercial structures. Without derogating the interest underlying §106.20, it can be said that the potential harm to the public forseen by that provision is no greater than that foreseen by the provisions reviewed in *Camera*, *See* and *Barlow's, Inc.*

The potential constitutional infirmity in §106.20 is the complete discretion it can be viewed to provide conservation officers regarding what to inspect, when to inspect, how to inspect, and why to inspect. In *Klutz v. Beam*, 374 F.Supp. at 1133, the court stated:

> [P]ossible emergencies aside, warrantless searches against the owner's will of a boat on a land locked lake, which can be repeated willy nilly, by that inspector or any other inspector who chooses to board the boat, is an oppressive and unreasonable — and unconstitutional — burden not justified by the consideration of sanitation and safety advanced by the state.

This does not mean that no circumstances exist under which conservation officers can stop and search boats on Iowa's waterways without running afoul of the constitution. For purposes of this discussion it is important to realize that conservation officers appointed pursuant to §107.13, *The Code 1981*, have the authority "conferred by law on peace officers in the enforcement of the laws of the state of Iowa and the apprehension of violators." §107.13, The Code 1981; See also §801.4(7)(g), The Code 1981.

Of course, the conservation officers can inspect boats if the owners or custodians consent to an inspection whether or not they have a warrant. *State v. Bakker*, 262 N.W.2d 538 (Iowa 1978). This sort of warrantless inspection would be limited to boats at a dock or which are not moving in the water. Stopping a boat to obtain a consent to inspect would be a warrantless "seizure". *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Therefore, a warrantless inspection of a moving boat would have to be authorized by another contingency discussed below.

Probable cause that the inspection of a boat will uncover evidence of public offense, combined with the exigent circumstances created by the mobility of most boats, may be sufficient to justify a warrantless search of the boat. This assumes that boats are akin to motor vehicles when considering the constitutionality of searches. See *State v. Holderness*, 301 N.W.2d 733 (Iowa 1981). However, this

question will be a fact question to a large extent. The court in *Klutz v. Beam* held that a large houseboat on a land-locked lake was more akin to a house, *i.e.* it did not in and of itself create a sufficient exigency to justify a warrantless search upon probable cause. The distinction between the difficulty of removing the houseboat in *Klutz v. Beam* from the water and the relative ease of removing the vast majority of boats used in Iowa from the water would appear to make that case inapposite to most inspections of boats in this state made upon probable cause.

If a conservation officer is making a lawful arrest of a person in a boat, he can search the boat for the protection of his safety and the preservation of evidence. *New York v. Belton*, ____ U.S. ____, 101 S.Ct. 2860, 2862 (1981).

The courts in *Delaware v. Prouse* and *State v. Hillesheim*, 291 N.W.2d 314 (Iowa 1980), stated that for purposes of safety inspections, officers may stop and inspect motor vehicles if they have a reasonable and articulable suspicion of safety violations. If other violations are suspected, a reasonable and articulable suspicion will warrant a stop and short questioning of a person but not a full inspection of the person or, in circumstances relevant to this opinion, of a boat. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As is noted above, except in the case of inspections for safety violations, searches of boats must be accompanied either by consent or by probable cause and exigent circumstances.

The *Prouse* and *Hillesheim* decisions also provide for warrantless inspections of motor vehicles absent probable cause, reasonable suspicion or consent in certain narrowly stated situations. As the Iowa Supreme Court noted in *Hillesheim*, 291 N.W.2d at 318:

> Where there is no consent, probable cause, or *Terry* — type reasonable and articulable suspicion, a vehicle stop may be made only where there minimally exists (1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists: (2) adequate advance warning signs illuminated at night, timely informing oncoming motorists of the nature of the impending intrusion; uniformed officers and official vehicles in sufficient quantity and visibility to "show... the police power of the community;" and (4) a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.

Although waterways may not be as adaptable to such inspection procedures, i.e. roadblocks, as are highways, that does not mean that waterways are not susceptible to an inspection system akin to that required for highways in *Prouse* and *Hillesheim*. We recognize that the difference between boats and care require somewhat different standards to insure the underlying purposes of the criteria set forth for automobiles in *Hillesheim*. The commission has the experience and expertise to determine in the first instance how best to conduct such general safety inspections of boats given the constitutional bases of *Hillesheim*. Special problems do exist. For example, on an inland lake not all boats will enter at the same point and there is not a single lane of travel as is true of highways.

It appears that some accommodation between the interests of the state in safety and those of the boating public in privacy enunciated in *Prouse* and *Hillesheim* is required if the conservation commission wishes to conduct warrantless safety inspections of boats on Iowa's waterways. It is not the function of this opinion, or within the expertise of this office, to detail the precise manner in which such warrantless inspections can be conducted. The following may be considered as recommended minima for such inspections:

1. The location(s) of such inspections must be readily visible to the boating public to make the boating public aware that safety inspections are taking place.

2. Advance warning signs, illuminated if inspections are at night, should be used if possible to give boaters reasonable notice of the nature of the inspections. (Such signs could probably be placed where boats are placed onto the water.)

3. Inspections must be made by uniformed officers present in sufficient numbers to show the police power of the community and to conduct a thorough and systematic inspection.

4. Inspections must be carried out at the direction of supervisory officials with policymaking authority and pursuant to carefully formulated standards and neutral criteria.

5. Inspections must be made either of all boats on the waterway or in a systematic manner in accordance with a set policy or regulations limiting the discretion of inspectors to a *de minimis* level.

Nothing in this opinion should be construed to state that the United States and Iowa Constitutions proscribe the mandatory safety inspections and display of safety certification decals requirements of §106.20, The Code 1981. In *Prouse*, the court saw similar requirements relating to motor vehicles as "essential elements in a highway safety program." 440 U.S. at 658, 99 S.Ct. at 1398—1399. They should be considered no less crucial in a waterway safety program.

Warrantless inspections of boats conducted in a manner not covered above for purposes of uncovering safety violations would probably be unconstitutional.

Finally, this opinion should be construed as applicable only to the question presented — warrantless boat safety inspections. It does not propose to address the constitutional limitations upon other searches, seizures or inspections which conservative officers, or other public officials, are authorized or required by law to perform.

IV. *SUMMARY*

Inspections of boats pursuant to §106.20, The Code 1981, are "searches and seizures" regulated by the Fourth Amendment to the United States Constitution and Article I, §8, of the Iowa Constitution. Such inspections should not be conducted on the water without a warrant except in one of the following circumstances:

1. The owner or custodian of the boat consents to the inspection,

2. An officer has probable cause to believe any criminal offense has occurred, that the search will uncover evidence of the offense and exigent circumstances exist precluding the officer from obtaining a warrant,

3. An officer searches the boat incident to a lawful arrest,

4. An officer may stop any boat and briefly question the occupants if he has a reasonable articulable suspicion that any public offense has occurred,

5. An officer may stop and inspect any boat if he has a reasonable and articulable suspicion that it is not in compliance with applicable safety standards, and

6. An officer may make safety inspection without probable cause or a reasonable articulable suspicion if the officer complies with the criteria set forth in *Delaware v. Prouse* and *State v. Hillesheim* for on the road motor vehicle inspections.

January 27, 1982

COUNTIES AND COUNTY OFFICERS; BOARD OF SUPERVISORS; AUDITOR: §349.16, 1981 Code. It is not permissible to publish a summary of resolutions and minutes of the proceedings of the board of supervisors. It is the responsibility of the county auditor to determine the text and format of the matters required for publication. (Fortney to Andersen, Audubon County Attorney, 1/27/82) #82-1-13

Mr. Brian P. Andersen, Audubon County Attorney: You have requested an opinion of the attorney general regarding the publication of the proceedings of the board of supervisors. You have inquired whether it is necessary to publish the minutes of the meetings or whether it is permissible to publish a summary of resolutions and parts of the minute book. You also inquire as to whether the board or the county auditor determines the text and format of the matters rquired to be printed.

We are of the opinion that it is not permissible to publish a summary of resolutions and minutes of the proceedings of the board of supervisors. Such proceedings must be published in full. We are further of the opinion that it is the responsibility of the county auditor to determine the text and format of the matters rquired for publication.

Section 349.16, The Code 1981, provides, in pertinent part:

> There shall be published in each of said official newspapers at the expense of the county during the ensuing year:
>
> (1) The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections, as provided by law; witness fees of witnesses before the grand jury and in the district court in criminal cases.

This office has on a number of occasions interpreted the above statute to require a complete and non-summarized publication of the board's proceedings. We most recently espoused this view in Op.Att'y.Gen. #80-5-12. In that opinion, we reaffirmed a prior opinion, 1968 Op.Att'y.Gen. 423, holding that county zoning ordinances must be published in full. In Op.Att'y.Gen. #80-5-12, we stated:

> The purpose of publication of county business in an official newspaper is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board of supervisors, and how it is being transacted. *See* §618.3, The Code 1979; Op.Att'y.Gen. #80-1-3. Publication in full of zoning ordinances in final form as adopted by a county's governing body may be the only way that a citizen will have notice of laws with which they must comply. *See* 1910 Op.Att'y.Gen. 223; 1970 Op.Att'y.Gen. 17.

This opinion went on to note that §349.16 is the only publication requirement with which a county must comply. The opinion argues that since a county was not in any other manner subject to publication, collection, or codification requirements, a summarized version of a county zoning ordinance would be inadequate notification to county residents. These statements must be modifed with passage of Acts, 1981 Session, chapter 117. The counties are now required to collect and publish all ordinances in code form. *See* §301(9) of chapter 117. However, this function must only be performed once every five years. We further note that while corresponding sections of the Code 1981 were amended by chapter 117, no amendment of §349.16 was made.

We also stated the following in Op.Att'y.Gen. #80-5-12:

> In *Choate Publishing Company v. Schade*, 225 Iowa 324, 328, 280 N.W. 540, 542 (1938), The Iowa Supreme Court held that the publication of a summary version of the grant of homestead exemptions by the board of supervisors was "a substantial compliance with the provisions of the statute." (Section 5411, The Code 1935, the predecessor of §349.16, The Code 1979.) The use by the court of the term "substantial compliance" indicates that the statute requires something more than a summary publication to effect actual compliance. The court in *Choate* determined that under the circumstances presented, publication falling short of actual compliance was permissible, particularly when the cost of publication in full would negate any savings to county residents which the homestead exemption was enacted to benefit. The approval of specific homestead exemptions would not have the county-wide impact that the adoption of a comprehensive zoning ordinance would, however, and all citizens of the county should have an interest in and bear any cost burden in the publication of an ordinance equally. We believe that to effect publication in this instance that would give a taxpayer or resident full and complete information requires publication of the entire body of any ordinance adopted. *See* 1970 Op.Att'y.Gen. 17.

We reaffirm the foregoing statements.

The previous administration took the same view we express here. In 1970 Op.Att'y.Gen. 17, the question was raised whether an air pollution control agreement among a number of political subdivisions, including a county, must be published in full pursuant to §349.16. This office stated:

> . . . the entire body of the agreement will have to be published as a part of the proceedings of the board of supervisors under §349.16 and 349.18 of the 1966 Code of Iowa. In a November 21, 1967 opinion of the attorney general concerning the publication of zoning ordinances it was stated that "subject to the excluded items, the statute (349.16) is mandatory and requires that the proceedings [of the board of supervisors] be published." The purpose of the publication is to inform the taxpayers of what is being done by their representative. Since the proposed agreement does not fall into one of the exclusions of §349.16, 1966 Code of Iowa, it is mandatory that such proposal or agreement be published.

We have discovered an early opinion from this office which recognizes the concerns of economy which you espouse and which endorses the use of a summary of proceedings. 1911—1912 Op.Att'y.Gen. 777 dealt with the board of supervisors' assessment of telegraph and telephone companies and railroad and express companies. Therein the following language is found:

> It would seem to me that both of these orders are clearly proceedings of the board, within the meaning of the term and used in code supplement

> section 441, and hence, it would follow that they should be published in some form. However, I am inclined to think that it would not be necessary to publish the matter in full, and it may be that the same could be abstracted in such a way as to comply with the law and yet make the publication must less expensive to the county.

To the extent that this early interpretation of the forerunner of §349.16 conflicts with the later interpretations, we believe it is clearly erroneous. We base this conclusion on the express language of §349.16(4). In contrast to §349.16(1), quoted above, subdivision four requires the board to publish "a *synopsis* of the expenditures of township trustees for road purposes as provided by law." [Emphasis supplied.] The legislature chose to utilize the term "synopsis" in §349.16(4). That word is omitted from §349.16(1). This is significant. If a summary of the proceedings of the board of supervisors was contemplated by §349.16(1), the language employed would so provide.

With regard to your inquiry related to responsibility for publishing the board proceedings as required by §349.16, Acts 1981 Session, chapter 117 provides:

The board shall:

> (6) Select official newspapers and cause official publications to be made in accordance with chapters 349 and 618.

§302(6).

The auditor shall:

> (6) Furnish a copy of the proceedings of the board required to be published as provided in section 349.18.

§503(6).

Section 349.18 provides:

> All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon, except that names of persons receiving relief from the county poor fund shall not be published. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board.

The auditor is charged with the role of clerk to the board of supervisors. *See* Acts, 1981 Session, chapter 117, §503(1). As such, the auditor is to "record the proceedings of the board." It is the auditor who performs the function of memorializing the official acts of the board. The auditor maintains the records of the board. While this is admittedly a close question, we are of the opinion that determining the format and text of what is given to the newspapers for official publication more closely falls within the statutory duties of the auditor. The board is charged with selection of official newspapers and seeing that its proceedings are in fact published. However, in the role of the clerk to the board it is the auditor who maintains the official record. This officer should logically control the text and format of the publication of proceedings in the same manner he or she controls the text and format of official minutes.

In conclusion, it is not permissible to publish a summary of resolutions and minutes of the proceedings of the board of supervisors. It is the responsibility of the county auditor to determine the text and format of the matters required for publication.

January 27, 1982

ELECTIONS; ELECTRONIC VOTING MACHINES: Chapter 49, §§49.12, 49.25, 49.43; Chapter 52, §52.27. Code sections relative to voting machines should be applied to govern the use of electronic voting systems. (Pottorff to Whitcome, Director of Elections, Office of the Secretary of State, 1/27/82) #82-1-14(L)

January 29, 1982

GAMBLING: Amusement Concession: License Revocation — §§99B.1(14), 99B.2(1), 99B.3 and 99B.4, The Code 1981, as amended by 1981 Session, 69th G.A., ch. 44, §4. According to section 99B.2(1) as amended, a gambling license can not be issued by the department of revenue for any location for which a previous gambling license or liquor license was revoked within the preceding two years. This location restriction does not apply to an amusement concession license revoked by the department of revenue. An amusement concession license is issued by the department for a particular game and not for a specific location. The revocation of a license for an amusement concession that was located at a fair does not preclude use of the fairgrounds by other legal amusement concessions, with proper authorization from the fair sponsor, notwithstanding this location restriction. (Richards to Poppen, Wright County Attorney, 1/29/82) #82-1-15(L)

January 29, 1982

TAXATION: Property Acquisitions By Tax Exempt Political Subdivisions. §427.1(1), The Code 1981; 12 U.S.C. §1714 (1980). Real property acquired by the Federal Housing Administration through foreclosure proceedings continue to be subject to the real property and drainage taxes that would have been payable had the property remained in private ownership. (Schuling to Jensen, Monona County Attorney, 1/29/82) #82-1-16(L)

January 29, 1982

TAXATION: Failure to Timely Apply for Industrial Real Estate New Construction Tax Exemption. Sections 427B.3 and 427B.4, The Code 1981. A claimant for the industrial real estate new construction tax exemption who fails to timely file an application for exemption as set forth in §427B.4 for the actual value added to the industrial project is not eligible to receive the exemption for the entire five year period set forth in §427B.3. (Griger to Riffel, Bremer County Attorney, 1/29/82) #82-1-17(L)

January 29, 1982

JUVENILE LAW: A judicial magistrate has authority to issue an order allowing the detention of a juvenile in an adult jail or lock-up. §§232.22(4); 602.39; 602.60, The Code 1981. (Hege to Jay, State Representative, 1/29/82) #82-1-18(L)

January 29, 1982

NEPOTISM: §17.1, The Code, relating to limitations on nepotism in state government does not conflict with §19A.1, The Code, requiring that appointment to governmental employment be made on merit alone. §17.1, The Code, applies not only to the head of an agency or other division of government, but applies to any person holding a public position who has been delegated the authority to hire or discharge employees. The prohibition on nepotism applies only to those jobs over which the person holding a public position has the authority to hire or discharge. (Black to Reagen, Department of Social Services, 1/29/82) #82-1-19(L)

FEBRUARY 1982

February 3, 1982

ELECTIONS: Persons Permitted at Polling Places. Chapter 49; §§49.82, 49.90, 49.104, 49.107(1), (2), and (6), The Code 1981; Acts, 69th G.A., 1981 Session, chapter 34, §32; Acts, 65th G.A., 1973 Session, chapter 136, §171. Pollsters conducting a survey, according to the provisions of chapter 49, are not persons permitted at a polling place. Nevertheless, such persons are permitted within three hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held. (Walding to Sturgeon, State Representative, 2/3/82) #82-2-1

The Honorable Al Sturgeon, State Representative: You have requested an opinion of the attorney general regarding whether a pollster may conduct a survey within a polling place on election day. Specifically, you have asked:

(1) Is it legal for news media to conduct a poll to determine how a voter cast his or her ballot and why they voted for this person inside a precinct polling place during elections hours?

(2) If the answer to question #1 is affirmative, then how many may be present and is this limited to media only?

(3) If the answer to question #1 is negative, then may this type of poll be conducted outside the doors of a voting precinct, but within 300 feet of the precinct doors on the polling place property?

Inserted in your request is a recital of the events which led to your opinion request. On election day, you submit that a local television station, in conjunction with a local college, conducted an exit poll in each of Sioux City's thirty-four precincts. The pollsters, operating inside the polling place, allegedly asked exiting voters to participate in a survey. The voters were questioned as to which candidate they had voted and on which issues they had based their electoral decision. When this practice was contested, the Woodbury Election Commissioner ordered the pollster to leave the polling place. In compliance with the commissioner's order, the pollsters removed themselves from the polling place. For the remainder of the election, the survey was conducted outside of the polling place.

Subsequent to your request, a brief was submitted to our office on behalf of tthe television station which sponsored the survey. Counsel for the station contend that the facts which they submit "more accurately portray the events of election day" than those contained in your opinion request. At the outset, we feel compelled to state the appropriate purposes of an attorney general's opinion. While it is appropriate for this office to express an opinion on legal issues, it is

improper for us to engage in judicial fact-finding in the context of an opinion. Accordingly, our discussion will be limited to matters of law, not fact. [1]

The applicable chapter of the Code, as you know, is chapter 49. Chapter 49, governing the method of conducting elections, was enacted to insure fair and impartial elections. The particular sections of the chapter which will be discussed, §§49.104 and 49.107, The Code 1981, provided for the regulation of the polling place during an election. Together, the aforementioned sections preserve the sanctity of the polling place, assuring that the right of suffrage remains untrammeled and unfettered.

Balanced against the prior concern is a countervailing interest. The First Amendment, which applies to the states through the Fourteenth, prohibits laws "abridging the freedom of speech, or of the press." Accordingly, at a certain point, concern for the sanctity of the polling place and the right of suffrage will give way to concern for First Amendment rights.

With the foregoing presented, attention is now directed to your first inquiry. Discussion will focus on three sections, §§49.104, 49.107(2), and 49.107(6), The Code 1981. First, §49.104, The Code 1981, as amended by Acts, 69th G.A., 1981 Session, chapter 34, §32, provides:

> The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:
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> 1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.
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> 2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization.
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> 3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots. Subject to the restrictions of section 51.11, the witnesses may observe the counting of ballots by a counting board during the hours the polls are open in any precinct for which double election boards have been appointed.
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> 4. Any peace officer assigned or called upon to keep order or maintain compliance with the provisions of this chapter, upon request of the commissioner or of the chairman of the precinct election board.
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> 5. One observer representing any nonparty political organization, any candidate nominated by petition pursuant to chapter 45, or any other nonpartisan candidate in a city or school election, appearing on the ballot of the election in progress.

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[1] Nevertheless, it is incumbent upon us to make one factual presumption. In the opinion, it is presumed that the results of the survey were not released prior to the close of the polls. Neither your opinion request, the station's brief, nor any other source has contended otherwise. Accordingly, we reserve comment on that issue for a later opinion.

> *NEW SUBSECTION:* Any persons expressing an interest in a ballot issue to be voted upon at an election except a general or primary election. Any such person shall file a notice of intent to serve as an observer with the commissioner prior to election day. If more than three such persons file a notice of intent with respect to ballot issues at any election, the commissioner shall appoint from those submitting a notice of intent three persons to serve as observers. The appointees, whenever possible, shall include both opponents and proponents of the ballot issues.

In construing the aforementioned section, familiar principles of statutory construction are applicable. Express mention of one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. *See In Re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). *Expressio Unis Est Exclusio Alterius* is the legal maxim. If fairly possible, unreasonable or absurd consequences should be avoided. *See Janson v. Fulton*, 162 N.W.2d 438, 442 (Iowa 1968). The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intentions of the legislature. *Id.* Other pertinent statutes must be considered. *Id.*

Emerging from the application of the foregoing principles to §49.104, The Code 1981, are three themes. First, the applicable statute makes express mention of election officials, party and non-party poll watchers, and peace officers as persons permitted at the polling place on election day. No mention of pollsters conducting a survey, however, is found in the statute. Second, an absurd result is not obtained when those persons not expressly permitted at the polling place in the statute are excluded. Although counsel for the station contend that such a construction will result in the exclusion of voters and those who would assist handicapped and elderly voters from the polling place, their presence is provided for elsewhere in the Code. The presence of the voter in the polling place can be inferred from §49.82, The Code 1981; whereas, the presence of those assisting voters is specifically provided for in §49.90, The Code 1981. Finally, a legislative intent to limit the number of persons permitted at the polling place to those expressly mentioned can be inferred. In 1973, the General Assembly amended the statute to permit peace officers to be present at and in the immediate vicinity of the polling place, despite provision in §49.105 authorizing any precinct election official to order the arrest of any person disrupting the polling place. *See* Acts, 65th G.A., 1973 Session, chapter 136, §171. The inclusion of peace officers as persons permitted at the polling place, therefore, emphasizes the legislative intent to exclude unauthorized persons. Accordingly, principles of statutory construction support the exclusion of unauthorized persons under §49.104, The Code 1981.

Additional support can be mustered for that proposition. First, policy considerations favor a statute limiting the number of persons permitted at the polling place to those expressly mentioned. Such a statute: avoids crowding; assures fair and impartial elections; maintains the secrecy of the ballot; preserves a neutral and detached polling place, a place of deliberation; prevents coercion and intimidation of voters; avoids unauthorized persons from being perceived as part of the electoral process; and preserves order. In addition, 29 C.J.S. Elections §200, p. 555 (1965), citing to *Taylor v. Neutzel*, 220 Ky. 510, 295 S.W. 873 (1927), states that "[u]nauthorized persons should be excluded from the polling place." Thus, policy considerations and an authority support the exclusion of unauthorized persons from a polling place on election day under §49.104, The Code 1981.

Accordingly, §49.104, The Code 1981, provides for the exclusion of unauthorized persons on election day from a polling place. Pollsters conducting a

survey, because they are not authorized persons under that statute, are not persons permitted at a polling place on election day.

Section 49.107(2), The Code 1981, prohibits, *"[i]nterrupting*, hindering, or opposing any voter while in or approaching the polling place for the purpose of voting." [Emphasis added.] Since the General Assembly did not define the term "interrupting", an extraneous definition must be adopted. Where a statute contains no definition of certain words used in the statute, the words should be construed according to their approved usage. *See State ex rel. Turner v. Drake*, 242 N.W.2d 707 (Iowa 1976).

The word "interrupt", according to *State v. Davis*, 21 Ohio App.2d 261, 263, 257 N.E.2d 79, 81 (1969) means "to stop by breaking in: halt, hinder, or interfere with the continuation of some activity." *Webster's New World Dictionary* 737 (2d ed. 1978) defines "interrupt", in part, to mean "to make a break in the continuity of; cut off; obstruct." The stopping of a voter to elicit his or her response to a survey, under either definition, would constitute "interrupting" a voter. Accordingly, conducting a survey while in a polling place is a prohibited act on election day under §49.107(2), The Code 1981. However, by its own terms, §49.107(2), The Code 1981, is applicable only to "interrupting" a voter "while in or approaching the polling place for the purpose of voting." Once the voter has left the polling place, the section would be inapplicable and would constitute no obstacle to "exit polling."

The final section to be addressed in response to your first inquiry is §49.107(6), The Code 1981. That section prohibits, *"[e]ndeavoring to induce* a voter to show how he marks or has marked his ballot." [Emphasis added.] Such practice is prohibited regardless of the vicinity to a polling place. Again, an extraneous definition must be sought.

The court in *People v. Jaskowitz*, 173 Misc. 685, 691, 18 N.Y.S.2d 897, 903 (1940), held that "induce" means "to influence the actions of others either by hope of reward or fear of reprisal." *Webster's New World Dictionary* 718 (2d ed. 1978) defines "induce", in part, to mean "to lead on to some action, condition, belief, etc.; prevail on; persuade." The word "induce", therefore, contemplates an effort to influence an act or course of conduct of another. As such, "endeavoring to induce" means attempting to influence. As long as a survey consists of nothing more than a request for voluntary cooperation, it is not an attempt or endeavor to influence or induce. Thus, conducting a survey is not a practice prohibited regardless of the vicinity to a polling place.

Accordingly, pollsters conducting a survey, because they are not authorized persons under §49.104, The Code 1981, are not persons permitted at a polling place on election day. Further, conducting a survey while in a polling place is a prohibited act on election day under §49.107(2), The Code 1981. Conducting a survey, however, is not a practice prohibited regardless of the vicinity to a polling place. In response to your first inquiry then, pollsters conducting a survey, according to the provisions of chapter 49, are not persons permitted at a polling place.

A negative response to the preceeding question makes your second inquiry moot. Attention, therefore, is not directed to the third question. Discussion will focus on a single section.

Section 49.107(1), The Code 1981, prohibits, *inter alia*, loitering or congregating:

> . . . either on the premises of any polling place or within three hundred feet of any outside door of any building affording access to any room where the

> polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held....
> [Footnotes omitted.]

A brief discussion of such statutes is found in 29 C.J.S. Elections §200, p.555—56 (1965). According to that authority:

> Election statutes sometimes require that all persons, except persons in the course of voting, election officers, clerks, watchers, and the like, remain a certain distance from the polling place during the progress of the voting. Such statutes are reasonable police regulation designed to preserve order and to maintain the secrecy of the ballot....
> [Footnotes omitted.]

The legislature, therefore, can regulate within a certain distance of the polling place.

For the third time in the opinion, an extraneous definition must be extracted for terms of a statute. In this case, however, two terms must be defined: "loitering" and "congregating."

The word "loitering", according to *Jacobs v. Transcontinental & Western Air*, 358 Mo. 674, 679, 216 S.W.2d 523, 526 (1949), means "to linger, to delay, to be slow moving." *Webster's New World Dictionary* 832 (2d ed. 1978) defines "loiter", in part, to mean "to spend time idly; linger in an aimless way." It should be obvious that pollsters conducting a survey are neither dilatory, nor idle with respect to their actions. Rather, their actions are purposeful and their efforts to seek volunteers in order to compile data on candidate support and issues are deliberate. Accordingly, pollsters conducting a survey are not loitering.

As to the term "congregating", *People v. Carcel*, 144 N.E.2d 81, 85, 3 N.Y.2d 327, 333, 165 N.Y.S. 2d 113, 117 (1957), states that it "implies and is usually applicable to the coming together of a considerable number of persons... or a crowd." *Webster's New World Dictionary* 299 (2d ed. 1978) defines "congregate", in part, to mean "to collect into a flock, gather, to gather into a mass or crowd; collect; assemble." The word "congregating", therefore, contemplates an assemblage of a mass or a crowd. Although a survey necessitates a minimum of two persons, a pollster and a subject, their meeting ordinarily will not qualify as "congregating."[2] Thus, pollsters conducting a survey are not congregating.

Accordingly, pollsters conducting a survey are neither loitering, nor congregating. In response to your third inquiry then, such persons are permitted within three hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held.

We buttress our reply with a First Amendment consideration. A contrary ruling may not withstand a constitutional challenge. As was noted in our introductory remarks, concern for First Amendment rights of free speech and

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[2] This is not to suggest that such a situation could not arise (e.g. the assemblage of numerous pollsters or subjects simultaneously). Again, we reserve comment on that issue for a later opinion.

freedom of the press exceeds concern for the sanctity of the polling place and the right of suffrage at a certain point. Effective foreclosure of surveying techniques may result by restricting such activity to outside a three hundred foot perimeter from the polling place. Conversely, a voter need only refuse to submit to the survey. Absent a clear legislative decree, therefore, any uncertainty should be weighed in favor of First Amendment rights.

In summary, pollsters conducting a survey, according to the provisions of chapter 49, are not persons permitted at a polling place. Nevertheless, such persons are permitted within three hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held.

February 3, 1982

COUNTIES: Township Trustees; Transfer of Funds. Chapter 359, §359.30, The Code 1981. It is beyond the power of the township trustees to transfer cemetery tax funds to another fund for the purchase of ambulance or fire equipment. (Weeg to Jensen, Monona County Attorney, 2/3/82) #82-2-2(L)

February 5, 1982

CITIES; HOUSING CODE: Use of administrative search warrants to inspect rental housing. Iowa Const., Art. V, §6. §§364.17, 602.1, 602.60, The Code 1981. City officials may seek and Iowa courts may issue administrative search warrants pursuant to §364.17 to fulfill the obligation to inspect rental housing. For warrants to be issued other than on a showing particularized to an individual property, a city council must by ordinance either prescribe reasonable legislative standards for inspections or require an appropriate city official to adopt reasonable administrative standards for inspections. (Schantz to Reusch, Assistant City Attorney, Council Bluffs, 2/5/82) #82-2-3(L)

February 5, 1982

TAXATION: Improvement Projects Commenced Prior to Designation of Urban Revitalization Area. Sections 404.3 and 404.4, The Code 1981. In the event that an improvement project is begun prior to January 29, 1979, or one year prior to the adoption by the city of a plan of urban revitalization, whichever occurs later, improvements made during the time the area is designated as an urban revitalization area are not eligible for the property tax exemption authorized in chapter 404, The Code 1981. (Griger to Murray, State Senator, 2/5/82) #82-2-4(L)

February 10, 1982

STATE OFFICERS AND DEPARTMENTS; WORKER'S COMPENSATION; TORT LIABILITY: State employee injured on employer's premises during a recreational activity. §§85.3, 88.4, The Code 1981. Worker's

compensation statute would apply to state employees injured while engaging in health or physical fitness program on employer's premises. If such activity was found to be outside the scope of employment, the state could nevertheless incur liability for negligence pursuant to its common law duty to business invitees or on the basis of its duty as an employer under §88.4, The Code. (Brammer to Pawlewski, 2/10/82) #82-2-5

Commissioner Norman Pawlewski, State Department of Health: You have requested an opinion of the attorney general regarding the potential liability of the state to its employees who are injured while engaging in voluntary health/physical fitness activities on state property. The specific questions you raised were as follows:

1. Is there state liability for injuries to employees voluntarily participating in such a program while they are on state property and/or using state equipment?

2. If an employee is injured in voluntarily participating in this 'Health Awareness Program' or any other agency health and physical fitness program while on state property but on employee's time, not work time, is he eligible for worker's compensation benefits?

Your letter stated that the department of health and other state agencies are developing health awareness programs pursuant to which state employees are provided with facilities and equipment free of charge on the premises of the employer. Although participation in the programs would be voluntary and would not be permitted during designated "work time", the agencies would encourage their employees to take advantage of these health improvement activities.

The question of whether the state would be liable to an employee who was injured as a result of his or her participation in one of these programs depends on an analysis of the state worker's compensation statute as well as common law principles of tort liability. In order to be eligible for worker's compensation benefits, the injuries sustained by the employee must arise out of and in the course of the employment. §85.3(1), The Code 1981. These are two distinct requirements. Under Iowa law, before it may be said that an injury "arose out of the employment", there must have been some causal connection between the employment and the harm giving rise to the claim. *Buehner v. Hauptly*, 161 N.W.2d 170 (Iowa 1968). The phrase "in the course of the employment" refers to the time, place and circumstances of the accident. *Id.* at 171.

' The decisions from the various courts which have considered the question of the compensability of injuries suffered by employees due to recreational activities either sponsored, encouraged, or permitted by employers have not produced unwavering consistency in outcome. For example, one state has granted compensation to a worker who was hurt while playing softball during lunch hour and on company grounds. *Tocci v. Tessler & Weiss, Inc.*, 28 N.J. 582, 147 A.2d 783 (1959). Another court, however, has denied coverage to a claimant injured while playing football on his employer's premises during his lunch hour. *Beiring v. Niagara Frontier Transit System, Inc.*, 23 A.D.2d 611, 256 N.Y. S.2d 365 (1956). We have not located any decision by the Supreme Court of Iowa which would clearly dictate a result in the factual situation you have presented.

One commentator has suggested that the following principles be used in determining an employee's eligibility for worker's compensation due to a "recreational" injury:

> Recreational or social activities are within the course of employment when:
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> 1. They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
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> 2. The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of the employee, brings the activity within the orbit of the employment; or
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> 3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

IA Larson, *The Law of Workmen's Compensation* §22.00, at 5-71 (1979). Under this analysis, it would seem that an employee injured as a result of participating in one of the programs mentioned in your letter would be eligible for worker's compensation pursuant to the first test listed above. The author of this approach has pointed out that the presence of the activity on the premises is often of critical importance in decisions which hold that employee recreational injuries are compensable. *Id.* at §22.11, 5-72. Proximity to the work place was a significant consideration in *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646 (Iowa 1980). In *Frost*, the employee was on her way to a birthday breakfast, to be held on the employer's premises prior to the start of the work day, when she slipped on an accumulation of ice on the sidewalk in front of the entrance to the store. The court held that the employee's injuries were covered by the worker's compensation act without discussing the fact that the employee's presence was occasioned by her desire to attend a social activity.

It should be pointed out that the worker's compensation statute, chapter 85, The Code, provides the exclusive remedy for an employee against the employer for personal injuries sustained by the employee arising out of and in the course of his or her employment. §85.20, The Code; *Jansen v. Harmon*, 164 N.W.2d 323 (Iowa 1969). In other words, if a state employee is injured due to participation in an agency's health and fitness program and this injury is deemed to have arisen out of and in the course of the person's employment, the worker is limited to whatever compensation may be had under chapter 85 and may not bring a civil action against the state to recover damages on account of said injury.

Assuming, however, that the worker's compensation act would not apply to the factual situation you have posited, the question then becomes whether the state could nevertheless be liable in tort to the injured employee. Under chapter 25A, The Code, the state has waived its immunity from suit for:

> Any claim against the state for money only, on account of damage to or loss of property on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.

Section 25A.5(a), The Code. In general, a private person who is the owner or occupant of property may be liable to persons who are injured while on the premises. The duty of the owner of the premises to the person who is injured depends on the nature of the relationship between the parties and the status of the injured person. Under Iowa law, a person who is injured on another's property is generally classified as either a trespasser, bare licensee, licensee by express or implied invitation, or an invitee. *Lattner v. Immaculate Conception Church*, 255 Iowa 120, 121 N.W.2d 639 (1963).

> An invitee is either a public invitee or a business visitor. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Hanson v. Town & County Shopping Center, Inc., 259 Iowa 542, 144 N.W.2d 870, 873 (1966). It would seem that the employee injured on premises possessed by the state while participating in the program you described, could properly be considered a business invitee.

> The possessor of real estate is under a duty to use reasonable care to keep his premises safe for use by invitees. Failure to do so constitutes negligence. The standard of reasonable care does not require the premises to be free from all defects so as to guarantee or insure the safety of all invitees. Neither does it require plaintiff-invitee to be a self-insurer.

Id. at 547, 144 N.W.2d at 874.

Aside from its potential liability as the possessor of business premises, the state might also incur liability to an injured employee pursuant to §88.4, The Code. That section provides, in pertinent part, as follows:

> Each employer shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause dealth or serious physical harm to his employees and comply with occupational safety and health standards promulgated under this chapter.

It should be pointed out that the term "employer" as used in the above quoted passage is specifically defined to include the "state of Iowa, its various departments and agencies, and any political subdivision of this state." §88.3(4), The Code. In *Nelson v. Smeltzer*, 221 Iowa 972, 265 N.W. 924 (1936), the court noted that the employer's duty to an employee in respect to care for the latter's safety and safe condition of the employer's premises is substantially the same as the property owner's duty to an invitee. As previously stated, that duty is to exercise reasonable care to protect the invitee against dangers that may reasonably be apprehended. 65 C.J.S. *Negligence*, §63(45) at 730.

In conclusion, it is our opinion that a state employee who is injured while participating in a voluntary health or physical fitness program, on state property but during the employee's "free" time, would be covered by the state worker's compensation statute. If it was determined that such an injury did not arise out of and in the course of the person's employment, the state might nevertheless be liable for negligence in the same way that a possessor of real property may be liable to an injured invitee.

February 10, 1982

SCHOOLS: School Lunches for Staff Members. Chapter 283A, The Code 1981. The Iowa Code does not allow school districts to provide school lunches without charge to staff members, except where staff members are on lunch room supervisory duty or pursuant to contract. (Fleming to Schwengels, State Senator, 2/10/82) #82-2-6(L)

February 10, 1982

MOTOR VEHICLES: Chauffeur's License. §321.1(43) The Code 1981. Rescue units and ambulances are not fire apparatus. A volunter firefighter does not need a chauffeur's license to operate rescue units and ambulances if there is no expectation of remuneration, other than reimbursement for fuel. (Ewald to Junkins, Senator, 2/10/82) #82-2-7(L)

February 10, 1982

TAXATION: Listing of Accreted Lands for Property Taxation. §§427.13, 428.1, 428.2, 428.4, 441.18, 441.19, 441.24, and 443.18, The Code 1981. Accreted lands, not heretofore listed and assessed for taxation, should be listed and assessed for property taxation in the 1982 assessment year, even if the acreage of such lands has to be estimated. (Griger to Maher, Fremont County Attorney, 2/10/82) #82-2-8(L)

February 23, 1982

TAXATION: Property Tax Exemption: Sections 427.1, 427.1(2) and 427.13, The Code 1981; Sections 383.1 and 565.6, The Code 1950. The cooperation agreement entered into by the Bellevue Bridge Commission and the Mills County Board of Supervisors effectuated a change of ownership to Mills County sufficient to render tax exempt status to the bridge. The bridge and related property are not taxable under chapter 427, The Code 1981. (Schuling to Green, Mills County Attorney, 2/23/82) #82-2-9

Mr. H. Walter Green, Mills County Attorney: You have requested the opinion of this office concerning the validity of the tax exempt status given to the Bellevue Bridge Commission (hereinafter commission) by the Mills County Board of Supervisors. The question posed is whether the power of the state of Iowa and the counties to tax pursuant to the Iowa Code may be compromised by a board of supervisors' resolution ratifying a cooperation agreement rendering tax exempt status.

Specifically, the document of concern is a 1950 cooperation agreement between Mills County and the commission. The agreement provided for an interstate bridge to be financed by the commission through self-liquidating revenue bonds to be paid solely from the tolls derived from the operation of the bridge between the states of Iowa and Nebraska. Mills County in consideration of the financing by the commission agreed to provide tax exempt status for all property owned or used by the commission within Mills County.

The agreement further stated.

> That title to all of said bridge, and the approaches and appurtenances thereto, and all facilities and property of any kind used in connection therewith shall, as long as any of said Bridge Revenue Bonds, including any refundings thereof, or the interest thereon, are outstanding and unpaid, be vested in the commission, subject to the following provisions; that upon the payment and discharge of all said Bridge Revenue Bonds, including any refunding thereof, and all interest thereon, title to that part of the bridge, and approaches and appurtenances thereto, and all facilities and property of any kind used in connection therewith, located within the county [Mills

> County referred to as county] shall vest in the county, a title to that part of the bridge, and approaches and appurtenances thereto, and all facilities and property of any kind used in connection therewith located within the county of Sarpy, state of Nebraska, shall remain vested in the commission. After the payment and discharge of all said Bridge Revenue Bonds, including any refundings thereof, and all interest thereon, the commission shall execute and deliver to the county such deeds, conveyances or other documents as shall be necessary to evidence the title of ownership of the county to that part of the bridge, and approaches and appurtenances thereto, and all facilities and property of any kind used in connection therewith, located within the county.

An analysis of your question requires initially a determination of the taxability of bridges.[1] Section 427.13, The Code 1981, provides in relevant part:

> All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace:
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> 1. Ferry franchises and toll bridges, which for the purposes of this chapter are considered real property.
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> * * * *
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> However the provisions of this section shall be subject to the provisions of section 427.1.

This brings us to a question that must first be resolved: Is this property exempted from taxation by §427.1? On the basis of the factual situation presented with your question, it would have to be concluded that the property is exempt from taxation pursuant to §427.1(2), The Code 1981.

Section 427.1 states in relevant part as follows:

> The following classes of property shall not be taxed.
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> 2. Municipal and military property. The property of a county, township, city, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit except property of a municipally owned electric utility held under joint ownership which shall be subject to assessment and taxation under provisions of chapters 428 and 427. The exemption for property owned by a city or county also applies to property which is operated by a city or county as a library, art gallery or museum, conservatory, botanical garden or display, observatory or science museum, or as a location for holding athletic contests, sports or entertainment events, expositions, meetings or conventions, or leased from the city or county for such purposes. Food and beverages may be served at the events or locations without affecting the exemptions, provided the city has approved the serving of food and beverages on the property if the property is owned by the county.

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[1] See 1968 Op.Att'y.Gen. 44 for complete analysis.

Section 427.1, The Code 1981. The determination of tax exempt status is dependent upon whether the property located and taxed in Iowa is owned by Mills County.

An analysis of relevant court decisions establishes that the 1950 cooperation agreement was sufficient to vest equitable title in Mills County. In *Appeal of City of Dubuque Bridge Comm'n*, the cooperation agreement did not provide absolutely that the state of Iowa would receive the property. *In re Appeal of City of Dubuque Bridge Comm'n.*, 232 Iowa 112, 130—131, 5 N.W.2d 334, 343—344 (1942). The drafting of the cooperation agreement reflected the possibility that ownership might not vest. The court determined that there was no fixed or certain beneficial interest, and exemption was disallowed because of the lack of certainty that the bridge would become exempt property. *Id.*

City of Dubuque v. Meuser, revolved around a lease which incorporated the requirements judicially set forth in *Appeal of City of Dubuque, supra. City of Dubuque v. Meuser*, 239 Iowa 446, 450—451, 31 N.W.2d 882, 884—885 (1948). The court declined to answer the question of whether the state became the owner of part of the bridge located in Iowa by virtue of the agreement between it and the bridge commission. Instead, the court relied on §§313.29 and 313.30, The Code 1946[2], which they determined evidenced the intent of the legislature to exempt taxes upon the making of the agreement. *Id.*

In *Keokuk & Hamilton Bridge v. C.I.R. Id.* it was held that the city of Keokuk possessed a beneficial interest and was the party to whom taxes should be assessed. *Keokuk & Hamilton Bridge v. C.I.R.*, 180 F.2d 58, 64 (8th Cir. 1950). The court reached this determination based on the fact that the cooperation agreement provided to a certainty for a later interest by the city of Keokuk, and the fact that the city of Keokuk had a vested interest arising from acceptance of the proposal. *Keokuk*, 180 F.2d at 63.

The court held sufficient evidence existed to establish the vesting of an interest through acceptance pursuant to §383.1, The Code 1946, which contained the provision that any city is authorized to acquire by purchase or gift or otherwise any existing bridge and §565.6, The Code 1946,[3] which stated:

> Counties, cities, towns, and park board of any city or town, including cities acting under special charter, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold

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[2] 313.29 Indebtedness paid. When all outstanding indebtedness or other obligations against such bridge * * * have been paid and discharged the state highway commission shall accept transfer of title thereof to the state and is thereafter authorized to take possession of, operate and maintain such bridge * * * or any part thereof, free of tolls as a part of the primary road system. Section 313.29, The Code 1946.

313.30 Taxes forgiven. Any such bridge * * * which has been offered to the state highway commission and with respect to which the commission has entered into a written agreement accepting such offer, shall after the date of such agreement, be free from * * * taxes in this state. Section 313.30, The Code 1946.

[3] Sections 565.6 and 383.1, The Code 1946, remained unchanged in the Code 1950.

property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof.

Mills County should be regarded as the equitable owner of the property in Iowa. First, the cooperation agreement was signed and accepted by Mills County on October 13, 1950. Upon acceptance all parties became bound to the agreement. Section 565.6, The Code 1950. Second, the agreement purports to be a gift without any possibility of revocation or reversion. *Keokuk*, 180 F.2d at 63. Third, the commission retained no beneficial interest in the property.[4] Fourth, by the acceptance and signing of the cooperation agreement, Mills County became the beneficiary regarded in equity as the equitable owner. *Leven v. Carney*, 161 Ohio St. 513, 120 N.E.2d 92, 96 (1954).

The cooperation agreement affected a change of ownership to Mills County sufficient to render tax exempt status to the bridge. The property in question is not taxable under chapter 427, The Code 1981. Therefore, since the property is exempt from taxation, there are no taxes which the board of supervisors could have purported to compromise.

February 24, 1982

SENTENCING, CONFIDENTIAL RECORDS, DEFERRED JUDGMENT, DEFERRED SENTENCE: Chapter 68A and sections 901.5, 907.1, 907.3, and 907.9. There is a significant difference between a "deferred sentence" and a "deferred judgment." The essential characteristic of a deferred sentence is that the court pronounces judgment but defers imposition of sentence. When the court defers judgment, both the adjudication of guilt and the imposition of sentence are deferred. Prior to completion of probation the record of the deferred judgment or deferred sentence is not a confidential record. When the defendant is discharged from a deferred judgment the criminal record is expunged. (Cleland to Nystrom, State Senator, 2/24/82) #82-2-10(L)

February 24, 1982

PENSIONS: Retirement Systems for Policemen and Firemen, chapter 411, The Code 1981. Persons who have terminated their employment prior to becoming vested under a chapter 411 Retirement System, are not entitled to recovery of their contributions made to that system. (Swanson to Welsh, State Representative, 2/24/82) #82-2-11(L)

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[4] The commission is a municipal corporation organized in response to the General Bridge Act of 1946 and was authorized to enter into the cooperation agreement with Mills County pursuant to NEB. REV. STAT. §38—837 (1943). See also NEB. REV. STAT. §39—867 (1943) for limitations on tolls.

February 24, 1982

COUNTIES; COUNTY COMPENSATION BOARD: Chapter 340A, The Code 1981, §340A.6. Chapter 340A establishes no limitations on what factors the county compensation board can consider before reaching its final salary recommendations. (Weeg to Heintz, Chickasaw County Attorney, 2/24/82) #82-2-12(L)

February 24, 1982

GRAIN DEALERS AND GRAIN WAREHOUSES: 1981 Session, 69th G.A., chapter 180, §§11 and 27, amending §§*542.11(1)* and *543.36(1)*. The provisions of §§542.11(1) and 543.36(1) do not subject accountants or employees of grain dealers or grain warehouses to charges of fraudulent practice *unless* those persons withhold or falsify information in any records required to be submitted or maintained under chapters 542 or 543. Accordingly, accountants and employees of grain dealers or grain warehouses are not required to take affirmative action to inform the commerce commission of information disclosing violations of those chapters unless that information is necessary to compile accurate financial statements or other records required to be kept by chapters 542 and 543. (Weeg to Pellett, State Representative, 2/24/82) #82-2-13(L)

February 24, 1982

MUNICIPALITIES: Special Assessments; Deficiency Assessments. Sections 362.1, 362.2(11), 384.37, 384.46, and 384.63, The Code 1981. Private improvement, as used in §384.63, The Code 1981, means any valuable addition to private property or an amelioration in its condition, excluding a public improvement, costing labor and capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Mere repairs or fixtures, however, do not qualify as private improvements. A deficiency assessment should be the difference between what the council's valuation of the fair market value of a lot would have been had the private improvement been constructed prior to their determination and the value at which the council did assess the property. During the period of amortization, the council has a duty to assess a deficiency on a lot subject to a deficiency when a private improvement is constructed on the lot. Finally, a change in the ownership of a lot does not have an effect on a deficiency assessment. (Walding to Davitt, State Representative, 2/24/82) #82-2-14(L)

February 25, 1982

CONSTITUTIONAL LAW; GOVERNOR: Power to pardon habitual traffic offender. Art. IV, §16, Iowa Const., §§321.555—321.560, The Code 1981. Neither the powers conferred by Art. IV, §16 to "pardon offenses" or "to remit fines and forfeitures" would authorize a pardon of the civil judgment forbidding issuance of a license to operate a motor vehicle entered against an "habitual traffic offender." A traffic conviction which previously has been the subject of a pardon may not be considered in habitual traffic offender proceedings. An habitual traffic offender judgment is not automatically voided by a subsequent pardon of one or more of the underlying convictions. (Schantz to O'Kane, State Representative, 2/25/82) #82-2-15

The Honorable James D. O'Kane, State Representative: We have your request for an attorney general's opinion on the following legal question: "Can the governor grant a pardon to a habitual traffic offender?"

Section 321.555, The Code 1981, defines "habitual offender" for purposes of the motor vehicle laws to include a person who has accumulated final convictions for offenses committed after July 1, 1974. Three convictions of a specified list of comparatively serious offenses within a six-year period bring a person within the definition under §321.555(1). Six or more convictions of offenses required to be reported to the department (DOT) by §321.207 or chapter 307 bring a person within the definition under §321.555(2).

When the director of transportation discovers that a person appears to be an "habitual offender," the director must certify abstracts of the conviction record to the county attorney of the county in which the person resides. §321.556. The county attorney then files a petition requesting a judicial determination that the person is an habitual offender. *Id.* The abstract of conviction is admissible in evidence and establishes prima facie the fact of the convictions. §321.557. Upon receipt of the petition, the court is to issue an order to show cause why the person named should not be barred from operating a motor vehicle on the highways of this state. §321.558. If the court finds that the person is an habitual offender, the court must enter a judgment forbidding issuance of a license to operate a motor vehicle for a specified period. §§321.559, 321.560.

These proceedings, although employing the "habitual offender" nomenclature often utilized in a criminal context, are plainly civil in nature. The state is not employing the sanctions associated with the criminal law, but rather is seeking to preclude lawful operation of a vehicle on the highways for an extended period. The procedures employed plainly appear to be civil in nature and constitutionally unacceptable for a criminal matter. Thus, the first issue raised by your report is whether the governor's power to pardon extends to a civil judgment directing that a person not be issued a license to operate a motor vehicle for a specified period.

I.

Article IV, §16, Iowa Const., sets forth the governor's power to pardon:

> *The governor shall have power to grant* reprieves, commutations and *pardons, after conviction, for all offenses* except treason and cases of impeachment, subject to such regulations as may be provided by law... *He shall have power to remit fines and forfeitures* under such regulations as may be prescribed by law; and shall report to the General Assembly at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted. [Emphasis added.]

Although this provision commits essentially unreviewable discretion to the governor concerning *whether* a pardon should be granted, issues relating to the *scope* of the Art. IV, §6, provision and to the *effect* of a pardon are questions of constitutional law, the final resolution of which are committed to the judicial branch of government.

The scope of the pardoning power relates to "all offenses, except treason and cases of impeachment." The word "offense" is ordinarily employed in this context and in the law generally as a term of art referring to conduct punishable as a

crime. *See Ex parte Campion*, 112 N.W.585 (Neb. 1907); *see also Meade v. Commonwealth*, 43 S.E.2d 858 (Va. 1947), *Cogdell v. Martin*, 176 S.W.2d 982 (Tex. Civ. App. 1943), *McMahan v. State*, 354 P.2d 476, (Okla. Cr. 1960). That the term is generally so employed in the Iowa Constitution may be inferred from the context in which the same term is employed in Art. I, §§11 and 12 (Indictment and Double Jeopardy). Moreover, the definition of "public offense" which has prevailed in this state since the Code of 1851 (prior to the enactment of the current constitution) refers to conduct prohibited by statute and punishable by fine or imprisonment. *See* §701.2, The Code 1981, §2816, Code 1851. Thus, despite the use of the term "habitual offender" in §321.555, it plainly appears that those provisions do not describe an "offense" within the meaning of Art. IV, §16.

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A recent decision by the Missouri Supreme Court also holds that the pardoning power does not reach license revocations. In *Theodoro v. Dept. of Liquor Control*, 527 S.W.2d 350 (Mo. 1975), a liquor licensee had his license revoked, but subsequently sought renewal on the basis of a purported pardon of the revocation. The Missouri Supreme Court interpreted a provision of the Missouri Constitution identical in pertinent part to its Iowa counterpart and stated.

> The question thus presented is whether or not the governor is constitutionally empowered to "pardon" the administrative revocation of respondent's liquor license. It is readily apparent that the language of the above provision, 'after *conviction*, for all *offenses*', speaks directly to criminal prosecutions, and in construing the constitution, words are to be taken in accord with their fair intendment and their natural and ordinary meaning.

527 N.W.2d at 352.53. We have found no authority extending the scope of the power to pardon beyond "offenses" in the criminal sense of the term.

Nor can we conclude that the power granted by Art. IV, §16, "to remit fines and forfeitures" contemplates the nullification of a habitual offender judgment.

A prior opinion of this office concluded that the pardoning power does not reach the suspension of a driver's license required by statute. In 1940 Op.Att'y.Gen. 78, the then attorney general stated in response to an inquiry from the motor vehicle department concerning whether a pardon obviated their duty to suspend a license:

> Reviewing the governor's power of pardon, it is to be observed that he may remit fines and forfeitures. It has been held that under a provision such as this, the revocation or suspension of a license is not a forfeiture.
>
> 'A proceeding, authorized by Acts 31st Leg. c. 17, for the revocation by the comptroller of public accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a "penalty", within Const., art. 5, sec. 8,...'
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> 2. Words and Phrases, Second Series, p. 613.
>
> The words of the constitution, to-wit, 'remit... forfeitures' indicate that such forfeitures are in the nature of refunds of money, and it has been so held in the case of bondsman, *State vs. Beebee*, 87 Iowa 636.
>
> Section 3812 is a statute properly passed by the legislature and its intent is clear. A license shall be suspended or revoked and a new license may not be issued until one year after its revocation. Our supreme court in the case

of *State of Iowa vs. Forkner*, 94 Iowa 1, speaks very clearly upon the governor's power by pardon to interfere with the legislature's power to suspension.

* * * *

We therefore reach the conclusion that the power to pardon granted to the governor by the statutes does not extend to any power of suspension provided by the legislature. It is, consequently, our opinion that section 3812, being a power of suspension, will not by the governor's pardon, relieve the motor vehicle department of the responsibility imposed by section 243, chapter 134, of the Acts of the 47th General Assembly.

At least upon initial perusal, the 1940 holding is difficult to reconcile with an earlier ruling, 1934 Op.Att'y.Gen. 267. The situation there posed involved an OMVUI conviction in which the court had sentenced the offender to jail for six months, but suspended the sentence on the condition that the defendant not drive an automobile for three months. The governor pardoned the offender and the question arose whether the motor vehicle department should enforce, in these circumstances, a statute which required it to revoke the license upon receiving a record of conviction of such person for OMVUI.

The result, as opposed to the reasoning, in that opinion is clearly correct. First, to the extent that the court had suspended the license as part of the sentence in the criminal case, the governor's pardon of the underlying offense removed the basis for the sentence. Second, to the extent that the conviction had been nullified by the pardon, as will be developed further in the next division of this opinion, the jurisdictional basis for a revocation by the motor vehicle department was eliminated.

However, the 1934 opinion perceived the controlling issue to be whether the provision for revocation of a driver's license was a "forfeiture" within the meaning of Art. IV, §16, Iowa Const. and concluded that it was "part of the penalty resulting from the conviction," and therefore was a forfeiture. That portion of the ruling was overruled *sub silentio* by the 1940 opinion and we believe the latter ruling was the proper one.

Although loss of one's driving privilege might in colloquial speech be described as a "forfeiture," and although the term is not always used with precision in the law, we believe that the customary legal usage of the term and the context in which it is employed in Art. IV, §16 require a less expansive construction.

"Forfeiture" is usually defined as "a divestiture of property without compensation, in consequence of a default or offense," 36 Am.Jur.2d, *Forfeitures and Penalties*, §1, and consists of a loss of money or other tangible property which could not otherwise be taken without just compensation. That the term is so employed in Art. IV, §16 may be inferred from the use of the verb "remit" preceding forfeiture and the subsequent requirement of a report to the General Assembly concerning the "amounts (of fines and forfeitures) remitted," both of which connote a monetary loss. The term "forfeiture" is also employed elsewhere

in the constitution of 1856 in a manner that connotes a monetary loss. *See* Art. XI, §2, Art. 12, §4. This meaning of the term would include "forfeitures" of bail bonds for failure to appear, but would not include a license to operate a motor vehicle. [1]

Our view is supported by the decision of the Virginia Supreme Court of Appeals in *Prichard v. Battle*, 17 S.E.2d 393 (Va. 1941). There, Prichard sought a writ of mandamus to compel the director of motor vehicles to issue a driver's license on terms generally available because he had been pardoned by the governor from a conviction for leaving the scene of an offense and that conviction had been the basis for the restriction on his license. The court reasoned that a license revocation is civil in nature, rather than an added punishment for the offense, and thus beyond the governor's power to remit fines and forfeitures:

> And so in the case before us, while the pardon granted the petitioner relieves him from the punishment or penalty which the state might have exacted of him for the offense, it does not wipe out the fact of his conviction or the fact that by reason of the act committed he is put in a class of persons regarded by the state as unfit to drive automobiles on the highways without making additional provision for the safety of others. If one who leaves the scene of an accident in which his car is involved becomes by reason of such an act unfit to exercise the privilege of driving an automobile on the highways, he is not rendered fit simply because the state's executive has relieved him of the burden of paying a fine or serving a sentence in prison for the act done.

17 S.E.2d at 397. *See also Holliman v. Cole*, 34 P.2d 597 (Okla. 1934) (Governor's power to remit fines and forfeitures does not include authority to remit penalties on delinquent ad valorem taxes).

We conclude that neither the governor's power to pardon an "offense" or the power to remit "forfeitures" can directly nullify a civil judgment declaring a person a "habitual traffic offender."

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[1] Whether the term "forfeiture" as employed in Art. IV, §16 would reach "forfeitures" of motor vehicles under §127.9, The Code 1981, and money or property wagered in violation of the law under §725.8 need not be resolved in this opinion.

II.

A negative answer to your principal question invites consideration of the subsiduary issue of the effect of a pardon of the underlying offense upon which the habitual offender judgment is based. If the pardon precludes use of a conviction in a habitual offender proceeding, the question also arises whether a pardon of an underlying conviction *subsequent* to entry of final judgment in the habitual offender proceeding is of any effect on that judgment. These issues related not to the *scope* of the pardoning power, but to the legal *effect* of a pardon in Iowa.

The leading Iowa decision on this question is *Slater v. Olson*, 230 Iowa 1005, 299 N.W. 879 (1941). In that case, a person convicted of a felony who had been granted a full pardon sought a civil service position, but was rejected pursuant to a statute which disqualified any person "convicted of a felony." The court held that the statute was unconstitutional as infringing upon the governor's power under Art. IV, §16 as applied to a person who had received a full pardon. Concerning the effects of a pardon on a conviction, the court stated:

> We do hold however, that a full pardon granted after conviction contemplates, as stated in *State v. Forkner*, 94 Iowa 1, 62 N.W.772, 777, 28 L.R.A. 206, supra, a remission of guilt 'both before and after a conviction', forgives the results of the offense, relieves not only from the punishment which the law inflicts for the crime *but also exempts him from additional penalties and legal consequences in the form of disqualifications or disabilities based on his conviction.* Undoubtedly the legislature may prescribe qualifications for office but the power must be exercised subject to the right of the pardoned man to be exempt from additional disabilities or disqualifications imposed because of the conviction. When, through the power of the pardon, the doors of the penitentiary opened to plaintiff, he took his place in society with all his civil rights restored entitled to start life anew unburdened of the onus of his conviction. [Emphasis added.]

The holding and principle espoused in *Slater* clearly indicate that after a person has been pardoned for an offense, that *conviction* may not be used as a basis for *subsequent* imposition of disqualifications or disabilities, including denial of licenses. Because the habitual offender determination provided for in §321.555 turns entirely upon the number of *convictions* of certain offenses, *Slater* requires that a conviction for which the defendant has *previously* been pardoned be disregarded in determining whether the person is an habitual offender. *Accord, Guastello v. Dept. of Liquor Control*, 536 S.W.2d 21 (Mo. 1976) (liquor license could not be denied solely on the basis of a conviction for which the applicant had been pardoned). [2]

We should note, however, that additional issues arise if an underlying offense is pardoned *subsequent* to entry of a final judgment in decreeing that a person is a

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[2] The court in *Slater* did appear to leave open the possibility that disqualifications framed in terms other than *conviction* would be treated differently. Thus, if suspension were based on evidence relating to driving competence and the convictions were not used to establish conclusively the underlying facts, a pardon would not appear to be a conclusive obstacle to proving the incident upon which the conviction was based.

habitual traffic offender in reliance upon a conviction that had not been pardoned when the issue was before the court. In that situation, the judgment would be valid at the time of entry and the doctrine of "issue preclusion" would appear fully applicable to the judgment.

In *Hunter v. City of Des Moines*, 300 N.W. 121, 123 (Iowa 1981), the supreme court explained the doctrine:

> In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. 'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' Restatement (Second) of Judgments §68 (Tent. Draft No. 4, 1977.)

The department of transportation should not, we believe act administratively to restore a driver's license when presented with such a subsequent pardon. Nor would a court, because of the preclusive effect of the prior judgment, permit a person to relitigate in mandamus action or in a proceeding for judicial review of administrative action under 17A, the issue of whether the person was an habitual traffic offender. Rather, the person would have to move to reopen the judgment or bring an independent action seeking relief from the original judgment. *See* 46 Am.Jur.2d, *Judgments*, §§679 *et seq.*; §§792 *et seq.*. *See also* rules 252, 253, I.R.C.P. Because such an action invokes the discretion of the court and could depend upon the facts of a particular case, it is not appropriate for this office to speculate on whether, and on what showing, a court might grant to a recipient of a subsequent pardon relief from a habitual traffic offender judgment. Suffice it to say that, in our opinion, a *subsequent* pardon does not, without more, operate to overturn an habitual traffic offender judgment.

February 26, 1982

CONSUMER FRAUDS: Gasoline Pump and Advertising Disclosures. Sections 714.16(2)(a), 214A.3, 214A.11, The Code 1981. Service stations selling gasoline other than the brand advertised and labeled on the station's signs and pumps may be in violation of the ban on deceptive and omissive advertising and sales practices of §714.16(2)(a). Especially if the different product being sold is materially different from the product advertised and labeled. Said violation may occur whether or not any person has, in fact, been misled, deceived or damaged thereby. Similar sales practices engaged in for the purpose of misleading the public as to the quality of the product being sold are also practices in violation of chapter 214A, Motor Vehicle Fuel, §214A.3, False Representations, which violation is a simple misdemeanor pursuant to §214A.11. (Carlson to Lind, State Representative, 2/26/82) #82-2-16

The Honorable Thomas A. Lind, State Representative — 33rd District: Your several inquiries pose questions in regard to advertising and pump labeling practices at service stations. You pose several questions in regard to "brand name" service stations who may be selling gasoline other than the brand involved, without disclosing such. You finally query whether such practices may violate the provisions of the *Iowa Consumer Fraud Act.*

Of course, any individual factual situation would be investigated pursuant to the specific facts involved. In this opinion, I can only address myself to general comments on the area involved.

The applicable provision of the *Iowa Consumer Fraud Act* is §714.16(2)(a), 1981 Code of Iowa, which states:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A reasonable interpretation of the *Iowa Consumer Fraud Act* would be that it requires advertisers to fairly and adequately disclose in their advertising and labeling the exact product or service they are selling. If a service station advertises on its sign and labels on the pump itself that they are selling a brand name gas, then the public has a right to rely on these representations and assume that they are getting the brand name gas.

A seller selling gasoline other than the brand advertised on his sign and labeled on his pump would be in violation of subparagraph (2)(a) of the *Iowa Consumer Fraud Act* unless the fact that a different product was being sold was adequately disclosed, in proper relationship to the gasoline pump. The most accepted manner of doing this is "bagging" a brand name pump with a bag covering up the brand name information, containing new identifying information in regard to the product being sold and, of course, allowing the pricing and measuring display areas of the pump to remain visible.

Although it is easy to say that acts such as the above either by overt misrepresentation or by failure to disclose might be a violation of the *Iowa Consumer Fraud Act*, the question in a particular fact situation would then turn to whether it was an actionable violation. In reality, the factual question of whether or not the product being sold was the equivalent of the brand name product could be very important. For example, a seller selling a product out of a gasoline pump clearly inferior either in quality, content, octane rating or additives to the advertised brand name product would certainly not only technically be violating the *Iowa Consumer Fraud Act* but also be violating it in a material manner. On the other hand, a seller selling a different brand of gas that was, in fact, the complete equivalent in quality, content, octane and additives might be technically at fault but not really committing any act that could be considered to be materially damaging to the consumer buyer.

I point out the above because it would be of import in any specific investigation of practices in this area. Many so-called "brand name" gasolines really come from the same distribution point or pipeline and either do not differ at all or only differ because of certain additives placed in them by jobbers or distributors. Thus in today's marketplace quite a bit of the gas purchased in various brand name stations may not be gas actually produced by that company but it, of course, should be gas that lives up to all advertised and represented claims of quality content, octane and additives for the brand involved.

In addition to the *Iowa Consumer Fraud Act*, a civil remedial statute enforced by the attorney general, the Iowa Code also addresses itself to another possible method of redress in this area. We find in chapter 214A, *Motor Vehicle Fuel*, 1981 Code of Iowa, in §214A.3, *False Representations*, the following:

214A.3 *False Representations.* No person for purposes of selling shall falsely represent the quality or kind of any motor vehicle fuel or add coloring matter thereto for the purpose of misleading the public as to its quality.

And:

214A.11 *Violations.* Any person violating the provisions of this chapter shall be guilty of simple misdemeanor.

Thus the Code also provides a criminal penalty wherein local authorities can investigate and if appropriate, prosecute individuals falsely advertising the gasoline product they are selling. Again, this section, to be invoked, would require a factual situation wherein the seller was "falsely representing the quality or kind of any motor vehicle fuel... for the purpose of misleading the public as to its quality." Thus once again the sale of a product different than the brand name product but its equivalent in quality, content, octane and additives would not be a prosecutable violation whereas the sale of a product other than the brand name which was deficient in either quality, content, octane or additives would be.

MARCH 1982

March 2, 1982

CONSTITUTIONAL LAW: Contracting debts. Iowa Const., Art. VII, §2. Any interest that may accrue on an advance from the federal government to replenish Iowa's unemployment insurance trust fund creates a valid legal obligation upon the state. (Miller to Ray, Governor, 3/2/82) #82-3-1

The Honorable Robert D. Ray, Governor of the State of Iowa: You have requested an opinion of the attorney general concerning application by the state for an advance from the federal government to replenish Iowa's unemployment insurance trust fund. Specifically, you inquire whether any interest that may accrue from the advance payment creates a valid legal obligation upon the state. In our opinion, the accrual of this interest would create a valid legal obligation.

The ability of the state to incur legal obligations is limited by Article VII of the Iowa Constitution. Section 2 provides that the state may "contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for" with the conditions that the debt not exceed the sum of two hundred and fifty thousand dollars ($250,000) and that the debt be applied to the purpose for which it was obtained or to repay the debt itself. Iowa Const., Art. VII, §2.

Our office considered the application of this section to the receipt of advances from the federal government to replenish Iowa's unemployment insurance trust fund in 1976. 1976 Op.Att'y.Gen. 481. We observed that these advances could be repaid by crediting the advance against federal funds to which the state would be entitled in the future or by reducing federal credits allowed to employers under the Unemployment Tax Act. 1976 Op.Att'y.Gen. 481, 482-86. In analyzing this situation, we invoked two principles. First, the character of an obligation must be determined at the time of its creation. Second, a "debt" is created when the creditor is unconditionally entitled to receive and the debtor is obligated to pay. 1976 Op.Att'y.Gen. 481, 482. Applying these principles, we reasoned that an advance to replenish the trust fund did not create a "debt" because at the time the advance was made the federal government was not unconditionally entitled to receive and the state was not obligated to pay state funds in repayment. 1976 Op.Att'y.Gen. 481, 486.

In our view, the reasoning of this opinion is equally applicable to the accrual of interest on advance payments. We note that the state could incur no interest liability at all if the advance were repaid by September 30 of the calendar year and no other advance were made. Act of Aug. 13, 1981, Pub. L. No. 97-35, §2407. At the time the advance is made, therefore, no "debt" is created because the federal government will not be unconditionally entitled to receive and the state will not be obligated to pay state funds to meet interest payments.

Another consideration supports the conclusion that the state may undertake this obligation. Our constitutional limitation on contracting debts addresses contracts "to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for." Iowa Const., Art. VII, §2. Accrued interest would not constitute a debt to meet this purpose. The interest cannot be applied by the state to supply deficits or failures in revenues or to meet expenses. The interest is only a cost to the state of receiving the advance which is, itself, a valid legal obligation.

Accordingly, it is our opinion that any interest that may accrue on an advance from the federal government to replenish Iowa's unemployment trust fund creates a valid legal obligation upon the state.

March 4, 1982

AUDITOR; REVENUE: State Tax Records — Confidentiality: Sections 11.4, 11.28, 422.20(1), and 422.72(1), The Code 1981; 730 IAC §38.6. "Tax administration" as contemplated in section 422.72(1) means the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws; the development and formulation of state tax policy; and includes assessment, collection, enforcement, litigation, publication, and statistical functions. The functions of the auditor of the state are not included within the meaning of "tax administration." The functions of the auditor of the state do not constitute an exception "provided by law" to the confidentiality provisions of sections 422.20(1) and 422.72(1). The revenue director's discretion to adopt administrative rules authorizing examinations of state tax returns by other officers and employees of this state is limited to examinations only for purposes of "tax administration." (Richards to Johnson, Auditor and Bair, Dept. of Revenue, 3/4/82) #82-3-2

Mr. Richard D. Johnson, CPA, Auditor of State: You have requested an opinion of the attorney general on the question of whether the office of the auditor of state in auditing the department of revenue may have access to tax return information otherwise declared to be confidential under sections 422.20 and 422.72, The Code 1981. Your request poses the following specific questions:

1. Are the functions of the auditor of state included in "tax administration" as contemplated in Iowa Code section 422.72(1) (1981)?

2. Are the functions of the auditor, as spelled out in Iowa Code sections 11.4 and 11.28 (1981) exceptions provided by law to Iowa Code sections 422.20(1) and 422.72(1) (1981)?

3. Is the director's discretion to adopt rules as provided in Iowa Code section 422.72(1) (1981) to authorize examination of state information returns by other officers or employees of this state limited to examination for purposes of tax administration?

We recently analyzed the aforementioned confidentiality provisions and revenue rule 730 IAC, §38.6. Op.Att'y.Gen. #81-11-11. The general prohibition against disclosure is stated in section 422.20(1), The Code 1981:

> It shall be unlawful for any present or former officer or employee of the state to divulge or to make known in any manner whatever *not provided by law* to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any persons *except as provided by law;* and it shall be unlawful for any person to print or publish in any manner whatever *not provided by law* any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a serious misdemeanor. If the offender is an officer or employee of the state, such person shall also be dismissed from office or discharged from employment. Nothing herein shall prohibit turning over to duly authorized officers of the United States or tax officials of other states state information and income returns pursuant to agreement between the director and the secretary of the treasury of the United States or the secretary's delegate or pursuant to a reciprocal agreement with another state.

[Emphasis added.] This section's prohibitions are applied to all "present or former" state officers and employees. The department of revenue is more particularly regulated in section 422.72(1), The Code 1981:

> It is unlawful for the director, or any person having an administrative duty under this chapter, or any present or former officer or other employee of the state authorized by the director to examine returns, to divulge in any manner whatever, the business affairs, operations or information obtained by an investigation under this chapter of records and equipment of any person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy of a return or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law.* However, the director may authorize examination of such state returns and other state information which is confidential under this section, if a reciprocal arrangement exists, by tax officers of another state or the federal government. *The director may, by rules adopted pursuant to chapter 17A, authorize examination of state information and returns by other officers or employees of this state to the extent required by their official duties and responsibilities.* Disclosure of state information to tax officers of another state is limited to disclosures which have a tax administrative purpose and only to officers of those states which have laws that are as strict as the laws of this state protecting the confidentiality of returns and information. The director shall place upon the state tax form a notice to the taxpayer that state tax information may be disclosed to tax officials of another state or of the United States for tax administrative purposes. *The department shall not authorize the examination of tax information by officers and employees of this state,* another state, or of the United States *if the officers or employees would otherwise be required to obtain a judicial order to examine the information if it were to be obtained from another source, and if the purpose of the examination is other than for tax administration.* However, the director of revenue may provide sample individual income tax information to be used for statistical purposes to the legislative fiscal bureau. The information shall not include the name or mailing address of the taxpayer or the taxpayer's social security number. Any information contained in an individual income tax return which is provided by the director shall only be used as a part of a data base which contains similar information for a number of returns. The legislative fiscal bureau shall not have access to the income tax returns of individuals. Each request for individual income tax information shall contain a statement by the director of the legislative fiscal bureau that the individual income tax information received by the bureau shall be used solely for statistical purposes. This subsection does not prevent the department from authorizing the examination of state returns and state information under the provisions of section 252B.9. This subsection prevails over any general law of this state relating to public records.

[Emphasis added.] Pursuant to the rule-making mandate of section 422.72(1) highlighted above, the department of revenue has adopted regulation 730 IAC, §38.6 which provides:

> Information deemed confidential. Section 422.20 and 422.72 apply generally to the director, deputies, auditors, agents, present or former officers and employees of the department. Disclosure of information from a taxpayer's filed return or report or other confidential state information by department of revenue personnel to a third person is prohibited under the above sections. Other persons having acquired information disclosed in a taxpayer's filed return or report or other confidential state information, will be bound by the same rules of secrecy under these sections as any

> member of the department and will be subject to the same penalties for violations as provided by law. The director may disclose state tax information including return information to tax officials of another state or of the United States for tax administrative purposes provided that written reciprocal agreements exist.
>
> The director may further disclose information to the child support recovery unit of the social services department where such information has been requested pursuant to section 252B.9, The Code. *All other state agencies will be required to obtain a judicial order from a court of competent jurisdiction.*
>
> This rule is intended to implement sections 422.20 and 422.72, The Code.

[Emphasis added.] The general purposes of these confidentiality provisions, as stated in the aforementioned prior opinion, are to maximize revenues and to promote accurate and complete reporting to the department of revenue by assuring taxpayers that their revelations to that agency will be kept secret. To insure these policy goals the legislature has flatly made confidentiality over tax information the rule and access thereto the highly restricted exception.

The office of state auditor is constitutionally created with duties specified in chapter 11 of The Code. As noted in your second question, that office's function with regard to state agencies is delineated in sections 11.4 and 11.28, The Code 1981. It has been described by the Iowa Supreme Court in the following terms:

> The auditor of state, as his name indicates, is the chief officer of the state authorized to audit or examine the accounts of every state officer, department, agency, or authority charged by law with the receiving or expenditure of public money. [Citation omitted.] He has at all times in his office and under his control examiners and accountants of recognized skill and integrity, under bond, subject at all times to the direction of the auditor. [Citation omitted.] He shall make or cause to be made and kept on file in his office all audits and examinations, showing the condition of any department examined, or whether in his opinion its funds have been properly and efficiently expended, the business efficiently conducted, a report of all illegal or unbusinesslike practices, recommendations for greater simplicity, accuracy, efficiency or economy. [Citations omitted.] He shall make annual and biennial reports to the governor and General Assembly, and individual audit reports giving the results of all examinations and audits of all departments and establishments and all fiscal officers of the state. [Citations omitted.]

Ryan v. Wilson, 231 Iowa 33, 41—42, 300 N.W. 707, 711-712 (1941). The court has further characterized this function as "the *broad authority* of the auditor of state in examining and auditing all state offices, departments, divisions, and agencies of every kind, and the making and filing of general, and individual reports thereon." 231 Iowa at 42, 300 N.W. at 712. Against this backdrop, we turn then to an examination of your specific inquiries.

Your first two questions focus on the nature of the state auditor's function as discussed above — first, whether such is part of "tax administration" as contemplated in section 422.72(1) quoted above; second, whether such constitutes an exception "provided by law" that would otherwise justify access to confidential tax information. The terms "tax administration" are not defined anywhere in chapter 422. However, we believe their meaning can be gleaned through construction "according to the context and the approved usage of the language," section 4.1(2), The Code 1981, and review of other, comparable tax statutes, notably section 6103 of the Internal Revenue Code which is the federal

confidentiality provision. *See* Op.Att'y.Gen. #81-11-11; 1976 Op.Att'y.Gen. 679; 1976 Op.Att'y.Gen. 569. "Tax administration" is specifically defined for purposes of the federal confidentiality provision in 26 U.S.C. §6103(b)(4):

> The term 'tax administration' —
>
> (A) means —
>
> (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a state) and tax conventions to which the United States is a party, and
>
> (ii) the development and formulation of federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
>
> (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

Upon consideration, it is our view that "tax administration as used in section 422.72(1), The Code 1981, has generally the same meaning as used in 26 United States Code section 6103(b)(4). In other words, "tax administration" means the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws; the development and formulation of state tax policy; and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions. After careful review and in response to your first question, it is our opinion that the functions and "broad" authority of auditor of state as discussed earlier in this opinion are *not* part of "tax administration" within the above meaning.

In our earlier opinion, #81-11-11, we identified a number of the exceptions to confidentiality "provided by law." Those are expressly contained in sections 422.20 and 422.72. We note that, unlike the legislative fiscal bureau or the child support recovery unit, the office of state auditor is nowhere mentioned as an exception to confidentiality in those respective sections nor in chapter 11 of The Code. We are guided by the following familiar rules of statutory construction: "[W]here certain exceptions are enumerated, it is presumed the legislature intended no others be created." *Iowa Farmers Purchasing Association, Inc. v. Huff*, 260 N.W.2d 824, 827 (Iowa 1977). Put another way, the express mention of one thing in a statute implies the exclusion of all others (expressio unius est exclusio alterius). *Dotson v. City of Ames*, 251 Iowa 1077, 104 N.W.2d 621 (1960). Finally, it is well established that any proviso, exemption, or exception in any statute must be strictly construed and all doubts should be resolved in favor of the general provision rather than the alleged exception. *State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware*, 231 Iowa 784, 2 N.W.2d 372 (1942). *See generally* 2A J. Sutherland, *Statutory Construction* §47.11 (3d rev.ed. 1973). Weighing all of these matters and in answer to your second question, we are constrained to find that the functions and "broad" authority of the auditor of state are *not* exceptions "provided by law" to the confidentiality provisions of sections 422.20(1) and 422.72(1), The Code 1981.

Our conclusions are also directly supported by the recent decision of *Collins v. Ferguson*, 48 Ohio App.2d 255, 357 N.E.2d 51 (1976). In reviewing the Ohio tax confidentiality statute, the court stated that:

> ... *any exception* to the confidentiality principle of information in income tax returns could be rationalized only when the requesting party's inspection is directly related to the administration of any state or local tax

> law. Consequently, plaintiff (tax commissioner) shall not release tax returns to other public officials unless it is affirmatively demonstrated that they must have access to them to perform *legally delegated duties of administering or enforcing tax laws* of the state of Ohio or a political subdivision thereof.

357 N.E.2d at 55 [emphasis added]. The court concluded that the state auditor's functions did not include the administration or enforcement of the state income tax laws and, therefore, its statutory duties did not operate as an exception to confidentiality. A similar result was also reached in the decision of *Director of Revenue v. State Auditor*, 511 S.W.2d 779 (Mo. 1974). Other generally supportive authorities are collected and annotated in 1 A.L.R. 4th 959 (1980). Our research has disclosed a contrary result reached in the case of *State ex rel. Oklahoma Tax Commission v. Daxon*, 607 P.2d 683 (Okla. 1980), holding that the Oklahoma State Auditor and Inspector is entitled to access to confidential tax records by virtue of his statutory duties. However, we believe this decision is readily distinguishable; unlike our statutes, the Oklahoma tax laws specifically allow access to the state auditor: "Nothing herein contained shall be construed to prevent:... (3) The examination of such records and files by the state auditor and inspector, and his duly authorized agents." Okla. Stat. tit. 69, §205(b) (Supp. 1979).

These conclusions are reached with some reluctance. We are particularly mindful of the admonition of the Oklahoma Supreme Court in *State ex rel. Oklahoma Tax Commission v. Daxon*, 607 P.2d at 687:

> To limit the state auditor and inspector's right to access to primary tax revenue documents as the tax commission urges would seriously hamper, if not forestall, the auditor's ability to account for revenue received. Without the ability to determine what funds are coming into the state in the first instance from the primary documents containing that information, the auditor and inspector would have no means by which to account for all funds in the hands of the commission. To so limit the access of the auditor would at once amount to a usurpation of legislative power clearly given and of the mandate... of the state constitution, and this court will not so act.

But, even though the state auditor's economic "watchdog" functions are undeniably important and his office should have access to all such records of state agencies that would facilitate that purpose, the laws in question in their present form cannot be read as overcoming the expressed, pre-eminent public policy against access to state tax returns. We cannot by this opinion create the desired exception in the face of this blanket proscription. Such an exception may be created only by the Iowa legislature.

Your final question has already been answered indirectly in our response to your second query. The language from *Collins v. Ferguson*, 48 Ohio App.2d 255, 357 N.E.2d 51, 55 (1976), quoted earlier in this opinion, clearly intimates that access to confidential tax information can be predicated only upon inspection "directly related to the administration of any state or local tax law." *See also New York State Department of Taxation and Finance v. New York State Department of Law, Statewide Organized Crimes Task Force*, 44 N.Y.2d 575, 378 N.E.2d 110 (1978); 1 A.L.R. 4th 959 (1980). Moreover, we believe that section 422.72(1), itself, intimates the same: "The department shall not authorize the examination of tax information... if the purpose of the examination is other than for tax administration." Taking all of this into account in answer to your third question, it is our opinion that the revenue director's discretion to adopt administrative rules authorizing examination of state tax returns by other officers and employees of this state is limited to examinations only for purposes of tax administration. To the extent that present revenue rule 730 IAC, §38.6 allows examination for purposes other than for tax administration, it is in derrogation of

the statute and consequently void. *Schmitt v. Iowa Department of Social Services*, 263 N.W.2d 739, 745 (Iowa 1978) ("The plain provisions of a statute cannot be altered by administrative rule."); *Bruce Motor Freight, Inc. v. Lauterback*, 247 Iowa 956, 961, 77 N.W.2d 613, 616 (1956) ("Rules cannot be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent."). We wish to emphasize that this conclusion is limited to the administrative rule in question. Since the issue is not squarely before us, we do not opine on the district court's powers, inherent or statutory, to order the department of revenue to produce such information. *See* §602.1, The Code 1981. ("The Iowa district court shall have exclusive, general and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile... and it shall have and exercise all the power usually possessed and exercised by trial courts of general jurisdiction..."); Iowa R.Civ.P. 122 and 134; Iowa R.Crim.P. 13; *State v. Eads*, 166 N.W.2d 766, 769 (Iowa 1969) ("Even in the absence of statute, however, few today deny that courts have inherent power to compel disclosure of evidence by the state when necessary in the interests of justice."); *White v. Citizen's Nat'l Bank of Boone*, 262 N.W.2d 812, 816 (Iowa 1978) ("We hold trial courts have inherent power to enforce our discovery rules and have discretion to impose sanctions for a litigant's failure to obey them."); *Walles v. International Brotherhood of Electrical Workers*, 252 N.W.2d 701, 710 (Iowa 1977) ("Every court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it."); 23 Am.Jur.2d *Depositions and Discovery*, §§140, 141 and 308 (1965).

March 4, 1982

BAIL BOND: Sections 811.2(1), 811.8, and 907.6, The Code 1981. Subject to the limitations, if any, of their contract with the defendant, the bonding company may avail themselves of the provisions of §811.8 thereby causing the clerk of court to order the exoneration of the surety. A condition of posting a bond as a condition of probation does not affect the bonding company's rights under §811.8, The Code. (Cleland to Slater, State Senator, 3/4/82) #82-3-3(L)

March 5, 1982

TAXATION: Mobile Home Owned by a Religious Organization and Used as a Classroom, but Which Has Not Been Converted to Real Estate. Sections 135D.22, 135D.26 and 427.1(10), The Code 1981. A mobile home which is owned by a religious organization and used as a classroom, but which has not been converted to real estate would not be exempt from the semi-annual taxes imposed on mobile homes under section 135D.22. (Donahue to Davis, Scott County Attorney, 3/5/82) #82-3-4(L)

March 5, 1982

TAXATION: Application For Industrial Real Estate New Construction Tax Exemption. Sections 427B.1, 427B.3, and 427B.4, The Code 1981. A purported application for the local option industrial real estate new construction property tax exemption filed with the assessor before a city council enacted an ordinance to authorize the exemption is ineffectual and cannot be considered as an application for such exemption. Claimants must file their exemption applications between January 1 and February 1 of the assessment year in which the value added is first assessed for taxation. Department of Revenue instructions which state that if a new construction industrial project requires

more than a year to construct or complete a single application for exemption may be filed upon completion of the project are inconsistent with §427B.4. (Griger to Kimes, Clarke County Attorney, 3/5/82) #82-3-5(L)

March 8, 1982

TAXATION: Tax on Grain Handled. Section 428.35, The Code 1981. The tax imposed by §428.35, The Code 1981, is an excise tax on the handling of grain. Handling occurs when the grain is received. Ownership of the grain is not a relevant consideration, and as a result when the ownership of grain changes without movement of the grain, the transaction would not be taxable under §428.35. (Schuling to Harbor, State Representative, 3/8/82) #82-3-6(L)

March 9, 1982

STATE DEPARTMENTS AND OFFICERS; REAL ESTATE COMMISSION: Exemption from real estate licensing requirements. §117.3, The Code 1981. Attorneys who engage in real estate transactions for a client incident to the practice of law are not rquired to seek a real estate license. However, the mere fact that a person is licensed as an attorney does not exempt that person from the licensing requirements of chapter 117 if the person engages in real estate practices subject to licensure outside the attorney-client relationship. (Thomas to Dreeszen and Waldstein, State Senators, 3/9/82) #82-3-7(L)

March 10, 1982

COUNTIES AND COUNTY OFFICERS: Medical Examiner. Chapter 339, The Code 1981; §339.7. The county in which a death occurs is liable for the costs of an autopsy, the exception being where the death occurred in the manner specified in §339.6(10). Accordingly, a county may not attempt to recover those costs from either the county of the deceased's residence if the death occurred in a different county, or from the deceased's estate. (Weeg to Gustafson, Crawford County Attorney, 3/10/82) #82-3-8(L)

March 17, 1982

TAXATION: Application of the Board of Review's or Court's Final Disposition of a Real Property Tax Assessment Protest Filed for a Reassessment Year to the Assessed Value of the Property for the Following Interim Assessment Years. §§441.37, 441.35, The Code 1977. The board of review's or court's final disposition of a real property tax assessment protest filed pursuant to §441.37 for a reassessment year shall also control and set the assessed value of the property on the assessment rolls for the following interim assessment years provided that the assessor or board of review did not change the assessed value for an interim assessment year or that a protest was not filed by the taxpayer (property owner) for an interim assessment year successfully showing that the assessed value had changed for the particular interim assessment year being protested. (Kuehn to Martens, Emmet County Attorney, 3/17/82) #82-3-9(L)

March 17, 1982

IOWA PUBLIC EMPLOYEES RETIREMENT SYSTEM; AREA EDUCATION AGENCIES: Retirement Age of Employees. Chapter 97B, §§97B.41, 97B.46; chapter 273, §§273.2, 273.9. Area Education Agencies are "political subdivisions" which constitute "employers" within the meaning of section 97B.41(3). An employee of an Area Education Agency, therefore, is not an employee of the "state" as the term is used in sections 97B.41 and 97B.46 of the Code. (Pottorff to Tieden, State Senator, 3/17/82) #82-3-10(L)

March 17, 1982

HIGHWAYS: Sale of excess right of way — preference of sale. §306.23, The Code 1981. In the proposed sale of excess right of way by the Department of Transportation, present owners of adjacent land from which a piece of land was originally bought or condemned for highway purposes are not allowed to ascertain the highest bid and make a subsequent offer after the close of the sealed bidding process. (Dundis to Taylor, State Senator, 3/17/82) #82-3-11(L)

March 19, 1982

CRIMINAL LAW, CONTRIBUTING TO JUVENILE DELINQUENCY, CLASSIFICATION OF PUBLIC OFFENSES: §§233.1, 233.2, 701.8, 801.4(3), 903.1, The Code 1981. Contributing to juvenile delinquency in violation of §233.1, The Code 1981, is a simple misdemeanor. (Cleland to Heitland, Hardin County Attorney, 3/19/82) #82-3-12(L)

March 22, 1982

OMVUI; IMPLIED CONSENT: Chapter 321B. A refusal to sign the implied consent form following an oral consent to the withdrawal of a blood specimen for chemical testing to detrmine blood alcohol content does not constitute a refusal of the test. (Gregersen to Ritchie, Buena Vista County Attorney, 3/22/82) #82-3-13(L)

March 23, 1982

SCHOOLS: Minors' School License. §§17A.19, 321.194, chapter 613A, The Code 1981. A school board or school superintendent who issues a "statement of necessity" to a student who wishes to apply for a minor's school license performs a ministerial act. A student whose application for such "statement of necessity" and has been rejected has recourse by way of an administrative appeal pursuant to chapters 17A and 290, The Code 1981. The school district or official would be exempt from any claims of liability in connection with such a ministerial act under the terms of §613A.4(3), The Code 1981. (Fleming to Angrick, Citizens' Aide/Ombudsman, 3/23/82) #82-3-14(L)

March 23, 1982

COUNTIES AND COUNTY OFFICERS; BOARDS OF SUPERVISORS: Selection of Representation Plan. Chapter 331, §§331.207, 331.208, 331.209, and 331.210. A special election held under section 331.207, which results in a change in the supervisor representation plan, requires a transition in the membership on the board of supervisors pursuant to section 331.207(4). New members must be elected under the new supervisor representation plan at the general election pursuant to sections 331.208, 331.209, or 331.210. The terms of current members who were elected under the previous representation plan must expire in January following the general election. The length of terms of the new members should be determined by lot pursuant to section 331.208(4). (Pottorff to Hutchins, State Senator, 3/23/82) #82-3-15(L)

March 23, 1982

NATIONAL GUARD; ARMORY BOARD: Authority to lease or accept donated property to be used for training purposes. §§29A.12; 29A.13; 29A.57; 29A.58; 29A.59; 565.3; 565.4, The Code. The state armory board may lease or accept donated property to be used for the purpose of training units of the Iowa National Guard. Lease of property must be approved by state executive council. (Swanson to Gilbert, Adjutant General, 3/23/82) #82-3-16(L)

March 23, 1982

COUNTIES; COUNTY ATTORNEY; 28E ORGANIZATIONS: Chapter 28E, section 28E.11; 1981 Session, 69th G.A., chapter 117, §§756, 756.2, 756.6, 756.7. A county attorney is not required to represent a 28E organization to which the county belongs as a part of his or her official duties. However, in the event a 28E agreement so provides, a county attorney may represent the organization in his or her official capacity so long as no conflict of interest problem appears. Further, in the absence of a contrary provision, a 28E organization has the implied authority to hire private legal counsel, which could include a part-time, but not a full-time, county attorney. (Weeg to Swearingen, State Representative, 3/23/82) #82-3-17(L)

March 23, 1982

JUVENILE LAW: A juvenile probation officer should qualify as a "law enforcement" or "public safety" officer under the federal "Public Safety Officers' Death Benefits" program, entitling their family to the $50,000 death benefits to a public safety officer who is "killed as a direct and proximate result of personal injury sustained in the line of duty". 42 U.S.C. §3796, *et seq.*; §§231.10; 232.19(1); 232.28; 232.29; 232.45(4); 232.47(7); 232.48; 801.4(7), The Code 1981. Secondly, Senate File 474, amending chapter 613A — Tort Liability of Governmental Subdivisions, would apply to limit the liability of juvenile probation officers, since counties are municipalities under chapter 613A and juvenile probation officers are employees of the county. Senate File 474, §§1—6; chapter 613A; §231.10, The Code 1981. (Hege to Welsh, State Representative, 3/23/82) #82-3-18(L)

March 23, 1982

SOCIAL SERVICES: Reimbursement from Third Parties for Medicaid Payments. Assignment of rights to benefits vis-a-vis the state's subrogation statute. 42 U.S.C. §§1396a(a)(25), 1396k(a), 42 CFR §433.146, §249A.6(1), Code of Iowa. The Department of Social Services meets the requirements of federal law pertaining to the assignment of rights to benefits by Medicaid recipients against third parties for the purpose of reimbursement by those legally liable to pay for such medical assistance. (Stephen C. Robinson to Don Kassar, Chief, Bureau of Medical Services, Department of Social Services, 3/23/82) #82-3-19(L)

March 23, 1982

COUNTIES; COUNTY OFFICERS: Incompatibility. Chapter 174, The Code 1981; 1981 Session Laws, 69th G.A., ch. 117, §§500 to 511. The positions of deputy county auditor and secretary to a county agricultural society are not public offices and therefore are not incompatible. (Weeg to Swaim, Davis County Attorney, 3/23/82) #82-3-20(L)

March 24, 1982

COUNTIES: Historical preservation tax funds. 1981 Session, 69th G.A., chapter 117, §421.18. Historical preservation tax funds may be used for the preservation of historical buildings. (Weeg to Howell, State Representative, 3/24/82) #82-3-21(L)

March 24, 1982

MENTAL HEALTH: County Liability for Costs of Care of Mental Patients Admitted to Private Hospitals. §§125.34(2), 229.22, 229.22(2), 230.20(5), 444.12(3), The Code 1981. The county of legal settlement is responsible for the costs of care and treatment of a mental patient treated at a private facility under §229.22. Where the legal settlement of the patient is in another state or is unknown, the county of admission or commitment is liable for the costs of care and treatment of mental patients treated at private facilities under §229.22.

Detention of a person pursuant to §229.22 does not constitute an arrest within the meaning of the criminal law, but rather constitutes the taking of a person into protective custody to prevent injury to the detainee or others.

Where a court enters an order placing a person in the custody of a private facility, such order extinguishes all prior rights to custody that may have been reposed in either a city, county, or state agency, unless specifically excepted by the order.

Where a person detained pursuant to §229.22 is treated at a state mental health facility, and the person's legal settlement is in another state or is unknown, the state is liable for the costs of such care and treatment. If legal settlement is in a county in Iowa, and the patient is treated at a state mental

health facility, the county is liable for eighty percent of the costs of care and treatment and the state is liable for the remainder. (Mann to Smith, State Representative, 3/24/82) #82-3-22(L)

March 24, 1982

WORKER'S COMPENSATION: Agricultural Exemptions. U.S. Const., Amendment XIV; Iowa Const., Art. I, §6; 1976 Session, 66th G.A., chapter 1084, §1; §§85.1, 87.1, The Code 1981. That portion of §85.1 which exempts certain "persons engaged in agriculture" from the Iowa Worker's Compensation statute violates neither U.S. Const. Amendment XIV nor Iowa Const., Art. I, §6. (Benton to Comito, State Senator, 3/24/82) #82-3-23(L)

March 25, 1982

MUNICIPALITIES: Conflict of Interest. Section 362.6, The Code 1981. Section 362.6, The Code 1981, does not require an interested officer to disqualify himself or herself on a measure before a municipal committee. (Walding to Nystrom, State Senator, 3/25/82) #82-3-24(L)

March 31, 1982

SUBSTANCE ABUSE; MENTAL HEALTH: Privacy and Confidentiality Requirements. 21 U.S.C. §§1175(a) and 1175(b)(2)(c), 42 U.S.C. §4582(a); 42 C.F.R. §2.12(a)(1—4), §2.23, §2.64(g), §2.65(c); §§4.1(36)(a), 68A.7, 125.1(1), 125.33(2) and (3), 125.37, 217.30(1)(d), 217.30(4), 229.25, 622.10, 703.3, 719.1, 719.2, 804.15, 808.1; §§803—3.9 and 805—3.9, I.A.C.

Section 622.10, which creates a physician-patient testimonial privilege, does not preclude a physician from testifying in a civil or criminal proceeding as a result of a diagnostic examination performed to determine a person's mental or physical condition.

Section 68A.7's confidentiality requirements do not bar the non-consensual disclosure of medical records where sought by subpoena or court order.

Section 125.33(2) and (3) and section 125.37 generally prohibit substance abuse treatment facilities from disclosing the fact that a person is participating in a treatment program, and from disclosing information on the nature of the treatment given, but does not prohibit the non-consensual disclosure of non-treatment related information where required to do so by court order in pursuit of the administration of justice.

Section 217.30(1)(d) generally prohibits the disclosure of medical or psychiatric data by a treatment facility, including diagnosis and past history of disease or disability of a patient, but pursuant to §217.30(4) such information shall be disclosed without a patient's consent to law enforcement officials for use in connection with their official duties relating to law enforcement where authorized by court order.

Section 229.25 general prohibition on the disclosure of medical records may be abrogated where non-treatment related information is sought pursuant to court order.

The constitutional right to privacy precludes the non-consensual disclosure of confidential medical information, unless such disclosure is justified by compelling state interests.

Neither the constitution nor statutory confidentiality provisions would permit a treating physician/psychiatrist or other medical staff to testify at an involuntary commitment hearing under chapter 229 to communications and observations gained as a result of treating a patient, and not as a result of a diagnostic evaluation performed pursuant to court order.

A treatment facility's staff may report to law enforcement officials, without violating §125.33, neutral facts surrounding the possession of a weapon by a patient, so long as the identity or identities of patients are not disclosed.

If the identity or identities of patients involved in suspected criminal violations are sought by law enforcement officials, such information should not be disclosed by a treatment facility unless authorized to do so by court order.

Law enforcement officials may execute a search warrant at a treatment facility since search warrants are court orders, and searches are proper when made under the authority of a validly issued search warrant.

Absent a court order affirmatively authorizing a treatment facility's staff to assist in the execution of a search warrant, said staff must passively observe the execution of the search warrant.

A treatment facility's staff will not incur criminal liability under §§703.3, 719.1 and 719.2, where said staff abides by statutory or constitutional confidentiality requirements and refuse to disclose confidential information to law enforcement personnel, so long as they do not affirmatively act to obstruct law enforcement personnel in the performance of their duties. (Mann and Freeman to Wilson, Buchanan County Hospitalization Referee, 3/31/82) #82-3-25(L)

March 31, 1982

MUNICIPALITIES: Police and Fire Pensions. Section 411.1(12), The Code 1981; Acts, 67th G.A., 1978 Session, chapter 1060, §42; Acts, 66th G.A., 1976 Session, chapter 1089, §18. Base wages and longevity, holiday pay, and educational pay included in a wage are to be included as earnable compensation. Acting pay and educational pay not included in a wage are not to be included. As to corrective measures in the event that a municipality has incorrectly computed the earnable compensation, the judgment of the police and fire pensions boards prevail. (Walding to Slater, State Senator, 3/31/82) #82-3-26(L)

March 31, 1982

ELECTIONS; SCHOOL ELECTIONS; PRECINCTS: Chapter 49, §§49.1, 49.3, 49.11; chapter 277, §277.3. Precincts drawn pursuant to section 49.3 are applicable in school elections. These precincts may be temporarily merged under sections 49.11(1), 49.11(3)(a), or 49.11(3)(b). The merger of precincts

under section 49.11(3)(b) is restricted by the population and geographic limitations of section 49.3. The merger of precincts under sections 49.11(1) and 49.11(3)(a) are not restricted by the population and geographic limitations of section 49.3. (Pottorff to Hall, State Representative 3/31/82) #82-3-27(L)

March 31, 1982

MUNICIPALITIES: Civil Service. Section 400.13, The Code 1981; Acts, 65th G.A., 1973 Session, chapter 233, §2. An ordinance imposing disparate salaries between members and nonmembers of the police department vying for the office of the chief of police violates §400.13, The Code 1981. (Walding to Welsh, State Representative, 3/31/82) #82-3-28(L)

March 31, 1982

COURTS: A petition or application to modify a decree of dissolution is a "petition" and the clerk of court is required to collect a $25 filing fee from the party moving to initiate such an action. 1981 Session, 69th G.A., chapter 117, §704 and chapter 189, §4; §598.21(8); Ia. R.Civ.P. 48. (Hege to Tofte, State Representative, 3/31/82) #82-3-29(L)

March 31, 1982

COUNTIES AND COUNTY OFFICERS; PRISONERS: County liability for emergency medical care provided to a prisoner. §356.5(2) and 356.15, The Code 1981. The county in which a prisoner is taken into custody is responsible for the provision of life necessities to such prisoners, including emergency medical care. (Mann to Jensen, Monona County Attorney, 3/31/82) #82-3-30(L)

March 31, 1982

STATE OFFICERS AND DEPARTMENTS: Board of Psychology. §§147.72, 154B.4, The Code 1981. Section 154B.4, The Code 1981. Section 154B.4, The Code, prohibits an unlicensed person who is not otherwise exempt from the provisions of chapter 154B from using the title "psychotherapist" in connection with an offer to practice or the practice of psychology. Section 147.72, The Code, does not prohibit the use of said title by an unlicensed person. An applicant for licensure as a psychologist is subject to the same restrictions on using the title "psychotherapist" as are other unlicensed individuals. (Brammer to Scott, Chairman, Board of Psychology Examiners, 3/31/82) #82-3-31(L)

APRIL 1982

April 8, 1982

COUNTIES; COUNTY ATTORNEY: Salaries of assistant county attorneys: Sections 331.752(2), (3), and (4); 331.903(1) and 331.904(3). An assistant county attorney's salary ceiling is based not on the county attorney's actual salary but on eighty-five percent of the statutory maximum salary for any full-time county attorney. Consequently, it is permissible for an assistant county attorney to receive a salary that exceeds eighty-five percent of the salary actually received by the county attorney. (Weeg to Johnson, Auditor of State, 4/8/82) #82-4-1(L)

April 13, 1982

COUNTIES; COUNTY CONSERVATION BOARD; BOARD OF SUPERVISORS: Section 111A.4, The Code 1981; Sections 331.424 and 331.426, Supplement to The Code 1981. The board of supervisors does not have the authority to refuse to pay a warrant issued by the county conservation board if that warrant 1) does not exceed the conservation board's budget limits and 2) is for a legitimate purpose. (Weeg to Wilson, Director, Conservation Commission, 4/13/82) #82-4-2(L)

April 14, 1982

CRIMINAL LAW: General Assistance Application, chapter 252, The Code 1981, as the Basis for a Perjury Charge, §720.2, The Code 1981. Chapter 252, does not require that an application for general assistance be made under oath or affirmation. Such an application, however false the statements therein, does not necessarily furnish an adequate basis for a perjury charge under §720.2. (Steffe to Tullar, Sac County Attorney, 4/14/82) #82-4-3(L)

April 15, 1982

DRIVER'S LICENSE; INTERSTATE COMPACTS: §§321.513, 321C.1, The Code 1981. The interstate compacts of §321.513 and §321C.1, The Code 1981, contemplate that the jurisdiction issuing the traffic citation or obtaining the traffic conviction is different than the jurisdiction issuing and suspending the driver's license. Thus, the licensee suspension provisions of §321.513 and §321C.1 are not applicable to drivers licensed in Iowa for failure to comply with a traffic citation issued in Iowa or convicted of a traffic offense committed in Iowa. (Mull to Kumpula, 4/15/82) #82-4-4(L)

April 15, 1982

RAILROADS: The Iowa Department of Transportation is subject to statutory bidding requirements. However, the railroad division of the transportation department is not subject to public bidding procedures regarding its administration of expenditures from the railroad assistance fund as set out in

chapter 327H. Chapter 327H contains no requirement for public bids nor are railroads subject to public bidding requirements for work being done on their right-of-way. (Miller to Schwengels, State Senator, 4/15/82) #82-4-5(L)

April 15, 1982

COUNTIES AND COUNTY OFFICERS; IMCOMPATIBILITY AND CONFLICT OF INTEREST: Sections 331.905 through 331.907, Supplement to The Code 1981. No incompatibility of offices exists when the county auditor serves as clerk to the county compensation board, but there may be some circumstances in which a conflict of interest problem may arise. (Weeg to Salvo, Shelby County Attorney, 4/15/82) #82-4-6(L)

April 16, 1982

COUNTIES; CIVIL SERVICE COMMISSION; OPEN MEETINGS; PUBLIC RECORDS: Chapters 28A, 68A, and 341A; §§28A.3, 28A.5, 68A.2, 68A.7(11), 341A.6(4), 341A.6(11), and 341A.12. Under chapter 28A, final action of the civil service commission must be taken in open session, even if the proceedings were conducted in closed session. Because "final action" under §28A.5(3) encompasses both the final decision and the factual findings which support that decision and the factual findings which support that decision, and because of the presumption in favor of disclosre under chapter 68A and the absence of any express exceptions, the commission's decision and factual findings constitute public records under chapter 68A. Further, the commission has discretion under the provisions of §341A.6(4) to conduct informal hearing of an employee's appeal of a written reprimand. (Weeg to McCormick, Woodbury County Attorney, 4/16/82) #82-4-7(L)

April 16, 1982

JUVENILE LAW: School officials should cooperate with a child abuse investigation by allowing the child abuse investigator to interview the alleged child abuse victim in school without notifying the parents of said victim. Chapter 235A, The Code 1966; §§232.67—.77, The Code 1981; chapters 709, 726, The Code 1981; chapter 235A, The Code 1981; §§232.67, .68(2), .69, .70, .71, The Code 1981; The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g; IAC 770—135.4(2). A child abuse investigator is mandated to conduct an appropriate investigation on a reported complaint of child abuse. If in the course of said investigation, the investigator determines that the child should be interviewed independently of his or her parent(s) and a school is the most appropriate setting to do so, school officials should allow the investigation without contacting the parents. No state statute could be found requiring school officials to notify parents prior to their child, an alleged victim of child abuse, being interviewed during a child abuse investigation. Similarly the Federal Family Educational Rights and Privacy Act, the so-called Buckley amendement, does not require school officials to notify parents that their child has been or will be interviewed during a child abuse investigation. Absent some affirmative duty to notify parents, the purported interests of school officials must yield to the mandatory child abuse investigation whose "primary purpose... shall be the protection of the child named in the report". (Hege to Krejci, Marshall Co. Atty., 4/16/82) #82-4-8(L)

April 19, 1982

TAXATION: Application of the "Fee Simple Title" Concept to the Owner of a House Filing for a Homestead Tax Credit. §§425.11(1)(a) and (2), The Code 1981. A dwelling house cannot qualify for the homestead tax credit pursuant to §425.11(1)(a) and (2) when the house's owner does not own the land upon which the house sets. (Kuehn to Johnston, Polk County Attorney, 4/19/82) #82-4-9(L)

April 19, 1982

COUNTIES; BOARD OF SUPERVISORS; PUBLICATION OF CLAIMS: Section 349.18, The Code 1981. The publication requirement of §349.18 does not permit a board of supervisors to merely publish the total amount of the county secondary road payroll and the name of the county engineer as the individual receiving that claim. Instead, §349.18 requires publication of each county secondary road employee's name and the amount of the total payroll claim paid to that employee. (Weeg to Folkers, Mitchell County Attorney 4/19/82) #82-4-10(L)

April 20, 1982

COUNTIES; BOARD OF SUPERVISORS: Reimbursement of expenses. Sections 331.215 and 331.324(1), Supplement to The Code 1981; §§79.9 through 79.13, The Code 1981. The county board of supervisors is required, under §§331.215 and 331.324(1), Supplement to The Code 1981, and §§79.9 through 79.13, The Code 1981, to reimburse county officers and county employees for expenses incurred in the course of their official duties. In the absence of any express statutory provision, supervisors are authorized under home rule authority to promulgate policies for reimbursement of expenses, either those that *must* be paid or those that *may* be paid by the supervisors. More specifically, the supervisors have the authority to enforce a policy that both requires county officers and employees to obtain their approval before reimburseable expenses are incurred and limits reimbursement to a maximum dollar amount. (Weeg to Folkers, Mitchell County Attorney, 4/20/82) #82-4-11(L)

April 21, 1982

COUNTIES; SHERIFF; PAYMENT OF SHERIFF'S FEES: Sections 331.424(3)(2), 331.655(1), 331.655(2), 331.902(1). The fees collected by the sheriff under §331.655(1)(1) for transferring prisoners pursuant to court order are not to be paid to the sheriff as a part of his or her salary, but are to pass to the county under §331.902(1). The county may theoretically be liable for reimbursing the general fund in the event the prisoner is indigent. However, the practical effect of the prisoner's inability to pay is that the actual expenses of the transfer will be paid from the county general fund and the statutory hourly rate will not be collected. (Weeg to Tullar, Sac County Attorney, 4/21/82) #82-4-12(L)

April 21, 1982

CRIMINAL LAW; LAW ENFORCEMENT; MOTOR VEHICLES: Implied Consent; Extraterritorial Jurisdiction. §§321B.2, 321B.3 and 400.8, The Code 1981. Probationary status under §400.8, The Code 1981, has no effect on a peace officer's authority to invoke the provisions of the implied consent law, chapter 321B, The Code 1981. Officers included within the definition of "peace officer" in §321B.2, The Code 1981, may invoke the provisions of the Iowa implied consent law anywhere within the state. (Hayward to Poncy, State Representative, 4/21/82) #82-4-13(L)

April 26, 1982

STATE OFFICERS AND DEPARTMENTS; MERIT SYSTEM EXEMPTIONS; CHIEF ADMINISTRATIVE OFFICERS: Chapter 19A, §19A.3(20); chapter 258A, §§258A.1, 258A.7. The positions of executive secretary of both the Board of Cosmetology Examiners and the Board of Barbering Examiners are exempt from the merit system under the provisions of section 19A.3(20) of the Code. (Pottorff to Van Winkle, Director, Merit Employment Department, 4/26/82) #82-4-14(L)

April 26, 1982

MUNICIPALITIES: Governmental Zoning Immunity. Traditionally, courts have held that, in the absence of express statutory language to the contrary, a state is not amendable to local zoning regulations. Iowa has subscribed to that majority rule. The trend in case law and the vast weight of scholarly authority, however, advocate rejection of the three traditional standards of governmental-proprietary, eminent domain, and superior sovereignty. In their stead, courts have adopted the "balancing of interests" test. The true test of immunity from local zoning requirements, according to those courts, is legislative intent; that intent is to be divined from a consideration of many factors, including: the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests. The burden of proof is upon the intruding government. Accordingly, under present Iowa law, the Division of Adult Corrections would be safe to assume immunity from the municipal zoning regulation imposing a fence requirement on the state. Although not as certain as with the majority rule, it is our judgment that a favorable judicial decree would be issued if the court applied the "balancing of interests" test to this zoning conflict, provided the legislative intent was clearly expressed. (Walding to Baugher, State Senator and Krewson, State Representative, 4/26/82) #82-4-15

The Honorable Gary L. Baugher, State Senator; The Honorable Lyle Krewson, State Representative: You have requested an opinion of the attorney general regarding governmental zoning immunity. The issue presented is whether a state agency, the Division of Adult Corrections of the Department of Social

Services, is subject to a municipal zoning ordinance. [1] A Mitchellville, Iowa zoning ordinance, recently amended, requiring not less than a "twelve (12) foot high non-climable fence exclusive of the additional requirement of three strands of razor fence located on the top of said fence angled in such a manner to restrict climbing" to encompass any adult security facility within the city limits and that such property remain "locked at all times or patrolled by a security guard" is the subject of concern. CITY OF MITCHELLVILLE, IA ORDINANCES, Chapter 5, Art. 18, §3.2(U) (1981).

I.

Traditionally, courts have held that, in the absence of express statutory language to the contrary, a state is not amendable to local zoning regulations. *See, e.g., Kremers v. Alpine Tp.*, 355 Mich. 563, 94 N.W.2d 840 (1959); *Olson v. Avon*, 143 Conn. 448, 123 A.2d 279 (1956); *Appeal of Sawdey*, 369 Pa. 19, 85 A.2d 28 (1951). *See generally*, RHYNE, ZONING AND PLANNING §26.65 (1980); 2 RATHKOPF, THE LAW OF ZONING AND PLANNING §31 (4th ed. 1979); 2 ANDERSON, AMERICAN LAW OF ZONING §12.06 (2nd ed. 1976); 1A ANTIEAU, MUNICIPAL CORPORATION LAW §7.17 (1974); 8 McQUILLIN, MUNICIPAL CORPORATIONS §25.15 (1965). The statement represents the majority rule.

Of the jurisdiction which follow the majority rule, most adjudicate claims of zoning immunity based upon one of three theories. The approach followed by a plurality of states is to distinguish between governmental and proprietary functions. If found to be performing a function governmental in nature, the political unit is immune from the conflicting zoning ordinance. *See, e.g., City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962). Conversely, when the use is considered proprietary, the zoning ordinance prevails. *See, e.g., Taber v. City of Benton Harbor*, 280 Mich. 522, 274 N.W. 324 (1937).

The balance of the majority jurisdictions utilize tests based upon either the theory of superior sovereignty or the power of eminent domain. Under the superior sovereignty test, courts rule in favor of the superior political unit on the conflicting zoning ordinance. Thus, where immunity from a local zoning ordinance is claimed by an agency of the superior political unit, immunity is presumed.

The third standard, eminent domain, grants immunity whenever the proposed land use could be implemented by condemnation. This approach assumes that the power to take implies the power to use. Thus, where the power of eminent domain has been granted to the governmental unit seeking immunity from local zoning,

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[1] There may be some question concerning the authority of a municipality to require fencing around a preexisting use. Although some courts have upheld reasonable buffer requirements between residential and less desireable uses; *See, e.g. Church v. Town of Islip*, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960), the Iowa Supreme Court has not addressed the issue. Accordingly, no judicial guidance is available as to that question.

some courts have concluded that this conclusively demonstrates the units have concluded that this conclusively demonstrates the units' superiority where its proposed use conflicts with local zoning regulations. *See, e.g., Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954).

Iowa's most recent judicial pronouncement on governmental zoning immunity was in 1963. In *City of Bloomfield v. David Co. Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909 (1963), the court, upon citing statements of hornbook law, noted that:

> The underlying logic of some of these authorities is, in substance, that the legislature could not have intended, in the absence of clear expression to the contrary, to give municipalities authority to thwart the state, or any of its agencies in performing a duty imposed upon it by statute.

Bloomfield, 254 Iowa at 904, 119 N.W.2d at 911—12. In addition, the court stated that:

> There can be no doubt the school district is an arm or agency of the state and that the maintenance of public schools, including providing transportation to the pupils entitled to it as required by statute is a governmental function. Certainly it is not a proprietary one.

Bloomfield, 254 Iowa at 904, 119 N.W.2d at 912. The former language appears to be posing the superior sovereignty test; whereas, the latter language is clearly presenting the governmental-proprietary standard. Therefore, Iowa subscribes to the majority rule.

Application of Iowa law to the current situation, regardless of which of the two standards used in *Bloomfield* is applied, would likely result in governmental immunity from the local zoning regulation. As concerns the superior sovereignty test, the state is sovereign and, absent of legislative decree to the contrary, would not be presumed to have given a municipal entity authority to thwart the state in the administration of a correctional institution. The location and maintenance of a correctional facility, under the governmental-proprietary standard, would be classified as a governmental function. Accordingly, the Iowa Division of Adult Correction would be safe, under present Iowa law, to assume immunity from the Mitchellville zoning regulation imposing a fence requirement on the state.

II.

The trend in case law and the vast weight of scholarly authority, however, advocate rejection of the majority rule. *See* Johnston, *Recent Cases in the Law on Intergovernmental Immunity: New Standards to Maximize the Public Interests*, 8 URB. LAW 327 (1976); Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971); Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, 19 SYRACUSE L. REV. 698 (1968); Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284 (1964); Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316 (1961).

In its stead, courts have adopted the "balancing of interests" test, which is sometimes referred to the "balancing of competing interests" test or the "balancing of public interests" test. Several states have adopted the minority view, including: Florida, *Orange Co. v. City of Apopka*, 229 So.2d 652 (Fla. 4th D.C.A. 1974); Kansas, *Brown v. Kansas Forestry, Fish and Game*, 2 Kan.App.2d

102, 576 P.2d 230 (1978); Michigan, *Dearden v. City of Detroit*, 403 Mich. 257, 269 N.W.2d 139 (1978); Minnesota, *Town of Oronoco v. City of Rochester*, 293 Minn. 435, 197 N.W.2d 426 (1972); Missouri, *St. Louis Co. v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962), New Jersey, *Rutgers v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972), and North Dakota, *City of Fargo v. Harwood Tp.*, 256 N.W.2d 694 (N.D. 1977).

The leading case in this new trend of intergovernmental zoning decisions is *Rutgers v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972). After recognizing the three common tests and reviewing its own prior decisions, the court advances the balancing of interests test by stating:

> The rationale which runs through our cases and which we are convinced should furnish the true test of immunity in the first instance, albeit a somewhat nebulous one, is the legislative intent in this regard with respect to the particular agency or function involved. That intent, rarely specifically expressed, is to be divined from a consideration of many factors, with a value judgment reached on an overall evaluation. All possible factors cannot be abstractly catalogued. The most obvious and common ones include (1) the nature and scope of the instrumentality seeking immunity, (2) the kind of function or land use involved, (3) the extent of the public interest to be served thereby, (4) the effect local land use regulation would have upon the enterprise concerned and (5) the impact upon legitimate local interest.... In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. No one, such as the granting or withholding of the power of eminent domain, is to be thought of as ritualistically required or controlling. And there will undoubtedly be cases, as there have been in the past, where the broader public interest is so important that immunity must be granted even though the local interests may be great. The point is that there is no precise formula or set of criteria which will determine every case mechanically and automatically. [Numbers inserted.]

Rutgers, 60 N.J. at 152—53, 286 A.2d at 702—03. Accordingly, a finding of immunity is to be determined by construing the legislative intent. Absent a clear expression of such intent, the court will engage in a comprehensive evaluation of relevant factors. Five factors to be considered are provided in the *Rutgers* opinion.

The burden of proof, it should be noted, is upon the intruding government. According to the court in *City of Temple Terrace v. Hillsborough Ass'n. for Retarded Citizens, Inc.*, 322 So.2d 571, 579 (Fla. App.2d 1975), aff'd, 332 So.2d 610, "the governmental unit seeking to use land contrary to applicable zoning regulations should have the burden of proving that the public interests favoring the proposed use outweigh those mitigating against a use not sanctioned by the zoning regulations of the host government."

Although the outcome of a balancing of interests test, should it be adopted by our supreme court, is inherently somewhat more difficult to predict, in our opinion, the court would not permit the municipality to restrict the state here without the latter's consent. The maintenance of correctional facilities in an effort to protect the public safety is among the most fundamental functions of government. Moreover, in these circumstances, the state has maintained a correctional facility on the land in question for many years and is merely changing the nature of the population housed there. In short, the state here is not placing a new institution in an area previously zoned for an arguably incompatible use. Of course, to the extent the General Assembly expresses its intention that the use preferred by the state should prevail, the court will follow that preference.

In summary, courts have traditionally held that, in the absence of express statutory language to the contrary, a state is not amendable to local zoning regulations. Iowa has subscribed to that majority rule. The trend in case law and the vast weight of scholarly authority, however, advocate rejection of the three traditional standards of governmental-proprietary, eminent domain, and superior sovereignty. In their stead, courts have adopted the "balancing of interests" test. The true test of immunity from local zoning requirements, according to those courts, is legislative intent; that intent is to be divined frm a consideration of many factors, including: the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests. The burden of proof is upon the intruding government. Accordingly, under present Iowa law, the Division of Adult Corrections would be safe to assume immunity from the municipal zoning regulation imposing a fence requirement on the state. Although not as certain as with the majority rule, it is our judgment that a favorable judicial decree would be issued if the court applied the "balancing of interest" test to this zoning conflict, provided the legislative intent was clearly expressed.

April 26, 1982

ELECTIONS; ELECTRONIC VOTING SYSTEMS; CENTRAL COUNTING CENTERS: Chapter 43; §§43.45, 43.46, 43.47, 43.49, 43.50; Chapter 50; §§50.1, 50,11, 50.12, 50.16, 50.17, 50.23; Chapter 52, §§52.32, 52.37. There is some conflict between the statutory authorization for a central counting center and the statutory obligation to conduct a precinct canvass of votes cast at each polling place. The statutory authorization for a central counting center, however, prevails. Central counting centers, therefore, can be established as provided in §§52.34 through 52.37 of the Code. (Pottorff to Whitcome, Director of Elections, Office of the Secretary of State, 4/26/82) #82-4-16

Ms. Louise Whitcome, Director of Elections, Office of the Secretary of State: You have requested an opinion of the attorney general concerning the tabulation of votes cast in electronic voting systems. You indicate that §§52.34 through 52.37 of The Code authorize a central counting center to tabulate votes cast in individual precincts using an electronic voting system. You point out, however, that chapters 43 and 50 require election officials to conduct a precinct canvass of votes cast at each polling place upon the closing of the polls. In view of both the statutory authorization for a central counting center and the statutory obligation to conduct a precinct canvass of votes cast in each precinct, you pose the following questions:

1. Is there a conflict between the provisions in chapter 43 and 50 relative to the precinct canvass of votes, and sections 52.34 through 52.37 of the Code?

2. If the answer to #1 is "yes", can the conflict be reconciled in some manner and a central counting center be established as provided in sections 52.34—52.37?

In our opinion there is some conflict between the statutory authorization for a central counting center and the statutory obligation to conduct a precinct canvass of votes cast at each polling place. The statutory authorization for a central counting center, however, prevails. Central counting centers, therefore, can be established as provided in §§52.34 through 52.37 of The Code.

The Code requires the election board to canvass the votes at each polling place. Section 50.1 expressly provides:

> *Canvass by officials.* At every election conducted under chapter 49, except the primary election provided for by chapter 43, and at every other election unless the law authorizing the election otherwise requires, the vote shall be canvassed at each polling place by the election board in the manner prescribed by this chapter. When the poll is closed, the precinct election officials shall forthwith, and without adjournment:
>
> 1. Publicly canvass the vote, and credit each candidate with the number of votes counted for him.
>
> 2. Ascertain the result of the vote.
>
> 3. Prepare in writing a list of any apparently or possibly erroneous information appearing in the precinct election register.
>
> 4. Designate two election board members, not members of the same political party, who shall each separately keep a tally list of the count.

This language imposes upon the election board the statutory obligation to canvass the vote, credit each candidate with the votes counted, ascertain the result, prepare a written list of potentially erroneous information appearing in the precinct election register, and designate two board members to keep a separate tally of the count.

Other statutory obligations stem from the statutory obligation to canvass. The election board is required to prepare a written tally list and to give "in legibly printed numerals, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office...." §50.16, The Code 1981.

The result of the canvass must be proclaimed by one of the precinct election officials pursuant to §50.11 in the following manner:

> *Proclamatiuon of result.* When the canvass is completed one of the precinct election officials shall publicly announce the total number of votes received by each of the persons voted for, the office for which he is designated, as announced by the designated tally keepers, and the number of votes for, and the number of votes against, any proposition which shall have been submitted to a vote of the people, and he shall communicate said information by telephone or telegraph or in person to the commissioner who is conducting the election immediately upon completion of the canvass; and the commissioner shall remain on duty until such information is communicated to him from each polling place in his county.

This language requires that the election result be publicly announced and communicated to the election commissioner.

Finally, election materials remaining at a polling place must be properly delivered to the election commissioner. Section 50.12 requires that ballots be handled in the following manner:

> *Return and preservation of ballots.* Immediately after making such proclamation, and before separating, the board members of each precinct in which votes have been received by paper ballot shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been

counted by them, except those endorsed "Rejected as double", "Defective", or "Objected to", unite the ends of such wire in a firm knot, seal the knot in such a manner that it cannot be untied without breaking the seal, enclose the ballots so strung in an envelope, and securely seal such envelope. The precinct election officials shall return all the ballots to the commissioner, who shall carefully preserve them for six months.

Any ballots described in this section, the precinct election register, and the written tally list must all be delivered to the election commissioner by one of the precinct election officials. §50.17, The Code. The election commissioner must send messengers for all tally lists not delivered as statutorily required. §50.23, The Code.

Chapter 43 imposes a similar statutory obligation to canvass the vote at a primary election. Section 43.45 expressly provides:

Counting ballots and returns. Upon the closing of the polls the precinct election officials shall immediately:

1. Place the ballots of the several political parties in separate piles.

2. Separately count the ballots of each part, and make the correct entries thereof on the tally sheets.

3. Certify to the number of votes cast upon the ticket of each political party for each candidate for each office.

4. Seal the ballots cast on behalf of each of the parties in separate envelopes, and on the outside of such envelope write or print the names of said party's candidates for all offices and opposite each name enter the number of votes cast for such candidate in said precinct.

5. Seal all the envelopes of all political parties in one large envelope and on the outside thereof, or on a paper attached thereto, enter the number of votes cast by each party in said precinct.

6. Seal the precinct election register and the tally sheets and certificates of the precinct election officials in an envelope, or other secure container, on the outside of which are written or printed in perpendicular columns the names of the several political parties with the names of the candidates for the different offices under their party name, and opposite each candidate's name enter the number of votes cast for such candidate in said precinct.

7. Enter at the bottom of each party column on said envelope the total vote cast by said party in said precinct.

8. Communicate the results of the ballots cast for each candidate for office upon the ticket of each political party, in the manner required by section 50.11, to the commissioner of the county in which said polls are located, who shall remain on duty until the results are communicated to him from each polling place in the county.

This language statutorily prescribes the manner of counting, certifying, sealing, and communicating the results of the ballots cast.

Election materials remaining at a polling place must be delivered to the proper authorities. Section 43.46 states:

> *Delivering returns.* The precinct election officials shall deliver all election supplies, by noon of the day after the close of the polls, to the commissioner who shall carefully preserve them and deliver the returns and envelopes containing ballots, in the condition in which received except as is otherwise required by sections 50.20 to 50.22, to the county board of supervisors.

This language requires the precinct election officials to deliver all election materials to the election commissioner who, in turn, must deliver the returns and envelopes containing ballots to the county board of supervisors. The election commissioner must send messengers for all returns not delivered as statutorily required. §43.47, The Code.

In 1975 the legislature enacted legislation authorizing the use of electronic voting systems. 1975 Session, 66th G.A., chapter 81, §§103—114. A specific procedure for closing polls in precincts utilizing electronic voting systems is provided by statute. Section 52.32 states:

> *Procedure upon closing polls.* The provisions of this section shall apply, in lieu of sections 50.1 to 50.12 to any precinct for those elections at which voting is conducted by means of an electronic voting system.
>
> 1. At the time for closing of the polls, or as soon thereafter as all persons entitled under section 49.74 to do so have cast their votes, the precinct election officials in each precinct where voting punch devices are in use shall secure the devices against further voting. They shall then open the ballot box and count the number of ballots or envelopes containing ballots that have been cast to determine whether the number of ballots cast exceeds the number of declarations of eligibility signed as required by section 49.77. If so, that fact shall be reported in writing to the commissioner together with the number of excess ballots and the reason for the excess, if known.
>
> 2. The precinct election officials shall next count the write-in votes cast in the precinct, if any. If ballot cards are used, and separate write-in ballots or envelopes for recording write-in votes are used, all ballots or envelopes on which write-in votes have been recorded shall be serially numbered, starting with the number one, and the same number shall be placed on the regular ballot card of that voter. The precinct election official shall compare the write-in votes with the votes cast on the ballot card. If the total number of votes for any office exceeds the number allowed by law, a notation to that effect shall be entered on the back of the ballot card and the votes for the office involved shall not be counted.
>
> 3. The precinct election officials shall place all ballots that have been cast in a container provided by the commissioner for the purpose, which shall be sealed in the presence of all of the precinct election officials. They shall then each affix their signatures to a statement attesting that the requirements of this section have been complied with, and the statement shall be returned to the commissioner with the election register as required by section 50.17.

Under this procedure precinct election officials count but do not tabulate the votes cast. All ballots are placed in a container and sealed.

The tabulation of the sealed ballots is controlled by §§52.34 through 52.37. These sections address the use of central counting centers to tabulate votes cast in individual precincts using electronic voting systems. The tabulation procedure is set out in §52.37 which provides:

> *Counting center tabulation procedure.* The tabulation of ballots cast by means of an electronic voting system, at a counting center established pursuant to this chapter, shall be conducted as follows:
>
> 1. The sealed ballot container from each precinct shall be delivered to the counting center by two of the election officials of that precinct, not members of the same political party, who shall travel together in the same vehicle and shall have the container under their immediate joint control until they surrender it to the commissioner or the commissioner's designee in charge of the counting center. The commissioner or designee shall, in the presence of the two precinct election officials who delivered the container, enter on a record kept for the purpose that the container was received and the condition of the seal upon receipt.
>
> 2. After the record required by subsection 1 has been made, the ballot container shall be opened. If any ballot is found damaged or defective, so that it cannot be counted properly by the automatic tabulating equipment, a true duplicate shall be made in the presence of witnesses and substituted for the damaged or defective ballot or the valid votes on a defective ballot may be manually counted at the counting center by at least two employees of the commissioner, whichever method is best suited to the system being used. All duplicate ballots shall be clearly labeled as such, and shall bear a serial number which shall also be recorded on the damaged or defective ballot.
>
> 3. The record printed by the automatic tabulating equipment, with the addition of a record of any write-in or other votes manually counted pursuant to this chapter, shall constitute the official return of the precinct. Upon completion of the tabulation of the votes from each individual precinct, the result shall be announced and reported in substantially the manner required by section 50.11.
>
> 4. If for any reason it becomes impracticable to count all or any part of the ballots with the automatic tabulation equipment, the commissioner may direct that they be counted manually, in accordance with chapter 50 so far as applicable.

Under this language, the ballots from each precinct are tabulated by automatic tabulating equipment located at the counting center. The result of this automatic tabulation and the total of any votes manually counted pursuant to chapter 52 constitutes the official return of the precinct. The results must be announced and reported in substantial compliance with section 50.11 [1]

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[1] We note that this section was amended by the 69th General Assembly to permit the transfer and delivery of ballots to the counting center for processing throughout the day. H.F. 2285.

It is evident that the procedures established under chapter 52 for the utilization of a central counting center would require a significant departure from the procedures established under chapter 50 for the canvass of votes. When a central counting center is utilized, precinct election officials count but do not tabulate ballots at each polling place. Accordingly, there can be no public canvass to credit each candidate with the number of votes counted for him or her at each polling place. *Compare* §52.32 *with* §50.1, The Code. Since there is no public canvass at each polling place, there can be no preparation of a written precinct tally list. *Compare* §52.32 *with* §50.16, The Code. Similarly, there can be no immediate, public proclamation of the result of the canvass at each polling place. *Compare* §52.32 *with* §50.11, The Code. Finally, election ballots must be delivered directly to the central counting center for tabulation. *Compare* §§52.32, 52.37 *with* §§50.12, 50.17, 50.23, The Code.

The procedures established under chapter 52 for the utilization of a centralized counting center similarly would require a significant departure from the procedures established under chapter 43 with respect to primary elections. When a centralized counting center is utilized, precinct election officials cannot count, certify, seal, or communicate the results of the ballots cast at each polling place. *Compare* §52.32 *with* §43.45, The Code. Election ballots must be delivered directly to the central counting center for tabulation. *Compare* §§52.32, 52.37 *with* §§43.46, 43.47, The Code.

In order to resolve these procedural conflicts we rely on the language of the statutes themselves and on familiar principles of statutory construction. We point out that conflicts between the procedure applicable when closing polls utilizing central counting centers and procedures established under §§50.1 through 50.12 are resolved by statute. Section 52.32 specifically states the procedure upon closing polls in "any precinct for those elections at which voting is conducted by means of an electronic voting system" and specifically provides that this section shall apply "in lieu of sections 50.1 to 50.12." §52.32, The Code.

The remaining conflicts between the procedures established under chapter 52 for the utilization of a central counting center and the procedures established under sections 50.16, 50.17, and 50.23 may be resolved by principles of statutory construction. We observe the principle that, when two statutes are irreconcilable, the later statute controls. *Peters v. Iowa Employment Security Commission*, 248 N.W.2d 92, 96 (Iowa 1976). The statutory requirements that precinct officials at polls using electronic voting systems count the ballots, seal them in a container, and deliver them to the tabulating center pursuant to §§52.32 and 52.37 were enacted later than the statutory requirements that precinct officials prepare a written tally list of each polling place, deliver the ballots, precinct register, and tally list to the election commissioner pursuant to §§50.16, 50.17, and 50.23. *See* 1975 Session, 66th G.A., chapter 81, §§103—114. In a conflict between these sections, therefore, §§52.32 and 52.34 prevail.

Although there is no express statutory language providing that the provisions of chapter 52 apply in lieu of the provisions of chapter 43, the same principle of statutory construction is applicable. The legislative drafters of chapter 52 anticipated that electronic voting systems would be used in primary elections. *See* §52.26(4), The Code. The statutory requirements that precinct officials at polls using electronic voting systems count the ballots, seal them in a container, and deliver them to the tabulating center pursuant to §§52.32 and 52.37 similarly were enacted later than the statutory requirements that precinct officials count, certify, seal the ballots, communicate the results of the ballots cast at each polling place and deliver the election materials to the election commissioner pursuant to §§43.45, 43.46, and 43.47 *See* 1975 Session, 66th G.A., chapter 81, §§103—114. In a conflict between these sections, therefore, §§52.32 and 52.37 prevail.

We stress that the resolution of these statutory conflicts may not always result in the complete nullification of the conflicting provisions of chapters 50 and 43. Generally, in construing recently enacted legislation it is necessary to consider the state of the law when the legislation was enacted and harmonize the legislation, if possible, with preexisting statutes relating to the same subject. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Under this principle, conflicting statutes may be construed so that some portions of the statutes are harmonized. Only those portions of the statutes, which are in direct conflict, therefore, would necessitate the application of the principle that the later enacted statute prevails.

To illustrate this principle we point to §§43.49 and 43.50 of The Code. These sections address the canvass of and preparation of abstracts from returns from each precinct to be conducted by the board of supervisors on the Monday following the primary election. Section 43.49 provides:

> *Canvass by county board.* On the Monday following the primary election, the board of supervisors shall meet, open and canvass the returns from each voting precinct in the county and make abstracts thereof, stating in words written at length:
>
> 1. The number of ballots cast in the county in each precinct by each political party, separately, for each office.
>
> 2. The name of each person voted for and the number of votes given to each person for each different office.
>
> If the day designated by this section for the canvass is a public holiday, the provisions of section 4.1, subsection 22, shall apply.

Under this section the board of supervisors "shall meet, open and canvass the returns from each voting precinct" to make abstracts of the results. Abstracts, in turn, are filed with the election commissioner as provided in §43.50:

> *Signing and filing of abstract.* The members of the board shall sign said abstracts and certify to the correctness thereof, and file the same with the commissioner.

The filed abstract constitutes the final result of the votes. §49.51, The Code.

We note there is an inconsistency between use of a central counting center and the statutory direction to "meet, open and canvass the returns from each precinct." If a central counting center is utilized, the returns will consist of the ballots, the record printed by the automatic tabulating equipment, and any write-in or other votes manually counted pursuant to chapter 52. *See* §§52.37(3), The Code. The returns, "opened" by the board of supervisors on Monday following the primary election, therefore, will significantly differ from the returns contemplated in chapter 43. Harmonizing these sections, however, the returns from the central counting center should be canvassed as directed by §§43.49 and 43.50.

Accordingly, with the foregoing caveat concerning the harmonizing of statutes, we advise that there is some conflict between the statutory authorization for a central counting center and the statutory obligation to conduct a precinct canvass of votes cast at each polling place. The statutory authorization for a central counting center, however, prevails. Central counting centers, therefore, can be established as provided in §§52.34 through 52.37 of The Code.

April 29, 1982

SCHOOLS: Use of School Property; First Amendment of United States Constitution; §§278.1(4), 297.9, The Code 1981. If school districts permit community groups to use schoolhouse or grounds for meetings, religious groups are entitled to use school property on an equal basis. School boards may promulgate 'time, place and manner' regulations for use of school property. (Fleming to Baugher, State Senator, 4/29/82) #82-4-17

The Honorable Gary L. Baugher, State Senator, State Capitol: You have submitted the following question for our consideration:

> Can local school boards restrict the use of school owned property by religious organizations after school hours?

The question you submit gives rise to a wide range of issues stemming from the First Amendment of the United States Constitution, Art. I, Sec. 3 of the Iowa Constitution, and to certain statutes in the Code of Iowa, 1981. You do not describe a specific factual situation that caused you to elicit our opinion. Whether a school district's board of directors may restrict the use of school property after school hours depends on the specific facts involved. Therefore, we will answer your question in the context of different stated examples.

> Example 1: Can a school board prohibit use of school property by religious groups after school hours if other community groups are allowed to use school property for meetings after school hours?
>
> The answer to this question is no.

The First Amendment of the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,...

The protections afforded by the First Amendment were extended to the states by the adoption of the Fourteenth Amendment. The supreme court has interpreted the meaning of the clauses of the First Amendment in a host of cases. We conclude that a recent case, *Widmar v. Vincent*, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), controls in this situation.

The court's cases reflect a continuing effort to strike and maintain a delicate balance of the "tension between the two Religious Clauses." *Thomas v. Review Board of Indiana*, ____ U.S. ____, 101 S.Ct. 1425, 67 L.Ed.2d 624, 635 (1981). Moreover, many of the religious cases are directly or indirectly controlled by the speech clause rather than the Religious Clauses. *See, e.g., Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

The Code of Iowa provides as follows:

> *Use for other than school purposes.* The board of directors of any school district *may authorize the use of any schoolhouse and its grounds* within such district for the *purpose of meetings* of granges, lodges, agricultural societies, and similar societies, for parent-teacher associations, for community recreational activities, community education programs, election purposes, other meetings of public interest, public forums and similar community purposes; *provided that such use shall in no way interfere with school activities; such use to be for such compensation and upon*

> *such terms and conditions as may be fixed by said board* for the proper protection of the schoolhouse and the property belonging therein, including that of pupils, ...

§297.9, The Code 1981 [emphasis supplied]. We note that the list of organizations that may be permitted to use schoolhouses or grounds for meetings *does not include* religious groups.

Ordinarily, where a statute contains an enumeration as does §297.9, a principle of statutory construction known as "*expressio unius est exclusio alterius*" is invoked. That phrase means that what is included by specific mention excludes what is not mentioned. *In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). We believe the First Amendment of the United States Constitution as construed by the U.S. Supreme Court in *Widmar v. Vincent, supra*, does not permit the exclusion of religious groups by application of the principle of statutory construction set out above. Moreover, we believe the Iowa legislature could not expressly exclude use of school property by religious groups for meetings if the groups listed in §297.9 were allowed to use the school facilities. [1]

The case in *Widmar* was before the court because the University of Missouri at Kansas City routinely provided for the meetings of registered student organizations in university facilities. The university refused, however to allow a registered religious student group to meet in university buildings pursuant to a Board of Curators regulation that prohibited the use of university buildings by groups for purposes of religious worship or religious teaching. *Widmar*, ____ U.S. ____, S.Ct. 269, 70 L.Ed.2d at 444—445. The supreme court held that the university could not enforce such a regulation under the First Amendment and stated:

> The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. *Widmar v. Vincent*, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 446.

In other words, if a school district board of directors exercises its discretionary power under §297.9, The Code 1981, to authorize the use of a schoolhouse or grounds for meetings of community groups, it cannot exclude religious groups.

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[1] Your question appears to relate to the use of school facilities by community or student groups for purposes extrinsic to the academic functions of the school. Use of school facilities for *religious instruction of school-aged youth* during or after school hours presents a different set of issues not controlled by the principles of *Widmar v. Vincent. See McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Establishment Clause of First Amendment prohibits program of "released time" for religious instruction in the school building during school hours).

Of course, as the court pointed out in *Widmar*, the board may "establish reasonable time, place and manner regulations." *See Widmar v. Vincent*, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 451 and note 19, at *Id.* Furthermore, we believe that the supreme court's decision in *Widmar v. Vincent, supra*, overruled an opinion issued by this office on December 8, 1965. 1966 Op.Att'y.Gen. 292. That opinion relied on the principle of statutory construction mentioned above to state that a school district could not rent classroom space after hours to a religious organization.

Example 2: Can a district board prohibit use of school property by religious groups if use of school property by all outside groups is prohibited?

We believe the answer to this question is yes.

We do not believe that the Religious Clauses or the cases construing those clauses require a school board to allow school property to be used for other than school use. Rather, the First Amendment, as construed in *Widmar v. Vincent*, merely proscribes unequal treatment. The Iowa General Assembly has vested in the electors of a school district the following power:

4. Instruct the board that school buildings may or may not be used for meetings of public interest. §278.1(4), The Code 1981.

Thus, the electors of a school district may require the board *to allow* community groups to use school facilities *or* the electors may require the board *to stop* providing for such use. We do not believe such a course of action is constitutionally proscribed. A school district may decide to limit the use of its facilities strictly to school purposes. *See Widmar*, n. 5, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 446 ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.") In sum, a district board or the electors of the district may prohibit use of school property by religious groups if use of school property by all outside groups is prohibited.

Example 3: Can a district board "restrict" the use of school property by religious groups after school hours?

We note that your request for our opinion used the term restrict rather than the term prohibit. The first two examples considered prohibitions. As we have already indicated, a school board, under the constitution and the statutes, may promulgate reasonable time, place and manner regulations and those regulations must be enforced on an equal basis. In that context, the answer is yes, the board may "restrict" the use of school property by religious and other groups.

On the other hand, we do not believe a school board could "restrict" a religious or other group to the extent of regulating the *content* of a group's intended speech unless it could "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, ____ U.S. ____, 102 S.Ct. 269, 70 L.Ed.2d at 448. We conclude on the basis of *Widmar v. Vincent*, that state regulations should be neutral, i.e., where school property is available to community groups for meetings, religious groups are entitled to use such property on an equal footing with other groups.

April 29, 1982

MOTOR VEHICLES: Truck Tractors, §321.1(6); Motor Truck, §321.1(4), §321.1(71), Code of Iowa, 1981. The modification of a truck tractor converts the vehicle into a motor truck. (Lamb to Representative Harbor, 4/29/82) #82-4-18(L)

April 29, 1982

SCHOOLS; CHANGING METHOD OF SELECTING SCHOOL BOARD MEMBERS; REDISTRICTING; SPECIAL ELECTIONS: Fourteenth Amendment, U.S. Const.; §§4.1(25), 275.12(2), 275.35, 275.36, 277.2, and 278.1, The Code 1981. School districts must use the latest preceding certified federal census in establishing or changing subdistrict boundaries for selecting school board members. Section 277.2 does not grant a school board the power to call a special election for the purpose of changing the method of selecting school board members. Where a petition is filed requesting an election to change the method of selecting school board members, pursuant to §275.36, the timeliness of the petition is determined on the date the petition is filed. (Fleming to Tyrrell, State Representative, 4/29/82) #82-4-19(L)

April 29, 1982

COUNTY HOSPITALS: Health care benefits for hospital employees. §§347.13(4), 347.14(10), 509A.1, 509A.2, The Code 1981. A county hospital board of trustees may establish, under chapter 347, The Code, a trust to fund health care benefits for hospital employees. Either the county or the board may establish plans for group health care benefits for these employees, but said plans may only be funded by contributions from the hospital employees, the governing body, or a combination of both. (Brammer to Shirley, Dallas County Attorney, 4/29/82) #82-4-20(L)

April 30, 1982

STATE OFFICERS AND DEPARTMENTS: Department of Health. Vital Statistics. Records. Sections 68A.2, 68A.3, 68A.6, The Code 1981. Sections 144.5, 144.7, 144.8, 144.9, 144.25, 144.43, 144.53, The Code 1981, as amended by 1981 Session, 69th G.A., chapter 64, H.F. 413. The state registrar of vital statistics possesses supervisory authority over county and local registrars as these registrars' duties relate to the maintenance of a vital statistics system. Where a county or local registrar refuses to comply with a lawful directive of the state registrar, the state registrar may seek to enforce his or her statutory authority to gain the compliance of the reclacitrant registrar. While not clear, it appears that pursuant to section 144.43, the state registrar may not permit the inspection and copying of vital statistics records except as authorized by regulation; vital records enumerated by section 144.43, however, are not subject to this prohibition. A person denied the right to examine vital records open to the public may seek redress under either chapters 68A or 144. County or local registrars have the authority to adopt and enforce reasonable rules governing the inspection and copying of open vital records; this mechanism might be employed to protect against the revelation of closed information while an inspection of open records is taking place. A county or local registrar

can be found guilty of a 68A.6 violation only if he or she acts knowingly and can be guilty of a 144.53(3) violation only if he or she acts willfully. In the face of lack of funds and shortage of personnel, county and local registrars must, nonetheless, make reasonable efforts to protect closed information while allowing access to open records. Sections 144.43 and 144.25 can be viewed as conflicting; the specific provisions of section 144.25, however, prevail over the general provisions of section 144.43. Furthermore, the sealing or forwarding requirements of section 144.25 are procedural in nature and thus, retroactive in effect. (Freeman to Pawlewski, 4/30/82) #82-4-21

Mr. Norman L. Pawlewski, Commissioner of Public Health, Department of Health: You have requested an opinion from the attorney general with respect to the authority of the commissioner of public health, as state registrar of vital statistics records, to enforce the various provisions of the vital statistics law. You are especially concerned with the supervisory responsibilities of the state registrar over the local registrars and you have asked specifically whether the state registrar has the ability to direct local registrars to comply with directions issued by the state registrar in an effort to fulfill his or her statutory responsibilities. You have further asked for an opinion concerning the responsibilities of the state and local registrars with respect to information located in the registrars' files which is closed to public inspection. Finally, you have questioned whether sections 144.43 and 144.25 are in conflict with each other, whether section 144.25 requires retroactive sealing from the date of its enactment, and how registrars of vital statistics can fulfill their responsibilities with respect to access and confidentiality under section 144.43 while experiencing significant economic and personnel problems. Each of your questions will be answered in turn.

Chapter 144, The Code 1981, governs the maintenance of a system of vital statistics for the state of Iowa, section 144.2, The Code, provides in part as follows:

> There is hereby established in the department a division for records and statistics which shall install, maintain, and operate the system of vital statistics throughout the state. No system for the registration of births, deaths, fetal deaths, adoptions, marriages, divorces, and annulments, shall be maintained in the state or any of its political subdivisions other than the one provided for in this chapter.

A "system of vital statistics" is defined by section 144.1(7), The Code as:

> [T]he registration, collection, preservation, amendment and certification of vital statistics records, and activities and records related thereto including the data processing, analysis, and publication of statistical data derived from such records.

Pursuant to section 144.4, The Code, the commissioner of public health is designated as the state registrar of vital statistics. The state registrar "shall carry out the provisions of this chapter". Section 144.4, The Code.

The duties of state registrar are outlined by section 144.5, The Code. Those provisions which are particularly applicable to the first question posed by you provide that the state registrar shall:

> 1. Administer and enforce this chapter and the rules and regulations issued hereunder, and issue instructions for the efficient administration of the state-wide system for vital statistics and the division for records and statistics.

2. Direct and supervise the state-wide system of vital statistics and the division for records and statistics and be custodian of its records.

3. Direct, supervise, and control the activities of local registrars and deputy local registrars, and the activities of clerks of the district court related to the operation of the vital statistics system and provide registrars with necessary postage.

* * * *

6. Delegate functions and duties vested in the state registrar to officers, employees of the department, and to the local registrars as the state registrar deems necessary or expedient.

Section 144.5, The Code 1981, as amended by 1981 Session, 69th G.A., chapter 64, H.F. 413, section 1.

The clerks of the various district courts serve as county registrars. Section 144.9, The Code. The county registrars shall, with respect to their registration districts, "[a]dminister and enforce the provisions of this chapter and the rules issued by the department, and exercise general supervision over the local and deputy local registrars in his districts." Section 144.9(1), The Code.

The appointment of local registrars is provided for by section 144.7, The Code, which states that local registrars and deputy local registrars shall be appointed by the county registrar with the approval of the state registrar. A local registrar or deputy local registrar may be removed by the state registrar for reasonable cause. Section 144.7, The Code. Local registrars shall, with respect to their registration districts, "[a]dminister and enforce the provisions of this chapter and instruction and rules issued by the department," and "[m]aintain records, make reports, and perform other duties required by the state registrar." Section 144.8(1)(4), The Code.

The above provisions highlight an administrative structure with respect to the maintenance and operation of a vital statistics system. The state registrar serves as head of this administrative structure. One of the detailed duties of the state registrar is to direct, supervise and control the activities of the local and deputy local registrars as well as the activities of the clerks of district court as those activities relate to the operation of a vital statistics system. The clerks of district court serve as county registrars. The county registrars are required to appoint local and local deputy registrars for each registration district. Likewise, the county registrars are to exercise general supervision over the local and local deputy registrars in their respective districts. Local and deputy local registrars are appointed by the county registrars with the approval of the state registrar. County, local and deputy local registrars are to administer and enforce the provisions of chapter 144 and rules issued thereunder by the department of health. These registrars all function under the supervisory authority of the state registrar.

In answer to your first question, then, the commissioner of public health, as the state registrar of vital statistics, clearly has supervisory authority over local and county registrars as these registrars' duties relate to the maintenance of a system of vital statistics. The state registrar has the power, as derived from his or her duties to administer and enforce chapter 144, to direct and supervise local and county registrars. Both local and county registrars are to administer and enforce the provisions of chapter 144 as well as the rules issued by the department pursuant to said chapter.

Furthermore, the state registrar shall delegate duties vested in him or her to local registrars as he or she deems necessary or expedient. Section 144.5(6), The Code. The local registrars are to perform such duties as required by the state registrar. Section 144.8(4), The Code. It should be noted that county registrars are not named as those persons to whom the state registrar shall delegate duties, section 144.5(6), nor is the county registrar specifically required to perform duties delegated by the state registrar. Section 144.9, The Code. Quite possibly this distinction derives from the fact that county registrars, as clerks of district courts, are elected officials, section 39.7, The Code, while local and local deputy registrars are appointed pursuant to the authority of chapter 144. Nonetheless, county registrars are required to administer and enforce the provisions of chapter 144 and rules issued thereunder.

As noted above, both local and county registrars are required to enforce the rules of the department of health. Section 144.8(1), 144.9(1), The Code. Section 144.3 provides that the department may adopt rules for the purpose of carrying out the provisions of chapter 144. The state registrar is to issue instructions for the efficient administration of a state-wide system, of vital statistics. Section 144.5(1), The Code. Where the state registrar seeks to efficiently administer the provisions of chapter 144 by requesting that local and county registrars act in a uniform manner with respect to a particular record keeping situation, the state registrar should do so pursuant to rulemaking so that all registrars may be notified of what is expected of them and act accordingly. Rulemaking is particularly important in seeking the compliance of county registrars; while section 144.8(1) provides that local registrars shall administer and enforce "instructions" issued by the department, section 144.9(1) does not expressly require compliance of county registrars with the "instructions" of the department. It is certainly arguable the county registrars' compliance with the lawful instructions of the department is implied from chapter 144; rulemaking, however, would remove any doubt as to applicability of a directive to a county registrar.

Where the local or county registrars refuse to comply with a lawful directive of the state registrar, the state registrar may then seek to enforce his or her authority pursuant to sections 144.7, 144.53(3), 144.54, and 144.55, The Code. While the state registrar has no authority to remove a county registrar (most likely due to the fact that clerks of district courts are elected officials), the state registrar may for reasonable cause remove a local or deputy local registrar. Section 144.7, The Code. Furthermore, section 144.53(3) provides that a person is guilty of a simple misdemeanor if he or she willfully refuses to perform any of the duties imposed upon him or her by chapter 144. The state registrar might also consider a mandamus action against a local or county registrar who willfully refuses to perform his or her lawful duty. Chapter 661, The Code. Certainly before any legal action is brought against a local or county registrar, reasonable efforts should be made to gain the compliance of the uncooperative official.

You have generally noted concern over challenges to the state registrar's authority to gain compliance from county, local and deputy local registrars with respect to the control of, access to, and preservation of vital statistics. The extent of the state registrar's authority in any one particular situation can be determined fairly only after the facts are known and adjudged in light of the language of the various provisions of chapter 144. Where the state registrar acts under the authority of chapter 144, and where the county, local and deputy local registrars are required to perform certain acts but fail to do so, the state registrar generally will have the authority to gain the compliance of the errant county or local registrars although the manner of exercising that authority may be different with respect to county registrars than local and deputy local registrars.

The most apparent source of this authority is section 144.5(3) which provides that the state registrar shall direct, supervise and control the activities of local registrars and deputy local registrars and those activities of the clerks of the district court which are related to the operation of the vital statistics system. Where a local registrar or county registrar is required by law to provide access to or, on the other hand, to maintain the confidentiality of a particular record and refuses to do so, then the state registrar has authority to seek the compliance of the recalcitrant registrar.

Your second question seeks clarification on the right of the public to certain records under chapter 144 and 68A, The Code. You are particularly concerned with the public's access to vital records sixty-five years or older which contain information considered confidential, such as fetal deaths, out of wedlock births and adoptions which have not been sealed or otherwise secured so as to disallow public access. This question was asked before the most recent amendments to chapter 144. Our answer will be based upon section 144.43, as recently amended by the General Assembly.

The beginning point of analysis in situations involving public access to records held by state and local agencies is chapter 68A, Iowa's Freedom of Information Act. Section 68A.2, The Code 1981, states in part that:

> Every citizen of Iowa shall have the right to examine all public records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential.

"Public records" refers to "all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing." Section 68A.1, The Code. Pursuant to the above definition, vital records kept by the state, county, local or deputy local registrars are public records. Hence, these records are, according to 68A, accessible to the public unless accessibility is expressly limited by statute or such records are deemed secret or confidential by another provision of the Code.

Section 68A.7 provides for the confidentiality of certain records; this section, however, does not appear to apply to vital records. Chapter 144, thus, must be examined to determine the extent to which the public may enjoy access to vital records.

Section 144.43, The Code 1981, as amended by 1981 Session. 69th G.A., chapter 64, H.F. 413, section 10, states the following:

> *Vital records closed to inspection — exceptions.* To protect the integrity of vital statistics records, to insure their proper use, and to insure the efficient and proper administration of the vital statistics system kept by the state registrar, access to vital statistics records kept by the state registrar shall be limited to the state registrar and his employees, and then only for administrative purposes. It shall be unlawful for the state registrar to permit inspection of, or to disclose information contained in vital statistics records, or to copy or permit to be copied all or part of any such record except as authorized by regulation.
>
> However, the following vital statistics may be inspected and copied as of right under chapter 68A when they are in the custody of a county or of a local register:

1. A record of birth if that birth did not occur out of wedlock.

2. A record of marriage.

3. A record of divorce, dissolution of marriage, or annulment of marriage.

4. A record of death if that death was not a fetal death.

The first paragraph is unchanged from the original law. The second paragraph replaces paragraphs two and three of the previous law which provided as follows:

> The provisions of this section shall not apply to the following vital statistics if they are sixty-five years old or older:
>
> 1. A record of birth if that birth did not occur out of wedlock.
>
> 2. A record of marriage.
>
> 3. A record of divorce, dissolution of marriage, or annulment of marriage.
>
> 4. A record of death if that death was not a fetal death.
>
> However, a vital statistic, as described in this paragraph, shall be inspected and copied, as of right under chapter 68A, only when they are in the custody of a county or of a local registrar.

These paragraphs were added to section 144.43 by the legislature in 1974. 1974 Session, 65th G.A., chapter 1139, S.F. 1237, section 1. An explanation accompanying the bill stated in pertinent part: "This bill makes certain vital statistics open to public inspection if they are sixty-five years old or older. However, public inspection may be demanded only on the local level."

The exact meaning of section 144.43 is elusive, to say the least. Earlier opinions issued by the office of the attorney general have impliedly, if not expressly, determined that the first unnumbered paragraph of section 144.43 serves to limit access to all vital records, whether these records are kept by the state registrar or by the county or local registrars. Op.Att'y.Gen. #74-3-15, #80-3-14. Sentence one of unnumbered paragraph one clearly does provide for limited accessibility by stating in part that "access to vital statistics records *kept by the state registrar* shall be limited to the state registrar and his employees, and then only for administrative purposes." [Emphasis added.] It is not clear, however, whether this limited accessibility applies to *all* vital records or only to vital records maintained on the state level as opposed to those records kept on the county and local levels. Certainly, in reading the emphasized language above, one would be inclined to conclude that access is limited only to those records held on the state level for purposes of protecting the integrity of vital statistics records, insuring their proper use, and insuring the efficient and proper administration of the viutal statistics system *"kept by the state registrar."* [Emphasis added.] In listing specific purposes and in twice using the phrase "kept by the state registrar" in sentence one of the first paragraph of section 144.43, the legislature apparently originally intended that access to those records kept by the state registrar should be limited, not for purposes of protecting the confidentiality interests that persons might have in these vital records, but for purposes of protecting the records themselves and insuring that the information contained therein would be available at least on the state level although lost or destroyed due to access on the county or local levels.

The above interpretation with respect to the first sentence of unnumbered paragraph one seems sensible. The more difficult task arises in ascertaining the meaning and intent of the second sentence of that paragraph. Unlike the first sentence, which addresses access, the second sentence addresses inspection and copying of records and the disclosure of information contained therein. That sentence provides: "It shall be unlawful for the state registrar to permit inspection of, or to disclose information contained in vital statistics records, or to copy or permit to be copied all or part of any such record except as authorized by regulation." The limiting phrase "kept by the state registrar" is noticeably absent from sentence two. The question logically arises as to whether sentence two refers impliedly only to records kept by the state registrar or whether that sentence refers to all vital records wherever said records may be kept.

We are inclined to find that the second sentence refers to all vital statistic records whether kept on the state, county or local levels. If the legislature had meant sentence two to refer only to records kept by the state registrar, it would, as it did in sentence one, have said so. In seeking legislative intent, one must look at what the legislature said rather than at what it should or might have said. *Kelly v. Brewer*, 239 N.W.2d 109, 113—14 (Iowa 1976). Where the legislature has failed to add or include a certain word or phrase, it is not proper, under the guise of judicial construction, to add words of qualification to or to change terms in a statute. *Id.* at 114. Thus, the state registrar may not permit the inspection of, or disclose information contained in, vital statistics records whether such records are maintained on the state, county or local levels except by regulation. This duty is part of the state registrar's responsibility for the supervision of the state-wide system of vital statistics. Section 144.5(2), The Code. No system of vital records is to be maintained in the state or any of its political subdivisions other than the one provided for by chapter 144. Section 144.2, The Code. Consequently, the fact that sentence two of paragraph one refers only to the state registrar and not to the county or local registrars cannot be read to mean that sentence two is, like sentence one, applicable only to records kept on the state level by the state registrar. The state registrar clearly has duties with respect to all vital statistic records maintained as part of the system of vital statistics, whether on the state or local levels.

This conclusion is buttressed by the language of paragraph two of the amended version of section 144.43. That paragraph begins, "However, the following vital statistics may be inspected and copied as of right under chapter 68A when they are in the custody of a county or local registrar: . . . ." Certain vital records are then listed. If paragraph one, sentence two referred only to vital records kept on the state level, then vital records kept by the county or local registrars would be open to inspection and copying since no other provision of chapter 144 expressly limits inspection and copying of said vital records on the county and local levels. If this interpretation were adopted, paragraph two would be rendered superfluous. "[A] statute should not be construed so as to make any part of it superfluous unless no other construction is reasonably possible." *Iowa Auto Dealers Association v. Department of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981).

A reasonable construction of section 144.43 is possible so as to give all portions of that section meaning and effect. Paragraph one, sentence one, refers to access and in particular, limits access to those records kept by the state registrar to the state registrar and his or her employees for purposes of preserving the integrity of the vital statistics system. Sentence one only addresses access and does not speak to inspection and copying and the disclosure of information contained in vital records. Paragraph one, sentence two does address inspection, copying and disclosure. That sentence states, in essence, that all vital records are closed to inspection, copying, and the disclosure of information unless the state registrar provides otherwise by regulation. Paragraph two of section 144.43, however,

allows the inspection and copying of certain delineated vital records which are in the custody of a county or local registrar. This paragraph apparently does not allow the insepction and copying of vital records in the custody of the state registrar.

It must be emphasized, however, that the second paragraph of section 144.43 clearly opens the listed vital records to inspection and copying as a matter of right when those records are in the custody of the county or local registrars. Consequently, the state registrar has no authority to close these records or any part thereof to public inspection and copying unless some other provision of the Code authorizes such closure. Section 68A.2, The Code.

On the other hand, where records have been closed to inspection and copying by section 144.43, the state registrar does have the authority to open said records for inspection and copying through the issuance of regulations. If so authorized, direct access to records kept on the state level, nonetheless, remains limited to the state registrar and his employees pursuant to sentence one of the first paragraph of section 144.43. Furthermore, it must be noted that section 144.44 permits access to vital statistics by professional genealogists and historians and the disclosure of information contained in vital statistics records when deemed essential for bona fide research purposes not for private gain. The third and fourth paragraphs of section 144.45 should also be noted.

Where the public has a right to examine and copy certain records and where a state, county or local registrar refuses that right, an aggrieved person may seek redress under either chapters 68A or 144. Furthermore, the state registrar has authority consistent with the provisions of chapter 144 noted above in the earlier portions of this opinion, to gain the compliance of county and local registrars who refuse to grant the right to inspect and copy or, conversely, who allow the inspection and copying of material which is not open for such purposes.

You seem to be particularly concerned with allowing access on the county and local levels to records which are open under section 144.43 where such access might lead to the discovery of vital records which are not open to inspection, such as records of fetal deaths, out-of-wedlock births, or adoptions which have not been sealed or otherwise secured to disallow public access. It is our understanding that due to the lack of personnel and funds, many county and local registrars have been unable to separately file or otherwise protect closed records from general inspection.

At the outset, it might be noted that section 144.43 allows the inspection of *a record* of birth if that birth did not occur out of wedlock, *a record* of marriage, *a record* of divorce, dissolution of marriage, or annulment of marriage, and *a record* of death if that death was not a fetal death. The intent of chapter 144 does not appear to be to necessarily allow general inspection of *all* birth records, *all* marriage records, and the like; rather, section 144.43 seems to intend access to a particular record of birth, a particular record of marriage and so forth. Despite the language of section 144.43, however, it is doubtful given the ecompassing language of 68A.2 that "[e]very citizen of Iowa shall have the right to examine all public records and to copy such records . . . ," that a county or local registrar could refuse access to an otherwise open record or records of any of the enumerated vital statistics because the person requesting to examine said record or records failed to specifically identify "a" record.

Chapter 68A, though, does make specific provision for the inspection and copying of open records under the supervision of the lawful custodian of the records or his or her authorized deputy. Section 68A.3 provides that "[t]he lawful custodian may adopt and enforce reasonable rules regarding such work and the

protection of the records against damage or disorganization." The county and local registrars, thus, could develop a procedure which would seek to allow access to open records while protecting against access to closed records.

The determination of a procedure for access to open records certainly presents an administrative dilemma which properly must be resolved by those persons most familiar with the problems involved. The state registrar, in his or her supervisory function, might consider meeting with the county and local clerks and developing a workable procedure that could then, be adopted as a rule, which rule would notify the registrars and the public of the methods that are to govern access to open vital records while guarding against the release of vital records which are not open.

The question of liability is certainly relevant to a discussion of the county and local registrars' responsibilities with respect to public access to open vital records. Section 68A.6, The Code, states:

> It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

It should be noted that one can be guilty of a simple misdemeanor under this provision only if that person acts "knowingly." The term "knowingly" refers to actual knowledge of an act rather than constructive knowledge. *Parsons v. Rinard Grain Co.*, 186 Iowa 1017, 173 N.W. 276, 280 (1919). Furthermore, section 144.53(3) provides that a person is guilty of a simple misdemeanor if that person "willfully violates any of the provisions of this chapter or refuses to perform any of the duties imposed upon him by this chapter." The term "willfully" refers to the "intentional doing of a wrongful act." *City of Des Moines v. Cutler*, 144 Iowa 535, 123 N.W. 218, 220 (1909). From the above, it is clear that the county and local registrars are required to allow access to vital records which are open to inspection. On the other hand, where a county or local registrar has taken reasonable measures to protect against the release of closed vital records but where information in said records is inadvertently revealed, a county or local registrar would not be guilty of willfully violating any provision of chapter 144.

A portion of your final question relates specifically to the above. You ask how and to what extent, given very real problems of lack of funds and shortage of personnel, are local registrars obligated to protect information not open to inspection from revelation which might occur in the process of the inspection of vital records which are open. This question is not an easy one and no particular answer is readily available. Certainly in times of economic stress, where government agencies are expected to fulfill specific duties with limited personnel and funds, a question such as this one becomes even more relevant. It is our opinion that county and local registrars must make reasonable efforts to protect closed information while allowing access to open records. The reasonableness of these efforts would be evaluated in light of the number of personnel and the amount of funds available to the registrars to perform those acts required of them. Lack of funds and personnel cannot be used as automatic absolutions from a statutory duty, but certainly they can serve as bases for determining the reasonableness of a county or local registrar's efforts in meeting statutory mandates. County and local registrars should be prepared to show what efforts have been taken to protect vital records which are closed while allowing access to those which are open.

Your final question asks whether sections 144.43 and 144.25 are in conflict with each other. You further ask whether section 144.25 requires retroactive sealing from the date of enactment. Section 144.43 has been set out and discussed above. Section 144.25 provides in part as follows:

> *No previous certification — procedure.* If no certificate of birth is on file for the person for whom a new certificate is to be established, a delayed certificate of birth shall be filed with the state registrar as provided in section 144.15, or sections 144.17 and 144.18, before a new certificate of birth is established in the adoption proceedings, a delayed certificate shall not be required.
>
> When a new certificate of birth is established by the state registrar, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this state shall be sealed from inspection or forwarded to the state registrar of vital statistics, as he shall direct.

Section 144.43 provides that a record of birth, if that birth did not occur out of wedlock, is open to inspection; 144.43 does not speak to sealed birth certificates and, in that respect, the two provisions are in conflict. Nonetheless, when a general provision of a statute is in conflict with a specific provision, the specific provision shall prevail. Section 4.7, The Code 1981; *State v. Broten*, 295 N.W.2d 453. 455 (Iowa 1980). Therefore, birth certificates sealed pursuant to section 144.25 are not open to inspection under section 144.43.

The last portion of your final question apparently is concerned with whether original certificates of birth must be sealed or forwarded to the state registrar where the new certificate of birth was established by the state registrar prior to the effective date of section 144.25. Section 144.25 was adopted on April 8, 1970 by 1970 Session, 63rd G.A., chapter 1081, section 26, and became effective July 1, 1970.

Generally a statute or amendment which is substantive in nature will not be applied retrospectively unless the terms of the statute clearly require retrospective application. *Smith v. Korf, Diehl, Clayton & Cleverley*, 302, N.W.2d 137, 138 (Iowa 1981). *See also*, section 4.5, The Code 1981. If a statute, however, relates solely to remedy or procedure, it is not limited to prospective application, even in the absence of clear legislative intent. *Smith*, 302 N.W.2d at 138. In determining whether a statute is substantive or procedural in nature for purposes of ascertaining prospective or retroactive application, a substantive law is "that part of the law which creates, defines, and regulates rights," while a procedural law is "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *State ex. re. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976).

While not clear, we are of the opinion that section 144.25 is more procedural in nature than substantive. That portion dealing with the sealing or forwarding of old birth certificates does not, in and of itself, create a right but, rather, it provides a mechanism for effectuating the right. Section 144.24 provides the right in question in that portion which states that an original certificate of birth, where a new certificate has been established, "shall not be subject to inspection except under order of a court of competent jurisdiction or as provided by regulation for statistical or administrative purposes only." To further that right, section 144.25 provides for the sealing or forwarding to the state registrar of old birth certificates. Thus, it would appear that all old birth certificates subject to

the sealing or forwarding provisions of section 144.25 shall be so sealed or forwarded regardless of whether the new certificate of birth was established before or after the date of enactment of section 144.43.

In conclusion, the state registrar does enjoy supervisory authority over county and local registrars as these registrars' duties relate to the maintenance of a vital statistics system. Where a county or local registrar refuses to comply with a lawful directive of the state registrar, the state registrar may seek to enforce his or her statutory authority to gain the compliance of the recalcitrant registrar. While the exact intent of section 144.43 is not clear, it does appear that the state registrar my not permit the inspection and copying of vital statistics records except as authorized by regulation; vital records enumerated by section 144.43, however, are not subject to this prohibition. A person denied the right to examine vital records open to the public may seek redress under either chapters 68A or 144. County and local registrars have the authority to adopt and enforce reasonable rules governing the inspection and copying of open vital records; this mechanism might be employed to protect against the revelation of closed information while an open-access inspection is taking place. A county or local registrar can be found guilty of a 68A.6 violation only if he or she acts knowingly and can be guilty of a 144.53(3) violation only if he or she acts willfully. In the face of lack of funds and shortage of personnel, county and local registrars must, nonetheless, make reasonable efforts to protect closed information while allowing access to open records. Sections 144.43 and 144.25 can be viewed as conflicting; the specific provisions of section 144.25, however, prevail over the general provisions of section 144.43. Furthermore, the sealing or forwarding requirements of section 144.25 are procedural in nature and, thus, retroactive in effect.

MAY 1982

May 3, 1982

COUNTIES AND COUNTY OFFICERS; COUNTY RECORDER; FILING FEE REQUIREMENT: Section 331.604, Supplement to The Code 1981. Section 331.604 requires the county recorder to charge three dollars for every separate transaction filed in the recorder's office, regardless of the fact that several transactions may be contained on one page. (Weeg to Richards, Story County Attorney, 5/3/82) #82-5-1(L)

May 3, 1982

JUVENILE LAW: Neither Article I, §8 of the Iowa Constitution, relating to searches and seizures, nor a school's limited in loco parentis status require school officials to notify parents of an alleged child abuse victim's interview with a child abuse investigator. Iowa Const. art. I §8. After review of Article I, §8 of the Iowa Constitution and a school's limited in loco parentis status, there is no reason to depart from the previous conclusion found in Op.Att'y.Gen. #82-4-8(L). (Hege to Richter, Pottawattamie County Attorney, 5/3/82) #82-5-2(L)

May 10, 1982

CRIMINAL LAW: Theft by Check — Worthless Check Given in Payment for Rent. Section 714.1(6), The Code 1981. A tenant does not commit theft by check in violation of §714.1(6), when said person gives a worthless check in payment for rent. (Steffe to Trucano, State Representative, 5/10/82) #82-5-3(L)

May 10, 1982

TOWNSHIPS: Township Trustees: Gifts: §§359.1, 359.17, 359.29, 360.9, The Code 1981. Township Trustees are not authorized to transfer by gift township property to a private, non-profit corporation. Procedures for disposing of township property no longer needed for township purposes is contained in §360.9, The Code 1981. (Fleming to Swaim, Davis County Attorney, 5/10/82) #82-5-4(L)

May 10, 1982

CRIMINAL PROCEDURE; CLERK OF COURT; GRAND JURY FEES AND EXPENSES AS COURT COSTS: Chapter 625, The Code 1981; Sections 331.422(24), 331.424(1), 331.424(2)(9), 331.426(9), 331.705(1), 331.705(2), 331.778(3), Supplement to the Code 1981. (1)There is no statutory authority to tax fees and expenses incident to grand jury proceedings as court costs against a criminal defendant. (2) A $25 fee filing and docketing fee is not

chargable for the filing and docketing of an indictment or trial information. (3) Court costs recovered from a criminal defendant are properly paid into general county funds and not into the county court expense fund. Fees and expenses incident to grand jury proceedings are properly paid out of the county court expense fund where one exists. (4) Court costs may not be apportioned among several defendants. (5) Payment of court costs may be made a condition of probation. (6) The taxation of court costs against a criminal defendant creates a civil liability which is properly recovered through a civil judgment against the defendant. (Hansen to Tullar, Sac County Attorney, 5/10/82) #82-5-5(L)

May 14, 1982

STATE OFFICERS AND DEPARTMENTS: Public Employee Blanket Bonds. Sections 64.2, 341.4, 29A.37, 107.7, The Code 1981; 1956 Op.Att'y.Gen. 51; 1964 Op.Att'y.Gen. 102; 1968 Op.Att'y.Gen. 408, 944. In those situations wherein the Code of Iowa provides that a certain public official must give a bond for a certain amount of coverage, such officials must give an individual bond. (Swanson to Hoeman, Risk Manager, Department of General Services, 5/14/82) #82-5-6(L)

May 14, 1982

COUNTIES; BENEFITED STREET LIGHTING DISTRICTS: Chapter 357C. An individual property owner may not withdraw his of her property from a benefited street lighting district once that district has been established pursuant to chapter 357C. The only way that property may be withdrawn is if the entire district is dissolved pursuant to §357C.11. (Weeg to Criswell, Warren County Attorney, 5/14/82) #82-5-7(L)

May 14, 1982

COUNTIES; AMBULANCE SERVICE BUDGET: Sections 331.422(25) and 331.423. A county may not supplement the ambulance service budget with monies transferred from the general fund once either the maximum ambulance service tax is levied or the budget reaches the ceiling imposed by §331.422(25). However, the budget may be supplemented in the event a proposition to increase the ambulance service tax levy is approved by the voters pursuant to §331.423. (Weeg to Casper, Madison County Attorney, 5/14/82) #82-5-8(L)

May 14, 1982

COUNTIES; COUNTY JAILS; COST OF HOUSING PRISONERS; Chapter 356, The Code 1981; §356.15, chapter 356A, The Code 1981. A county is never liable for the costs of housing a prisoner who was committed for a violation of a city ordinance, regardless of whether the city in question is located within or outside the county where the prisoner is jailed. Second, a county is not liable for the cost of housing prisoners who are merely residents of that county but were charged, and convicted, in another county. Third, in

the event a county cannot or will not continue to operate a jail facility for county prisoners, that county is liable for the expense of prisoners charged and convicted within that county but housed in another county's jail facility. (Weeg to Casper, Madison County Attorney, 5/14/82) #82-5-9(L)

May 18, 1982

AGRICULTURE; BRANDING: §§187.1, 187.3, and 187.7, The Code 1981. Cryo-brands or hot brands consisting of Arabic numerals only may be used either alone or in conjunction with recorded hot brands for within-herd identification purposes. In either instance, the Arabic numeral hot or cryo-brands do not have to be recorded. (Willits to Lounsberry, Secretary of Agriculture, 5/18/82) #82-5-10(L)

May 18, 1982

MUNICIPALITIES: Conflict of Interest. Sections 362.5(9) and 400.2, The Code 1981; Acts, 67th G.A., 1978 Session, chapter 133, §1. A civil service commissioner who is the president and major stockholder of a corporation has disqualifying interest under §400.2, The Code 1981. A contract entered into in violation of that section is probably void, and at least voidable. Recovery, if such a municipal contract is held to be void against public policy, may be based on aquantum meruit or an implied contract theory. Finally, a measure voted upon by the commission is not invalid by reason of a conflict of interest in a civil service commissioner. (Walding to Zenor, Clay County Attorney, 5/18/82) #82-5-11(L)

May 18, 1982

ADC; EXEMPTION FROM ATTACHMENT: §239.13: As long as an Iowa AFDC recipient holds funds credited to his or her account by direct deposit through an electronic funds transfer from the state for the purpose of meeting current living expenses and until such funds could be characterized as permanent investments rather than funds held for the purpose of meeting daily living expenses, the statute at §239.13 protects the account from garnishment or other legal process by a third party. (Morgan to Angrick, Citizens' Aide/Ombudsman, 5/18/82) #82-5-12

Mr. William P. Angrick II, Citizens' Aide/Ombudsman, Citizens' Aide Office: You requested on March 31, 1982 that we respond to the following questions regarding the availability of Aid to Families with Dependent Children (AFDC) benefits for garnishment. Specifically, you ask the following:

1. Whether any portion of the money from an AFDC benefit check, deposited in an Iowa State Bank checking or savings account maintained for the sole purpose of direct deposit of such checks at the direct deposit of such checks at the encouragement of the Iowa Department of Social Services and with a specific agreement therefore with said bank, is exempt from garnishment or other legal process arising from a court judgment.

2. Is the nature of the underlying obligation (i.e. whether the child or children is benefited from or made a party to the obligation) a factor in the determination of the issue raised in Question 1?

3. If otherwise exempt, does comingling of the AFDC funds with non-exempt funds destroy the exempt nature of the AFDC funds?

4. If ortherwise exempt, does the lack of a specific agreement with the depository bank for the direct deposit of AFDC benefit checks destroy the exempt nature of the AFDC funds?

AFDC funds are protected from execution levy, attachment, garnishment and "other legal process" by §239.13 of The Code which states:

> *Assistance not assignable.* Assistance granted under this chapter shall not be transferable or assignable at law or in equity, and none of the money paid or payable under this chapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

§239.13, The Code 1981.

It would appear in view of §239.13 that AFDC funds deposited in a checking or savings account by direct deposit are exempt from garnishment by third parties. [1] The technical method of deposit does not change the statutory exemption from legal process of the funds.

The language of the Iowa statute is nearly identical to the protection from attachment in Federal Old Age Survivors and Disability Insurance (OASDI) payments (commonly called Social Security payments.) 42 U.S.C. §407. Section 407 has been interpreted by the courts as a protection for the recipient and his or her dependents and the section has been construed liberally in favor of recipients by the United States Supreme Court. *Essex County Welfare Board v. Philpott*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1969). A similar provision also appears in Veterans' benefit laws. 38 U.S.C. §3101.

With respect to these analogous provisions of Federal law, courts have precluded creditors of living OASDI or Veterans' benefit recipients from garnishing funds by the recipient. "Permanent investments" are not protected. *Lawrence v. Shaw*, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623 (1937). The general rule with respect to investments is stated in *Porter v. Aetna Casualty Co.*, 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (1962). The court characterizes the test for goverment warrants which have been deposited in a checking account as "whether as so deposited, the benefits remain subject to demand and use as the needs of the veteran for support and maintenance required", rather than funds which are held for investment. 370 U.S. at 161. The court explains the exception for Veterans' benefits in *Lawrence v. Shaw*, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623 (1937), a case in which the state of North Carolina attempted to collect taxes from an incompetent veteran whose benefits were deposited in various accounts.

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[1] We do not interpret in this opinion any statutory right of setoff which the banking institution may have against deposited funds pursuant to §554.4101 *et. seq.*, The Code 1981.

In quoting from *Trotter v. Tennessee*, 290 U.S. 354, 356—57, which held that land purchased with exempt funds was not exempt, the court stated:

> We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who chose to trade in land or merchandise, in bonds or in shares of stock, must pay their tribute to the states.

Lawrence v. Shaw, 300 U.S. at p. 248 quoting from *Trotter v. Tenn.*, 290 U.S. 354, 356—57 (1933).

> ...The avails of the government warrants or checks must be deemed exempt unless they are expended or invested.

Lawrence v. Shaw, 300 U.S. at p. 251.

Negotiable notes and United States bonds have been held to be non-exempt by the United States Supreme Court. *Carrier v. Bryant*, 306 U.S. 545 (1938). *Porter* concludes that a savings and loan account is exempt despite the technical form of the investment, because it is more like a bank savings account than shares of stock. *Porter v. Aetna Casualty Co.*, 370 U.S. at 162.

We conclude that as long as an Iowa AFDC recipient holds funds credited to his or her account by direct deposit through an electronic funds transfer from the state for the purpose of meeting current living expenses and until such funds could be characterized as permanent investments rather than funds held for the purpose of meeting daily living expenses, the statute at §239.13 protects the account from garnishment or other legal process by a third party.

You also inquire whether the underlying nature of the obligation giving rise to the garnishment determines whether the funds can be garnished. We do not believe that the underlying nature of the obligation giving rise to the garnishment by a third party is material. Another provision of law protects AFDC funds for the use of the children for whom benefits are extended. In the event that the Iowa Department of Social Services discovered that AFDC benefits are being spent in a manner which does not reasonably serve the needs of the children for whom the benefits are paid, the department may require the recipient, after notice and an opportunity for hearing, to enter into a protective payment relationship with a third party. Under protective payment relationships, the state pays benefits to a third person who then works closely with the recipient in meeting budgeted expenditures. *See* 770 *Iowa Administrative Code* §43.2.

Receipt of AFDC benefits does not make a person "judgment proof" and AFDC recipients may incur obligations for which non-exempt resources may be attached, levied upon, or garnished. The extent to which funds have been comingled may be determinative of the exempt or non-exempt character of the funds. One court has stated that the funds are exempt as long as they are "traceable". *Matter of Vary's Estate*, 237 N.W.2d 498, 501, 65 Mich.App. 447, aff'd 258 N.W.2d 11, 401 Mich. 340, *cert. den.* 434 U.S. 1087, 98 S.Ct. 1283, 55 L.Ed.2d. 793 (1975). Other courts have upheld the exemption even in a joint account. *Anderson v. First National Bank of Atlanta*, 151 Ga.App. 573, 260 S.E.2d 501 (1979); *Century Indemnity Co. v. Mead*, 121 Vt. 434, 159 A.2d 325 (1960).

With respect to your fourth question, we are unaware that AFDC benefits are presently being deposited directly to a bank without a client authorized agreement. Because the exemption from garnishment or other legal process is statutory, we assume that it would control the transaction whether or not there was a client agreement with respect to third parties.

May 24, 1982

CIVIL RIGHTS: Public Accommodation. §601A.2(10), The Code 1981. A jail or other penal institution is not a "public accommodation" within the meaning of the definition in §601A.2(10) of the Iowa Civil Rights Act. (Schantz to Reis, Director, Iowa Civil Rights Commission, 5/24/82) #82-5-13

Ms. Artis I. Reis, Executive Director, Iowa Civil Rights Commission: You have requested an opinion of the attorney general concerning whether jails and other penal facilities operated by state and local governments constitute "public accommodations" within the meaning of the Iowa Civil Rights Act, §601A.2(10), The Code 1981. We conclude that they do not.

Section 601A.2(10) provides:

> 'Public accommodation' means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee or charge, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the general public gratuitously shall be deemed a public accommodation if the accommodation receives any substantial governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.
>
> 'Public accommodation' includes *each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public*, gratuitously or otherwise. This paragraph shall not be construed by negative implication or otherwise to restrict any part or portion of the pre-existing definition of the term 'public accommodation.' [Emphasis added.]

This definition of "public accommodation" was plainly drafted in broad terms to avoid the creation of technical loopholes. Moreover, §601A.18 expressly provides that the chapter shall be construed broadly to effectuate its purposes. A "definition," however, by definition, excludes as well as includes. In this respect it should be noted that the General Assembly did not simply confer jurisdiction upon the commission to entertain all complaints of discrimination on the basis of race, creed, color, sex national origin, religion or disability. Rather, it conferred jurisdiction over complaints of such discrimination in connection with employment practices §601A.6, public accommodations, §601A.7, housing, §601A.8, education, §601A.9, and credit practices, §601A.10.

The operative language of limitation in the definition of "public accommodations" for present purpose is "*offers* services, facilities, benefits, grants or goods *to the* public, gratuitously or otherwise." The term "offer" in the present context means "to make available or accessible," *Webster's Third New International Dictionary* (1966). When persons are "offered" a facility or service, those persons clearly have a choice whether to avail themselves of the facility or service. The term contemplates a voluntary transaction between parties with liberty of contract. Penal facilities obviously are not "offered" in that sense. Such facilities are not "made available" to persons free to accept or reject them. Rather, a person provided such facilities receives them only by operation of law, i.e. by reason of a lawful arrest or a judgment of conviction, and they do not have a choice to decline to reside in the jail or penal facility.

Moreover, because they are provided only by operation of law to a limited class of persons, facilities afforded inmates of jails and prisons also are not offered "to the public" within the meaning of §601A.2(1). Although "public" is not a defined term in chapter 601A, it plainly is used in contrast to the term "private," rather than in the sense of owned by the government. In this sense, "public" refers to a facility that is accessible to some portion of the public, rather than, say, being limited to bona fide members of an organization. Because admission (as an inmate) to a jail or penal facility is strictly limited by law, such facilities are not "public" as that term is employed in §601A.2(1). Thus, even if some "services" within jails or penal facilities are "offered" or "made available" to inmates who may choose whether to accept them, these services cannot be said to be offered "to the public." Our conclusion about the meaning of the term "public accommodations" as defined in chapter 601A is confirmed in part by the total absence of authority from other jurisdictions suggesting, much less holding, that the familar term "public accommodations" reaches jails and penal institutions.

Of course, our conclusion that the Iowa Civil Rights Commission lacks jurisdiction over complaints of discrimination by inmates does not mean that such complainants are left without legal recourse. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids invidious discrimination and 42 U.S.C. §§1983 and 1988 provide remedies in the form of damages, equitable relief and attorneys' fees.

May 24, 1982

SCHOOLS; ELECTION: §§278.1, 279.1, 280.3, 296.6, The Code 1981. School sponsorship of a vote yes poster contest or a vote yes message in a school newsletter is impermissible but school officials or employees are free to work as individuals to promote or oppose a ballot issue. (Fleming to Tullar, Sac County Attorney, 5/24/82) #82-5-14-(L)

May 25, 1982

OPEN MEETINGS: Chapter 28A. If a city council committee is not a governing body, but holds a meeting at which a majority of the council is present, that meeting becomes a meeting of the full council and is thereby subject to the requirements of chapter 28A if that meeting is: 1) for the purpose of deliberation or action, 2) on a matter that is within the scope of the city council's policy-making duties. Any questions as to the applicability of chapter 28A in a given situation should be resolved by holding the committee meeting in open session. (Weeg to McKean, State Representative, 5/25/82) #82-5-15

The Honorable Andrew McKean, State Representative: You have requested an opinion of the attorney general concerning the applicability of chapter 28A, The Code 1981 (the Iowa Open Meeting Law), to a meeting of a city council committee. More specifically, you indicate in your opinion request that a particular city council committee consists of less than a majority of the full council. You further indicate that a council member who does not sit on that committee wishes to attend the committee's meeting to obtain information

pertaining to a particular subject being discussed. By that member's presence, the committee meeting then becomes a meeting of the majority of the full council. You ask whether this meeting is then subject to the open meeting requirements of chapter 28A. It is our opinion that whenever a majority of the city council meets together and engages in any discussion or action concerning the council's policy-making duties, chapter 28A requires that meeting to be held in open session. Our reasons are as follows.

Section 28A.3 provides:

> Meeting of governmental bodies shall be preceded by public notice as provided in section 28A.4 and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 28A.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Interpretation of this section requires reference to §28A.2, the definitional section of chapter 28A. First, §28A.2(1) defines "governmental bodies" to mean:

> a. A board, council, commission or other governmental body expressly created by the statutes of this state or by executive order.
>
> b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.
>
> c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs "a" and "b" of this subsection.
>
> d. Those multimembered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.

Because city councils clearly constitute a governmental body within the meaning of §28A.2(1)(b), meetings of the full council are subject to the open meeting requirement of §28A.3.[1]

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[1] The committee here in question may constitute a "governmental body" within the meaning of §28A.2(1)(c) if the committee is: 1) *multi-membered*, 2) *formally created* by the city council, 3) *directly created* by the council, and 4) a *governing body* in the sense of having been delegated some policy-making or decision-making authority. Further elaboration of these requirements is contained in Op.Att'y.Gen. #79-5-4; Op.Att'y.Gen. #79-5-18; Op.Att'y.Gen. #79-5-17. Because your opinion request does not contain sufficient facts, we are unable to determine whether the committee in question constitutes a governmental body under §28A.2(1)(c). However, in the event the committee is a governmental body, its meetings are subject to the open meeting requirements of chapter 28A regardless of whether a majority of the council's members are present at a given meeting. *See* §28A.3.

The next inquiry must be, what kind of gathering of members of a governmental body constitutes a meeting? Section 28A.2(2) states:

> 'Meeting' means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

Interpretation of this provision was the subject of a recent Iowa Supreme Court decision. In *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 532—533 (Iowa 1980), the court stated:

> It is obvious that the legislature's definition of 'meeting' is confined to the first sentence of section 28A.2(2). It requires a gathering (in person or by electronic means) of a *majority* of the members of a governmental body. It also requires deliberation or action upon a matter within the scope of the body's policy-making duties. Thus, this definition is applicable whenever the term 'meeting' is used in chapter 28A, including the second sentence of section 28A.2(2). In our view, the second sentence of section 28A.2(2)... merely reaffirms the right of a majority of a governmental body's members to meet for a purely ministerial function, or in a social setting (as is often the case in a small community), without being required to follow chapter 28A provisions, so long as there is no discussion of policy and no intent to avoid the purposes of the act.... (emphasis in original).

Using this interpretation, the court concluded that various interviews for a city position conducted by one or two city council members at a time did not constitute meetings under §28A.2(2) and therefore were not subject to the open meeting requirement.

Further, numerous opinions issued by this office have addressed the question of what constitutes a meeting under §28A.2(2). *See* Op.Att'y.Gen. #81-7-4(L); Op.Att'y.Gen. #81-2-13(L); Op.Att'y.Gen. #79-5-14. We recently discussed in detail the four factors that constitute a meeting under §28A.2(2). *See* Op.Att'y.Gen. #81-7-4(L). Further elaboration of these factors is contained in that opinion, a copy of which is enclosed, but to briefly summarize, a meeting under §28A.2(2) consits of: 1) a *formal or informal* gathering, 2) of a *majority* of the members of a governmental body, 3) for the purpose of *deliberation or action*, and 4) on a matter that is *within the scope of the governmental body's policy-making duties.*

In particular, we have further stated that this fourth factor "encompasses the discussion and evaluative processes in arriving at a decision or policy," Op.Att'y.Gen. #79-5-14, and is synonymous with "an exercise of discretion or judgment as to the propriety of an act to be performed by the body." Op.Att'y.Gen. #81-7-4(L), p. 8. This is contrasted with the "ministerial or social purposes" exception contained in §28A.2(2). This distinction was elaborated on in Op.Att'y.Gen. #81-7-4(L), p. 10:

> ...it appears that gathering for 'purely ministerial' purposes may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body's policy-making duties. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either 'deliberation' or 'action' [as defined earlier in the opinion] occurs. A meeting may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they exercise judgment or discretion.

Consequently, as applied to the facts of your opinion request, a meeting of a city council committee is not subject to the "open meetings" requirements of chapter 28A if that committee is not comprised of a majority of the members of the full council and if the committee does not constitute a governmental body under §28A.2(1). However, even if that committee is not governmental body, if a council member who is not a member of the committee attends a committee meeting and by his or her attendance causes a majority of council members to be present, a meeting within the meaning of §28A.2(2) is held if the committee (effectively the *council*) deliberates or acts on any matter within the council's policy-making duties. In that event, the meeting must be held in open session. *See* §28A.3.

However, in your opinion you suggest that the "extra" council member attends the committee meeting not to participate in the meeting, but "to obtain information pertaining to the subject being discussed" at the meeting. In the absence of more detailed facts, we can only state that a judgment must be made as to whether the subject being discussed falls within the scope of the council's policy-making duties, as defined earlier in this opinion and in the previous opinions cited. If so, it is our opinion that the committee meeting then constitutes a meeting of the full council, subject to the open meetings requirement of §28A.3, regardless of whether the "extra" council member simply observes or participates in the meeting. *See* Op.Att'y.Gen. #81-7-4(L); Op.Att'y.Gen. #81-2-13(L) (Iowa Civil Rights Commission conducts a meeting under §28A.2(2) when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates). We find further support for this conclusion in §28A.1, which states:

> This chapter seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decision, as well as those decisions themselves, are easily accessible to the people. *Ambiguity in the construction or application of this chapter should be resolved in favor of openness* [emphasis added].

In light of the potential for abuse in situations such as the one described in your opinion request, and in light of this express statutory preference in favor of open meetings, it is our opinion that any question as to the applicability of chapter 28A to a committee meeting attended by an "extra" council member should be resolved by holding that meeting in open session.

In conclusion, if a city council committee is not a governing body, but holds a meeting at which a majority of the council is present, that meeting becomes a meeting of the full council and is thereby subject to the requirements of chapter 28A if that meeting is: 1) for the purpose of deliberation or action, 2) on a matter that is within the scope of the city council's policy-making duties. Any questions as to the applicability of chapter 28A in a given situation should be resolved by holding the committee meeting in open session.

May 28, 1982

SCHOOLS; DRIVER EDUCATION; TUITION: §§4.1(36)(a); 282.1; 321.178; 442.4(1), The Code 1981. A school district that provides driver education to students enrolled in a parochial school located within the district shall charge tuition for students who are non-residents of the district. (Fleming to Chiodo, State Representative, 5/28/82) #82-5-16(L)

May 28, 1982

COUNTIES; COUNTY ATTORNEY: Scope of Duties: §331.302(9), The Code 1981; §331.756, Supplement to The Code, 1981. The statutory responsibility for periodically compiling a county code of ordinances devolves upon the county board of supervisors. Consequently, the county attorney may, but is not required to, provide the supervisors with assistance in compiling this code. Alternatively, the board of supervisors may contact with a private attorney, a part-time county attorney, or an assistant county attorney to provide any necessary assistance in compiling the county code of ordinances. (Weeg to Tullar, Sac County Attorney, 5/28/82) #82-5-17(L)

JUNE 1982

June 16, 1982

AGRICULTURE: Authority of the Iowa Department of Agriculture to regulate the storage and distribution of surplus cheese by the Food and Nutrition Service of the United States Department of Agriculture. 7 U.S.C. §§404, 1431, 1431(e); 7 C.F.R. §250.6(q); §§170.1(1), 170.1(2), 170.2, 170.9, 170.20, 170.46; §§170A.2(5), 170A.3, 170.5, 170A.7, 170A.8, §190.1(55); §192.25, The Code 1981; 30 I.A.C. §37.2; 30 I.A.C. Chapter 38. There are no statutes nor regulations within Title IX or Title X of the Code which are applicable to the storage and distribution of surplus cheese by the Food and Nutrition Service of the United States Department of Agriculture, consequently the Iowa Department of Agriculture has no regulatory authority over that program. To prevent the cheese from spoilage, the Iowa Department of Social Services may follow guidelines issued by the Food and Nutrition Service, or the Iowa Department of Agriculture's standards, although these standards are advisory not mandatory. (Miller and Benton to Lounsberry, 6/16/82) #82-6-1

The Honorable R.H. Lounsberry, Iowa Secretary of Agriculture, Wallace Building:
In a recent letter to this office, you have requested an opinion concerning the extent of the Iowa Department of Agriculture's regulatory authority over cheese which is donated to needy individuals rather than sold in a commercial enterprise. Your letter has been promoted by the federal government's release of surplus cheese formerly held by the United States Department of Agriculture and now distributed free to needy persons. In Iowa, the Department of Social Services has contracted with the Food and Nutrition Service of the USDA to conduct the distribution service. Your letter notes that the Department of Social Services has sought specific guidelines from the Department of Agriculture as to any refrigeration and storage requirements which might be applicable to the cheese prior to its distribution. The Department of Agriculture, pursuant to certain statutes within Title IX of The Code, regulates certain establishments such as restaurants and grocery stores which sell food. The department also regulates the content of certain foods under various provisions of Title X of the Code. Given the department's general regulatory authority in this field, you have asked:

> Does Title IX or X, Code of Iowa (or rules promulgated pursuant thereto), contain any temperature or storage requirements for cheese that is not distributed for commercial purposes?

More specifically, the central question in this context is whether the department's regulatory authority extends to cheese donated without charge to needy persons by another state agency under the auspices of a federal program. Before turning to an examination of the applicable Iowa statutes it might be useful to review the federal law under which the cheese distribution program operates.

On December 29, 1981, the Food and Nutrition Service of the USDA announced that it would provide at least 30 million pounds of surplus process cheese for distribution to eligible recipients by requesting state agencies. Subsequently, on March 9, 1982, the service announced that it would make available an additional 70 million pounds of surplus cheese for similar distribution. We note from your letter that since January of this year the Department of Social Services has donated over 3,291,200 pounds of cheese to approximately 376,000 qualifying Iowans. In announcing the program the service stated that the cheese was being offered under sections 416 of the Agriculture Act of 1949 and 1114 of the Agriculture and Food Act of 1981. These provisions, codified in 7 U.S.C. §§1431 and 1431(e) respectively, essentially empower the Commodity Credit Corporation and the secretary to donate surplus food commodities to needy persons. These statutes do not state specific standards as to the storage of the cheese prior to its distribution. The service's announcement also stated that the distribution to needy persons for use in the preparation of meals in the home could only be made through food banks established pursuant to Section 211 of the Agriculture Act of 1980. This statute, 7 U.S.C. §404, grants the secretary the authority to carry out nutrition projects to provide agricultural commodities to community food banks for distribution to needy individuals and families. However, this provision, like others utilized as authority for the cheese distribution program, does not set forth specific standards under which the cheese is to be stored.

The federal regulations concerning the donation of food commodities generally to needy persons are found in 7 C.F.R. §250, therefore, these regulations seem opposite to the distribution of surplus cheese. Unfortunately, these regulations also are silent as to any specific storage temperatures or other requirements for the donated foods. 7 C.F.R. §250.6(q) states:

> Facilities for the handling, storage, and distribution of donated foods shall be such as to properly safeguard against theft, *spoilage*, and other loss. Subdistributing agencies and recipient agencies shall be required to provide similar facilities. [Emphasis supplied.]

The regulations thus require that the donated foods be protected from spoilage, but there are no standards for any specific food, such as cheese, which would require for example that the cheese be stored at a specific temperature. In order to prevent "spoilage" the Food and Nutrition Service has furnished recommended guidelines to the distributing agencies such as the Department of Social Services, for the handling and storage of process cheese. According to the guidelines, the optimum storage process cheese temperature is 35° to 45°F. However, these guidelines are recommendations to enable the local agency to comply with the regulations and do not themselves have the force of law. The contract itself between the service and the Department of Social Services does not require the department to store the cheese at a particular temperature nor provide any other directives concerning the cheese. In summary, the federal statutes authorizing the program,the applicable regulations, and the contract between the state and Food and Nutrition Service do not provide standards for the storage of the cheese. There are general guidelines which the state can follow, but the only specific requirement in the federal law is that the distributing

agency safeguard against "spoilage". We can turn now to the Iowa statutes to determine whether they are applicable to this program and if so, what standards they require.

There are several general and oft-repeated principles of statutory construction which must guide our examination. First of course, it must be noted that if the language of a statute is plain and unambiguous there is no room for statutory construction. *State v. Baker*, 293.N.W.2d 568, 572 (Iowa 1980). However, where ambiguity exists our first obligation is to ascertain the legislative intent. *American Home Products Corp. v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 142 (Iowa 1981). To determine the legislature's intent in drafting particular legislation, we must consider the language used, the object the legislature sought to accomplish, the evils and mischief it sought to remedy, and if possible, place a construction on the statute which will effect its purpose rather than defeat it. *Pearson v. Robinson*, 318 N.W.2d 188, 190 (Iowa 1982). Finally, we must avoid construing the pertinent language in a manner which would lead to strained, impractical and absurd results. *Pearson* at 190. It should be borne in mind also, that these regulatory provisions are remedial in nature, as laws conducive to public good and welfare, and as such should ordinarily be given a liberal construction. *See Johnson County v. Guernsey Ass'n of Johnson County Iowa Inc.*, 232 N.W.2d 84, 87 (Iowa 1975).

Title IX contains two chapters which might arguably apply to the cheese distribution program involved here. The first is chapter 170 which regulates "Food Establishments". The requirements for such establishments include licensing with the Department of Agriculture and an annual inspection. §§170.2 and 170.46, The Code 1981. In addition, such establishments must meet certain standards governing the plumbing system, toilet and lavatory facilities, and sanitary requirements for those working in the establishment such as hair restraints. §§170.9—170.28, The Code 1981. Thus, if a building holding cheese for donation to the needy fell within this chapter, all of these regulations would apply. Section 170.1(2), The Code 1981, defines "food establishment" in the following terms:

> "Food establishment" shall mean any place used as a bakery, confectionery, cannery, packaginghouse, slaughterhouse where animals or poultry are killed or dressed for food, retail grocery, meat market, or other place in which food is kept, produced, prepared, or distributed for commercial purposes for off the premise consumption, except those premises covered by a current class "A" beer permit as provided in chapter 123.

Section 170.1(1), The Code 1981, defines food as:

> ...any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or sale in whole or in part for human consumption.

Cheese seems clearly to fall within the definition of food as found in §170.1(1). However, we do not believe that the donation of cheese to needy persons would place facilities utilized for that purpose within the definition of "food establishment". The language in §170.1(2) refers to places where food is kept, produced, prepared or distributed *for commercial purposes.* Consequently, the legislature seemingly has not included premises where food is donated without charge within its definition. We would conclude therefore, that facilities where cheese is stored for ultimate distribution under this program are not "food establishments". Moreover, it would lead to absurd results, if it were decided that

all of the regulations attendent upon food establishments, such as hair restraints for example, should apply to the storage facilities for the surplus cheese. Although as your letter notes the department has recently promulgated rules which will go into effect June 16, 1982 concerning the storage of foods, 30 I.A.C. chapter 38, these rules cannot be considered as binding upon the storage and handling of the surplus cheese.

While chapter 170 seems directed towards commercial establishments such as grocery stores and markets, chapter 170A, the Iowa Food Service Sanitation Code contains several regulations governing " food service establishments" including licensing and inspection by the department of plumbing, toilet and lavatory facilities and other rules found within the federal food service sanitation ordinance as adopted by the Iowa Secretary of Agriculture. *See* §§170A.3, 170A.5, 170A.7, 170A.8, The Code 1981 and 30 I.A.C. Chapter 37. Section 170A.2(5) defines a "food service establishment" as:

> ...any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service and food service operations in schools and summer camps. The term does not include private homes where food is prepared or stored for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles. The term does not include child day care facilities, food service facilities subject to inspection by other agencies of the state and located in nursing homes, health care facilities, or hospitals.

We do not believe this definition would encompass facilities for the distribution of cheese under the Food and Nutrition Service program. First, the cheese donated to needy persons is not "prepared and intended for individual portion service".That phrase clearly refers to a facility such as a restaurant where the food is prepared and served in individual portions. Secondly, it would again lead to absurd results to subject places where surplus cheese is stored and distributed to the stringent requirements of the food service sanitation code. Finally, the department's own rule, 30 I.A.C. §37.2 excludes certain charitable activities from it licensing requirements, leading to the conclusion that the department, at least implicitly, does not intend to extend its regulatory sphere into every charitable donation. We must find that chapter 170A also does not apply to the cheese distribution program.

Title X concerns generally the regulation and inspection of foods, drugs, commercial feeds and other articles. Chapter 189 is the general chapter providing penalties for various mislabeling and adulterations. Chapter 190 concerns the adulteration of foods, and its definitions are utilized in subsequent chapters which regulate specific foods such as frozen desserts and dairy products. Of particular relevance to our inquiry here are the definitions of cheeses and cheese products and milk products. Cheese is defined in a provision, §190.1(55), The Code 1981, which is distinct from the definition of milk products. Section 190.1(55) defines milk products with the following language:

> Milk products include cream, light cream, coffee cream, table cream, whipping cream, light whipping cream, heavy cream, heavy whipping cream, whipped cream, whipped light cream, whipped coffee cream, whipped table cream, sour cream, cultured sour cream, half-and-half, sour

half-and-half, cultured half-and-half, reconstituted or recombined milk and milk products, concentrated milk, concentrated milk products, skim milk, skimmed milk, low fat milk, fortified milk and milk products, vitamin "D" milk and milk products, homogenized milk, flavored milk or milk products, buttermilk, cultured buttermilk, cultured milk, cultured whole milk, buttermilk and acidified milk and milk products.

This definition is not intended to include such products as sterilized milk and milk products hermetically sealed in a container and so processed, either before or after sealing, as to prevent microbial spoilage, or evaporated milk, condensed milk, ice cream and other frozen desserts, butter, dry milk products, except as defined herein, cottage cheese dry curd, cottage cheese, low fat cottage cheese, cheese or cheese products except when they are combined with other substances to produce any pasteurized milk or milk product defined herein.

The definition expressly excludes cheese, except when combined to produce a milk product, which would place the cheese distributed to the needy in this program outside its scope. Section 192.25, The Code 1981 states:

It shall be unlawful to sell or serve any pasteurized milk or milk product which has not been maintained at a tempertatue of 45°F. or less except as authorized in section 192.21 subsection 17. If containers of pasteurized milk or milk products are stored in ice, the storage container shall be properly drained.

Since cheese is not defined as a milk product, the 45°F. requirement does not apply. As to those other chapters within Title X which might apply to cheese, specifically chapters 194 and 195, they do not, as you point out in your letter, contain any temperature or other storage requirements. Neither do the department's rules promulgated pursuant to these chapters contain such standards. It is our conclusion therefore, that there are no provisions within Title X which would provide standards binding on the cheese distribution program.

In summary, there are no standards within either Title IX or X which the department could impose on the cheese donation program undertaken by the Food and Nutrition Service. The Department of Social Services is required by federal regulation to prevent the cheese from spoilage. To that end, it may turn to guidelines issued by the Food and Nutrition Service, or the standards promulgated by the Iowa Department of Agriculture, although those standards are advisory, not mandatory.

June 14, 1982

CLERK OF COURT; FILING FEES: The twenty-five dollar filing fee imposed pursuant to section 331.701(1)(a), The Code Supp. 1981, is not applicable to cross-petitions, petitions of intervention, counterclaims or other like pleadings filed pursuant to the initiatory petition. (Messina to O'Brien, Court Administrator, 6/17/82) #82-6-2

William O'Brien, Court Administrator, Supreme Court: You have requested an attorney general's opinion regarding the collection of filing fees under section 331.705, The Code Supp. 1981. In relevant part, that statute provides that:

(1) The clerk shall collect the following fees:

(a) For filing *a petition, appeal, or writ of error* and docketing them, twenty-five dollars [emphasis supplied].

Section 331.705(1)(a), The Code Supp. 1981. Your specific question is:

> Does the twenty-five dollar filing and docketing fee apply to third party petitions, cross-petitions, petitions of intervention, and counterclaims or may the fee only be assessed against the party initiating the original action?

The particular pleadings you ask about are obviously not included in the statutory reference to an appeal or writ of error; we thus focus on whether the authorization for imposition of fees for the filing of a "petition is meant to encompass any of the pleadings to which you refer. We conclude that by using the term "petition" in section 331.705(1)(a), the legislature has authorized the imposition of fees only for the single pleading which originates the legal action.

The word "petition" is not a catch-all term for the variety of pleadings which may be filed in a given case. In our scheme of litigation, a "petition" is a term of art. It denotes the singular pleading which initiates the legal action.*See* Iowa R.Civ.P. 48; *see also* Iowa R.Civ.P. 70. The petition is but one of a number of allowable pleadings. *See* Iowa R.Civ.P. 68. The cross-petition, counterclaim, and petition to intervene that you ask about are all pleadings independent of the pleading which is specifically denominated the "petition." *See* Iowa R.Civ.P. 69(a). We find no basis for concluding that the reference to a "petition" in section 331.705(1)(a) is anything but a reference to that single, particular pleading which commences the original legal action. *See* 2A C. Sands, *Statutes and Statutory Construction* §47.30, at 152 (4th ed. 1973) ("In the absence of a manifested legislative intent to the contrary, or other overriding evidence of a different meaning, legal terms in a statute are presumed to have been used in their legal sense"); *See also Dotson v. Ames*, 251 Iowa 467, 471, 101 N.W.2d 711, 714 (1960) (the express mention of one thing in a statute implies the exclusion of others).

It is our opinion that the legislature intended the term "petition" in section 331.705(1)(a) to refere only to the initial pleading which originates the legal action. The filing fee is not applicable to third party petitions, cross-petitions, petitions of intervention, counterclaims or other like pleadings filed subsequent to the initiatory petition.

June 17, 1982

JUVENILE LAW: Legal settlement of child whose parental rights have been terminated. Sections 252.16, .17, The Code 1981. A child, whose parent/child relationship has been extinguished and has had the Department of Social Services appointed as her guardian, retains the legal settlement established by her terminated parents at the time of entry of the termination of parental rights judgment. The established legal settlement will continue, unaffected by the public body guardian's acts, until such time as the child reaches majority and by her own acts, establishes a new legal settlement. If, in the interim, a natural person guardian is appointed, the child will assume the legal settlement of that guardian. Once a child reaches majority, their legal settlement is determined by their own acts and are no longer derived from acts of their parent or guardian. Legal settlement once acquired will continue

until a new legal settlement is affirmatively established. Generally, legal settlement is acquired by "continuously" residing in any county of this state for a period of one year". (Hege to Reagan, Social Services, 6/17/82) #82-6-3

Dr. Michael V. Reagen, Ph.D., Commissioner, Iowa Department of Social Services: You have requested an opinion of this office relating to the determination of legal settlement of a minor whose parental rights have been terminated with his or her natural or adoptive parents. Specifically, you inquire:

1. Does a child whose parental rights have been terminated and who is placed under guardianship of the Department of Social Services, retain the county of legal settlement of his/her parents as established prior to the termination?

2. If a child whose parental rights have been terminated relinquishes his/her county of legal settlement, who has financial responsibility for services needed by the child?

3. What factors are considered in determining the legal settlement of a child whose parental rights have been terminated after that child becomes an adult?

RETENTION OF LEGAL SETTLEMENT OF TERMINATED PARENT

The traditional view has always been that the child, incapable of determining her own legal settlement by the civil disability of minority, takes the legal settlement of her natural, custodial parents. The Supreme Court of Iowa reiterated this principle in *State ex. rel. Rankin v. Peisen*, 223 Iowa 865, 10 N.W. 2d 645 (1943).

> The rule of section 3828.088, paragraph 5, that minors take the settlement of their father had its origin in the accepted theory of the family relation. Polk County v. Clarke County, 171 Iowa 558, 560, 561, 151 N.W. 489.

Rankin, at 871. This rule is now codified in section 252.16(4), The Code 1981.

This traditional view has further held that the legal settlement of a child is the same as that of her guardian, if different from the natural parent, even though her natural parents are living, when all matters pertaining to the welfare of the child is placed by judicial decree. *In Re Waite*, 190 Iowa 189, 189 N.W. 159 (1920); 1968 Op.Att'y.Gen. 328, citing 1936 Op.Att'y.Gen. 562; 1940 Op.Att'y.Gen. 195; Cf. 1964 Op.Att'y.Gen. 449.

The case of *State ex rel. Rankin v. Peisen*, 233 Iowa 865, 10 N.W.2d 645 (1943) is further dispositive of the effect of a termination of parental rights action upon the parents ability to determine legal settlement.

> Where, as here, *the family ties are broken and the father is deprived by court order of the right to custody and control of the children, the reason for the rule no longer exists.* The settlement of the children is then not affected by a subsequent act of the father which might change his own settlement.
>
> Our holding that a father *who has been legally deprived of the custody of his children can no longer control their settlement* finds support in decisions that

> the settlement of a wife who has been confined in an asylum or abandoned by her husband remains unchanged by any subsequent act of the husband. *Breaking the family unity destroys the premise that the settlement of the father controls that of members of the family who have been legally separated from him.* Polk County v. Clarke County, 171 Iowa 558, 561, 151 N.W. 489, Scott County v. Townsley, 174 Iowa 192, 194, 156 N.W. 291; State ex rel. O'Connor v. Clay County, 226 Iowa 885, 892, 893, 285 N.W. 229. [Emphasis added.]

Rankin, at 871. Clearly, the court held that where parents are deprived of custody they lose their ability to affect legal settlement. The rights of parents to determine their children's legal settlement is forfeited upon the entry of a judgment terminating parental rights. Sections 232.2(51), 600A.2(4), The Code 1981.

Statutory requirements presently mandate that upon the termination of parental rights, the court has a duty to appoint another as guardian of the child. Sections 232.117(3), 600A.9(1)(b), The Code 1981; *In Interest of J.R. and S.R.*, 315 N.W.2d 750, 752 (Iowa 1982). Under a chapter 232 termination (involuntary, state-initiated termination), those eligible for appointment as guardian are limited to:

> a. The department of social services.
>
> b. A child placing agency or other suitable private agency, facility or institution which is licensed or otherwise authorized by law to receive and provide care for the child.
>
> c. A relative or other suitable person.

Section 232.117(3), The Code 1981.

The determination of legal settlement of a child subsequent to the termination decree will be determined by whether the guardian appointed is a natural person, §232.117(3)(c), or is a public or private agency, body or entity, §232.117(3)(a) and (b).

If the child is appointed a natural person as a guardian, her legal settlement will be determined by the acts of the guardian. *In Re Waite*, 190 Iowa 189, 180 N.W. 159 (120); 1968 Op.Att'y.Gen. 328, citing 1936 Op.Att'y.Gen. 52; 1940 Op.Att'y.Gen. 195, §252.16(l), (2), (3), (4), The Code 1981.

If, however, a public or private body, not a natural person, is appointed as a guardian a variance of the traditional rule obtains. This is necessarily so because the Department of Social Services or other agency is clearly incapable of moving from place to place or establishing a living place or any other act traditionally used to determine legal settlement. This variance of the traditional rule was set out in *In Re Sonneberg*, 265 Minn. 571, 99 N.W.2d 444 (1959). There, the Supreme Court of Minnesota held that the act of an unwed mother, unconditionally surrendering her child at the time of birth to a child-placing agency for the purpose of providing the child with a new parental relationship by adoption, emancipated the child to the extent that the child subsequently retained the legal settlement derived from birth from the mother, irrespective of any subsequent changes in the legal settlement of the terminated mother. This view is consistent with our legal settlement statutes and case laws. *State ex rel. Rankin v. Peisen*, 233 Iowa 865, 10 N.W.2d 645 (1943); *In Re Waite*, 190 Iowa 189, 180 N.W. 159 (1920); §252.16, .17, The Code 1981; 39 C.J.S. *Guardian and Ward*, §60 (1976).

Therefore, where the guardian is a public body, like the Department of Social Services, no change in the child's legal settlement will occur. Instead, the child gains limited emancipation upon the termination of parental rights and she retains the legal settlement derived from the terminated parent(s) prior to the termination of parental rights. The answer to your first inquiry is yes.

RELINQUISHMENT OF LEGAL SETTLEMENT

The answer to the above question being affirmative, your alternative second question is answered in the negative. There is no relinquishment of the legal settlement. When guardianship is placed in the department, the child retains the legal settlement of the terminated parent(s), unless and until the child reaches majority or a natural person, capable of affecting legal settlement, is appointed.

FACTORS DETERMINING LEGAL SETTLEMENT

The factors and principles utilized to determine legal settlement are found in sections 252.16 and .17, The Code 1981. These provisions provide:

> 252.16 Settlement — how acquired. A legal settlement in this state may be acquired as follows:
>
> 1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.
>
> 2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.
>
> 3. A peron who is an inmate of or is supported by an institution whether organized for pecuniary profit or not or an institution supported by charitable or public funds in a county in this state shall not acquire a settlement in the county unless the person before becoming an inmate in the institution or being supported by an institution has a settlement in the county. A minor child residing in an institution assumes the settlement of his parent as prescribed in subsections 5 and 6. Settlement of the minor child changes with the settlement of his parent, except that the child retains the settlement that his parent has on the child's eighteenth birthday until he is discharged from the institution, at which time he acquires his own settlement, as provided in this section.
>
> 4. Minor children who reside with both parents take the settlement of the parents. If the minor child resides on a permanent basis with only one parent or a guardian, the minor child takes the settlement of the parent or guardian with whom the child resides.
>
> 5. Any person with settlement in this state who enlists in or is inducted into the military or naval service of the United States shall retain such settlement during the period of his military or naval service. Any person without settlement in this state who is serving in said military or naval service within the borders of this state shall not aquire a settlement during the period of such service.

6. The provisions of subsections 1, 2, and 3 of this section shall not apply to any blind person who is receiving assistance under the laws of this state. Any such person who has resided in any one county of this state for a period of six months shall have acquired legal settlement for support as provided in this chapter.

252.17 Settlement continues. A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state.

The general rule is that legal settlement arises by "continuously residing in any county in this state for a period of one year". Section 252.17(1), The Code 1981. Once a legal settlement is established, it continues until the necessary acts are completed to establish a new legal settlement. Section 252.17, The Code 1981.

The event of reaching majority, for any child regardless of family history, results in gaining the legal ability to affect their own legal settlement. That is, their legal settlement will be determined by their own acts, rather than being derived from acts of their parents or guardian.

In conclusion, it is the opinion of this office that a child, whose parent/child relationship has been extinguished and has had the Department of Social Services appointed as her guardian, retains the legal settlement established by her terminated parents at the time of entry of the termination of parental rights judgment. The established legal settlement will continue, unaffected by the public body guardian's acts, until such time as the child reaches majority and by her own acts, establishes a new legal settlement. If, in the interim, a natural person guardian is appointed, the child will assume the legal settlement of that guardian. Once a child reaches majority, their legal settlement is determined by their own acts and are no longer derived from acts of their parent or guardian. Legal settlement once acquired will continue until a new legal settlement is affirmatively established. Generally, legal settlement is acquired by "continuously residing in any county of this state for a period of one year".

June 17, 1982

CRIMINAL LAW; PROBATION; CONDITIONS: Section 907.6, The Code 1981; Chapter 229, The Code 1981. Mental health care may be required as a condition of probation under §907.6, The Code 1981; however, a trail court may not order a probationer to be committed to a state mental health institution without regard for the commitment procedures outlined in chapter 229 of the Iowa Code. (Messina to Reagen, Social Services, 6/17/82) #82-6-4

Michael V. Reagen, Iowa Department of Social Services: You have requested an attorney general's opinion on the following question:

Can a person be involuntarily committed to a mental health institute as a condition of probation under chapter 907, the Code of Iowa?

It is our opinion that commitment for treatment at a state mental health institution may be required as a condition of probation under chapter 907 of the Iowa Code. However, such institutional commitments cannot be effected through a court order directly committing the individual to an institution without regard for the commitment procedures outlined in chapter 229 of the Code.

In ordering probation, Iowa trial courts are statutorily empowered to impose "any reasonable rules and conditions which will promote rehabilitation of the defendant and protection of the community." §907.6, The Code 1981. Flexibility to mould conditions to rehabilitative needs is the cornerstone of this statutory authorization. *See State v. Rogers*, 251 N.W.2d 239, 241—42 (Iowa 1977). In an appropriate case mental health care could quite obviously aid in the rehabilitation of a criminal defendant. Section 907.6, on its face, would thus seem to authorize trial courts to require mental health treatment as a condition of probation. We note also that courts in other jurisdictions have upheld the imposition of similar conditions under similar statutory authority. *See, e.g., Moore v. United States*, 387 A.2d 714, 715—16 (D.C. Ct.App. 1978) (condition that defendant "undergo a mental examination and, if necessary, submit to psychiatric or psychological treatment"); *People v. McDonald*, 52 Ill.App.2d 298, 301—02, 202 N.E.2d 100, 101 (1964) (condition that defendant enter mental hospital for treatment); *State v. Hysell*,364 So.2d 1300, 1307 (La. 1978) (condition that defendant participate in a drug rehabilitation program); *State v. Muggins*, 192 Neb. 415, 418—20, 222 N.W.2d 289, 291—92 (1974) (condition that defendant attend "Alcohol Abuse Course"); *State v. Osborn*, 87 Wash.2d 161, 165, 550 P.2d 513, 517 (1976) (condition that defendant enter sexual psychopath program); *State v. Walker*, 27 Wash.App. 544, 548, 619 P.2d 699, 701 (1980) (condition that defendant enter and complete private "Residential Treatment Facility Program"); *see also* III Standards for Criminal Justice §18—2.3(f)(v)(1980) (conditions may require that defendant undergo "available medical or psychiatric treatment").

In light of the broad language of §907.6, the interpretation of flexibility in its application, and the results reached in other jurisdictions, we conclude that trial courts have authority under §907.6 to require commitment to a state mental health institution as a condition of probation.

While it is apparent that mental health treatment may be required as a condition of probation, we find no authority for trial courts to order, *sua sponte*, the direct commitment of a defendant to a state mental health institution. Admission to the state mental health institutions is controlled by chapter 229 of the Code. It provides for both a voluntary and "involuntary" admission procedure. The voluntary admission is effected through individual application by the person seeking treatment. *See* §229.2, The Code 1981. The "involuntary" admission is an involved process for hospitalization of a person who is alleged and found to be "seriously mentally impaired." *See* §229.6, The Code 1981. The involuntary admission process requires application by an "interested person," corroborating affidavits, a physician's report, notice and hearing, and a finding by a trial court of serious mental impairment. *See* §§229.6, 229.7, 229.12, 229.13, The Code 1981. Neither the voluntary or involuntary admission procedures recognize the authority of a trial court to sua sponte commit a defendant to a state mental health institution pursuant to a probation order.

This is not to say that a trail court cannot "require commitment" to a mental health institute as a condition of probation. Under the authority vested in section 907.6, a trial court can require a defendant to apply for voluntary commitment to a state mental health institution, and to agree to remain for treatment. Thus while the trial court lacks authority to directly commit the defendant into the mental health institution, it may nonetheless achieve that result by requiring the defendant to present himself for voluntary admission under section 229.2. To an extent this elevates form over substance. However, the authority to devise and impose conditions of probation carries no concomitant authority for the circumvention of the commitment procedures outlined in chapter 229. If a trial court wishes to require commitment to a state mental health institution as a condition of probation, then it must do so within the enabling provisions of

chapter 229. That means either ordering defendant to present himself for voluntary admission, or undertaking the arduous process mandated for involuntary commitment.

We note that mental health care may be made available to probationers through means other than a court order requiring the probationers to commit himself to a state institution. A person placed on probation can be assigned to the judicial district department of correctional services. *See* §907.8(2), The Code 1981. Each district department of correctional services is required to establish and maintain a variety of treatment-oriented services, including psychiatric counseling. *See* §§905.2, 905.4(9), 905.7, The Code 1981. Under the general authority of section 907.6, a trial court can condition probation on the requirement that the defendant utilize a particular treatment program made available through the district department of correctional services. *See also* §907.3(2), The Code 1981 (expressly authorizing a trial court to suspend sentence and commit defendant to a "residental treatment facility" maintained by the department of correctional services). If a trial court wishes to require mental health care as a condition of probation, it can assign defendant to the district department of correctional services and require that defendant utilize mental health care programs available through the department; it may not be necessary to require commitment to a state mental health institution in order to insure that the probationer receive mental health care.[1]

June 17, 1982

STATE AGENCIES; ENVIRONMENTAL QUALITY: Incorporation of Federal Rules by Reference. §§455B.139, 455B.132, The Code 1981; 42 U.S.C. 6926, 6929; 400 I.A.C. §45.2; 40 C.F.R. 261. Iowa Department of Environmental Quality can interpret its rule identifying hazardous wastes differently than United States Environmental Protection Agency interprets its rule, even though Iowa rule incorporates federal rule by reference. (Ovrom to Ballou, Department of Environmental Quality, 6/17/82) #82-6-5(L)

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[1] A district department of correctional services is authorized to contract with a state mental health institution for the provision of mental health care services. *See* §905.4(9), The Code 1981. If such an agreement exists between the state institution and the judicial district, probationers presumably could be admitted to the institution for mental health care without regard for the admission procedures outlined in chapter 229.

June 17, 1982

MUNICIPALITIES: Fire Pension Systems. §§97B.3, 400.1, 400.2, 400.3, 411.2, and 411.6, The Code 1981. Provision for police and fire pension systems is predicated upon municipal participation in a chapter 400 civil service system. A city having a population of less than eight thousand may, by ordinance, abolish its civil service system, and thus its police and fire pension systems. Such ordinance, however, shall not take effect until, after publication, it has been submitted to approved by a majority of the voters at a regular municipal election. (Walding to Holt, State Representative, 6/17/82) #82-6-6(L)

June 17, 1982

HIGHWAYS; COUNTIES: §§306.10—306.17, 306.22, 306.23 as amended by 1981 Session, 69th G.A. ch. 117, §360(2). Vacation of a secondary road pursuant to §306.10—306.17, The Code 1981, terminates the interest of the county in the right-of-way held by an easement for highway purposes. Right of way held by the county fee title can be sold pursuant to §306.22, §306.23 as amended by 1981 Session, 69th G.A., ch. 98, §306.24—306.26, The Code 1981, and 1981 Session, 69th G.A., ch. 117, §360(2) after vacation of the secondary road in order to terminate the interest of the county. (Mull to Soldat, Kossuth County Attorney, 6/17/82) #82-6-7(L)

June 17, 1982

MOTOR VEHICLES: Powers of Local Authorities, §321.236; Posting Signs — Snow Routes, §321.237, Code of Iowa, 1981. A muncipality may enact an alternate side parking ordinance for snow emergencies. (Lamb to O'Kane, State Representative, 6/17/82) #82-6-8(L)

June 17, 1982

CRIMINAL LAW; BAIL: Chapters 804, 811, section 356.2, The Code 1981, Iowa Rules of Criminal Procedure 1(c), 2(1). Courts generally have the power to set bail, except as that power has been modified by statute, and bail statutes should be strictly construed. A proposed interim cash bond procedure permitting release of an arrested person between 11 p.m. and 7 a.m., pursuant to a preset schedule of cash bonds, is inconsistent with the statutorily mandated case-by-case determination of bail to be made at the initial appearance. A person lawfully arrested and committed to jail pending an initial appearance is "lawfully committed," no "warrant of commitment" issued by a magistrate is required, nor would a sheriff be civilly liable for false imprisonment. (Ryan to Carr, Assistant Clay County Attorney, 6/17/82) #82-6-9(L)

June 24, 1982

DRIVERS EDUCATION; STUDENT TEACHERS: Sections 257.9, 11; 321.178, 180. The presence of the supervising teacher is not required by law

when a student driver education teacher conducts behind-the-wheel classes. The Department of Public Instruction may by rule or its approval of teacher education programs require specified amounts of direct supervision of student teachers and prohibit the reassignment of the supervising teachers to other duties when the student teacher is instructing in the absence of the supervising teacher. (Gregersn to Benton, Dept. of Public Instruction, 6/24/82) #82-6-10(L)

June 24, 1982

EDUCATION: Area Education Agency: Section 273.8(2). A person who serves as a substitute aide to a school district at the request of the district, is paid an hourly wage for time served, is covered by workmen's compensation, is supplied materials by the district as needed, and is subject to the supervision of the school district's building administrator as an employee of the school district within the meaning of §273.8(2) and is therefore not eligible to serve as a member of the AEA board of directors. (Fleming to Lind, State Representative, 6/24/82) #82-6-11(L)

June 29, 1982

ELECTIONS; COUNTY CONVENTIONS; DELEGATES' TERMS OF OFFICE: Chapter 43; §§43.4, 43.90, 43.94. Delegates elected in precinct caucuses in 1980 cannot hold over to attend the county convention in 1982. (Pottorff to Connolly, State Representative, 6/29/82) #82-6-12(L)

June 29, 1982

MUNICIPALITIES: Housing Codes. Sections 364.17, 364.17(l), 364.17(2), 364.17(3), and 562A.5(3), The Code 1981; Acts, 68th G.A., 1980 Session, ch. 1126, §1. Fraternity and sorority houses are rental dwelling units and, thus, subject to rental inspections as provided for in §364.17, The Code 1981. (Walding to Murray, State Senator, 6/29/82) #82-6-13(L)

June 30, 1982

COUNTIES; CLERK OF COURT; ABANDONED PROPERTY: Chapter 556; §§633.109, 682.31. When funds due a named heir or beneficiary who cannot be found are deposited with the county clerk of court pursuant to §633.109 or §682.31 (inability to distribute estate funds), the clerk is required to follow the provisions of ch. 556 (disposition of unclaimed property) in disposing of that property. (Weeg to Huffman, Pocahontas County Attorney, 6/30/82) #82-6-14(L)

June 30, 1982

COUNTIES; COMMISSION ON VETERANS AFFAIRS: Section 250.3, .5, .6, .7, The Code 1981. The county commission on veterans affairs may delegate only ministerial duties to an administrative aide and matters of discretion may not be delegated. Ministerial decisions may include the determination of eligibility for payment of benefits by use of inflexible standards. (Morgan to Beine, Cedar County Attorney, 6/30/82) #82-6-15(L)

June 30, 1982

COUNTIES; COUNTY OFFICERS; SHERIFF AND DEPUTY SHERIFFS: Sections 331.322(9), 331.657, and 331.904, Supplement to The Code 1981. Subject to express statutory limitations on the amount of compensation that may be received by a deputy sheriff, a county is authorized to pay a uniform allowance to both uniformed and non-uniformed deputy sheriffs for the purchase and care of clothing to be worn in the performance of their official duties. (Weeg to Burk, Assistant Black Hawk County Attorney, 6/30/82) #82-6-16(L)

JULY 1982

July 2, 1982

SCHOOLS: Schoolhouse Funds; School Bus Maintenance Building; §§278.1(7), 285.10(3), 297.5, The Code 1981. Construction costs of a new school bus maintenance building must be met from the Schoolhouse Fund. (Fleming to Husak, State Senator, 7/2/82) #82-7-1(L)

July 12, 1982

CRIMINAL LAW: Possession of beer by minor. Section 123.47, The Code 1981. Mere occupation of a car containing beer with knowledge of its presence is not sufficient to constitute a violation of §123.47 (possession of beer by minor). (Cleland to Wilson, Marion County Attorney, 7/12/82) #82-7-2(L)

July 12, 1982

MOTOR VEHICLES: Inspection stations and operators-license revocation and suspension hearings. §321.238. The review hearing provided for in §321.238(21) is a de novo proceeding in which competent evidence not presented at an initial hearing can be admitted. An administrative procedure which, on appeal, exposes the appellant to more severe sanctions than those imposed after an initial hearing does not in itself unconstitutionally chill an appellant's due process rights. (Dundis to Swartz, State Representative, 7/12/82) #82-7-3(L)

July 13, 1982

COUNTY OFFICERS: County Engineer; Counties; Plats; State Officials; Engineering Examiners. §§114.2, 114.16, 114.17; §306.21; §§309.17; 355.4; ch. 358A; ch. 409, The Code 1981. The review and approval of a subdivision plat by a county engineer pursuant to §306.21, The Code, or a county ordinance implementing chapter 358A or chapter 409, The Code, is not necessarily the practice of land surveying under §114.2, The Code. (Osenbaugh to Hanson, Iowa State Board of Engineering Examiners, 7/13/82) #82-7-4(L)

July 13, 1982

CIVIL RIGHTS: Jurisdiction of Iowa Civil Rights Commission over Citizens' Aide/Ombudsman Office. §§601A.2(10), 601A.7, 601A.5, 601G.20, The Code 1981. The Iowa Civil Rights Commission has jurisdiction to investigate and determine complaints alleging discrimination against the Citizens' Aide/Ombudsman Office as a public accommodation, notwithstanding immunity from proceedings except for acts involving malice or gross negligence.

Implicit in every complaint of "discrimination" is an allegation of an intentional violation of the Iowa Civil Rights Act. (Swanson to Reis, Director, Iowa Civil Rights Commission, 7/13/82) #82-7-5

Ms. Artis Reis, Executive Director, Iowa Civil Rights Commission: You have requested an opinion of the attorney general concerning whether the Iowa Civil Rights Commission has jurisdiction over a complaint alleging discrimination against the Citizens' Aide/Ombudsman Office as a public accommodation.

The Citizens' Aide/Ombudsman Office, is first of all, a "public accommodation" within the statutory definition. The term "public accommodation" includes "each state and local government unit or tax-supported district of whatever kind, nature or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise." Section 601A.2(10), The Code 1981.

It is considered an unfair practice to discriminate against certain classes of persons in the furnishing of such accommodations. Section 601A.7, The Code 1981, provides, in part, as follows:

> "1. It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:
>
> a. To refuse or deny to any person because of race, creed, color, sex, national origin, religion or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any persons because of race, creed, color, sex, national origin, religion or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges...."

By an Act of the Iowa General Assembly in 1965, the Iowa Civil Rights Commission was established and given certain powers and duties, among them, being...

> "...to receive, investigate, and finally determine the merits of complaints alleging unfair or discriminatory practices. [and] to investigate and study the existence, character, causes and extent of discrimination in public accommodations,... and to attempt the elimination of such discrimination by education and conciliation." Section 601A.5, The Code 1981.

The Citizens' Aide/Ombudsman Office was established by statute in 1972 and codified in chapter 601G, The Code 1981, with certain authority, responsibilities and immunities. Section 601G.20, The Code 1981, provides as follows:

> "Immunities. *No civil action*, except removal from office as provided in chapter 66, *or proceeding shall be commenced against the citizens' aide or any member of his staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent*, nor shall the citizens' aide or any member of his staff be compelled to testify in any court with respect to any matter involving the exercise of his official duties except as may be necessary to enforce the provisions of this chapter." [Emphasis supplied.]

The term "proceeding" would include filing or acting upon a complaint alleging discrimination by the Iowa Civil Rights Commission.

The immunity conferred by section 601G.20, The Code 1981, by its terms is plainly not *absolute*. Rather, it is in the nature of a "good faith" immunity, see generally, *Scheuer v. Rhodes*, 24 S.Ct. 1683, 416 U.S. 232, 40 L.Ed.2d 90 (1974), and is designed to provide needed "elbow room" for aggressive performance of duty rather than total freedom from litigation.

By the terms of the statute, the Citizens' Aide/Ombudsman Office is not immune from proceedings in which an unlawful act is actuated by "malice" or "gross negligence."

The term "malice" has been defined by the Iowa Supreme Court as

> "... the intentional commission of a wrongful act without just cause or excuse." *Hagenson v. United Tel. Co. of Iowa*, 209 N.W.2d 76, 82 (Iowa 1973).

The term "gross negligence" is defined by Black's Law Dictionary 931 (rev. 5th ed. 1979) as...

> "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another."

It follows that while the Citizens' Aide/Ombudsman is immune from any proceeding in which simple negligence only is alleged, it is not immune from suits or other proceedings when the complaint properly alleges an intentional or reckless unlawful act. Thus, if a civil rights complaint, properly construed, alleges an intentional or reckless violation, the Civil Rights Commission would have jurisdiction to entertain a complaint against the Citizens' Aide/Ombudsman. Because it appears that explicit or implicit in every complaint of "discrimination" is an allegation of an *intentional* violation of chapter 601A, Code 1981, we conclude that the Civil Rights Commission has jurisdiction over complaints of discrimination against the Citizens' Aide/Ombudsman Office as a public accommodation.

Implicit in every complaint of discrimination are both an allegation and proof of intent to discriminate. *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 48 L.Ed.2d 597, 608 (1976).

The basic allocation of burdens and order of presentation of proof in complaints of discriminatory treatment was set out by the United States Supreme Court in *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), as follows: First, the complainant has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the complainant succeeds in proving the prima facie case, the burden shifts to the respondent "to articulate some legitimate, nondiscriminatory reason for the complainant's treatment." *Id.*, at 802, 36 L.Ed.2d 668, 93 S.Ct. 1817. Third, should the respondent carry this burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 36 L.Ed.2d 668, 93 S.Ct. 1817.

The ultimate burden of persuading the trier of fact that the respondent intentionally discriminated against the complainant remains at all times with the complainant. See *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25, n.2, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978). The respondent's burden is satisfied if it simply 'explains what it has done' or 'produce[s] evidence of legitimate nondiscriminatory reasons,' 439 U.S., at 25, 58 L.Ed.2d 216, 99 S.Ct. 295, although the respondent's explanation of its legitimate reasons must be clear and reasonably

specific. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, 67 L.Ed.2d 207, 216, 101 S.Ct. 1089 (1981).

The *Burdine* Court, in affirming *McDonald* and *Sweeney*, supra, discussed this burden of respondent as follows:

> "If the [respondent] carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the [respondent] thus serves simultaneously to meet the [complainants'] prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [respondent's] evidence should be evaluated by the extent to which it fulfills these functions." 450 U.S., at 255, 67 L.Ed.2d, at 216, 101 S.Ct. 1089.

That a complainant in a chapter 601A proceeding has the burden of proving intentional discrimination was recently made clear by the Iowa Supreme Court in *Linn Co-op Oil Co. v. Quigley*, 305 N.W.2d 729, 733 (Iowa 1981), which cited with approval from *McDonald*, *Sweeney*, and *Burdine*, supra:

> "[Complainant] now must have the opportunity to demonstrate that the proferred reason [of the respondent] was not the true reason for the [treatment]. This burden now merges with the ultimate burden of persuading the [commission] that it has been the victim of intentional discrimination. It may succeed in this either directly by persuading the [commission] that a discriminatory reason more likely motivated the [respondent] or indirectly by showing that the [respondents'] proffered explanation is unworthy of belief."

If the complainant fails to meet this burden, the complaint should be dismissed. If, however, the burden is met, the requisite showing of intentional discrimination would satisfy the question of immunity. Each complaint and the facts of each case must be determined and judged on an individual basis within the legal framework described above. The Iowa Civil Rights Commission does have jurisdiction to investigate and determine complaints of discrimination against the Citizens' Aide/Ombudsman Office as a public accommodation.

July 15, 1982

GENERAL ASSEMBLY: Resignations; Special Elections to Fill Vacancies; Special Sessions. Ch. 69, The Code 1981; §§69.2, 69.4, 69.14, The Code 1981. The resignation of a state legislator becomes final once it is submitted to the designated public official pursuant to §§69.2(4) and 69.4(2) and the effective date specified in the resignation has passed. When a vacancy exists prior to or after the time a special session of the legislature is announced, §69.14 requires a special election be held. Ten days' notice of election is required if the special session will convene within forty-five days of the date the session is announced; forty days' notice is required if the special session will convene forty-six days or more from that same date. While the special election process must be set in motion once the special session is announced, there is no requirement that the vacancy be filled before the special session convenes, or that the special session be postponed until the vacancy is filled. (Weeg to Holden, Chairperson, Mortgage Problems Joint Subcommittee, 7/15/82) #82-7-6

The Honorable Edgar H. Holden, Chairperson, Mortgage Problems Joint Subcommittee: You have requested an opinion of the attorney general on several questions concerning the effect of numerous vacancies in the General Assembly in the event a special session of the legislature is convened. In particular, you pose the following questions:

1. If a vacancy presently exists in an Iowa House or Senate seat, must that vacancy be filled by a special election prior to the convening of a special session?

2. When a vacancy in a House or Senate seat purportedly has been created by a resignation, can the resignation subsequently be withdrawn or otherwise modified by the member to enable the member to serve in a special session held prior to the expiration of the term to which the member had been elected?

3. If another vacancy were to occur in a House or Senate seat prior to the actual convening of a special session, would the convening of the special session have to be postponed until the vacancy were filled by special election?

4. How many days notice of a special election would have to be given prior to the holding of a special election to fill a vacancy for purposes of a special session convening during the 1982-83 legislative interim?

It is our opinion that: 1) if a vacancy in the legislature currently exists and a special session is later convened, a special election must be held, but the special election process need not be completed and the vacancy filled in order for the legislature to convene the special session; 2) a resignation submitted according to statute becomes final on the date designated in the resignation and cannot afterward be withdrawn or modified; 3) if a vacancy in the legislature occurs after the special session is announced but before it is convened, a special election must be held, but convening of the special session need not be postponed until the special election process is completed and the vacancy is filled; and 4) in most cases, at least ten days notice of a special election to fill a vacancy must be given once a special session is announced. Our reasons are as follows.

I.

In order to determine answers to your questions, we look to the provisions of ch. 69, The Code 1981. In reviewing these statutory provisions, we observe governing principles of statutory construction. *See* ch. 4, The Code 1981. First, in construing a statute, that statute must be read as a whole and given its plain and obvious meaning, and a sensible and logical construction. *Hamilton v. City of Urbandale*, 291 N.W.2d 15 (Iowa 1980). Further, the purpose of all principles of statutory construction is to ascertain the intent of the enacting legislature. *American Home Products Corp. v. Iowa State Board of Tax Review*, 302 N.W.2d 140 (Iowa 1981). Applying these principles, we turn now to your particular questions.

II.

We first address the question of withdrawal or modification of a resignation. We begin by referring to ch. 69, which governs vacancies in public offices. In particular, §69.2 provides:

> Every civil office *shall* be vacant upon the happening of either of the following events:
>
> * * *
>
> (4) The resignation or death of the incumbent...

[Emphasis added] *See* §4.36(a), The Code 1981 ("the word 'shall' imposes a duty"). Further, §69.4 provides in relevant part that:

> Resignations in writing by civil officers may be made as follows, except as otherwise provided:
>
> * * *
>
> 2. By state senators and representatives, and all officers appointed by the senate or house, or by the presiding officers thereof, to the respective presiding officers of the senate and house, when the General Assembly is in session, and such presiding officers shall immediately transmit to the governor information of the resignation of any member thereof; when the General Assembly is not in session, all such resignations shall be made to the governor.

The Iowa Supreme Court has previously addressed the question of when a resignation of a public office becomes effective. Beginning with its decision in *Gates v. Delaware County*, 12 Iowa 405 (1861), the supreme court has held that the unconditional resignation of a public officer need not be formally accepted before a vacancy in that office is created, and further, that once the resignation is submitted, a withdrawal of that resignation is ineffective. *See Board of Directors v. Blakesley*, 36 N.W.2d 754 (Iowa 1949) (submitting, a signed resignation creates an immediate vacancy in the office of the school district board, and subsequent withdrawal of that resignation is not authorized). *See also* 1975 Op.Att'y.Gen. 72 (accepting authority may permit withdrawal of a resignation prior to its effective date, notwithstanding nomination of a successor, so long as no successor has been appointed); 1938 Op.Att'y.Gen. 1 (resignation of mayor submitted to the city council becomes effective upon the date specified in the resignation, and council approval of the resignation is not necessary); 1904 Op.Att'y.Gen. 343 (written resignation made to proper officer creates a vacancy without any formal acceptance on the part of that officer).

Consequently, once a state legislator submits his or her resignation to the government official designated in §69.4, the mandatory provisions of §69.2(4) operate to create a vacancy upon the effective date specified in the resignation. Further, we note there are no statutory provisions allowing for the withdrawal or modification of a resignation after the date upon which the resignation is effective. Therefore, it is our opinion that a resignation, once submitted, is final on the date designated.

III.

Once a vacancy in the General Assembly exists, the question of how to fill that vacancy may be answered by reference to §69.14, The Code 1981, which provides:

> A special election to fill a vacancy *shall* be held for a representative in Congress, or senator or representative in the General Assembly, when the

> body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order, not later than five days from the date the vacancy exists, a special election, giving not less than forty days' notice of such election. *In the event the special election is to fill a vacancy in the General Assembly while it is in session or within forty-five days of the convening of any session, the time limit herein provided shall not apply and the governor shall order such special election at the earliest practical time, giving at least ten days' notice thereof.* Any special election called under this section must be held on a Tuesday.

[Emphasis added.] *See* §4.36(a).

Section 69.14 thus *requires* a special election to be held if a vacancy occurs: 1) when the Congress or the General Assembly is in session, or 2) when either body is scheduled to convene prior to the next general election. The practical effect of this requirement is that a special election to fill a vacancy is called only when necessary. If a vacancy occurs, but no legislative session is being or will be held, no special election is required, the general requirement is that the governor must order the election within five days from the date a vacancy occurs. A minimum forty days' notice of the election is required.

However, the second sentence of §69.14 addresses an exception to these requirements. This sentence states that if the special election must be held while the General Assembly is in session, or within forty-five days of the convening of *any* session, the notice period is expedited: instead, the governor is to order the special election as soon as practicable, and a minimum ten days' notice of the election is required.

In order to demonstrate the applicability of §69.14 to various situations, we pose the following scenarios:

1. A vacancy occurs while the General Assembly is in session, regular or special.[1] Section 69.14 requires a special election be held; the expedited order and notice procedures are followed.

2. A vacancy occurs while the General Assembly is not in session, and no regular or special sessions are scheduled to convene prior to the next general election. Accordingly, §69.14 does not require a special election to be held. *See* 1958 Op.Att'y.Gen. 112.

3. A vacancy occurs while the General Assembly is not in session, and either a regular or special session is scheduled to convene prior to the next general election at the time that vacancy occurs. In this case, §69.14 requires that a special election be held, and further requires the following:

   a. If that session is scheduled to convene forty-six days or more from the date the vacancy occurs, the regular order and notice procedures are followed.

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[1] In 1970 Op.Att'y.Gen. 66 we stated that there are only two kinds of legislative sessions recognized in the Iowa Constitution: regular sessions and special, or extra, sessions. Accordingly, we construe the use of the term "session" in §69.14 to include both regular and special sessions.

b. If that session is scheduled to convene within forty-five days from the date the vacancy occurs, the expedited order and notice procedures are followed.

4. A vacancy occurs while the General Assembly is not in session, and no session, regular or special, is scheduled to convene prior to the next general election at the time the vacancy occurs. Consequently, no special election is required at that time. However, subsequent to the time the vacancy occurs, a special session is announced. Once this announcement is made, the special election requirement is triggered, and when the date for the special session is set, §69.14 requires the following:

a. If the special session is scheduled to convene forty-six days or more after the date the special session is called (and thus, a special election required), the regular order and notice procedures are followed.

b. If the special session is scheduled to convene within forty-five days from the date the special session is called (and thus, a special election required), the expedited order and notice procedures are followed.

The situation described in No. 4, above, is the one applicable in the present case. Consequently, if a special session of the General Assembly is convened in the near future, and vacancies exist before *or* after the date the special session is announced, special elections must be held. The appropriate times within which the election must be ordered and notice of the election given are established as set forth in No. 4(a) and (b), above. However, we expect that in most cases when a special session is called, the requirement will be that the governor order the special election "at the earliest practical time" and give a minimum of ten days' notice of the election.

IV.

Once it is determined that a special election must be called to fill a vacancy, a question arises as to whether that vacancy must be filled by special election before the special session is convened, or instead, whether that session must be postponed until the election is held. As discussed previously, §69.14 requires that when a vacancy occurs, a special election must be called when a special session of the legislature is to convene. However, nowhere in §69.14 is there an express requirement that the special election process be completed and the new legislator in office before the special session may convene. Indeed, nowhere in §69.14 is there a requirement that any special election to fill a vacancy must be completed before a session may continue (if the vacancy occurred while the legislature was in session), or convene in regular or special session (if the vacancy occurred while the legislature was not in session but scheduled to convene).

It should be noted that, historically, the practice has been to continue a session, regular or special, even when vacancies occur, either by death or resignation. We believe this practice is in accord with the spirit of §69.14 and the practical realities of the situation. For example, if a legislator were to die or resign in the midst of the General Assembly's regular session, a special election is called immediately pursuant to §69.14, but the session continues. The legislature does not adjourn once the special election process is set in motion, and reconvene once the newly-elected legislator is seated. This latter result would cause needless disruption and unnecessary delay of the legislative process. Similarly, if a vacancy exists at the time a special session is scheduled, the legislature is not required to postpone that session until the vacancy is filled.

However, we note that in the event the special session is to convene within forty-five days from the date the session is announced, §69.14 does express a preference, as opposed to a requirement, that the special election be held as soon as possible. The diminution of the regular forty days' notice requirement, in addition to the "earliest practical time" language, indicates the legislature's preference that the special election process be swiftly completed in order to make the special election process meaningful. This would enable the newly-elected legislator an opportunity to participate in a significant portion of the legislative session, and ensure that the electors of the affected legislative district be as fully represented as possible.

In conclusion, the resignation of a state legislator becomes final once it is submitted to the designated public official pursuant to §§69.2(4) and 69.4(2) and the effective date specified in the resignation has passed. When a vacancy exists prior to or after the time a special session of the legislature is announced, §69.14 requires a special election be held. Ten days' notice of election is required if the special session will convene within forty-five days of the date the session is announced; forty days' notice is required if the special session will convene forty-six days or more from that same date. While the special election process must be set in motion once the special session is announced, there is no requirement that the vacancy be filled before the special session convenes, or that the special session be postponed until the vacancy is filled.

July 15, 1982

LAW ENFORCEMENT; POLICEMEN AND FIREMEN; PUBLIC SAFETY, DEPARTMENT OF: Private Detectives. §§80A.1 and 80A.2, The Code 1981. (1) §80A.2, The Code 1981, exempt "detectives and officers" of any federal, state or local "police force" in the United States from the licensing and regulatory requirements. "Police force" means an agency with general authority to enforce the law, maintain peace, investigate crime and arrest offenders subject only to the territorial limitations of its jurisdiction. "Detective or officer" means an employee of a "police force" who is called upon in the course of such employment to perform investigatory or enforcement duties and who has peace officer authority. (2) The Department of Public Safety may by rule limit persons' practice in the private detective business to security work when their confidential relationship to a criminal justice agency would create a conflict of interest were they to engage in private investigations. (3) A law enforcement agency may prohibit its officers from engaging in private investigations for secondary employment. (4) A lie detection device is a tool used in the private detective business. (Hayward to Miller, 7/15/82) #82-7-7

William D. Miller, Commissioner, Iowa Department of Public Safety: You have asked this office for an opinion on several issues relating to the private detective business which is regulated by the Iowa Department of Public Safety pursuant to chapter 80A, The Code 1981. Specifically you have asked:

1. May a peace officer lawfully engage in the private detective business or operate a private detective agency without a license issued by the Iowa Department of Public Safety;

2. If a peace officer must obtain a license to do so, may the Iowa Department of Public Safety restrict the license to permitting the officer to provide only security services, such as furnishing guards for the protection of persons or property;

3. If a peace officer need not obtain a private detective license to engage in that business, may a police or sheriff's department adopt and enforce rules forbidding or restricting its officers from engaging in that business; and

4. Are persons who hold themselves out as polygraph operators engaged in the private detective business as defined in §80A.1(1), The Code 1981, and thus subject to the licensing requirements of chapter 80A?

I. *RELEVANT STATUTES AND THE RULES OF THEIR CONSTRUCTION*

Several provisions of The Code are relevant to the questions posed in your request for an opinion. They include §80A.1(1), The Code which states:

> *"Private detective business or profession"* shall mean and include the business of making for hire, reward or gratis an investigation or investigations for the purpose of obtaining information with reference to any of the following matters: Crimes against a commonwealth or wrongs done or threatened; the habits, conduct, movement, whereabouts, associations, transactions, reputation or character of any person, firm or corporation; the credibility of witnesses or other persons; the location or recovery of lost or stolen property; the causes, origin of or responsibility for fires or accidents or injuries or damages to persons or to real or personal property; or concerning the truth or falsity of any statement or representation; or the business of securing for hire, reward, or gratis evidence to be used before investigation committees, boards of award or arbitration, or in the trial of civil or criminal cases, or the business of furnishing for hire, reward, or gratis guards or other persons to protect persons or property; or to prevent the theft or the unlawful taking or use of real or personal property, or the business of performing the services of such guard or other person for any of said purposes.

§80A.1(2), The Code 1981, which states,

> "Detective agency" shall mean and include any person, firm or corporation engaged in the private detective business who advertises as such or employs one or more detective agents in conducting such business.

§80A.1(3), The Code 1981, which states,

> *"Private detective"* shall mean and include any person who advertises himself as such or who singly conducts a private detective agents other than those employed as such on a part-time basis only and who do not make such an occupation their principal business or means of livelihood.

§80A.2, The Code 1981, which states,

> The provisions of this chapter shall not apply to any detective or officer belonging to and on the payroll of the police force of the United States, or of any state, or of any county, city or village thereof, appointed or elected by due authority of law; nor to any person in the employ of the police force or police department or law enforcement agency of any state, or of any county, city or village thereof in the performance of his official duties; nor to any county attorney; nor to any attorneys-at-law in the regular practice of their profession; nor to any person, firm or corporation whose business is solely

> the making of investigations and adjustments for insurance companies or the furnishing of information with respect to the business and financial standing and credit of persons, firms or corporations; nor to any person making any investigation of any matter in which such person or the person, firm or corporation engaged in the business of transporting persons or property in interstate commerce, nor to any person or persons, firm or corporation by whom such person is solely employed is interested or involved nor to any person making any investigation for any person, firm or corporation engaged in the business of transporting persons or property in interstate commerce, nor to any person or persons, firm or corporation while engaged in the collection, editing or dissemination of news for or on behalf of any newspaper, magazine, radio broadcasting station or press or wire news services.

§80A.3, The Code 1981, which states,

> It shall be unlawful for any person to engage in or attempt to engage in business as a private detective without first obtaining a license therefor issued by the commissioner of public safety.

and §80A.4, The Code 1981, which states,

> It shall be unlawful for any person, firm or corporation to conduct or engage in business as a detective agency or to employ persons to act as detective agents in the conduct of such business without first obtaining a license therefor issued by the commissioner of public safety, which license shall include authority for the detective agency to employ detective agents.

The purpose of the construction of a statute is to ascertain the intent of the General Assembly when it enacted the law and to then interpret the statute in a manner which best effects that intent. This should be done by construing the language actually used by the General Assembly and not by making conjectures as to what it could, or should, have said. *City of Dubuque v. Telegraph Herald*, 297 N.W.2d 523, 527 (Iowa 1980), *Neumeister v. City Development Bd.*, 291 N.W.2d 11, 14 (Iowa 1980). The entire statute and related statutes ought to be considered rather than looking at isolated sections or passages. *Peffers v. City of Des Moines*, 299 N.W.2d 675, 678 (Iowa 1980). Strained constructions, or those which would lead to absurd results, should be avoided because the General Assembly is presumed to intend workable and logical results from its enactments. *Hansen v. State*, 298 N.W.2d 263, 266 (Iowa 1980); *State v. Berry*, 247 N.W.2d 263, 266 (Iowa 1976). Words are to be given their meanings in ordinary usage unless they are otherwise defined or have acquired a particular meaning in the law. *American Home Products v. Iowa State Bd. of Tax Review*, 302 N.W.2d 140, 143 (Iowa 1981).

II. THE PRIVATE DETECTIVE BUSINESS

The definition of the private detective business in §80A. 1(1), The Code 1981, encompasses both the areas of private investigation and private security. There are certain related activities which are not within this definition but which are otherwise relevant to this opinion because they may be, as is argued below, subject to regulation or limitation by law enforcement agencies *vis-a-vis* their officers.

The private detective business is defined in §80A.1(1) as "the business" or performing certain investigative or security functions" for hire, reward or gratis". The first key word is "business". The functions must be ancillary to a

"business". The term business has no definite or legal meaning. *Black's Law Dictionary* 248 (4th ed. 1968). In this context, the word business has a commercial meaning, most likely the selling or providing of the stated services as one's work, usually with a profit motive. *See, Webster's New World Dictionary* 192 (2d ed. 1972). Thus, providing the services set forth in §80A.1(1) for purely personal reasons or as a favor to a friend or associate, in a context where it is not one's work, is not engaging in the private detective business. However, if done as one's primary or secondary employment, or ancillary thereto, and otherwise meets the §80A.1(1) definition it is engaging in the private detective business.

Once it is established that the services listed in §80A.1(1) are being provided as part of a business, it must be established that they are being provided "for hire, reward or gratis". The phrase "for hire" means that one is available to perform services for a fee. *Webster's New World Dictionary* 665 (2d ed. 1972). Thus a person who provides security or investigative services solely for one employer, which is not itself engaged in the private detective business such as a bank, department store or factory is not doing so for hire, because the person has not made himself or herself available for that purpose. However, persons who are not exempted by the provisions of §80A.2 who provide such services for customers of their business are engaged in the private detective business whether or not they charge their customers for the services or not. This is because the definition includes the business of providing such services for gratis.

For these reasons, there are many related fields of endeavor which are not subject to the regulatory provisions of chapter 80A on the private detective business. Also, the employment of a person as a "detective agent" as defined in §80A.1(4) does not require that person to obtain any license from the Iowa Department of Public Safety.

III. THE POLICE OFFICER EXCEPTION

Previous opinions of the attorney general to the contrary notwithstanding, American police officers may engage in the private detective business in the State of Iowa without being subject to the regulatory authority of the Iowa Department of Public Safety pursuant to chapter 80A, The Code 1981. Section 80A.2 specifically exempts them from the provisions of that chapter, stating:

> The provisions of this chapter shall not apply to any *detective or officer belonging to and on the payroll of the police force* of the United States, or of any state, or of any county, city or village thereof, appointed or elected by due authority of law. [Emphasis added.]

A. *The phrase "detective or officer belonging to and on the payroll of the police force" does not encompass all persons who are peace officers.*

1. The Meaning of Police Force

It is important to note initially, when considering this exemption, that it does not apply to all persons who are "peace officers" under Iowa criminal law, or that of any other jurisdiction. For purposes of Iowa law, the term "peace officer" is defined in §801.4(7), The Code 1981, as follows:

> *"Peace officers"*, sometimes designated "law enforcement officers", include:

a. Sheriffs and their regular deputies who are subject to mandated law enforcement training.

b. Marshals and policemen of cities.

c. Peace officer members of the department of public safety as defined in chapter 80.

d. Probation and parole agents acting pursuant to section 906.2.

e. Probation officers acting pursuant to section 231.10.

f. Special security officers employed by board of regent's institutions as set forth in section 262.13.

g. Conservation officers as authorized by section 107.13.

h. Such employees of the department of transportation as are designated "peace officers" by resolution of the department under section 321.477.

i. Such persons as may be otherwise so designated by law.

Peace officers have a variety of functions. Their special authority includes the authority to arrest with a warrant, §804.6, The Code 1981, more expansive power to arrest without a warrant, §804.7, The Code 1981, a different authority to use force, §804.8, The Code 1981, to issue citations §§805.1 and 805.6, The Code 1981, and to execute search warrants, §§808.5 and 808.6, The Code 1981. Thus, the term "peace officer" identifies those public officers who the legislature has determined must have certain types of powers and authority to execute their assigned duties.

However, in §80A.2, the legislature exempts detectives and officers belonging to a "police force". This is an exemption based upon the function of the officer's department and his or her role within the department, rather than on the authority of the officer. The term "police force" is not defined in the statute, so the legislature is presumed to have intended that it have its meaning in general usage. In *Severson v. Sueppel*, 260 Iowa 1169, 1173, 152 N.W.2d 281, 284 (1967) the court stated, "'Police' refers to maintaining law and order." The court was determining the meaning of the phrase "formal police training", and looked to the generally accepted meaning of the term. The word "police" has also been defined as:

> The function of that branch of the administrative machinery of government which is changed with the preservation of public order and tranquility, the promotion of the public health, safety and morals, and the prevention, detection and punishment of crimes.

Black's Law Dictionary 1316 (4th ed. 1968). However, this latter definition refers to the general "police power" of the government.[1] It is unlikely that the legislature

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[1] See, "Police Power", *Black's Law Dictionary* 1317 (4th ed. 1968).

intended to exempt all government officials engaged in promoting the state's interests in that expansive arena from the requirements of chapter 80A. The words "detective or officer" along with the court's interpretation of the phrase "formal police training" in *Seversen v. Sueppel*, indicates that "police force", as used in §80A.2, The Code 1981, means...

> [T]he governmental department (of a city, state, etc.) organized for keeping order, enforcing the law, and preventing, detecting and prosecuting crimes.

Webster's New World Dictionary, 1102 (2d ed. 1972).

Therefore, all peace officers are not officers of a police force for purposes of the §80A.2 exemption. Parole and probation officers are not members of such a force. Similarly, persons given peace officer authority simply to facilitate the regulatory authority of an agency are not members of a "police force". Examples would be conservation officers and peace officer members of the Department of Transportation.[2]

The general authority granted to the Iowa Department of Public Safety to enforce all state laws, to prevent crime and to detect and apprehend criminals by §80.9, The Code 1981, and the similar authority granted sheriffs in chapter 337, The Code 1981, clearly establish "police forces" as that term is used in §80A.2. Also, §364.1, The Code 1981, impliedly gives any city the authority to establish a police force subject to statutory restraints such as chapter 400, The Code 1981, regarding civil service, chapter 410, The Code 1981, regarding disability pensions for police and firemen and chapter 411, The Code 1981, regarding retire-

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[2] Section 107.13, The Code 1981, states in regard to conservation officers:

> [T]he director shall appoint the number of officers and supervisory personnel that are necessary to enforce the laws and rules and regulations, the enforcement of which are imposed on the commission. The officers and supervisory personnel shall have the same powers that are conferred by law on peace officers in the enforcement of the laws of the state of Iowa and the apprehension of violators.

Their peace officer powers are limited to matters under the authority of the Conservation Commission. *See, Op.Atty.Gen.* p. 419 (April 14, 1936). Section 321.477, The Code 1981, places a similar limitation on peace officer members of the Department of Transportation, by stating...

> The department may designate by resolution certain of its employees upon each of whom there is hereby conferred the authority of a peace officer to control and direct traffic and weigh vehicles, and to make arrests for violations of the motor vehicle laws relating to operating authority, registration, size, weight and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department.

ment of police and firemen. Finally, the security forces of the Board of Regent's institutions constitute a police force of the state because they have full authority to enforce the law and investigate crime subject only to the territorial limitations of the institutions they serve. *See*, §262.13, The Code 1981.

The key to whether an agency is a "police force" is its function. If it has general authority to enforce the law and maintain the peace, to investigate crime and to arrest offenders subject only to the territorial limits of its jurisdiction, it is a "police force". If, on the other hand, the agency's employees only have peace officer powers to enforce specified statutes relating to its regulatory authority, or if its employees are parole or probation officers, it is not a police force.

2. The Meaning of "Detective or Officer"

Once it has been determined that an individual is employed by a "police force", the next question is whether the person is a "detective or officer" or another person in the employ of the police force. A "detective" is defined as:

> One whose business it is to watch, and furnish information concerning, alleged wrongdoers by investigating their haunts and habits. One whose business it is to detect criminals or discover matters of secret and pernicious import for the protection of the public.

Black's Law Dictionary 536 (4th ed. 1968). A "police officer" is defined as:

> One of the staff of men employed in cities and towns to enforce the municipal police, *i.e.*, the laws and ordinances for preserving the peace and good order of the community. Otherwise called "policeman."

Black's Law Dictionary 1317 (4th ed. 1968). The key to that definition for purposes of §80A.2 is "employed . . . to enforce . . . the laws and ordinances for preserving the peace and good order of the community."

If a person may be called upon to perform general enforcement or investigatory functions of a "police force" and has peace officer authority, that individual should be considered a "detective or officer" of that force for purposes of §80A.2. If, on the other hand, the individual solely performs another kind of service such as a jailer, custodian, clerical worker, bookkeeper, dispatcher, or administrator, that person would fall into the second exemption in §80A.2 which applies to any other "person in the employ of the police force."

B. *Persons who are detectives or officers of a police force are exempt from the licensing requirements and regulatory authority established by chapter 80A, The Code 1981.*

The clear import of §80A.2 is that the provisions of chapter 80A "shall not apply" to detectives or officers of police forces. Furthermore, except for the exemption to county attorneys, the exemption for "detectives and officers" is the only one which is not limited to some covered activity which is carried on in the course of some other business or profession. Other police employees are exempted only while engaged in official business. Attorneys are exempted only in the regular practice of law. News media are exempt only while engaged in the collection, editing or dissemination of news. Similar restrictions are placed on the exemptions for insurance adjusters, interstate common carriers and credit bureaus.

The legislature demonstrated that it could condition exemptions from the provisions if it wished. Its refusal to so limit the exemption of detectives and officers of police forces indicates it meant that they be unconditionally exempt from the act. The express mention of one thing in a statute implies the exclusion of others. *In re Wilson's Estate*, 202 N.W.2d 41, 44 (Iowa 1972).

This opinion is directly contrary to a previous opinion of this office which states in part:

> [T]he officers of a private detective agency and of a policeman are incompatible and . . . a policeman should not be licensed or authorized to engage in the private detective business.

Op.Atty.Gen. #69-3-7 (1969). In a later opinion, this office stated that in appropriate instances involving such conflicts of interest, private detective licenses should be limited to private security work. Op.Atty.Gen. #74-8-12 (1974). As applied to detectives and officers of designated police forces, both opinions ignore the fact that such persons are exempt from the provisions of chapter 80A. Furthermore, the 1969 opinion rests upon a theory of incompatible offices. Yet, that theory is wholly inapposite because a private detective is not an officer of any sort. Therefore, to the extent those two opinions of the attorney general are inconsistent with this opinion, they are expressly overruled.

Detective and officers of American police forces, whether federal, state or local, may engage in the private detective business in the state of Iowa without a license. All other persons, including some persons with peace officer authority, may not engage in that business in this state without a license unless otherwise exempted by §80A.2. Finally, the exemption is personal to the detectives and officers and does not extend to corporations which they may control or to associations to which they belong. This is so even if such control of membership is exclusively limited to such persons.

IV. THE DEPARTMENT OF PUBLIC SAFETY MAY BY RULE LIMIT PERSONS' PRIVATE DETECTIVE BUSINESS TO SECURITY WORK WHEN THEIR CONFIDENTIAL RELATIONSHIP TO THE PUBLIC WOULD CREATE TOO GREAT A RISK OF A CONFLICT OF INTEREST IF THEY ENGAGED IN INVESTIGATORY WORK.

A. *The Department of Public Safety has the authority to make rules regarding the private detective business which it can rationally believe the legislature intended it be able to make.*

The Department of Public Safety is charged with the responsibility of regulating the private detective business in the state of Iowa. In doing so, it only has that authority to make rules which has been granted by the General Assembly. Any rule established by the department which exceeds the scope of that authority is *ultra vires* and, therefore, invalid and unenforceable. *Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue*, 301 N.W.2d 760, 762 (Iowa 1981); *Patch v. Civil Service Com'n. of the City of Des Moines*, 295 N.W.2d 460, 464 (Iowa 1980); *Motor Club of Iowa v. Dept. of Transportation*, 251 N.W.2d 510, 518 (Iowa 1977). An agency has the authority to promulgate a rule when it could rationally conclude that the rule is within its statutory authority. *Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue*, 301 N.W.2d at 762; *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979). While chapter 80A does not expressly grant to the Department of Public Safety authority to promulgate rules regulating the private detective business, that express authority does exist in a rather peculiar place, chapter 321, The Code 1981, on motor vehicles. Section 321.4, The Code 1981, states:

> The commissioner of public safety is authorized to adopt and promulgate administrative rules governing procedures as may be necessary to carry out the provisions of this chapter; *and to carry out any other laws the enforcement of which is vested in the department of public safety.* [Emphasis added.]

Chapter 80A is clearly a law the enforcement of which is vested in the Department of Public Safety. Of course, any policy or rule of the Department of Public Safety of general applicability which either limits a person's eligibility for a private detective license, or limits the scope of such a license if issued, would be enforceable unless the department complied with the rule promulgation procedures of the Iowa Administrative Procedure Act. §§17A.3(2) and 17A.4(3), The Code 1981.

> B. *The Department of Public Safety could rationally conclude that the legislature gave it the authority to limit the scope of private detective licenses issued to persons with a conflict of interest, or lack of qualification to engage, in a particular aspect of the private detective business.*

This office has previously opined that the Department of Public Safety could limit the private detective licenses of persons engaged in, or closely related to, law enforcement to security work. Op.Atty.Gen. #74-8-12 (1974). While this opinion rejects the inference of earlier opinions that the Department of Public Safety had the authority to exclude persons from, or limit their activities in, the private detective business who are exempted from that authority by §80A.2, The Code 1981, it does not reject the 1974 opinion's conclusion that the department can limit the activities of persons subject to its licensing authority. However, because the previous opinions of this office did not give any rationale for that authority, it is necessary to do more than affirm their results in this opinion.

As stated above, the legislature gave the Department of Public Safety express authority to promulgate rules governing the private detective business in §321.4, The Code 1981. The private detective business, as defined in §80A.1(1), The Code 1981, necessarily involves a certain amount of interference with citizens' rights to privacy. The very fact that the General Assembly enacted the licensing provisions of chapter 80A, The Code 1981, indicates that it intended that the business be regulated in the public interest. Further indications of that intent are (1) the §80A.5(3) requirement that applicants be of "good moral character"; (2) the §80A.5 requirement that applicants post a bond "conditional on the faithful, lawful and honest conduct of such applicant and those employed by such applicant in the private detective business"; and (3) the provision allowing the department to suspend or revoke a private detective license if the licensee is adjudged guilty of the commission of a crime of moral turpitude, §80A.10(3), betrays a confidence of a client, §80A.10(4), or demonstrates that he or she is not of good moral character, §80A.10(6). The regulatory nature of the scheme is also apparent from the fact that chapter 80A is obviously not a revenue generating provision. Thus, the Department of Public Safety can rationally conclude that chapter 80A grants it the authority to promulgate rules which require private detective licensees to engage in their business in an ethical manner and in the public interest.[3]

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[3] This is an example of the general police power which is distinguished from the term "police force" above.

As this office opined in its 1969 and 1974 opinions discussed above, there is an inherent conflict of interest between the private investigation business and public law enforcement. The inherent probability that one confidential relationship or the other will be compromised ought to preclude persons engaged in law enforcement and who have access to law enforcement records and reports in the course of public employment from engaging in the private investigation business. The National Advisory Committee on Criminal Justice Standards and Goals of the Law Enforcement Assistance Administration reached the same conclusion. Its task force on private security set the following as a standard:

> Law enforcement officers should be strictly forbidden from performing any private investigatory work.

National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Private Security, Std. 6.9, p. 238 (1976). In discussing this standard, the task force report states:

> Private investigatory work is one of the few jobs where a conflict of interest is present because of the nature of this job and is, therefore, inappropriate for a law enforcement officer. The only effective way to ensure that the integrity of law enforcement agencies and law enforcement officers is maintained and citizens' rights protected is to ban law enforcement officers from employment as private investigators.

National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Private Security, at 239.

Because the Department of Public Safety could conclude that law enforcement officials with access to confidential public records cannot conduct a private investigatory business without facing probable ethical impediments, and that it has the authority to promulgate rules designed to promote ethical practices in that business, it could, as this office opined in 1969 and 1974, render such persons who are subject to its regulatory authority, ineligible for a license to engage in the private investigation business. It could also promulgate rules prohibiting their employment as investigators by private detective agencies.

The next question is whether the various aspects of the private detective business are severable; whether ineligibility for one aspect of the business equal ineligibility for the whole business. This is again a question of statutory construction, and the intent of the General Assembly is the primary consideration. We reaffirm our 1974 opinion that the legislature did not intend that a conflict of interest in the area of private investigations would render a person ineligible for a license to engage in security work.

In summary, the Department of Public Safety could rationally conclude that §321.4, The Code 1981, gives it the authority to promulgate rules regulating the private detective business and requiring that such business be conducted in an ethical manner in the public interest. That authority would include the power to promulgate rules rendering persons subject to its regulatory authority who, due to a confidential relationship to public law enforcement agencies, have an inherent conflict of interest from the private detective business, or from employment in such a business. Such a rule need not exclude such persons from the private security business.

V. THE HEAD OF A LAW ENFORCEMENT AGENCY MAY ESTABLISH PERSONNEL RULES PROHIBITING PERSONS IN A CONFIDENTIAL EMPLOYMENT RELATIONSHIP WITH THE AGENCY FROM ENGAGING IN ANY PRIVATE INVESTIGATORY ACTIVITY.

Law enforcement officers have traditionally been held to a higher standard of conduct than the general population. As the court stated in *Millsap v. Civil Service Com'n.*, 249 N.W.2d 679, 684 (Iowa 1977):

> The public has a right to have for peace officers men of character, sobriety, judgment and discretion.

The employing law enforcement agency also has a right to have its officers above reproach, singularly loyal to the department, and physically and mentally able to respond when needed. In *Jurgens v. Davenport, Rock Island and Northwestern Rwy. Co.*, 249 Iowa 711, 716, 88 N.W.2d 797, (1958), the court sustained an ordinance of the city of Davenport prohibiting secondary employment of policemen, stating:

> The purpose of this provision is apparently to insure that the police officers will not have divided loyalties as between their public and private employers; that they will be available in case of emergencies as the ordinance requires, even when they are off duty; and that they will be in condition, both physical and mental, to perform their official functions when and as they should.... These considerations in themselves demonstrate that [the ordinance] is not so clearly arbitrary or unreasonable that we may strike it down.

In *Cox v. McNamara*, 493 P. 2d 54, 56 (Or. App. 1971), the court upheld a rule that policemen could not engage in secondary employment, except in certain narrow exceptions, stating:

> Some of the legitimate objects to be accomplished are: to increase efficiency during off duty hours; to help ensure that the officers will be available for police duty 24 hours a day; to avoid potential conflicts of interest; and to prevent any possible detrimental effect on the image of the police force because of the type of employment held by the officers while off duty.

Another recent case which upholds a law enforcement agency's authority to set limits on an officer's off-duty activity is *Otten v. Schicker*, 655 F.2d 142 (8th Cir. 1981). In that case, the court held that a law enforcement agency did not act unconstitutionally when it prohibited its officers from running for partisan political office. The court in *Otten* found the agency had an overriding interest in (1) obtaining job security free from partisan consideration and (2) ensuring impartial execution of the law.

As is noted above in regard to the Department of Public Safety's authority to limit eligibility of persons for the private investigatory aspect of the private detective business, that aspect has an inherent conflict of interest with law enforcement. That conflict runs both ways. The private/public detective may while acting in either capacity have access to information which while useful to the other employer cannot be ethically or legally disclosed. In their private capacity, investigators will also be tempted to rely on informants or facilities of their public employer contrary to the public interest. This fact, and the private employers perception that such is the case, may also give the public/private detective an unfair advantage over his or her competitors.

For these reasons, a chief of police, sheriff or other head of a law enforcement agency has the authority to prohibit officers from engaging in the private investigation business, or from working for someone in that business. This opinion does not address any other sort of secondary employment and should not be construed as an affirmance or limitation on the agency's authority *vis-a-vis* other such employment.

VI. THE BUSINESS OF OPERATING A LIE DETECTION DEVICE FOR HIRE, REWARD OR GRATIS FALLS WITHIN THE DEFINITION OF "THE PRIVATE DETECTIVE BUSINESS" IN §80A.1(1), THE CODE 1981.

In 1974, this office issued an opinion stating that the business of operating polygraph devices fell within the §80A.1(1), The Code 1981, definition of "the private detective business." As such, it is subject to all the requirements of chapter 80A. Op.Atty.Gen. #74-8-12 (1974). We reaffirm that opinion and expand it to cover any lie detection device. The §80A.1(1) definition of the "private detection business" includes:

> [T]he business of making for hire, reward, or gratis an investigation or investigations for the purpose of obtaining information with reference to any of the following matters...the credibility of witnesses or other persons...or concerning the truth or falsity of any statement or representation...

Lie detection devices are used for the purpose of investigating the credibility of persons and the veracity of statements and representations. As such, they should be merely considered tools or equipment used in the private detective business. The language of §80A.1(1) clearly indicates that the legislature was concerned with the ends of an investigation rather than the means to those ends.

Therefore, pursuant to §§80A.3 and 80A.4, The Code 1981, it is unlawful for a person or agency to engage in the business of operating lie detection devices, such as a polygraph, for hire, reward or gratis unless that person first obtains an appropriate private detective license under chapter 80A, The Code 1981.

VIII. SUMMARY

1. Section 80A.2, The Code 1981, exempts "detectives and officers" of any federal, state or local "police force" in the United States from the licensing and regulatory requirements of chapter 80A, relating to the private detective business. If an agency has general authority to enforce the law, maintain peace, investigate crime and arrest offenders subject only to the territorial limitations of its jurisdiction, it is a "police force". If an agency exercises some peace officer authority but does not have such general law enforcement responsibility, it is not a "police force". If an employee of a "police force" is called upon by that agency to perform general investigatory or enforcement duties and has peace officer authority, he or she is a "detective or officer" of that "police force".

2. The Department of Public Safety may by rule limit persons' practice in the private detective business to security work when their confidential relationship to a criminal justice agency would create a conflict of interest were they to engage in private investigations.

3. A law enforcement agency may prohibit its officers from engaging in private investigatory work as secondary employment.

4. The business of operating a lie detection device for hire, reward or gratis falls within the §80A.1(1), The Code 1981, definition of the private detective business.

July 15, 1982

SCHOOLS; ELECTIONS; SCHOOL BOARD DIRECTORS; REDISTRICTING; CONSTITUTIONAL LAW: Equal Protection Clause, Fourteenth Amendment, U.S. Constitution, §4.1(25), §275.12(2), §275.12(2)(a), (b), (c), (d) and (e), §278.1(8), The Code 1981. The Equal Protection Clause of the U.S. Constitution or Iowa statutes require: 1) school districts must use the latest preceding federal census report in creating or changing subdistrict boundaries; 2) director districts created pursuant to §275.12(2)(d) and §275.12(2)(e) must be substantially equal in population; 3) director districts created pursuant to §275.12(2)(b) and §275.12(2)(c) must be substantially equal in population; 4) school districts must utilize one of the methods provided in §275.12(2) for selecting directors; 5) school districts that elect directors pursuant to subsections (b), (c), (d), or (e) should reapportion every ten years, if necessary, to comply with the one person, one vote principle; and 6) clarifying legislation would be helpful. (Fleming to Lloyd-Jones, State Representative, 7/15/82) #82-7-8

Representative Jean Lloyd-Jones: You have submitted for our consideration a series of six questions pertaining to the re-districting of school districts that elect school board members as residents of subdistricts rather than at large. You state that the League of Women Voters of Iowa conducted a survey of Iowa school districts to discover whether school board members are selected pursuant to the principle of "one person, one vote."

You state that the league survey reported the following:

1. Subdistricts of grossly disparate population in school districts that nominate and elect board members from subdistricts as provided for in sections 275.12(2)(d) or (e), The Code 1981;

2. Subdistricts of grossly disparate population in school districts that elect board members as provided for in section 275.12(2)(b) or (c);

3. School districts that elect board members by a method not provided for in section 275.12(2), Code of Iowa 1981.

In addition, you made reference to our opinion of April 29, 1982, that noted that school districts may be using school census data rather than federal census data in establishing director districts or in the re-districting process. This information gave rise to the following questions:

A. What population data should be used in creating subdistricts of school districts where all members are not nominated and elected at large from the entire district?

B. Does the constitution or law require that the population of subdistricts be equal where subdistricts are created pursuant to sections 275.12(2)(d) or (e)?

C. Does the constitution or law require that the population of subdistricts be equal where subdistricts are created pursuant to section 275.12(2)(b) or (c)?

D. May a school district use a method of selecting directors other than those described in section 275.12(2)?

E. Must school districts reapportion every ten years if subdistricts become unequal because of population change?

F. If the answer to question #5 is yes, would a timetable for schools to reapportion that would mesh with precinct boundary changes by city councils and boards of supervisors following a federal census be helpful to assure that the principle of one person, one vote is implemented?

The answers to these questions necessarily involve the interrelation of federal constitutional requirements, the Iowa Constitution, statutes, and various principles of statutory construction. We shall present an introduction and a historical background and then respond to the questions.

I.

INTRODUCTION AND HISTORICAL BACKGROUND

A. The Iowa School System

In the United States, the main responsibility for education rests with the state and "[p]roviding public schools ranks at the very apex of the function of a state." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The Constitution of Iowa grants power to the General Assembly to "provide for the educational interest of the state in any... manner that to them shall seem best and proper." Iowa Const. Art. IX, Sec. 15. The legislature has created a system for elementary and secondary education that is implemented by local school districts. Certain supervisory powers are exercised by the State Board of Public Instruction, the state superintendent, and the State Department of Public Instruction. *See* chapter 257, The Code 1981. Other responsibilities are assigned to area education agencies and other government bodies or officials, particularly in connection with elections and finance. Title XII of the Code of Iowa contains most of the statutes that are relevant to your questions.

Iowa school corporations have not been granted home rule. School districts, unlike cities and counties, are subject to the operation of Dillon's Rule: the only powers of a school district are those expressly granted or necessarily implied in government statutes. *McFarland v. Board of Education*, 277 N.W.2d 901 (Iowa 1979); *Barnett v. Durant Community School District*, 249 N.W.2d 626, 627 (Iowa 1977); *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947).

The statutory scheme is not a model of clarity. When Iowa became a state, the school laws were based on those of the Territory of Iowa. *See e.g.*, chapter 410, Revised Statutes, Territory of Iowa (1843). Over time the school laws were subjected to numerous changes by amendment and repeal. For decades, thou-

sands of school districts operated as school corporations to manage the one-room schools. Other districts offered a high school program as well as elementary education. In 1957, the General Assembly declared it "to be the policy of the state that all the area of the state shall be in a district maintaining twelve grades by July 1, 1962." *See* 1957 Iowa Acts, chapter 128, section 1. *cf.* §275.1, The Code 1981. The 1957 legislature also provided the method for election of school board directors. *See* 1977 Iowa Acts, chapter 130, section 1. (Current version: §275.12(2), The Code 1981.) The 1957 Act contained the fundamental authorization for selecting the school board members in all Iowa school districts. The wave of school reorganization that occurred between 1957 and 1962 and subsequent reorganizations resulted in the school districts that now exist in Iowa.

Section 257.12(2) permits the voters in each local school district to choose one of five different methods for electing school board members. The structure or method for selecting school board members are: 1) all members are selected at large from the entire district, §275.12(2)(a); 2) the district is divided into subdistricts and each subdistrict must be represented on the board by a resident but all are elected by vote of electors of the entire district, §275.12(2)(b); 3) not more than one half of the members are elected at large from the entire district and the remaining directors are elected from and as residents of subdistricts but voted upon by the voters of the entire district, §275.12(2)(c); 4) the district is divided into subdistricts and members are elected from and by the electors of their respective subdistricts, §275.12(2)(d); and 5) in districts having seven directors, three members are elected at large by the entire district and the others are elected from and by the voters in each of four subdistricts, §275.12(2)(e).

The method for selecting members of the board of directors of a school district is one of the most fundamental issues in creation and maintenance of that governmental unit. The people may establish a polity in which their representatives are all elected at large or one in which each representative is selected by and from a subdistrict. The election-at-large method does not put importance on the section or area in which the members of the board reside while a method that provides that all directors are elected from subdistricts creates a polity in which representation based on geographical areas of the district is assured. In addition to the right to choose one of two very different structures, the electors may choose one of three alternatives in which the policy-making body is composed of members selected by a combination of the two basic methods. *See* §§275.12(2)(b) or (c) or (e).

A substantial portion of Iowa school districts, involving a substantial portion of Iowa voters, utilize the election-at-large method of subsection (a). Implementation of that subsection is not at issue in this discussion. It is the operation of school districts under subsections 275.12(2)(b), (c), (d), and (e) and related statutes that gave rise to your request for our opinion.

B. Equality of Representation Under the Federal Constitution

Even though the states hold most of the power to provide education, the constraints of the United States Constitution are applicable to the educational system. Thus, the principle of "one person, one vote" is applicable to the selection of school board members under the Equal Protection Clause of the Constitution pursuant to principles announced by the supreme court in a line of decisions commencing with *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

For decades, federal courts refused to decide cases brought by citizens or groups of citizens who complained of unequal representation caused by refusal of state legislatures to reapportion in response to shifts in population. In *Baker v. Carr*, the supreme court decided that claims challenging the apportionment of seats in state legislatures presented a justiciable controversy subject to adjudication by federal courts.

The supreme court developed in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny, the basic standards and applicable guidelines for implementing the landmark decision of *Baker v. Carr*. Population shifts occur in subdistricts of local governmental units as well as in congressional and state legislative districts, and the principle of "one man, one vote" was held by the supreme court to apply in the election of local governmental officials in *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).

The relevant principles developed by the supreme court include the following:

> The rights impaired by an unequal apportionment scheme are "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. at 561, 84 S.Ct. 1362, 12 L.Ed.2d at 527.
>
> The Equal Protection Clause demands no less than representation that is "substantially equal." *Reynolds v. Sims*, 377 U.S. at 568, 84 S.Ct. 1362, 12 L.Ed.2d at 531.
>
> Periodic redistricting to maintain equality of representation is appropriate and "decennial reapportionment appears to be a rational approach." *Reynolds v. Sims*, 377 U.S. at 583, 84 S.Ct. 1362, 12 L.Ed.2d at 539.
>
> If reapportionment is accomplished less frequently than every 10 years, "it would assuredly be constitutionally suspect." *Reynolds v. Sims*, 377 U.S. at 584, 84 S.Ct. 1362, 12 L.Ed.2d at 540.
>
> Judicial relief becomes available when there has been a failure to reapportion after the relevant body has had an adequate opportunity to do so. *Reynolds v. Sims*, 377 U.S. at 586, 84 S.Ct. 1362, 12 L.Ed.2d at 541.
>
> If one person's vote is given less weight through unequal apportionment, "his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator." *Hadley v. Junior College District*, 397 U.S. at 55, 90 S.Ct. 791, 25 L.Ed.2d at 50.
>
> Whenever a state or local government decides to select persons by popular election to perform governmental functions, each voter must be given an equal opportunity to participate in that election, and "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 456, 90 S.Ct. 791, 25 L.Ed.2d at 50-51.

The above list of constitutional principles is not exclusive but it includes the crucial concepts that we apply to the following issues you have presented for our opinion.

II.

THE QUESTIONS PRESENTED

A. The Word "Population"

Section 275.12(2), The Code 1981, contains the methods for electing members of boards of directors of local school districts. Section 275.12(2)(a) provides for the election of all members at large from the entire district.[1] In contrast, subsections (b), (c), (d), and (e) each provide that the school district be divided into designated subdistricts "on the basis of population."

The answer to your first question set out above is that school districts should utilize federal decennial census data when establishing director districts or when re-districting.

This response is based on §4.1(25), The Code 1981, as follows:

> The word "population" where used in this Code or any statute means the population shown by the last preceding certified federal census, unless otherwise specifically provided.

Neither §275.12(2) nor any other section of the education Title of The Code contains a separate definition of the term "population" and we conclude, therefore, that §4.1(25) applies to the school board member districting and re-districting process. We note that this provision of the Code is long-standing. *See e.g.*, chapter 3, §26, Iowa Code 1897 ("the word 'population' where used in this Code or any statute hereafter passed, shall be taken to be that as shown by the last preceding state or national census, unless otherwise specially provided."); §4.1(26), Iowa Code 1950, ("The word 'population,'... shall be taken to be that as shown by the last preceding national census, unless otherwise specially provided.").

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[1] We do not consider the possible impact of §275.12(2)(a). A divided supreme court in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 490, 64 L.Ed.2d 47 (1980), *reversed* a lower court decision that required disestablishment of an at-large electoral system for city commissioners and substitution of a separate district system. While the supreme court justices did not agree on a rationale, the effect of the decision was to leave in place the at-large system. The opinion of four members rejected the claim that the at-large system violated the Equal Protection Clause because purposeful racial discrimination had not been shown. Three other justices concurred in the judgment. Given the demographic composition of Iowa, the complexity of the statutory history, and the difficulty of proving invidious discrimination under *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), we doubt that an Equal Protection challenge to §275.12(2)(a), The Code 1981, could succeed. For a case that sustained a claim that a multimember legislative district unconstitutionally diluted the voting strength of a discrete group, *see White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

We base our opinion that the federal census data must be used in creation of director districts entirely upon the statute. It is not imposed by the federal constitution even though the census is the usual source used by state and local government in reapportionment. *See Gaffney v. Cummings*, 412 U.S. 735, 743-749, 93 S.Ct. 2321, 37 L.Ed.2d 298, 306-310 (1973); *Burns v. Richardson*, 384 U.S. 73, 90-97, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966) (upheld use of registered voters as a bases for legislative districts and noted that Equal Protection Clause does not require the states to use total population figures derived from the federal census even though most other cases considered by the supreme court have involved federal census data).

The court recognized in *Gaffney v. Cummings*, that the federal census "measures population at only a single instant in time." *Id.* 412 U.S. at 746, 93 S.Ct. 2321, 37 L.Ed.2d at 308. That decision also acknowledged the existence of substantial deviations in population growth rates. *Id.* Nevertheless, some measure must be utilized even though "[m]athematical exactness or precision is hardly a workable constitutional requirement." *Reynolds v. Sims*, 377 U.S. at 577, 84 S.Ct. 1362, 12 L.Ed.2d at 536. In spite of admitted defects, use of federal census data is clearly acceptable under the supreme court cases.

In sum, the Iowa General Assembly has defined the word "population" to mean the population shown by the latest preceding certified federal census and school districts should therefore use these data when drawing subdistrict boundaries.

B. Subsections 275.12(2)(d) and (e).

We next consider whether the federal constitution or Iowa law requires that the population of subdistricts be equal where subdistricts are created pursuant to §275.12(2)(d) or (e). These subsections are as follows:

> 2. Such petition shall also state the number of directors which may be either five or seven and the method of election of the school directors of the proposed district. The method of election of the directors *shall be one of the following optional plans:*
>
> * * *
>
> d. Division of the entire school district into designated geographical subdistricts *on the basis of population,* to be known as director districts, each of which director districts shall be represented on the school board by one director *who shall be a resident of such director* district and who shall be *elected by the voters of said director district.* Place of voting in such director districts shall be designated by the commission of elections. Changes in the boundaries of directors districts shall not be made during a period commencing sixty days prior to the date of the annual school election.
>
> e. In districts having seven directors, election of three directors at large by the electors of the entire district, one at each annual school election, and *election of the remaining directors as residents of* and *by the electors of individual geographic subdistricts established on the basis of population* and identified as director districts. Boundaries of the subdistricts shall follow precinct boundaries, insofar as practicable, and shall not be changed less than sixty days prior to the annual school election. [Emphasis added.]

It is our opinion that the Equal Protection Clause, as interpreted by the supreme court and summarized in Division I above, clearly commands that school districts established under either of the above subsections shall be substantially equal in population. The following statement by the supreme court is particularly relevant:

> When a court is asked to decide whether a state is required by the constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, *his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator.* While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.
>
> If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in "important" elections, but good judgment and common sense tell us that what might well be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, *we think the decision of the state to select that official by popular vote is a strong enough indication that the choice is an important one.* This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

Hadley v. Junior College District, 397 U.S. at 54-5, 90 S.Ct. 791, 25 L.Ed.2d at 51. [Emphasis supplied.]

The current trend of falling school enrollment in many school districts that result in the closing of attendance centers over the objection of citizens and parents of school children in those neighborhoods or communities within a district is but one example of the importance of equality of representation in selecting school board members.

Subsections (d) and (e) provide for the election of directors from and by separate subdistricts. Thus, these two methods for selecting directors fall squarely under the *Hadley* requirement and we therefore conclude that the Equal Protection Clause mandates subdistricts of substantially equal population in school districts that use these two methods.

C. Subsections 275.12(2)(b) and (c).

Your third question pertains to the selection of school board members pursuant to the following subsections of §275.12(2):

b. Division of the entire school district *into designated geographical subdistricts on the basis of population*, to be known as director districts, each of which director districts shall be represented on the school board by one director who shall *be a resident of such director district but who shall be elected by the vote of the electors of the entire school district.* The school district shall be divided into the same number of director districts as the number of school directors the district is authorized by law. The boundaries of such director districts and the area and population included within each district shall be such as justice, equity, and the interests of the people may require. Changes in the boundaries of director districts shall not be made during a period commencing sixty days prior to the date of the annual school election. Insofar as may be practicable, the boundaries of such districts shall follow established political or natural geographical divisions.

c. *Election of not more than one-half of the total number of school directors at large from the entire district* and the remaining directors *from* and *as residents of designated single-member director districts* into which the entire school district shall be divided *on the basis of population.* In such case, *all directors shall be elected by the electors of the entire school district.* Changes in the boundaries of director districts shall not be made during a period commencing sixty days prior to the date of the annual school election. [Emphasis supplied.]

The constitutional mandate with respect to election of school board members under subsections 275.12(2)(b) and (c) is not so clear as it is for (d) and (e) discussed above. In deciding *Hadley*, the supreme court distinguished *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 25 L.Ed. 45 (1967), in which an election scheme was upheld. In *Dusch*, the challenged statute required that candidates be residents of certain districts that did not contain equal numbers of people *but were elected at large.* Thus, because the board members are elected *at large*, under the holding of *Dusch v. Davis*, §275.12(2)(b) or (c) do not *per se* require substantial equality.

The Iowa Supreme Court relied on *Dusch v. Davis* in deciding *Mandicino v. Kelly*, 158 N.W.2d 754 (Iowa 1968), but we note that *Mandicino* was decided two years before *Hadley.* In *Mandicino*, the Iowa court stated the following:

> We therefore believe the holding of *Dusch v. Davis*, supra, is: Within a geographical unit comprised of disproportionately populated districts a requirement that some representatives to the governing body of that geographical unit necessarily reside among the less populous districts is not an invidiously discriminatory plan, on its face, to the voters of the most populous districts where the representatives are voted upon by the electorate of the entire geographic unit *when* such requirement does not manifest an evasive scheme to avoid the consequences of reapportionment or attempt to perpetuate certain persons in office nor preserve any controlling influence to the less populous districts.

158 N.W.2d at 763. The Iowa court concluded after careful analysis that districting of Woodbury County for purpose of electing members of the county board of supervisors was in violation of the Equal Protection Clause. The scheme invalidated by *Mandicino* provided for the election of five supervisors *at large* but only one could be a resident of Sioux City township with a population of 89,159 and the other members were elected as residents of four rural districts having a combined total population of 18,600. The league survey noted the existence now of a school district, using method (c), with a similar circumstance. The city with an approximate population of 10,800 is entitled to two resident directors. A rural district with a population of 3,900 has one resident director and another rural

district having a population of 1,100 has another. The fifth director is elected at large and all electors vote for all five. Under the analysis of *Mandicino*, we believe this circumstance is quite suspect. It is quite unlike the situation in *Dunham v. Souter*, 201 N.W.2d 75 (Iowa 1972), in which the court applied the *Mandacino* analysis and concluded that the districting plan was not discriminatory.

We do not basis our conclusion on this issue on *Mandicino*, however, and we now turn to other Iowa cases and to the language of the statutes to determine whether substantial equality among subdistricts designated pursuant to subsection (b) and (c) is required.

The history of §275.12(2) is complex. The first version of it was adopted by the 57th General Assembly. *See* 1957 Iowa Acts, chapter 130, §1. Previous statutes pertaining to election of school board directors that were very different were repealed by the legislature. *See* 1953 Iowa Acts, chapter 117, §36 which repealed §§274.16-34, Iowa Code 1950. In 1961, the opening paragraph of §275.12(2) was amended to allow for "either five or seven directors." *See* 1961 Iowa Acts, chapter 158, §1.

In the wake of the line of cases evolving from *Baker v. Carr* and *Reynolds v. Sims*, including Iowa Supreme Court cases, *see e.g., In Re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972) (Court invalidated districting plan adopted by General Assembly) and *Rasmussen, et al. v. Ray, et al.*, 175 N.W.2d 20 (1970), the General Assembly in 1975 amended §§275.12(2)(b), (c), and (d) by adding "on the basis of population" to the sentence of each subsection requiring the "designation" of director districts. *See* 1975 Iowa Acts, chapter 81, §126. We note that chapter 81 was a lengthy act entitled Election Procedures and that it amended scores of diverse election laws pertaining to numerous functions and the election of a variety of officials.

We note that "on the basis of population" was added to the statute seven years after *Mandicino* was decided and we therefore consider the identical language without reference to that decision. Nevertheless, we must consider the intent of the legislature in determining the meaning of the statutory language "on the basis of population." It is also important to note that §275.12(2)(e) was added to §275.12(2) by the 68th General Assembly. *See* 1979 Iowa Acts, chapter 61, §1. Like subsections (b), (c), and (d), the new subsection codified as (e), continued the language "on the basis of population" in relation to the creation of director districts. *Id.* Moreover, the legislature used the same phrase "on the basis of population" in §42.4(1), The Code 1981. Additional standards and guidelines to be applied in the congressional and legislative re-districting process are contained in that statute.

Prior to the addition of the "on the basis of population" language in 1975, the only standard for creating subdistricts contained in §275.12(2) were the following sentences:

> "The boundaries of such director districts and the area and population included within each district shall be such as justice, equity, and the interests of the people may require. Insofar as may be practicable, the boundaries of such districts shall follow established political or natural geographical divisions."

See §275.12(2)(b), Iowa Code 1973. We note that these sentences appeared only in subsection (b) of 1957 Iowa Acts, chapter 130, §1, and that these sentences do not appear in the current versions of §275.12(2)(c) and (d). The legislature did include the second of the above quoted sentences when it added §275.12(2)(e).

Given the ambiguity of these statutory provisions, we conclude that it is very significant that the legislature included "on the basis of population" in *each* of the sections that provide for a method of selecting school board members that require subdistricting. Where the same clause is used by the legislature in four subsections of the same statute, we conclude that the clause has the same meaning in each subsection.

We have no doubt that the legislature added the clause "on the basis of population" in response to the line of federal and state court decisions ordering the reapportionment of congressional, legislative, and local governmental districts. *See e.g., Reynolds v. Sims, supra, Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); *In Re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972); *Rasmussen v. Ray*, 175 N.W.2d 20 (Iowa 1975).

As pointed out in relation to §275.12(2)(d) and (e), the Equal Protection Clause requires that subdistricts must be substantially equal in population. By including the *identical standard* for creating subdistrict boundaries in §§275.12(2)(b) and (c) — "on the basis of population" — as it did in §§275.12(2)(d) and (e), we conclude that the legislature intended to impose the same standard of substantial equality in (b) and (c) as exists under (d) and (e). We note that the Iowa court ruled that "substantial equality" means "as nearly as practicable" and that a cutoff point may not be chosen for use in achieving substantial equality of districts. *See In Re Legislative Districting*, 193 N.W.2d at 788-789.

D. Methods Other Than Those in §275.12(2)

Discovery by the league survey that some Iowa school districts were electing directors by a method other than those provided in §275.12(2) led to your fourth question: whether use of a different method not included in that statute is allowed.

To implement the policy that all areas of the state should be in a high school district, the 1957 legislature provided that any area not in a high school district by July 1, 1962, should be attached to some district by the relevant county board of education. *See* 1957 Iowa Acts, chapter 128, §1. An earlier law, 1953 Iowa Acts, chapter 117, §3, had required that a proposed reorganization, to be approved, must include at least 300 resident children of school age. These and related legislative enactments produced a flurry of school reorganization.[2] The reorganizations of the 1950's and subsequent decades produced the school districts as they exist today.[3] Section 275.12(2) is contained in the code chapter on reorganization of school districts. Any school district that has reorganized since 1957 was required to adopt one of the methods in §275.12(2) as originally adopted or as amended.

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[2] This process was not free of conflict. *See e.g., Board of Education v. Joint Board of Education*, 196 N.W.2d 423, 424 (Iowa 1972).

[3] For a list of existing Iowa school districts see the most recent Iowa income tax instruction booklet which contains a complete list of school districts and the appropriate numbers required for filing Iowa income tax returns.

We have not attempted the monumental task of tracing the development of the boundaries of school districts as they exist today nor do we know if it is possible. We suppose that it may be possible that some Iowa school districts exist today that has precisely the same boundaries as it did when chapter 130 of the 1957 Iowa Acts (Current version: §275.12(2)) took effect. We conclude that such a district, if one exists, would not have been required to choose one of the five methods contained in §275.12(2) discussed above. Because we believe it is unlikely that such a district exists, we do not consider the implications of the Equal Protection issues discussed above in connection with such a district.[4]

Any district that has participated in a reorganization process since 1957, in our opinion, should be electing its board members pursuant to one of the methods provided in §275.12(2).

We base this response to your fourth question on the well-settled principle that, absent some federal constitutional constraint, Iowa school districts are limited to exercise of power granted to them or that is necessarily implied in enabling statutes. *See e.g., McFarland v. Board of Education, supra,* and *Barnett v. Durant Community School District, supra.* Inasmuch as the legislature has *expressly provided* five methods for electing directors in §275.12(2) which actually amount to nine different available systems because of the opportunity to choose a board of either five or seven members, we believe a school district is without power to choose an entirely different method.

In sum, we believe that all Iowa school districts that have been reorganized since 1957 should be utilizing one of the five methods of selecting board members provided in §275.12(2).

E. Decennial Redistricting

The statute that is central to this opinion includes four portions that require subdistricting of school districts. Your fifth question is whether school districts that utilize one of those four methods discussed in sections II.B and II.C of this opinion must be reapportioned every ten years. We conclude that such school districts must utilize the certified federal census report every ten years to determine whether the existing subdistricts are "substantially equal." We further conclude that if subdistricts have become unequal as a result of population shifts or differential growth rates, the subdistrict boundaries must be altered to meet the principle of "one person, one vote."

As discussed above, the Iowa General Assembly did not provide a different standard in providing for the division of school districts into subdistricts in the subsections of §275.12(2) and that subdistricting is to be "on the basis of population." We believe, therefore, that all Iowa school districts should redistrict every ten years if subdistricts have become substantially unequal.

We recognize that the statutes do not contain a clear directive that school district *must* redistrict but it is clear that the power to do so exists. *See* §278.1(8)

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[4] *See,* §§274.7-274.10, The Code 1950 (subsequently repealed).

(Voters have power to change to either 5 or 7 directors and to decide which of the methods authorized by §275.12(2) shall be used); §278.1(9) (Voters have power to authorize the establishment or abandonment of director districts or change boundaries of director districts); §278.2 (Submission of proposition); and §275.35 and.36 (Changing method of selecting directors).

As the supreme court made clear in *Reynolds v. Sims*, a state legislative apportionment scheme is violative of the federal constitution even if it is based on a state constitutional provision. *Id.* 377 U.S. at 584, 84 S.Ct. 1362, 12 L.Ed.2d at 541. Similarly, under the Supremacy Clause, a school district may not evade the mandate to redistrict in compliance with the "one person, one vote" principle on the ground of an ambiguous statutory provision, school board action or inaction, or action or inaction by the district voters.

Moreover, the language of the statute provides ample guidance for timing of any redistricting that does occur. *See e.g.*, §275.12(2) ("changes in the boundaries of director districts shall not be made during a period commencing sixty days prior to the date of the annual school election."); *cf.* similar language in §275.12(2)(b), (c), and (e).

In summary, we conclude that school districts that elect directors pursuant to subsection (b), (c), (d), and (e) of §275.12(2) should redistrict every ten years if necessary to insure compliance with the principle of "one person, one vote."

F. Suggested Legislation

You inquire, in your final question, whether legislation that would provide a timetable for school district reapportionment would be helpful to assure the implementation of the one person, one vote principle. Our answer is an emphatic yes.

The statutory provisions discussed above and other related statutes are ambiguous and are scattered in various chapters of the Education title of the Iowa Code. We believe that legislation to guide school districts in carrying out the duty to redistrict would be most helpful.

We note that the legislature has provided a time period in which city councils and county boards of supervisors may change boundaries of existing precincts. *See* §§49.1-49.8, The Code 1981. A similar timetable for altering school director district boundaries is desirable and could clarify any existing doubt that school districts must redistrict to comply with "one person, one vote."

SUMMARY

In summary, we have concluded that: 1) school districts must use the latest preceding federal census report in creating or changing subdistrict boundaries; 2) director districts created pursuant to §275.12(2)(d) and §275.12(2)(e) must be substantially equal in population; 3) director districts created pursuant to §275.12(2)(b) and §275.12(2)(c) must be substantially equal in population; 4) school districts must utilize one of the methods provided in §275.12(2) for selecting directors; 5) school districts that elect directors pursuant to subsections (b), (c), (d), or (e) should reapportion every ten years, if necessary, to comply with the one person, one vote principle; and 6) clarifying legislation would be helpful.

July 21, 1982

SOCIAL SERVICES: 2½% rate reduction on supplies. chapter 7, section 3, subsection 2, Acts of the 69th General Assembly, 1981 Session. SF 2304, §98, 69th G.A., 1982. Because of the precisely drawn provisions of the statute, certain medical assistance payments are reduced including the reduction of supplies for optometrists and opticians. (Robinson to Reagen, Commissioner, 7/21/82) #82-7-9(L)

July 23, 1982

CIGARETTES: Distribution of cigarettes by manufacturers. Sections 98.6, 98.39, 551A.2(8), 551A.3, and 551A.4, The Code 1981. A manufacturer may only distribute free cigarettes to the public pursuant to §98.39. Combination sales, where free cigarettes are given to the purchaser of cigarettes, are permitted by §551A.4. Manufacturers may send replacement cigarettes directly to the consumer provided state and federal requirements are fulfilled. (Schuling to Bair, Director, Iowa Department of Revenue, 7/23/82) #82-7-10

Gerald D. Bair, Director of Revenue: You have requested an opinion of this office concerning the distribution of cigarettes by manufactures. Specifically, you asked if there would be a violation of either §98.39 or §551A.3, The Code 1981, in each of the following situations:

1. An out-of-state manufacturer ships standard packs containing twenty cigarettes to a licensed distributors to be stamped with the tax stamp. The manufacturer reimburses the distributor for the cost of the stamps. A representative of the manufacturer obtains a retail permit; picks up the cigarettes from the distributor; and distributes the cigarettes free of charge to the public at the licensed retail location.

2. An out-of-state manufacturer ships standard packs containing twenty cigarettes to a licensed distributor to be stamped with the tax stamp. The manufacturer reimburses the distributor for the cost of the stamps. A manufacturer's representative picks up the cigarettes and delivers them to a licensed retailer for free distribution to the public.

3. An out-of-state manufacturer ships standard packs containing twenty cigarettes to a licensed distributor to be stamped with the tax stamp. The manufacturer reimburses the distributor for the cost of the stamps. The manufacturer directs the distributor to ship the cigarettes to a retailer. The manufacturer directs the retailer to attach the free packs to packs already purchased by the retailer and offer them to the public in a "buy one — get one free" promotion.

4. If any of the above situations are proper under both section 98.39 and section 551A.3, The Code 1981, could an in-state person licensed as a distributor or retailer offer the same promotions to the public in order to meet lawful competition?

5. As a result of a complaint from a consumer, an out-of-state manufacturer ships a carton containing ten packs of cigarettes containing twenty cigarettes directly to the consumer through the United States mails.

6. If number five above is proper, could the Department of Revenue allow the manufacturer to pay the tax due from the consumer under section 98.6(2), The Code 1981, directly to the department?

Chapter 98, entitled Cigarettes and Tobacco, regulates the physical sale of cigarettes and tobacco in Iowa. Its provisions provide for the regulation of, the tax and stamping of, and the requirements for distribution of cigarettes and tobacco products.

Chapter 551A, entitled the Iowa Unfair Cigarette Sales Act, regulates the price that may be charged for the sale of cigarettes in Iowa. Its provisions provide for the determination of the basic cost of cigarettes and the minimum selling price allowed in Iowa.

Your first two questions focus on a manufacturer's attempt to distribute cigarettes free of charge to the public. The crux of the questions is what limitations will either chapter 98 or chapter 551A have upon a manufacturer's free distribution. In order to make a proper determination, it is necessary to examine chapters 98 and 551A for the language used and the purpose for which they were enacted. *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692, 695 (Iowa 1973).

When statutorily construing sections, you must employ rules of statutory construction designed to ascertain the legislative intent behind the enactment. *Iowa Nat'l Indus. Loan Co. v. Iowa State Dep't of Revenue*, 224 N.W.2d 437, 440 (Iowa 1974). Rules of statutory construction to be employed are:

1. In considering legislative enactments we should avoid strained, impractical or absurd results.

2. Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used.

3. Where language is clear and plain, there is no room for construction.

4. We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

5. All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion.

6. We give weight to the administrative interpretation of statutes, particularly when they are longstanding.

Id. at 440. All rules of statutory construction that tend to shed light on the intent of the legislature should be utilized in ascertaining the true meaning. *American Home Prod. Corp. v. Iowa State Board of Tax Rev.*, 302 N.W.2d 140, 143, (Iowa 1981); Iowa R.App.P 14(f)(13).

Statutory construction of chapters 98 and 551A supports an interpretation which construes the provisions of §98.39, The Code 1981, to be the only procedure by which cigarettes may be distributed free of charge to the public. Section 98.39 states:

> The director may authorize a manufacturer to distribute in the state through his factory representative, free sample packages of cigarettes or little cigars containing four cigarettes or little cigars or less. Such packages of cigarettes or little cigars shall be shipped to a distributor that has a permit to stamp cigarettes or little cigars with Iowa tax. The manufacturer shipping cigarettes or little cigars under this section shall send an affidavit to the director stating the quality and to whom the cigarettes or little cigars were shipped. The distributor receiving the shipment shall send an affidavit to the director stating the quantity and from whom the cigarettes or little cigars were shipped. These affidavits shall be duly notarized and submitted to the director at time of shipment and receipt of cigarettes or little cigars. The distributor shall pay the tax on sample cigarettes or little cigars by separate remittance along with the affidavit. An acknowledgement in a form prescribed by the director that the tax has been paid shall be placed by the distributor on each carton of sample cigarettes or little cigars before distribution of sample cigarettes or little cigars. Such packages shall bear the word "Sample" in letters easily read. Authority granted under this section for disbursement and payment of sample packages may be withdrawn at any time in the discretion of the director.

Section 98.39, The Code 1981. The rationale behind this interpretation is fourfold.

First, in order to ascertain and give effect to the intention of the legislature, you must consider statutes relating to the same subject matter in light of their common purpose and intent. *Chicago & N.W. Ry Co. v. Osage*, 176 N.W.2d 788, 792 (Iowa 1970). All relevant legislative enactments must be harmonized so that the enactments may be accorded a practical application leading to a reasonable result which will accomplish, not defeat, their purpose. *Matter of Bliven's Estate*, 236 N.W.2d 366, 369 (Iowa 1975).

Chapter 98 regulates the physical sale of cigarettes and tobacco products in Iowa. Chapter 551A regulates the price at which those cigarettes may be sold. Both chapters regulate the business of selling cigarettes. In interpreting statutes, it is to be assumed the legislature was familiar with the existing state of the law. *Peffers v. City of Des Moines*, 299 N.W.2d 675, 678 (Iowa 1980). Therefore, in construing the statutes we must be mindful of the state of the law when each of the enactments were passed and seek to harmonize them with each other. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977).

Prior to 1949, manufacturers could only distribute free cigarettes pursuant to §98.39. chapter 551A was passed by the legislature in 1949. 1949 Session, 53rd G.A., chapter 226. The legislature is presumed to have known the state of the law. Chapter 551A has no express provisions providing for distribution of free cigarettes. Reading the chapters in *para materia* or with the understanding that the legislature did not expressly provide for any change in the free distribution of cigarettes and that the purpose of chapter 551A is to regulate the minimum price of cigarettes, it must be concluded that distribution of free cigarettes may only occur when the manufacturer is complying with §98.39.

Second, in construing a statute you must look to the object to be accomplished, evils sought to be remedied, or purpose to be subserved and place on the statute a reasonable or liberal construction which will best effectuate the purpose rather than one which will defeat it. *Shidler v. All American Life & Financial Corp.*, 298 N.W.2d 318, 321 (Iowa 1980). Section 98.39 provides that manufactures may distribute free samples of four cigarettes or less if they follow a specific statutory procedure. The specific satutory procedure sets forth restrictions for the manufacturer. These restrictions govern the notice to be sent to the Director of

Revenue, the quantity of cigarettes to be distributed free, the packaging of the cigarettes, and the method for stamping the cigarettes.

Where certain exceptions are enumerated by statute, it is to be presumed that the legislature intended no others to be created. *Iowa Farmers Purchasing Ass'n, Inc. v. Huff*, 260 N.W.2d 824, 827 (Iowa 1977); *In re Wilson's Estate*, 202 N.W.2d 41, 44 (Iowa 1972). Free cigarettes may be distributed only when the manufacturer is complying with §98.39.

Third, the legislature will be presumed to have enacted each part of a statute for a purpose and to have intended that each part be given effect. *Iowa Dep't of Transp. v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 11 (Iowa 1978). It cannot be presumed that the legislature intended that words in a statute should be given a redundant and useless meaning. *Hanover Ins. Co. v. Alamo Motel*, 264 N.W.2d 774, 778 (Iowa 1978).

If under chapter 551A a manufacturer can send cigarettes to a distributor with a zero invoice and distribute those cigarettes as free sample packages, then §98.39 is rendered superfluous. Such a result is contrary to statutory interpretation and must be avoided. It must be concluded that distribution of free cigarettes may only occur when the manufacturer is complying with §98.39.

Fourth, the interpretation that chapter 551A allows for the distribution of cigarettes free of charge to the public is contrary to the legislative intent of chapter 551A as determined by the Iowa Supreme Court. In *May's Drug Stores, Inc.*, the court determined that the legislature may prohibit an act or a business practice which is destructive of competitors and free competition. *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 319, 331, 45 N.W.2d 245, 252 (1950). It was further determined that this law prohibiting sales of cigarettes below cost, embodied a widespread conviction that such sales were destructive of free competition. *Id.*

To use a zero invoice cost under chapter 551A would thwart rather than advance the purpose of the chapter. If statutory language is susceptible to more than one construction, it should be given the construction which will effect rather than defeat the purpose of a statute. *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896, 901 (Iowa 1980). It must be concluded that the distribution of free cigarettes may only occur when the manufacturer is complying with §98.39.

Therefore, the answer to your first two questions are the same. The examples provided in questions one and two violate chapter 98, The Code 1981. A manufacturer may only distribute cigarettes free of charge to the public pursuant to the provisions of §98.39, The Code 1981.

Your third question presents a situation slightly different from the situations presented in your first two questions. In this question you request an opinion as to whether cigarettes can be given free to a *purchaser of cigarettes*, more specifically a "buy one — get one free" promotion.

In order to ascertain and give effect to the intention of the legislature, you must consider statutes relating to the same subject matter in light of their common purpose and intent. *Chicago & N.W. Ry. Co. v. Osage*, 176 N.W.2d 788, 792 (Iowa 1970). All relevant legislative enactments must be harmonized so that the enactments may be accorded a practical application leading to a reasonable result which will accomplish, not defeat, their purpose. *Matter of Bliven's Estate*, 236 N.W.2d 366, 369 (Iowa 1975).

Promotional situations are specifically covered by §551A.4, The Code 1981. Section 551A.4, entitled combination sales, states:

> In all offers for sale or sales involving cigarettes and any other item at a combined price, and in all offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the wholesaler's or retailer's combined selling price shall not be below the cost to the wholesaler or the cost to the wholesaler or the cost to the retailer, respectively, of the total of all articles, products, commodities, gifts and concessions included in such transactions: If any such articles, products, commodities, gifts of concessions, shall not be cigarettes, the basic cost thereof shall be determined in like manner as provided in section 551A.2, subsection 8.

Section 551A.4, The Code 1981.

In this situation §551A.4 would prevail over §98.39 provided it is a promotional scheme complying with the procedural requirements that it be a sale. Sale is defined for the purposes of §551A.4 to "mean and include any transfer for a consideration, exchange, barter, gift, offer for sale and distribution in any manner or by any means whatsoever." Section 551A.2(5), The Code 1981.[1] Once a sale has occurred, the gift may be any kind whatsoever. Section 551A.4, The Code 1981. Cigarettes can be given free to a purchaser of cigarettes under §551A.4.

The cost provisions of §551A.4 additionally would not prevent the distribution of cigarettes in this situation. Since §551A.4 is silent with respect to below cost combination sales by manufacturers, it should not be construed as preventing "buy one — get one free" promotions. *See* 1958 Op. Att'y Gen. 23. The cost of the cigarettes which are sold is controlled by §551A.2(8). The cigarettees sold under the "buy one" portion of the promotion will have a cost of the lower of the true invoice or the lowest replacement cost. The cigarettes sold under the "get one free" portion of the promotion and which were obtained free of charge will have no invoice cost to the retailer.

Combination sales pursuant to 551A.4 wherein free cigarettes are given away with the purchase of cigarettes are not in violation of chapters 98 and 551A.

Your fourth question presents a request for an opinion as to whether an in-state person licensed as a distributor or retailer may offer the same promotion found proper in your third question previously answered.

Section 551A.4 is explicit in its terms and prohibits only those combination sales which are below the total combined cost of the goods as determined by §551A.2(8). 1958 Op. Att'y Gen. 23. Any distributor or retailer who sells below the minimum selling price required by chapter 551A is in violation of that chapter.

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[1] The same rationale will not apply in the situations presented in questions one and two. The distribution of free cigarettes to the public is not a sale for purposes of §551A.4. Section 98.39 is controlling in those situations.

The fifth and sixth questions request an opinion on replacement cigarettes shipped directly by the manufacturer to the consumer in Iowa. As long as chapter 98 is not violated and the manufacturer meets the notification requirements of the Jenkins Act, the manufacturer will not have violated chapters 98 and 551A. 15 U.S.C. §§375, 376, 377 and 378 (1976). It would additionally be proper for the department to allow the manufacturer to pay the tax required by §98.6(2) directly to the department providing payment of the tax is evidenced as required by §98.6(3).

Therefore, it is the opinion of this office that a manufacturer's distribution of free cigarettes to the public may only occur pursuant to §98.39, The Code 1981, that combination sales, where free cigarettes are given to the purchaser of cigarettes, are permitted by §551A.4, The Code 1981, and that manufacturers may send replacement cigarettes directly to the consumer provided state and federal requirements are met.

July 29, 1982

CIVIL RIGHTS: Standing to File Complaint. Sections 601A.2(2), 601A.15(1), 601A.19, The Code 1981. Section 601A.15(1) does not grant standing to local civil rights agencies or their officials to file complaints with the state commission alleging injuries to third parties. (Nichols to Reis, 7/29/82) #82-7-11(L)

July 29, 1981

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Dental Examiners: Constitutional Law. U.S. Const., Amend. 14; Iowa Const., art. I, §6; §§147.2, 147.12, 147.14(4), 147.36, 147.76, Iowa Code 1981, 320 I.A.C. §11.2(1)(2a) and (3). The practice of the Board of Dental Examiners of denying graduates of foreign dental colleges the opportunity to take the Iowa dental examination would likely be held constitutional on its face. Because the classification does not on its face distinguish between citizens and aliens, "strict scrutiny" would not apply. The classification would likely survive the traditional rational basis test for determining equal protection challenges. However, were it shown that the practice, although neutral on its face, was intended to discriminate against aliens, an equal protection violation would be established. Intent to discriminate is a fact question which cannot be resolved in an opinion of the attorney general, but only by a court. (Schantz to Doderer, 7/29/82) #82-7-12(L)

July 30, 1982

COUNTIES; CONDEMNATION AUTHORITY: Iowa Code §331.304(8) (Supp. 1981), Iowa Code §§471.4(1), 306.19, 306.27, 306.28-306.37. A county has no inherent authority to condemn a right-of-way for a road across state-owned property and the legislature has made no express or necessarily implied grant of such power. A county, therefore, has no authority to condemn a right-of-way across state-owned property. (Kniep to Wilson, Director, State Conservation Commission, 7/30/82) #82-7-13(L)

AUGUST 1982

August 3, 1982

ENVIRONMENTAL QUALITY COMMISSION: Rulemaking authority; anaerobic lagoons; sections 455B.10, 455B.12, and 455B.13, The Code 1981. 1982 Session, 69th G.A., S.F. 2243. The Environmental Quality Commission may adopt rules setting limits on the maximum sulfate content of the water supply for an anaerobic lagoon, except in regard to industrial anaerobic lagoons constructed before February 22, 1979. (Norby to Running, State Representative, 8/3/82) #82-8-1(L)

August 6, 1982

GAMBLING: Qualified Organizations; Political Fund Raising — §§4.1(13), 43.2, 43.100, 43.111, The Code 1981, chapter 99B. The Code 1981, as amended by 1981 Session 69th G.A., ch. 44; 730 I.A.C. §§91.6(1)(j)(2) and 94.1. A political candidate or campaign organization is not eligible for a qualified organization gambling permit and, therefore, can *not* legitimately conduct any games, including bingo, for the candidate's benefit. A political party or qualifying nonparty political organization is eligible for such license and may conduct games. Bingo games held under a two-year license may not be conducted more than fourteen times per month, three times per week, or four consecutive hours at a time. (Richards to Egenes, State Representative, 8/6/82) #82-8-2

The Honorable Sonja Egenes, State Representative: You have requested an opinion of the attorney general regarding the legal restrictions on gambling for political fund raising. You ask the following specific questions:

1. Is it legal for a political candidate to hold a bingo game for his/her own benefit?

2. If the candidate cannot hold a bingo game, can a county central committee and/or auxiliary organization hold games for the benefit of political candidates?

3. How many bingo games can a political group sponsor during the time period for which a gambling license is valid?

Although your first and second questions are limited to the game of bingo, our responses thereto apply equally to other games of chance and to games of skill and raffles conducted by the proper gambling licensee.

The proper gambling licensee allowed to conduct such events is the qualified organization, provided for in section 99B.7, The Code 1981, as amended by 1981 Session, 69th G.A., chapter 44. A qualified organization is "any licensed *person* who dedicates the net receipts of a game of skill, game of chance or raffle..." "to educational, civic, public, charitable, patriotic or religious uses in this state....." Sections 99B.1(10) and 99B.7(3)(b), The Code 1981 [emphasis added]. Prior to the 1981 amendments, a qualified organization gambling license could issue to any

"individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." Section 4.1(13), The Code 1981 (defining the word "person"). Thus, prior to July 1, a qualified organization license could issue to a political candidate or campaign organization. However, this is no longer the case. According to section 99B.7(1), The Code 1981, as amended by 1981 Session, 69th G.A., ch. 44, §9, a person or organization may be issued a license thereunder only if it "can show to the satisfaction of the department (of revenue) that it is eligible for exemption from federal income taxation under either section 501(c)(3) (tax exemption granted to corporations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes), 501(c)(5) (tax exemption granted to labor, agricultual or horticultural organizations), 501(c)(6) (tax exemption granted to business leagues, chambers of commerce, or boards of trade), 501(c)(10) (tax exemption granted to domestic fraternal societies) or 501(c)(19) (tax exemption granted to war veterans' organizations or posts) of the Internal Revenue Code,....." Thus, a qualified organization license can *not* now be issued to a political candidate or campaign organization.

Section 9 of chapter 44 does go on, however, to provide eligibility to certain political interests. The last sentence of that section states: "However, this paragraph does not apply to a political party as defined in section 43.2 or to a nonparty political organization that has qualified to place a candidate as its nominee for statewide office pursuant to chapter 44." A political party is defined in that section as "a party which, at the last preceding general election, cast for its candidate for president of the United States or for governor, as the case may be, at least two percent of the total votes cast for all candidates for that office at that election." A political party is, in turn, composed of a state central committee, county central committees, and party auxiliary bodies. Sections 43.100 and 43.111, The Code 1981. Upon consideration, it is our opinion that a political party's state central committee and its county central committees would be eligible to make application for a qualified organization gambling license as within the political party exception of chapter 44, section 9. We feel that the law presently does not extend the same eligibility directly to a political party's auxiliary bodies. The state and county central committees are the steering bodies of a political party-organizing and presiding over its caucuses and conventions, promoting the election of its nominated candidates, and generally overseeing its day-to-day business and interest. The state central committees are required by law to file status statements and reports with the state commissioner of elections, the secretary of state; the county committees must similarly file with the state commissioner and also with the county commissioner of elections, the county auditor. Sections 43.100 and 43.111, The Code 1981. In fact, the department of revenue requires the applying political parties and organizations to "attach to their (gambling license) application verification of their status from the secretary of state." 730 I.A.C. §91.6(1)(j)(2).

A political party's auxiliary bodies do not serve the same functions as its state and county central committees. They are, indeed, support and assistance groups composed of a party's registered members. But we do not believe they constitute a "political party" within the meaning of section 43.2 and the exception of section 99B.7(1) as amended by chapter 44, section 9. This is not to suggest that they are prohibited from attempting to make application for a gambling license under some 501(c) eligibility status detailed above. Nor do we mean to imply that such auxiliary organizations are barred from providing the *volunteers* to help the gambling licensees in conducting their fund-raising ventures.

Having clarified the eligibility status, we turn next to the "use" issues raised in your first and second questions. In short, you ask whether the distribution of gambling net receipts to a particular candidate constitutes a legal use of those

funds under section 99B.7(3)(b). That section does provide that "'[p]ublic uses' specifically includes dedication of net receipts to political parties as defined in section 43.2." This is given additional content in a revenue rule: "Gambling receipts earned or received by a political party shall *not* be used to benefit an individual candidate. The gambling receipts may be used to benefit the political party as an organization or to benefit an entire slate of candidates in the general election." 730 I.A.C. §94.1 [emphasis added].

We construe this rule somewhat narrowly to avoid questions concerning the authority of the Department of Revenue to promulgate it. We believe the department has the authority by implication to implement the legislative decision reflected in the recent change in the statute *not* to treat political candidates as "qualified organizations." Thus, we believe the department has the authority to prohibit a political party from conducting bingo games in the *name* of an individual candidate or otherwise to suggest before or during the game that the proceeds have been earmarked for a particular candidate. However, we doubt seriously whether the legislature intended to authorize the Department of Revenue to regulate the internal affairs of a political party. Thus, we do not construe the second sentence of the rule as imposing any strict requirements on the manner in which the political party expends the proceeds. Rather, we construe the second sentence as merely placing an interpretative gloss on the first sentence by underscoring the requirement of good faith upon the party to use the proceeds for *party* purposes rather than as a conduit to a particular candidate. Thus, this rule does not require that a political party distribute bingo receipts according to any rigid formula such as equal amounts to all candidates. Nor does this rule restrict in any manner the expenditure of funds raised by a political party by other means.

Your third question deals with the frequency with which a political party may conduct the game of bingo. It is answered directly in section 99B.7(1)(c), The Code 1981, as amended by 1981 Session, 69th G.A., chapter 44, section 8, which provides in relevant part:

> A bingo occasion shall not last for longer than four consecutive hours. A qualified organization shall not hold more than fourteen bingo occasions per month. Bingo occasions held under a limited license shall not be counted in determining whether a qualified organization has conducted more than fourteen bingo occasions per month, nor shall bingo occasions held under a limited license be limited to four consecutive hours. With the exception of a limited license bingo, no more than three bingo occasions per week shall be held within a structure or building and only one person licensed to conduct games under this section may hold bingo occasions within a structure or building. However, a qualified organization whose gross receipts for the previous four quarters were three thousand five hundred dollars or less may hold more than fourteen bingo occasions per month and more than three bingo occasions per week within the same structure or building, and bingo occasions conducted by such a qualified organization may last for longer than four consecutive hours.

These limitations on the frequency of conducting the game of bingo allow for no exception due to eligibility status; political parties licensed under section 99B.7 are definitely bound by the foregoing limits. The limited license exception in amended section 99B.7(1)(c) refers to the limited license valid only "during a specified period of fourteen consecutive calendar days." §99B.7(3)(a), The Code 1981. The $3500 gross receipts exception applies only on a showing that the qualified organization's gross receipts *from all games* conducted during the previous four quarters did not exceed that amount.

In summary, a political candidate or campaign organization is *not* eligible for a qualified organization gambling license and, therefore, can *not* conduct any games, including bingo, for the candidate's benefit. A political party or qualifying nonparty political organization would be eligible for such license and could legitimately conduct games, including bingo. The net receipts from such games may not be used to benefit an individual candidate; a party is required to use the proceeds in good faith for *party* purposes and not as a conduit to a particular candidate. A properly licensed political organization conducting bingo games under a two-year license (section 99B.2(1), The Code 1981, as amended by 1981 Session, 69th G.A., ch. 44, §4) is limited in the frequency with which it conducts that game. The game of bingo may *not* be conducted more than fourteen times a month, more than three times a week, or more than four consecutive hours at a time.

August 6, 1982

COUNTIES: Plats; Rural Subdivisions; Dedication; Home Rule; Iowa Code §§306.21, 409.1, 409.12, 409.13, 409.18—409.26; 441.65—441.71; 558.65 (1981); Iowa Code §331.301 (Supp. 1981). The vacation provisions of chapter 409 do not apply to rural plats; instead these are governed by chapter 306 and the common law of dedication. A county can adopt an ordinance authorizing the vacation of plats only so long as such is not inconsistent with state statutes and the common law. (Osenbaugh to Burk, Assistant County Attorney, 8/6/82) #82-8-3(L)

August 10, 1982

PREFERENCE LAW; COAL; REGENTS: Sections 73.6, 73.7, The Code 1981; I.A.C. §720—8.1(1). The Iowa preference law was not applicable to the award of the 1982—83 University of Iowa coal contract because use of Iowa coal would have materially increased the cost of coal. Governmental bodies are vested with broad discretion in awarding contracts. We have concluded that the University did not abuse its discretion in awarding the contract to the lowest bidder. The low bidder was held to its bid price, the time, place and manner of delivery, and within the other specifications such as ash, sulphur and moisture content of the coal which are the "material" requirements of the contract and of the invitation-to-bid documents. In our opinion, the specific mine was an irregularity which the University could waive under the "waive all irregularities" clause. (Fleming to Gallagher, State Senator and Van Maanen, State Representative, 8/10/82) #82-8-4

Senator James V. Gallagher; Representative Harold Van Maanen: We have consolidated your requests for our opinion concerning the award of the coal contract for the year July 1, 1982, to June 30, 1983, by the University of Iowa. The questions you have presented for our consideration are as follows:

1. Whether the award of this contract for coal is affected by the Iowa preference laws, chapters 72 and 73, The Code 1981.

2. Were the proper procedures followed by the University in the bidding process?

3. Was it an irregularity to allow the low bidder to change suppliers after the bids had been opened?

We should note at the outset that we have been somewhat concerned about the form of the requests and the context in which they arise. The request, as framed, is primarily "backward looking," in that they ask us to resolve a past dispute. The principal function of attorney general's opinions, of course, is to provide legal advice for state officials to guide their *future conduct.* It is for the courts and appropriate administrative agencies to sort out rights and duties and to provide remedies for perceived grievances arising from past events.

Moreover, the opinion requests are not accompanied by a statement of facts surrounding the award of the coal contract. Although this office participates in investigations in connection with our litigation functions, we do not and should not make findings concerning disputed issues of fact in connection with the preparation of official opinions. Through the cooperation of the Board of Regents, the Office of Citizens' Aide/Ombudsman and others, however we are satisfied that we have obtained sufficient background from official documents and correspondence to address the legal questions you pose and believe we can safely assume that the material facts are not in dispute. And, because coal bidding is an ongoing process in which the Regents have expressed an interest in guidance and because the General Assembly may wish to consider changing the law in this area, the issues presented are sufficiently "future-oriented" to warrant an official opinion.

Having reviewed what we believe to be the material facts which we summarize below and having applied what we believe to be relevant principles of law to those facts, we conclude that the University of Iowa did not abuse its discretion in awarding the 1982—83 coal contract.

I. FACTUAL BACKGROUND

A. *The Nature of Coal*

Coal is not a fungible commodity. The characteristics of coal vary from one state to another and from one coal mine to another. The characteristics of coal also vary from truck, railroad car, or barge load to another, even where those loads are obtained from the same mine.

The university purchases coal to use in its power plant, i.e., to produce energy. The energy-producing characteristic of coal is measured in terms of the British Thermal Unit (BTU) and the energy potential, BTU's, of coal varies greatly. Therefore, the actual price of coal in this circumstance is always stated in terms of a formula that measures the BTU's as well as the tonnage of the coal.

In addition to the energy-producing potential, the moisture content, the ash content, the sulfur content, the ash softening temperature, whether it is to be washed, and the size of the coal fragments to be delivered to the buyer, are crucial variables in the purchase and consumption of coal. We now turn to the specific situation that gave rise to your questions.

B. *The Notice to Bidders and the Specifications*

University officials caused a notice to potential suppliers of coal to be published in two newspapers. The notice requested sealed proposals for supplying 110,000 tons of washed stoker coal and stated, *inter alia*, that bids would be received up to 2:00 p.m. on May 21, 1982. Notice was also given that the copies of the specifications and other contract documents were available upon request. (Notice to Coal Suppliers).

The Instruction to Bidders and the Specifications is a more detailed document. In the instruction-to-bidders section, the University reserved the right "to reject any or all bids and to waive all irregularities." (Instructions and Specifications, page 2). The instuction section also contained a request for equal employment opportunity statements, notice of the preference for coal produced in Iowa, and the requirements of bid bonds from all bidders and a performance bond from the successful bidder.

The specifications may be summarized, in pertinent part, as follows: Estimated 110,000 tons of two thousand pounds with the quantity subject to variation in response to federal energy usage restrictions or seasonal demands. The right to purchase 10% of coal needs elsewhere in an emergency was reserved. Other specifications are: washed stoker coal of sizes: 1" x ¼", 1¼" x ¼", 1½" x 1¼", all "dry basis" by weight. The coal is to be freshly mined, total sulfur content to be not less than 1.5% or more than 3.5%, all "dry basis" by weight. Ash content shall not exceed 12% by weight; the heat content shall be no lower than 12,000 BTU/lb. "dry basis" and the ash softening temperature is to be no lower than 2,000° F. The manner and schedule of shipping was included. The university reserved the right to reject shipments of coal where the requirements with respect to moisture, ash, or sulfur content or sizing limits were exceeded. The contract award formula was based on bid price per ton and the guaranteed BTU's. The specification included a provision that a premium would be paid for coal where the coal delivered was more than 1% over the guaranteed BTU content and a penalty would be assessed when the BTU content was more than 1% below the guarantee. To implement this system, the specification also included provision for sampling. The only reference to mines was included provision for sampling. The only reference to mines was an expression of a preference for "100% shipment from one mine as may appear proper." (Instructions and Specifications, p. 8).

The invitation to bid on the university coal contract for 1982—1983 produced the following result:

Bidder	Price per Mil. BTU's	Estimated Contract Value
ConAgra Commodities Minneapolis, MN	1.7572	4,647,794
Hiller Fuels, Inc. Dearborn Heights, MI	1.7966	4,752,007
The C. Reiss Coal Company Sheboygan, WI	1.8856	4,987,412
Roberts Bros. Coal Co., Inc. Mortons Gap, KY	1.8418	

(Bid would not have been considered, only bid 55,000 tons)

Mineral Resource, Inc. St. Louis, MO	1.9401	5,131,565
Old Ben Coal Company Chicago, IL	1.9571	5,176,530
Iowa Coal Sales Corporation Centerville, IA	1.9833	5,245,828
Peabody Coal Company St. Louis, MO	2.0179	5,337,345
Freeman United Coal Mining Company Chicago, IL 80,0000 tons 73% 1,930,850 BTU's	2.0889	4,033,353
30,000 tons 27% 714,150 BTU's	1.9968	1,426,015

(Summary provided by Ray B. Mossman, Business Manager and Treasurer, University of Iowa)

These bids were submitted on a proposal form that required that various information, including moisture, ash and sulfur content and other specifications as summarized above be provided. The proposal form also sought indentification of a mine or mines from which the bidder intended to provide the coal.

ConAgra was the low bidder. As had been the custom in the past, the university sent representatives, in this instance John Houck and Marshall Stewart, to visit the mine and inspect the facilities on May 28 and 29, 1982. Houck and Stewart made the determination that the contract specifications could not be satisfied by the Packer mine, the mine listed by ConAgra on its proposal form. Houck and Stewart, on June 1 and 2, 1982, visited the mine listed by Hiller Fuels, Inc., the second low bidder. The mine, like the Packer mine, was not in operation and did not have a washing facility and it was determined that the coal would not meet the specifications. (Letter of Ray B. Mossman to Robert McMurray, June 17, 1982).

University officials notified ConAgra that the Packer mine was not satisfactory. Thereafter, ConAgra offered to supply coal to meet the specifications from the Cean-Glo mine and supplied data to show that coal from the Cean-Glo mine would meet the specifications outlined above. Houck and Stewart visited that mine on June 14 and took samples of coal. They found "an operating mine with adequate reserves" which has a "preparation facility and washing plant at the mine location. The dock facility for loading barges is very adequate." (Letter of Ray Mossman to Robert McMurray, June 17, 1982, p. 2). Mossman stated that ConAgra had agreed to furnish coal from the Cean-Glo mine at the bid price of 1.7572 per million BTU. Mossman recommended that the ConAgra bid be accepted and that the source of the coal would be the Cean-Glo mine in Martin County, Indiana, rather than the Packer mine in Martin County, Indiana. (*Id.* letter, pp. 2—3).

The contract was awarded at the bid price; ConAgra supplied a performance bond and met other requirements. The other bidders were notified of the decision, including the substitution of the Cean-Glo mine for the Packer mine.

II. Application of Relevant Legal Principles

The board of regents institutions are subject to the requirements of §262.34, The Code 1981, in letting contracts for construction, repairs, or improvement of buildings and grounds. Other university contracts are let pursuant to rules of the regents found in IAC 720—8.1(262) and 8.5(262). In addition, all governmental units are subject to the requirements of the Iowa preference laws, chapters 72 and 73, The Code 1981.

A. *The Iowa Preference Law*

Section 73.7, The Code 1981, requires that a governmental unit request bids for coal by advertising and the university did so. That Code section also provides that contracts for the purchase of coal "shall be let to the *lowest responsible bidder.*" §73.3, The Code 1981. The specific statute that imposes a preference for Iowa coal is as follows:

> *It shall be unlawful for an . . . governing body of the state . . . to purchase or use any coal, except that mined or produced within the state* by producers who are, at the time such coal is purchased and produced, complying with the workers' compensation and mining laws of the state. *The provisions of this section shall not be applicable if* coal produced within the state cannot be procured of a quantity or quality reasonably suited to the needs of such purchaser, nor if the equipment now installed is not reasonably adapted to the use of coal produced within the state, nor if *the use of coal produced within the state would materially* lessen the efficiency or *increase the cost of operating such purchaser's heating or power plant, . . .*

Section 73.6, The Code 1981. [Emphasis supplied.]

Thus, the coal preference statute does not establish an absolute preference for the use of Iowa coal by Iowa governmental units. In the circumstances that gave rise to your questions, the bid from Iowa Coal Sales Corp. was the seventh lowest bid. The gross difference between the low bid and the Iowa Coal Sales Corp. bid was $598,034. The preference law expressly provides that the Code section is not applicable if use of Iowa Coal would materially increase the cost of operating the purchaser's heating or power plant.

The university may experience extra costs by accepting the ConAgra bid because of the need to receive coal in advance and store it due to the problems associated with shipping by barge on the Mississippi during the winter months. Those extra costs are estimated at $108,000. In other words, the ConAgra bid was almost $500,000 lower than that of Iowa Coal Sales Corp. when estimated "extra costs" are added to the ConAgra bid.

Whether we rely on Webster's Dictionary, Black's Law Dictionary, or the cases, it is certain that a difference of from $490,000 to $600,000, i.e., in excess of 10%, in the cost of coal for a governmental unit is a "material increase in cost" and therefore §73.6 is not applicable in this circumstance.

We take note of an earlier opinion issued by this office stating that a purchasing board:

> may exercise its discretion and if it decides that the benefits arising from the purchase of Iowa coal justifies so doing, Iowa coal may be purchased even though it is not found to be offered in the lowest bid.
>
> 1940 Iowa Att'y.Gen. p. 330. That opinion did not indicate if there was a limit to that discretion to favor Iowa coal where it is more expensive than that of other bidders. Cases from other jurisdictions indicate that a preference for a local product or service should not be indulged except where the bids are essentially equal as to quality and price. *See, e.g., Wampler v. Goldschmidt*, 486 F.Supp. 1130 (D. Minn. 1980). In that case, the court ruled that the Minnesota statute established a "qualified preference" for American materials. Where all factors are substantially equal, preference must be given to materials manufactured in the United States. The court upheld the Minnesota Highway Administrator's decision to accept a Japanese bid to supply steel which was 13% lower than that of an American supplier. *Id.* 486 F.Supp. at 1138—1139. *See also, King v. Alaska State Housing Authority*, 512 P.2d 887 (Alaska 1973), in which former owners tried to assert a "preference for former owners" when land acquired by the government for an urban renewal project was sold. The court ruled that under the preference regulations "former owners receive this limited preference *only when their proposals equal all others* with respect to criteria set forth in the Redevelopers Portfolio." *Id.* at 891. [Emphasis added.]

In this circumstance, we are not required to identify the point at which the preference law requires the purchase of Iowa coal. The difference between the low bid and the bid of the Iowa Coal Sales Corp. is sufficiently great to place this circumstance well within the exception of the statute. Moreover, we believe the difference between the third low bid and that of the Iowa coal supplier would not require the application of the preference statute if the contract had been awarded to the third lowest bidder.

In sum, chapter 73 of the Code creates a qualified preference for Iowa coal and the university was not required to reject the six lower bidders and award the 1982—83 coal contract to the Iowa supplier at a material increase in cost.

B. *Abuse of Discretion*

You have asked whether proper procedures were followed in the bidding process and whether it was an irregularity to allow the low bidder to change suppliers after the bids had been opened. Having reviewed the circumstances that gave rise to your questions and the relevant legal principles, we conclude that the legal issue presented by your inquiry is as follows:

> Whether the University of Iowa abused its discretion in awarding the 1982—83 coal contract to the low bidder after allowing the low bidder to substitute the Cean-Glo mine for the Packer mine.

In our opinion, the university did not abuse its discretion in awarding the contract.

1. *The Power to Contract and the Purpose of Competitive Bidding.*

The right of government to purchase goods and services to meet its needs is well-established. State government, like the federal government, possesses the power to determine with whom it will deal, and to fix the terms and conditions

upon which it will make needed purchases. *Coyne-Delaney Co., Inc. v. Capital Development Board of Illinois*, 616 F.2d 341, 342 (7th Cir. 1980). *See also, Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

The constitution of Iowa grants to the General Assembly the power to provide for the educational interest of the state as it shall decide is best and proper. *See* Iowa Const. Art. IX, sec. 15. Acting under that grant of power, the legislature has created the board of regents, chapter 262, The Code 1981. The regents' duties include the power to makes rules, manage and control property belonging to the institutions under it, and perform "all other acts necessary and proper." §262.9(3), (4) and (11), The Code 1981. The chief business officer for each regent institution is authorized to purchase coal "on the basis of the low competitive bid or quotation and in accordance with the Code and in accordance with specifications..." IAC §720—8.5(262). Thus Ray B. Mossman, Business Manager and Treasurer of the University of Iowa, is the individual vested with power to award contracts for the purchase of coal. Duane A. Nollsch, Director of the University Physical Plant, is the official responsible for implementing the details of the coal purchasing process.

The regents' rules as well as §73.7, The Code 1981, require that coal be purchased through the use of a competitive bidding process. The purpose for using such a process has been stated in various ways but all statements turn on the idea that such statutes or regulations are enacted for the purpose of enabling the governmental body "to secure the best bargin for the least money." *Iowa Electric Light & Power Co. v. Incorporated Town of Grand Junction*, 216 Iowa 1301, 1303, 250 N.W. 136, 137 (1933). Such statutes are construed with sole reference to the public good. *Trap Rock Industries v. Kohl*, 59 N.J. 471, 479, 284 A.2d 161 (1971).

Other statements of the purpose of competitive bidding include the following: *Owen of Georgia, Inc. v Shelby County*, 648 F.2d 1084, 1091 (6th Cir. 1981) ("It is beyond cavil that the primary objective is to promote the public interest by obtaining the lowest possible price that competition among responsible bidders can secure"). McQuillin, *Municipal Corporation*, Vol. 10, Sec. 29.29, p. 302 (3rd Ed. Rev.) ("The provisions... are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." 64 Am.Jur.2d, *Public Works and Contracts*, §30, p. 882. (The purpose of such statutes "is to secure competitive bidding on the part of intending contractors,and to prevent favoritism, collusion, fraud in the letting of such contracts to the detriment of the public"). 72 C.J.S. Supp., *Public Contracts*, §8, p. 183—184. ("Competitive bidding statutes are primarily intended for the benefit of the public rather than for the benefit or enrichment of bidders, and consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public.")

In this context, the purpose of the use of competitive bidding in the purchase of coal for the university was to acquire the needed coal at the lowest price possible for the benefit of the public, i.e., taxpayers and not for the benefit of the bidder or bidders.

2. *Procedural Regularity and Fairness to Bidders*

Whether stated as part of the purpose of competitive bidding or as a secondary objective, it is clear that fairness to bidders is a requirement in the competitive

process. *See* C.J.S. Supp., *supra.* Fairness to bidders is assured by various means including the preparation of specifications that include sufficient detail to permit bidders to prepare their bids on a particular proposal. Opening all bids at the time and the use of "sealed bids," *see* §§72.3 and .4, The Code 1981, are other means for assuring fairness to bidders. *See also, McQuillin, supra,* §29.53; 64 Am.Jur.2d, *Public Works and Contracts,* §§50—55; 72 C.J.S. Supp., *Public Contracts,* §§10—11.

All of these requirements are directed toward furtherance of the purpose of the public body purchasing goods and services at the lowest possible price. Courts have been reluctant to interfere with the orderly procurement of supplies by the executive branch of government. *See Perkins v. Lukens Steel Co., supra,* 310 U.S. at 127, 60 S.Ct. 869, 84 L.Ed. 1108 (Executive branch has an "adequate range of discretion free from vexations and dilatory restraints at the suits of prospective or potential sellers"). *Schiavone Const. Co., Inc. v. Samowitz,* 451 F.Supp. 29 (S.D. N.Y. 1978), *aff.,* 578 F.2d 1330.

Furthermore, the general rule is that "in the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not have acted illegally, but regularly and in a lawful manner." *Wells and Wells, Inc. v. United States,* 269 F.2d 412, 415 (8th Cir. 1959). *See also Anstey v. Iowa State Commerce Commission,* 292 N.W.2d 380, 390 (Iowa 1980); *Johnson v. Board of Adjustment,* 239 N.W.2d 873, 887 (Iowa 1976); 2 Davis, *Administrative Law Treatise,* §11.06 at 63 (1958). This presumption of regularity is applicable in the context of the awarding of contracts. *See Robinson v. City of Saginaw,* 255 N.W. 396, 398 (Mich. 1934) ("The court will indulge the presumption that the authorities acted in good faith in awarding the contract."); *Schiavone Const. Co., Inc. v. Samowitz,* 451 F.Supp. 29, 31 (S.D. N.Y. 1978) (Federal court will overturn agency's purchasing decision only if it is without a rational basis).

3. *Agency Discretion*

The courts in various jurisdictions and other authorities we have reviewed concur in the view that contracting officials exercise broad discretion in the awarding of contracts. That point is well summarized as follows:

> Public officers in awarding contracts for the construction of public works, the purchase or supplying of materials, etc., perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts, in the absence of fraud or a palpable abuse of that discretion ordinarily will not interfere with their decisions as to the details of entering into a contract, or the acceptance of bids therefor, so long as they conform to the requirements of controlling constitutional or statutory provisions, ordinances, or other governing legislative requirements. In the absence of fraud, a determination by the public authorities whether a bidder has complied with the conditions imposed by the advertisement for bid is final and conclusive and cannot be reviewed by the courts, although they will interfere with the action of officers in the award of a contract where there is fraud or gross abuse of discretion, particularly with regard to the qualifications of those whose bids are low in price.
>
> It is clear that what, if any, discretion is given awarding officials by a particular statute must be determined from the statute as a whole. Even though a board has broad discretion to determine the qualifications of bidders and let the contract accordingly, it may not act arbitrarily, and they must conform to statutory requirements governing the awarding of public contracts. They cannot refuse to award a contract merely upon the

> ground that the bidder refuses to comply with an illegal requirement as for example, because the bidder refused to agree to the employment of union labor on a public improvement. Reason must govern the acts of such officials, and courts will not hesitate to interfere when it is clearly made to appear that they have acted arbitrarily, dishonestly, or beyond the reasonable limits of the discretion conferred upon them.

64 Am.Jur.2d, *Public Works and Contracts*, §64, p. 918—919 (footnotes and citations omitted).

We have considered the question you have presented with the above principles in mind. The Iowa Supreme Court has defined discretion and the abuse thereof as follows:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias....

State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975). We turn now to the particular circumstances to determine whether the university abused its discretion in awarding the 1982—83 coal contract to the bidder after allowing the substitution of the Cean-Glo mine for the Packer mine listed on the proposal form.

4. *Waiver of Irregularities.*

Bids from nine suppliers were received by the university on or before May 21, 1982, and opened pursuant to the notice to bidders. The bids were tabulated and it was determined that the low bidder was ConAgra Commodities of Minneapolis, Minnesota. *See* summary chart above. At that point, two employees of the university went to visit the mine listed on the ConAgra proposal form — the Packer mine, Martin County, Indiana. Such an investigation is in keeping with the obligation of government officials to award contracts to the "lowest responsible bidder." *See e.g.*, IAC §720—8.1(1), first paragraph, *McQuillin, supra*, §29.73.

As the court observed in *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d at 1095, n. 12, by submitting a bid a bidder obtains a unique relationship with the government unit.[1] The circumstances that led to your request for our opinion

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[1] Much of the litigation pertaining to the award of bids involves disputes over whether there was compliance with the specifications of the bid proposal. The Iowa court has adopted a standard of "substantial compliance" in reviewing such disputes. *See e.g., Greaves v. City of Villisca*, 221 Iowa 776, 779, 266 N.W. 205, 806 (1936), and the cases cited therein. In applying the "substantial compliance" standard in the context of the broad discretion exercised by the public body, a decision by the public body that the bidder

arises in the context of a preliminary determination that the apparent low bidder was not a "responsible bidder." The Coal Bid Proposal reserved the right to "waive all irregularities." (Instructions to Bidders and Specifications, p. 2). Business manager Roy Mossman has stated that he based his decision to allow ConAgra to change the mine location from which the coal is to be provided on the "waive all irregularities" clause. (Letter of July 19, 1982, from Mossman to William B. Angrick, II).[2] Applying the "abuse of discretion" standard set out above to these circumstances, we conclude that the university did not abuse its discretion by allowing ConAgra to substitute the Cean-Glo mine for the Packer mine under the "waive all irregularities" clause of the Coal Proposal Document.

We have reviewed the specifications in detail. The purpose of the contract is to obtain coal of given specifications at the lowest price and not to obtain coal from a particular mine. The specifications do not include a provision that if coal is supplied from a mine other than that listed on the proposal form, sanctions will be imposed on the seller. Instead, the Coal Proposal Document provides that the contract can be cancelled by the university if the awardee fails "to deliver coal of the minimum grade guaranteed, at the time and in the quantities stipulated in the contract award." (Instructions and Specifications, p. 7.) In addition, the university reserved the right to review the contract and to act to correct or cancel the contract "if the coal delivered varies from that guaranteed or tested so as to result in the coal not being suitable to meet the burning conditions specified." (Instructions and Specifications, p. 6.) In other words, the crucial concern of the purchaser is the quality, quantity, and timeliness of delivery of the coal and not the specific mine from which it is obtained that gives cause for cancellation of the contract after it has been awarded.

An Alaska case in which an award of a contract to the best bidder was challenged is instructive. The successful bidder did not make a deposit with his bid because he erroneously believed he was not required to do so. *King v. Alaska State Housing Authority*, 512 P.2d 887 (Alaska 1973). The court noted that proposals for public contracts must substantially comply [the Iowa standard] with all requirements contained in the invitation for proposals. *Id.* at 892. The court stated:

> Consistent with this well established principle, courts hold that while a "material" variance from the invitation requires rejection of the proposal, a "minor" variance does not require rejection of the proposal. A variance is said to be material 'if it gives the bidder a substantial advantage over bidders, and thereby restricts or stifles competition.'

(Footnote, Cont'd.)

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has not complied with requirements will not be set aside, absent fraud or conspiracy. *See Menke v. Board of Education*, 211 N.W.2d 601, 608 (Iowa 1973). Applying those standards, courts also uphold decisions by public bodies that a bid be accepted where the bid differed from the specification. *See e.g., Pascoe v. Barlum*, 225 N.W. 506 (Mich. 1929).

[2] A copy of this letter was provided to this office by the University of Iowa. *See* chapter 601G, Citizens' Aide, The Code 1981.

Id. While ConAgra was allowed to substitute a different mine, it was held to the bid price, the time, place and manner of delivery, and within the other specifications such as ash, sulfur, and moisture content of the coal which we believe are the "material" requirements of the Coal Proposal Document. Presumably, in designating the Packer mine, ConAgra had selected the mine which was most advantageous to it. We also presume that other bidders designated the mine or mines that would have been most advantageous to them. The Cean-Glo mine was substituted after the university refused to accept the Packer mine as the source of coal. On the facts we have received, there is no reason to believe ConAgra will benefit from the substitution of the Cean-Glo mine. If the substitution had been made in the first instance at ConAgra's request and for its benefit, rather than in response to the university's dissatisfaction with the Packer mine, we would have a very different case. We conclude that the substitution of the mine did not give a competitive advantage to ConAgra and therefore the substitution was a waivable irregularity.

The view that substitution of the mine was a waivable irregularity is supported further by the fact that where a proposal form or bid lists more than one mine, information concerning the percentage of coal to be supplied from each mine listed is not requested or supplied.

Inasmuch as the primary purpose of competitive bidding is to permit the governing body to obtain the best bargin at the lowest price possible, we conclude that it was not an abuse of discretion for the university to allow ConAgra to substitute a mine and award ConAgra the coal contract, thereby permitting the university to take advantage of the lowest bid submitted. But that is not our only reason for believing the university did not abuse its discretion.

5. *The rights of the lowest bidder.*

For obvious reasons, lawsuits are not brought by successful low bidders. Moreover, because courts are limited in the remedies that may be granted to unsuccessful bidders even if they win lawsuits against government bodies that have awarded contracts to others, few cases are brought by other bidders after an award to a low bidder. For discussion of remedies in public contract cases and the cases cited therein *see McQuillin, Municipal Corporations*, Vol. 10, §§29.83—90; 72 C.J.S. Supp., *Public Contracts*, §17 (Rights and remedies as to bids and awards); 64 Am.Jur.2d, *Public Works and Contracts*, §§82—89 (Rights, remedies, and liabilities of bidders).

The case brought by low bidders who were *not* awarded a contract are much more helpful in this situation because it is clear that after a governing body makes a preliminary determination that the low bidder is not a "responsible" bidder, such a bidder must be given an opportunity to rebut that finding of non-responsibility. *See Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962—969 (D.C. Cir. 1980). Moreover, that right to rebut a finding of non-responsibility is based on the liberty interest guaranteed by the due process clause. *Id. See also Housing Authority of Opelousas, La. v. Pittman Const. Co.*, 264 F.2d 695, 703—705 (5th Cir. 1959). Thus, when bids in a public contract are opened and the lowest bidder is identified, the rights of the parties shift under the rule of the cases. At that point the contracting buyer must determine whether the low bidder is "responsible."

The relevant Iowa statutes and regulations direct the governing body to award contracts to the "lowest responsible bidder." *See* §73.7, The Code 1981, and IAC §720—8.1(1). Having identified ConAgra as the low bidder, university officials

visited the Packer mine and determined that it was unsatisfactory, i.e., ConAgra was not a "responsible" bidder.

Thereafter, ConAgra offered to substitute the Cean-Glo mine as the source of coal. ConAgra was able to demonstrate at that point that it could supply coal that met the specifications of the Coal Proposal Documents and at the price it had bid. We believe ConAgra demonstrated thereby that it was a "responsible" bidder and under the authority cited above it had a right to do so and therefore the university might well have been at risk had it failed to award the contract to ConAgra. For further discussion of the rights of the low bidder and the requirement that an award be made to the lowest responsible bidder *see Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1090-1094 (6th Cir. 1981); *Associated General Contractors of Calif. v. San Francisco Unified School District*, 616 F.2d 1381, 1385 (9th Cir.), *cert. den. sub. nom.*; *National Ass'n. of Minority Contractors v. Ass'n. of General Contractors*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980); *Funderberg Builders v. Abbeville City Memorial Hospital*, 467 F.Supp. 821, 824-25 (D.S.C. 1979).

In sum, ConAgra as the low bidder was allowed to demonstrate it was a "responsible" bidder by substituting a mine for that listed on the proposal form. We conclude that the rules of the cases cited above provide further reasons for our conclusion that the university did not abuse its discretion in awarding the 1982-83 coal contract to ConAgra.

While we have concluded that in this particular circumstance, there was not an abuse of discretion, a general policy of permitting bidders to substitute suppliers may give rise to an inappropriate practice called "bid shopping." Bid shopping tends to arise in the construction industry. *See e.g., Conduit and Foundation v. City of Philadelphia*, 401 A.2d 376 (Pa. Cmwlth. 1979), in which the low bidder listed alternative subcontractors. We note in connection with that case that Pennsylvania follows a "strict compliance with specifications" rule in contrast to the "substantial compliance" standard applicable in Iowa and many other jurisdictions. *See Nielson v. Womer*, 406 A.2d 1169, 1171 (Pa. Cmwlth. 1979) ("it is well settled that the specifications set forth in bidding document are mandatory and must be strictly followed for the bid to be valid."); *Hanover Area School Dist. v. Sarkision Bros., Inc.*, 514 F.Supp. 697, 702, (M.D. Pa. 1981).

As we have pointed out, it was for the university's benefit that a mine was substituted, thereby permitting the purchase of coal at the lowest price bid. To prevent "bid shopping" and similar disputes in the future, we believe that the university and the board of regents should revise the coal contract proposal forms to distinguish between specifications and information that is requested to permit the university to determine whether a bidder is "responsible." We express no view as to the need for review of proposal forms for other types of contracts.

CONCLUSION

It is our opinion that the Iowa preference law was not applicable to the award of the 1982-83 University of Iowa coal contract because use of Iowa coal would have materially increased the cost of coal.

Governmental bodies are vested with broad discretion in awarding contracts. We have concluded that the university did not abuse its discretion in awarding the contract to the lowest bidder after allowing ConAgra to substitute the Cean-Glo mine for the Packer mine. In supplying coal from the Cean-Glo mine, ConAgra was held to its bid price, the time, place and manner of delivery, and

within the other specifications such as ash, sulfur, and moisture content of the coal which are the "material" requirements of the contract and of the invitation-to-bid documents. In our opinion the specific mine was an irregularity which the university could waive under the "waive all irregularities" clause. To avoid future problems we recommend that the coal contract proposal forms be revised.

August 10, 1982

COUNTIES; COUNTY CONSERVATION BOARD: Iowa Code Chapter 111A (1981); Iowa Code §§111A.4, 327G.81, and 331.506 (1981). (1) It is not improper for the county conservation board to agree to offset property taxed due from the purchase price it agrees to pay for certain property, and then, as the owner of the property, to assume liability for those taxes; (2) the owner of a railroad right of way is responsible for maintaining and repairing county road overpass bridges located on that property, but the board of supervisors may assume responsibility for those repairs; (3) it is not improper for a county conservation board to use funds budgeted for property acquisition to purchase a piece of property other than that which it originally intended to purchase at the time the board's budget was submitted; and (4) the auditor's failure to sign a county conservation board warrant approved by the board of supervisors does not invalidate that warrant. (Weeg to Tieden, State Senator, 8/10/82) #82-8-5(L)

August 10, 1982

COUNTIES; COUNTY ATTORNEY; COUNTY CONSERVATION BOARD: Iowa Code §§111A.7 and 331.756 (1981); Iowa R.Civ.P. 2. The question of who is the real party in interest depends on the factual circumstances of each individual case. Further, the county attorney is required in the course of his or her offical duties to give oral and written advice to the county conservation board and to represent the board in litigation unless faced with a conflict of interest with his or her duty to represent the county. (Weeg to Hovda, Hancock County Attorney, 8/10/82) #82-8-6(L)

August 12, 1982

CONFLICTS OF INTEREST: Chapter 68B: §§68B.2, 68B.4, 68B.6, 68B.7, 68B.8; Chapter 601A: §§601A.2, 601A.4, 601A.6, 601A.8, 601A.10. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from teaching one or two courses at an incorporated educational institution on a part-time basis for pay. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from teaching at an incorporated educational institution for only reimbursement of expenses. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from part-time sales to members of the public who do not constitute individuals, associations, or corporations subject to the regulatory authority of the Iowa Civil Rights Commission. An official or employee as defined in §68B.2 is not prohibited from taking continuous, part-time

employment with an employer subject to the regulatory authority of the Iowa Civil Rights Commission. An official or employee as defined in §68B.2 is not prohibited from taking continuous employment with an organization subject to the regulatory authority of the Iowa Civil Rights Commission. An official or employee as defined in §68B.2 who is an attorney is prohibited from selling his or her legal services to individuals, associations, or corporations subject to the regulatory authority of the Iowa Civil Rights Commission. A firm with which such an attorney enters into partnership becomes subject to the same prohibitions. An employee as defined in §68B.2 is not prohibited by §68B.6 from acting as a private civil rights consultant for compensation in any proceeding before the Iowa Civil Rights Commission unless the consultation is based on information or expertise obtained in the course of fulfilling the specific duties of the employee's state position and provided in breach of the obligations owed to the employer. An employee as defined in §68B.2 is not prohibited by §68B.6 from consultation for compensation in a civil rights case in which the respondent is a state agency unless the consultation is based on information or expertise obtained in the course of fulfilling the specific duties of the employee's state position and provided in breach of the obligations owed to the employer. An attorney who is an official or employee as defined in §68B.2 is not prohibited by §68B.6 from entering into a partnership in an "of counsel" relationship with a firm which is involved in proceedings against the state. An official or employee as defined in §68B.2 who exercises general supervisory authority over agency case processing is directly concerned and personally participates in agency cases and, therefore, is prohibited by §§68B.7 from appearing or receiving compensation for services rendered before that agency for a period of two years after termination of service or employment with respect to those cases under his or her supervision. (Pottorff to Reis, Executive Director, Iowa Civil Rights Commission, 8/12/82) #82-8-7

Artis Reis, Executive Director: You have requested an opinion of the attorney general concerning the interpretation of §§68B.4, 68B.6, and 68B.7 of The Code which relate to conflicts of interest. You have posed ten separate questions based on potential applications of these sections to commissioners and employees of the Iowa Civil Rights Commission. For the purpose of clarity these questions are set out in full in the following three-part discussion which analyzes each section.

Chapter 68B generally addresses conflicts of interest of public officials and employees. The term "official" is defined as:

> any officer of the state of Iowa receiving a salary or per diem whether elected of appointed or whether serving full-time of part-time. Official shall include but not be limited to all supervisory personnel and members of state agencies and shall not include members of the General Assembly or legislative employees.

§68B.2(6), The Code 1981. The term "employee" is defined as:

> any full-time, salaried employee of the state of Iowa and does not include part-time employees or independent contractors. Employee shall include but not be limited to all clerical personnel.

§68B.2(5), The Code. Sections 68B.4, 68B.6, and 68B.7 specifically impose limitations on the activites of persons falling within the scope of these definitions.

I.

Section 68B.4 addresses the sale of goods and services in the following language:

> When sales prohibited. No official or employee of any regulatory agency shall sell, either directly or indirectly, any goods or services to individuals, associations, or corporations subject to the regulatory authority of the agency of which he is an official or employee.

This statutory language proscribes: (1) any official or employee; (2) of any regulatory agency; (3) from selling, either directly or indirectly; (4) any goods or services; (5) to individuals, associations, or corporations; (6) subject to the regulatory authority of the agency of which he is an official or employee.

Initially it is necessary to clarify the application of §68B.4 to commissioners and employees of your agency. This section applies only to "officials of employees" of "regulatory agencies". §68B.4, The Code 1981. Commissioners plainly constitute "officials" within the meaning of §64B.4. The term "official," *supra*, is statutorily defined to include "any officer of the state of Iowa". §68B.2(6), The Code 1981. An "officer," in turn, is commonly defined as "one who holds and office of trust, authority, or command". *Webster's New Collegiate Dictionary* at 790 (2nd ed. 1974). Commissioners are appointed by the governor and vested with statutory powers and duties to carry out the Iowa Civil Rights Act. §§601A.3-5, The Code 1981. Commissioners, therefore, hold an office of trust, authority, and command in administering the Iowa Civil Rights Act. The Iowa Civil Rights Commission, moreover, is a "regulatory agency" within the meaning of chapter 68B. The regulatory agencies are defined by enumeration and specifically include the Iowa Civil Rights Commission. §68B.2(4), The Code 1981. Accordingly, we conclude that §68B.4 applies to both commissioners and employees of the Iowa Civil Rights Commission.

With this clarification in mind, we now consider the specific questions which you pose concerning §68B.4. Your first two questions can be treated together:

> 1. Is an employee or commissioner prohibited from becoming a part-time member of the faculty of an educational institution for pay, i.e., teaching one or two courses which may or may not relate to civil rights law, in the course of a school year?
>
> 2. Is an employee or commissioner prohibited from teaching a course at a public or private educational institution when that employee or commissioner is not an employee of that educational institution, but rather receives only reimbursement for expenses?

These questions focus on the activities of a commissioner or employee teaching for either pay of reimbursement of expenses at an educational institution.

Analyzing these questions in the light of §68B.4, the threshold inquiry is whether an educational institution is an individual, association, or corporation "subject to the regulatory authority" of the Iowa Civil Rights Commission. *See* §68B.4, The Code 1981. We recently considered the scope of the terms individual, association, and corporation:

> "Individual" is defined by *Black's Law Dictionary* 913 (4th ed. 1951) as follows:

Individual. As a noun, this term denotes a single person as distinguished from a group or class, and also, *very commonly, a private or natural person as distinguished from a partnership, corportion, or association*; but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons (emphasis added). Webster defines "individual" as "a person". *Webster's New Twentieth Century Dictionary*, 932 (Unabridged 2nd Ed. 1971). We believe that the use of the term "individual" in §68B.4 was intended to mean a natural person, a human being. This interpretation is strengthened by the inclusion of "individual" within the language of the statute. Additionally, the legislature also used the word "individual" in defining "member of the General Assembly", §68B.2(3), and in §68B.10. Those uses of the word within the same Act convince us that for purposes of chapter 68B the legislature intended the term "individual" to mean a natural person....

The term "association" has been said to be a vague term without fixed meaning. 7 C.J.S. *Associations* §2 (1980) states the term 'association'... is used to indicate a collection of persons who have united or joined together for some special purpose of business and who are called, for convenience, by a common name... [A]s the term is commonly used it may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise".

Webster's defines association as "a society formed for transacting or carrying on some business or pursuit for mutual advantage." *Webster's, supra*, p. 113. *Black's Law Dictionary* 156 (4th ed. 1951), defines "association" as:

An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

* * *

The problem of defining "corporation" for purposes of chapter 68B is even more troublesome. The term is wholly undefined by the statute and yet is subject to an exceedingly broad range of definitions.... Corporations can be variously classified as public or private, quasi-public, quasi-corporations, and profit or non-profit. Entities which may fall into various classification of some form of "corporation" include nations, states, cities, counties, townships, school districts and drainage districts. *See* 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* Ch. 3, §§49-80, at 278-384 (rev. perm. ed. 1974).

Op.Att'y.Gen. #81-8-39. Although the nature of the educational institution is unclear from your questions, we assume for the purpose of this opinion that the educational institution is a corporation within the meaning of §68B.4.

Assuming, *arguendo*, that the educational institution is a corporation, there is little doubt that an educational institution is "subject to the regulatory authority" of the Iowa Civil Rights Commission. The Iowa Civil Rights Commission regulates the employment practices of employers. §601A.6(1)(c), The Code 1981. An "employer," in turn, is broadly defined to include "the state of Iowa or any political subdivision, board, commission, department, institution, or school district thereof, *and every other person employing employees within the state*". §601A.2(5), The Code 1981 [emphasis added]. A "person" expressly includes a

corporation. §601A.2(2), The Code 1981. Any incorporated educational institution which employs employees, in excess of threshold number, therefore, would fall within the scope of employment practice regulation. The Iowa Civil Rights Commission, moreover, specifically regulates the administration and employment practices of "educational institutions" which relate to sex discrimination. §601A.9, The Code 1981. Accordingly, we conclude that an incorporated educational institution is a corporation subject to the regulatory authority of the Iowa Civil Rights Commission.

In analyzing the statutory language, we observe familiar principles of statutory construction. Generally, each part of a statute is presumed to have a purpose and a statute should be construed in its entirety to effect its purpose. *Iowa Department of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W. 2d 6, 11 (Iowa 1978). In a recent opinion we observed that the primary purpose of §68B.4 is to prohibit self-dealing which may lead to conflicts of interest between officials or employees of regulatory agencies and those they regulate. Op.Att'y.Gen. #82-8-39. This prohibition against self-dealing prevents conflicts of interest by insuring that officials or employees of regulatory agencies do not reap profits from relationships with entities subject to the agency's regulatory authority which could influence their official duties or employment obligations.

In order to answer your questions we must determine whether teaching is restricted by the prohibition against self-dealing. The prohibition against self-dealing extends to the sale of both goods and services. §68B.4, The Code 1981. In construing the scope of this prohibition we observe the principle that words in a statute should be given their ordinary meaning unless defined differently by the legislature or possessed of a peculiar and appropriate meaning in law. *American Home Products v. Iowa State Board Tax Review*, 302 N.W.2d 140, 143-44 (Iowa 1981). A sale denotes the act of selling which, in turn, means the process in which goods or services are delivered in exchange for money or other valuable consideration. *Webster's New Collegiate Dictionary* at 1012, 1043. A service is commonly defined as "useful labor that does not produce a tangible commodity." *Webster's New Collegiate Dictionary* at 1051. Incorporating this definition of service as part of the entire statute to effect the purpose of prohibiting self-dealing for profits, we view useful labor as a learned skill which the possessor can sell to individuals, associations, or corporations. In our view this definition of service would include teaching.

Applying these principles to the situations posed in your questions, we do not believe that "becoming a part time member of the faculty of an educational institution for pay" constitutes the sale of a service within the meaning of §68B.4. A sale, defined *supra*, commonly denotes a specific transaction whereby services are exchanged for money or other valuable consideration. A sale, however, would not commonly denote becoming an emloyee of an educational institution in an on-going employer-employee relationship. An employee is commonly defined as a person who works for salary or wages. *Black's Law Dictionary* 617 (4th ed. 1968). An employee, moreover, performs work subject to the control and direction to be inconsistent with a mere transaction for money. In application, a sale of services more properly describes the business transactions of an independent contractor. Independent contractors, in fact, are generally excluded from the definition of employee. *See, e.g.*, §68B.2(5), The Code 1981. Assuming, *arguendo*, that "becoming a part time member of the faculty of an educational institution for pay" entails rendition of teaching services for salary or wages and subjection to the direction and control of the institution, it is our opinion that this activity would not constitute a sale of services within the meaning of §68B.4. Any implications to the contrary in prior opinions are hereby withdrawn.

The view that §68B.4 does not prohibit employment relationships is supported by principles of statutory construction. First, the question of whether the prohibition against a sale of a service is sufficiently broad to include an employment relationship under §68B.4 is, at best, ambiguous. Section 68B.4, however, is a penal statute. §68B.8, The Code 1981. Penal statutes must be construed narrowly in order to give all persons a "clear and unequivocal warning in language that people would generally understand as to what actions would expose them to liabilities for penalties." *Knight v. Iowa District Court of Story County*, 269 N.W.2d 430, 437-38 (Iowa 1978). Construing the statute narrowly, §68B.4 should be construed to exclude employment relationships.

Second, a construction which includes employment relationships would virtually bar commissioners of the Iowa Civil Rights Commission from any outside employment. Statutes should be given a sensible, workable, practical, and logical construction which avoids absurd results. *Hansen v. State*, 298 N.W.2d 263, 265-66 (Iowa 1980). We point out that the position of commissioner is not a salaried position but a position of appointment compensated by a forty dollar per diem and expenses incurred while on official commission business. §601.4, The Code 1981. The commissioners, however, have broad jurisdiction over such matters as unfair credit practices. *See* §§601A.10, The Code 1981. A prohibition on employment relationships with all individuals, associations, or corporations subject to the regulatory authority of the commission, therefore, would render commissioners virtually unemployable in this state. We do not believe that the legislature intended to exclude virtually all employed persons from service on the commission.

Third, a construction which includes employment relationships is inconsistent with the purpose of §68B.4. A statute should be construed to effect its purpose. *Iowa Department of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d at 11. We have previously identified the purpose of §68B.4 as the prevention of self-dealing which may lead to conflicts of interest and improper profits. Op.Att'y.Gen. #81-8-39. An on-going employment relationship which generates a fair salary or wage, however, does not constitute self-dealing for profits.

In our view the prohibitions of §68B.4, similarly, do not extend to the rendition of the same service in exchange for reimbursement of expenses. We reiterate that this prohibition is penal. §68B.8, The Code 1981. Penal statutes must be constued narrowly in order to give all persons a "clear and unequivocal warning in language that people would generally understand as to what actions would expose them to liabilities for penalties." *Knight v. Iowa District Court of Story County*, 269 N.W.2d at 437-38. A sale of a service, as discussed, *supra*, commonly denotes the delivery of a service in exchange for money or other valuable consideration. The delivery of a service in exchange for only reimbursement of legitimate expenses, however, fall short of the defined transaction. Construing §68B.4 narrowly, therefore, we conclude that a commissioner or employee who contracts to teach at an incorporated educational institution for only reimbursement of expenses would not be engaged in the sale of a "service" within the meaning of the statute.

You pose four additional questions concerning §68B.4. Three of these questions can be treated together:

> 3. Is an employee or commissioner prohibited from part time sales of products outside the work place, such as part time sales of cosmetics, housewares, or clothing, on an individual sales basis or through party type sales?

4. Is an employee or commissioner prohibited from taking a second job with an employer subject to the regulatory authority of the Iowa Civil Rights Commission, such as part time work in retail establishments, restaurants, etc?

5. Is a commissioner of the Iowa Civil Rights Commission prohibited under section 68B.4 from being an employee of an organization which is subject to the authority of the Iowa Civil Rights Commission?

These questions focus on the activities of officials or employees who hold part-time jobs in addition to their official duties of employment obligations at the Iowa Civil Rights Commission.

In responding to question #3 we note that the principles applicable to the sale of services are equally applicable to the sale of goods. §68B.4, The Code 1981. Part-time sales of goods to members of the public who do not constitute individuals, associations, or corporations subject to the regulatory authority of the agency, however, are not prohibited. §68B.4, The Code 1981. Because §68B.4 regulates sales but not purchases, moreover, it is irrelevant whether the goods ultimately sold to the public are obtained by the official or employee either wholesale or on consignment from individuals, associations, or corporations which are subject to the regulatory authority of the agency. We do not suggest that the sales you describe could never violate §68B.4. Sales to businesses or enterprises which constitute individuals, associations, or corporations subject to the regulatory authority of the commission would violate §68B.4. Although sales made "on an individual sales basis" or "through party type sales" would not likely be made to such entities, a clear policy within the agency should be drawn to distinguish impermissible customers.

In view of our analysis of sales of services and employment relationships set out in response to question #1, the resolution of questions #4 and #5 is clear. In both questions you inquire whether §68B.4 prohibits employment by employers subject to the regulatory authority of the commission. Since, in our opinion, §68B.4 does not prohibit employment relationships, §68B.4 would not prohibit the activities which you posit.

Your sixth and last question concerning §68B.4 reads as follows:

6. Is an employee or commissioner of the Iowa Civil Rights Commission who is an attorney and conducts a part-time private law practice prohibited from representing individuals, associations, or corportions, who are subject to the regulatory authority of the Iowa Civil Rights Commission in matters which are unrelated to civil rights? Is an attorney prohibited from entering into a partnership with a law firm which represents the above entities?

This question focuses on the activities of a commissioner or employee who practices law.

In view of the definition of service, *supra*, we have little doubt that legal representation is a service within the meaning of §68B.4. Legal representation is a learned skill which the attorney sells as useful labor to his or her clients. With the exclusion of salaried, house counsel positions, moreover, legal representation is provided to clients by lawyers as independent contractors rather than employees. Section 68B.4, therefore, would prohibit a commissioner or employee from selling his or her legal services to individuals, associations, or corporations subject to the regulatory authority of the Iowa Civil Rights Commission. We have observed that §68B.4 is not limited to the sale of goods or services directly related to the regulatory function of the agency. Op.Att'y.Gen. #81-8-39. It is irrelevant, therefore, whether the legal services relate to civil rights law.

We point out that any law firm with which a commissioner or employee who is an attorney enters into partnership would become subject to §68B.4 by statute. Chapter 68B expressly provides that "[w]henever the terms... 'employee,' or 'official' are used... the term shall be interpreted to include any firm or association of which any of the above is a member or partner..." §68B.2(12), The Code 1981. This statute would not prohibit a commissioner or employee from entering into partnership with any law firm. The firm, however, would become subject to the same prohibitions contained in §68B.4. [1]

In summary, in response to your questions concerning §68B.4, it is our opinion:

1. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from teaching one or two courses at an incorporated educational institution on a part-time basis for pay.

2. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from teaching at an incorporated educational institution for only reimbursement of expense.

3. An official or employee as defined in §68B.2 is not prohibited by §68B.4 from part-time sales to members of the public who do not constitute individuals, associations, or corporations subject to the regulatory authority of the Iowa Civil Rights Commission.

4. An official or employee as defined in §68B.2 is not prohibited from taking continuous, part-time employment with an employer subject to the regulatory authority of the Iowa Civil Rights Commission.

5. An official or employee as defined in §68B.2 is not prohibited from taking continuous employment with an organization subject to the regulatory authority of the Iowa Civil Rights Commission.

6. An official or employee as defined in §68B.2 who is an attorney is prohibited from selling his or her legal services to individuals, associations, or corporations subject to the regulatory authority of the Iowa Civil Rights Commission. A firm with which such an attorney enters into partnership becomes subject to the same prohibitions.

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[1] Section 68B.2(12) additionally extends the prohibitions of chapter 68B to the "wives and unemancipated minor children" of officials and employees. In a previous opinion we stated that this extension to "wives" but not husbands would undoubtedly be deemed unconstitutional by the courts as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Op.Att'y.Gen. #81-8-39.

II.

Section 68B.6 addresses the appearance and rendition of services against the interest of the state in the following language:

> Services against state prohibited. No official, employee, or legislative employee shall receive, directly or indirectly, or enter into any agreement, express or implied, for any compensation, in whatever form, for the appearance or rendition of services by himself or another against the interest of the state in relation to any case, proceeding, application, or other matter before any state agency, any court of the state of Iowa, any federal court, or any federal bureau, agency, commission or department.

This statutory language proscribes: (1) any offical, employee, or legislative employee; (2) from receiving, directly or indirectly, or entering into any agreement, express or implied, for any compensation; (3) for the appearance or rendition of services by himself or another; (4) against the interest of the state; (5) in relation to any case or proceeding before any state or federal court or agency.

The next three questions concern this statute. Two of these questions can be treated together:

> 7. Under section 68B.6 of The Code of Iowa, is an employee of a "regulatory agency" as defined in section 68B.2 of The Code of Iowa prohibited from acting as a private civil rights consultant for compensation in any proceeding before the Iowa Civil Rights Commission?
>
> 8. Is such an employee prohibited from acting as a private civil rights consultant in a civil rights case in which the respondent is a state agency?

These questions focus on the activities of officials or employes who consult for compensation in any administrative proceeding before the Iowa Civil Rights Commission or in any civil rights litigation before a court in which a state agency is the respondent.

In analyzing the application of §68B.6 to your questions, we point out that only one element of the statutory proscription is in issue. You specify that your questions pertain to "employees" who consult for "compensation" on civil rights issues in an agency "proceeding" or court "case". Consultation, in turn, constitutes the rendition of services when "service" is defined as "useful labor that does not produce a tangible commodity". *Webster's New Collegiate Dictionary* at 1051. *See* Division I, *supra*. The sole question, therefore, is whether employees who consult for compensation on civil rights issues in agency proceedings or court cases in which the state is the respondent render their service "against the interest of the state".

In resolving the question we again invoke principles of statutory construction. Each part of a statute is presumed to have a purpose. *Iowa Department of Transportation v. Nebraska-Iowa Supply*, 272 N.W.2d at 11. The purpose of a statute, in turn, is rooted in the intent of the enacting legislature. *See American Home Products Corp. v. Iowa State Board of Tax Review*, 302 N.W.2d at 142-43.

Applying these principles, it is difficult to ascretain either the purpose of §68B.6 or the underlying legislative intent. This difficulty is due to the inherent ambiguity of the phrase "against the interest of the state". On first reading, this phrase could be construed to encompass any appearance or rendition of services,

including testimony, on behalf of the opposite party in any agency proceeding or court case involving the state of Iowa. The activity could be construed as "against the interest of the state" under the rationale that the appearance or rendition of services aids a party against whom the state is adverse and may lose. The potential loss to the state may vary with the nature of the proceeding or case. For example, the state may lose money in a tort claim, real property in a title action, or a conviction in a criminal prosecution.

We perceive serious problems with applying this broad construction. First, a broad construction conflicts with established principles of statutory construction. Section 68B.6, like §68B.4, is a penal statute. §68B.8, The Code 1981. Penal statutes must be construed narrowly in order to give all persons a "clear and unequivocal warning in language that people generally would understand as to what actions would expose them to liabilities for penalties". *Knight v. Iowa District Court of Story County*, 269 N.W.2d at 437-38. A broad construction leaves unclear what activities could be construed to be "against the interest of the state." This unclarity could cause the statute to be unconstitutionally void for vagueness on its face. *Id.* at 438.

Second, the application of §68B.6 under this broad construction could result in a denial of due process. Broadly, and literally, applied, §68B.6 could prohibit any official, employee, or legislative employee from testifying in behalf of any party adverse to the state of Iowa. This application of §68B.6 could prevent a defendant from presenting the testimony of a state employed, expert witness. This limitation on testimony could rise to due process proportions if the expert witness were singularly and peculiarly necessary to the presentation of an adequate defense. The application of §68B.6, for example, could prohibit a state employed psychiatrist from testifying in a criminal prosecution as an expert defense witness on his theory of the physiological basis for insanity. If no other expert witness could adequately present this evidence, the application of §68B.6 could violate due process. *Cf. State v. Marchellino*, 304 N.W.2d 252, 255-57 (Iowa 1981) (potential constitutional problems exist in excluding witness as remedy for discovery rule violation).

Third, even if a broad construction of §68B.6 were constitutional, a broad construction may thwart legislative intent by rendering §68B.6 inconsistent with the other sections of chapter 68B. The other sections of chapter 68B prohibit public officials and employees from improperly profiting from their state position. This prohibition applies to material gains obtained by sales and gifts, *see, e.g.*, §68B.3, The Code 1981 (public bidding required for sale of goods to state agency); §68B.5, The Code 1981 (gifts in excess of $50.00 prohibited), and to strategic gains obtained by exertion of influence, *see, e.g.*, §68B.7, The Code 1981 (appearances before past employers limited). A broad construction of §68B.6 would exceed this purpose of prohibiting improper profiting through a state position and reach the result of prohibiting all services by employees regardless of improper profiting.

In view of these problems, we are obligated to place a more narrow construction on §68B.6. We observe the principle that when a statute can be construed both in a manner which is unconstitutional and in a manner which is constitutional, the constitutional construction should be adopted. *Iowa City v. Nolan*, 239 N.W.2d 102, 103 (Iowa 1976). In reaching a constitutional construction, the goal remains to ascertain legislative intent and give it effect. *City of Des Moines v. Elliot*, 267 N.W.2d 44, 45 (Iowa 1978). We believe a more narrow construction can avoid the problems we have discussed in compliance with both of these principles.

In our view a constitutional construction of §68B.6 which would be consistent with the other sections of chapter 68B is a construction which prohibits an official or employee from receiving compensation or entering into any agreement for compensation to appear or render services in breach of his or her official duties or employment obligations to the state. In other words, this construction would prohibit an official or employee from obtaining compensation for an appearance or service which conflicts with his or her official duties or employment obligations owed to the state. In application, for example, §68B.6 would prohibit an employee of the Iowa Civil Rights Commission who investigates complaints from peddling that information to the adverse party. Under these circumstances the employee's obligation to the employing agency as an investigator is breached by providing the information for compensation to the party under investigation. We believe this construction is a constitutional, reasonable, and workable construction consistent with the purpose of chapter 68B to prevent improper profiting.

A prior opinion of the attorney general adopted a broad construction of §68B.6 without adequate analysis of the potential constitutional and statutory problems of its application. 1978 Op.Att'y.Gen. 826. To the extent that opinion is inconsistent with the construction we now forward, the opinion is hereby withdrawn.

Applying the narrow construction of §68B.6 to the specific questions which you pose concerning consultation for compensation by an employee in administrative proceedings before the Iowa Civil Rights Commission or in civil rights litigation before a court, the crucial factor is the nature of the information upon which the consultation is based. Your hypothetical questions do not specify either the employing agency or the subject of the consultation. If, however, the consultation is based on information obtained in the course of fulfilling the specific duties of the employee's state position and provided in breach of the employee's obligations to his or her employer, consultation for compensation is prohibited by §68B.6

We stress that §68B.6 would not prohibit an employee from consulting based on his or her general knowledge acquired apart from the performance of the specific obligations of a state position. In the field of civil rights, however, a distinction between information or expertise obtained in the course of performing specific duties of an employee's state position and information obtained from a pool of general knowledge is difficult to draw. General knowledge about the subject may, necessarily, reflect the cumulative experience of work performed on individual cases. It seems unlikely that an employee of the Iowa Civil Rights Commission could consult for compensation without utilizing information obtained through the performance of the specific duties of his or her employment and breaching the obligations owed to the employing agency. This issue, however, must ultimately be resolved on a case-by-case basis.

Your third question regarding §68B.6 reads as follows:

> 9. Under section 68B.6 of The Code, is an attorney who is an official or employee, prohibited from entering into a partnership on an "of counsel" relationship with a firm which is involved in proceedings against the state, as long as the official or employee is not involved in any way with cases against the state?

This question focuses on officials or employees who are attorneys professionally affiliated with firms representing parties adverse to the state.

Under the construction of §68B.6 which we have adopted, an attorney who professionally affiliates with a firm representing parties adverse to the state

would not violate §68B.6. Since we view §68B.6 as a prohibition against peddling information or expertise gained in the course of fulfilling the specific duties of a state position, mere professional affiliation would be insufficient to constitute a prohibited act.

In summary, in response to your questions concerning §68B.6, it is our opinion:

7. An employee as defined in §68B.2 is not prohibited by §68B.6 from acting as a private civil rights consultant for compensation in any proceeding before the Iowa Civil Rights Commission unless the consultation is based on information or expertise obtained in the course of fulfilling the specific duties of the employee's state position and provided in breach of the obligations owed to the employer.

8. An employee as defined in §68B.2 is not prohibited by §68B.6 from consultation for compensation in a civil rights case in which the respondent is a state agency unless the consultation is based on information or expertise obtained in the course of fulfilling the specific duties of the employee's state position and provided in breach of the obligations owed to the employer.

9. An attorney who is an official or employee as defined in §68B.2 is not prohibited by §68B.6 from entering into a partnership in an "of counsel" relationship with a firm which is involved in proceedings against the state.

III.

Section 68B.7 addresses the appearance, receipt of compensation, and rendition of services by former officials and employees of state agencies in the following language:

> Ban for two-year period after service. No person who has served as an official or employee of a state agency shall within a period of two years after the termination of such service or employment appear before such state agency or receive compensation for any services rendered on behalf of any person, firm, corporation, or association in relation to any case, proceeding, or application with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment.
>
> No person who has served as the head of or on a commission or board of a regulatory agency or as a deputy thereof, shall within a period of two years after the termination of such service receive compensation for any services rendered on behalf of any person, firm, corporation, or association in any case, proceedings, or application before the department with which he so served wherein his compensation is to be dependent or contingent upon any action by such agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit, or in promoting or opposing, directly or indirectly, the passage of bills or resolutions before either house of the General Assembly.

This statute is divided into two separate paragraphs. Paragraph one limits appearances and receipts of compensation for services rendered by former officials and employees before the employing agency following a termination of service. Paragraph two limits receipts of compensation for services rendered by a

former head, deputy, or member of a commission or board of regulation before the commission or board when the compensation is contingent upon specific action being taken.

You pose the following, final questions concerning this statute:

> 10. Under section 68B.7, is a former employee of the Iowa Civil Rights Commission whose position was such to have general supervisory authority over case processing (Executive Director, Director of Compliance, or Director of Operations) prohibited for a two year period from representing any party to any case pending before the agency during the period of that person's employment, even though that former employee had no direct involvement in the case?

This question focuses on appearances by officials or employees of the Iowa Civil Rights Commission who have had supervisory authority over the agency case load.

The question which you pose concerns only the first paragraph of §68B.7. Analyzing your question in light of the first paragraph requires application of the specific statutory terms. In a recent opinion we concluded that the language of this portion of §68B.7 prohibits an official or employee of a state agency from appearing or receiving compensation for services rendered before that agency for a period of two years after termination of service or employment only with respect to matters in which the official or employee was "directly concerned" or "personally participated". Op.Att'y.Gen. #81-10-20.

The scope of the statutory terms "directly concerned" and "personally participated" is not further defined in chapter 68B. We give these terms their ordinary meaning. *See American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d at 143-44. The terms "directly concerned" mean to have had immediate influence over. *Webster's New Collegiate Dictionary* at 231, 320. The terms "personally participated" mean to have taken part in person. *Id.* at 829, 848. In light of these definitions we conclude that the prohibitions of §68B.7 apply to matters which officials or employees had immediate influence over or took part in person.

In our view the statutory terms, as defined, would be applicable to officials or employees with supervisory authority over case processing. Officials or employees who make administrative decisions regarding case processing, i.e., case assignments or case priorities, do have an immediate influence over and and take part in cases. Although such functions may be purely administrative, the statutory language of §68B.7 does not distinguish between direct concern and personal participation in the administrative aspect of cases and direct concern and personal participation in the substantive dispositon of cases. Some administrative decisions, including the priority accorded a particular case, in fact, could significantly impact on the ultimate disposition. Accordingly, we view the exercise of supervisory authority over case processing as direct involvement and personal participation.

In summary, in response to your final question concerning §68B.7, it is our opinion:

> 10. An official or employee as defined in §68B.2 who exercises general supervisory authority over agency case processing is directly concerned and personally participates in agency cases and, therefore, is prohibited by

§68B.7 from that agency for a period of two years after termination of service or employment with respect to those cases under his or her supervision.

We point out that our answers to all of your questions are based solely on a statutory analysis. In certain circumstances, conduct may not be prohibited by chapter 68B but may, nevertheless, give rise to ethical problems. We do not purport to address the ethical implications of the questions which you raise.

In a previous opinion we observed that many of the prohibitions of chapter 68B appear unreasonable and overboard. Although we are not free to rewrite chapter 68B, we have strongly advised that the legislature re-examine the statutory language and more clearly specify those activites which are prohibited. Op.Att'y.Gen. #81-8-39. We take this opportunity to reiterate our continued concern.

August 13, 1982

ADMINISTRATIVE AGENCIES: Historical Preservation Districts. Chapter 17A, §§17A.2(1), 303.20(1), 303.20(2), 303.21, 303.22, 303.24, 303.25, 303.26, 303.37, 303.28, 303.29, 303.30, 303.31, 303.34(1), 303.34(3), and 303.34(4), The Code 1981. An historical preservation district is not an "agency" within the meaning of the Iowa Administrative Procedure Act. Accordingly, the procedural provision of chapter 17A are not applicable to historical preservation districts. A determination of an historical preservation district commission, however, must be based upon procedural guidelines found in due process and §303.30, The Code 1981. (Walding to Tyrrell, State Representative 8/13/82) #82-8-8(L)

August 13, 1982

STATE OFFICERS AND DEPARTMENTS: City Development Board, Acceptance of Gifts. Chapter 68B; §§68B.2(6), 68B.2(9), 68B.5, 68B.8, 68B.11(2), and 368.9, The Code 1981; Acts, 68th G.A., 1980 Session, chapter 1015, §6. Each member of the city development board is, for purposes of §68B.5, The Code 1981, an "official," and thus subject to the fifty dollar gift limitation. Nevertheless, that limitation is restricted to the acceptance of a gift in an "official," not a private capacity. Any doubt as to which capacity a board member is acting should be resolved in favor of overinclusion. Finally, in the event that a gift is subject to the limitation, board members are advised that the gift should be reported pursuant to §68B.11(2), The Code 1981. (Walding to Pogue, City Development Chairperson, 8/13/82) #82-8-9(L)

August 13, 1982

CONSTITUTIONAL LAW: Constitutionality of legislation reducing an appropriation previously enacted for either a fiscal year not yet begun or the present fiscal year. U.S. Const. art. I, §10; Iowa Const. art. I, §21; Section 20.17(b). Legislation which reduces an appropriation previously enacted for either a fiscal year not yet begun or the present fiscal year does not violate the contract clauses of either the federal or state constitutions even if contracts based on these appropriations have been entered into; however, the state may be liable for breach of contract. (Hunacek to Holden, State Senator, 8/13/82) #82-8-10(L)

August 16, 1982

COUNTIES; COUNTY LAND USE; HISTORICAL PRESERVATION DISTRICTS: 1982 Iowa Acts, Senate File 2218; Iowa Code §§303.20—303.34 (1981). Once an historical preservation district is established, it may be recognized, subject to the discretion of the county, as a part of a S.F. 2218 land preservation and use plan and enforced accordingly. (Weeg to Tyrrell, State Representative, 8/16/82) #82-8-11(L)

August 16, 1982

MENTAL HEALTH: Establishment of legal settlement by mentally retarded persons who have assumed independent living arrangements. §§252.16(1), (2), and (3), 230.1, The Code 1981. A person who is an inmate of or is supported by an institution is precluded from acquiring a legal settlement. The term "institution" is broadly defined and it includes a privately incorporated nonprofit agency established to meet the needs of the mentally retarded. The term "supported by an institution" within the meaning of §252.16(3), is a phrase of general welfare and includes the provision of food, clothing, shelter, and other necessaries of life. (Mann to Andersen, Dickerson County Attorney, 8/16/82) #82-8-12(L)

August 25, 1982

STATE DEPARTMENT AND OFFICERS; REAL ESTATE COMMISSION: Exemption from real estate licensing requirements §117.7(5), The Code 1981. Auctioneers who simply conduct auctions of real property without closing the sales are not required to be licensed as a real estate broker or salesperson. If an auctioneer engages in the usual activities constituting dealing in real estate then the auctioneer must be licensed. (Thomas to Johnson, Director, Iowa Real Estate Commission, 8/25/82) #82-8-13(L)

August 25, 1982

FIRE MARSHAL; PUBLIC SAFETY, DEPARTMENT OF: Smoke Detectors, 1981 Iowa Acts, chapter 45, §1. The fire marshal may not require that smoke detectors be installed in dormitories prior to July 1, 1984. If a part of a dormitory is protected by a fire safety device within the exemption contained in 1981 Session, 69th G.A., chapter 45, §1(4), the state fire marshal

may approve its use under that provision and still require the installation of smoke detectors in the rest of the dormitory. (Hayward to Waldstein, State Senator, 8/25/82) #82-8-14(L)

August 25, 1982

SCHOOLS; COUNTY TREASURES: Direct Deposit of School Funds. Iowa Code §298.13 (1981) as amended by 1982 Iowa Acts, chapter 1195. County treasurers are required to make separate direct deposits in schoolhouse fund and general fund if the school district board designates a separate account for such fund. (Fleming to Daggett, State Representative, 8/25/82) #82-8-15(L)

August 25, 1982

TAXATION: The Propriety of Assessing Property Taxes On Coal Leases. Iowa Code §84.18 (1981). Coal leases are assessed and taxed separately to the owner of such rights. (Kuehn to Van Maanen, State Representative, 8/25/82) #82-8-16(L)

August 25, 1982

CIVIL RIGHTS; AGE DISCRIMINATION IN HIRING: §§601A.6(1)(a), 601A.13(1), 601A.13(3), The Code 1981. Sections 601A.6(1) and 601A.13 make it unlawful for employers to reject older applicants for employment because of their higher per capita pension or fringe benefit costs in comparison with younger applicants. (Nichols to Bowles, Commission on the Aging, 8/25/82) #82-8-17(L)

SEPTEMBER 1982

September 1, 1982

COUNTIES; DRAINAGE DISTRICTS: Iowa Code Chapter 455 (1981); Iowa Code §§24.22, 455.109, and 455.132. A county may re-establish an inactive drainage district by following the procedures set forth in §455.132. The costs of maintaining and repairing the district incurred by the county prior to the re-establishment of the district may be assessed against members of the district pursuant to this same section. Finally, the county is not authorized to temporarily transfer money from county funds to a drainage district. (Weeg to Bruner, Carroll County Attorney, 9/1/82) #82-9-1(L)

September 1, 1982

ENVIROMENTAL PROTECTION: Water Rights. Iowa Code §§455A.1, 455A.2, 455A.19—455A.30 (1981); 1982 Iowa Acts, House File 2463. Except for the "rights preserved" by Iowa Code §455A.27 (1981), the provision in §455A.1 concerning "absolute ownership" of "impounded or stored waters," does not exempt the storage of waters from the regulatory provisions of the statute. (Osenbaugh to Gallagher, State Senator, 9/1/82) #82-9-2(L)

September 1, 1982

PUBLIC RECORDS; MEDICAL RECORDS: Fire Rescue Reports. Chapter 68A, §§68A.1, 68A.2, 68A.7, 68A.7(2). A fire rescue report is a medical record under section 68A.7(2). The determination of whether any record is a medical record must be made on the basis of the record as a whole. The lawful custodian cannot be compelled to redact nonmedical information for examination and copying. The lawful custodian may exercise his or her discretion to release all or part of the record provided, however, that the information is not highly offensive to a reasonable person and is of legitimate concern to the public. (Pottorff to Nystrom, State Senator, 9/1/82) #82-9-3

The Honorable John Nystrom, State Senator: You have requested an opinion of the attorney general concerning public access to fire rescue reports which are completed in the course of fire rescue calls and maintained by the city of Madrid. From conversations with Madrid fire officials, it is our understanding that the reports were designed by the fire rescue unit. During a fire rescue call, a report is completed by emergency medical technicans. Two copies are sent with the victim to the treating medical facility. The original is maintained by the rescue unit of the fire department for a period of one year.

A blank copy of a fire rescue report furnished to our office shows that the report is designed to elicit a variety of information. A completed report would contain factual information concerning the rescue call. This includes the date of

the rescue call, the departure and arrival times of the rescue vehicle, the road and weather conditions, the location of the rescue scene, the identity of other law enforcement personnel at the scene, the name of the fire officer in charge, and the location to which the victim was transported.

A completed report would also contain information concerning "patient status." This includes observations of the skin moisture, color, and temperature, observations of the pupil and eye condition, and observations of motor and verbal responsiveness. The report also contains space for the recordation of vital signs including respiration, pulse and blood pressure and for the recordation of the administration of oxygen, defibrillation, and drugs. Any "pre-hospital treatment" including such measures as the insertion of an endotracheal tube, the application of a splint, or the administration of psychiatric first aid may be similarly recorded.

Finally, a completed report would contain information and summary notes concerning the patient. This includes the name, address, sex and age of the patient. Provision is made for a summary of the "patient history" including current medications and existing allergies, a summary of the "patient complaint," and a summary of the "patient assessment" made by the attending emergency medical technician. A separate space is provided for comments.

In view of the information elicited by these reports, you inquire concerning the applicability of chapter 68A of The Code which establishes the rights of every citizen, including members of the news media, to examine and copy public records. Specifically, you inquire whether the original fire rescue report is a public record which may be kept confidential under the provisions of §68A.7 of the Code.

An analysis of your inquiry must begin with the definition of a public record. Section 68A.1 defines "public record" as follows:

> Public records defined. Wherever used in this chapter, "public records" includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing. [Iowa Code §68A.1 (1981).]

Under this language, a "public record" encompasses "all records and documents" belonging to a wide range of governmental entities including cities. In a previous opinion, we observed that a "record" or "document" need not be required by law to be kept as a memorial of official action. The "record" or "document" may be kept only as a convenient, appropriate, or customary method of discharging the duties of office by a public official. Op.Att'y.Gen. #81-8-20.

Under these principles, the fire rescue report is unquestionably a public record within the meaning of chapter 68A. The fire rescue report documents information obtained in the course of a fire rescue call. Accordingly, we consider the report an appropriate method of discharging the duties of the fire rescue unit.

Although a fire rescue report may be defined as a public record, the public does not have unfettered access to *all* records which fall within the scope of this definition. The public has a statutory right to examine and copy such records "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." Iowa Code §68A.2 (1981). Within chapter 68A itself, section 68A.7 delineates categories of public records which

"shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information." Iowa Code §68A.7 (1981). These categories include:

1. Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records.

2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.

3. Trade secrets which are recognized and protected as such by law.

4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.

6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

10. Personal information in confidential personnel records of the military department of the state.

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

12. Financial statements submitted to the Iowa state commerce commission pursuant to chapter 542 or chapter 543, by or on behalf of a licensed grain dealer or warehouseman or by an applicant for a grain dealer license or warehouse license.

13. The records of a library which, by themselves or when examined with other public records, would reveal the identity of the library patron checking out or requesting an item from the library. [Iowa Code §68A.7(1)—(13) (1981).][1]

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[1] Amendments and additions to these categories were enacted by the 69th General Assembly but are not relevant to this opinion. *See* 1981 Session, 69th G.A., chapters 36, 38, 62.

Interpreting the language of section 68A.7 in a prior opinion, we observed that the statute vests the courts and the lawful custodians with authority to release records which are otherwise confidential under these categories but fails to enumerate standards by which either a court or lawful custodian may determine that exception from confidentiality would be appropriate in any particular case. Accordingly, we concluded that the decision to release these records is left to the discretion of the lawful custodian. 1980 Op.Att'y.Gen. 825.

In our view, one of these categories of confidential records is relevant to the rescue reports about which you inquire. Subsection two specifically designates as confidential "[h]ospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient." Iowa Code §68A.7(2) (1981). If a fire rescue report constitutes a medical record of the condition, diagnosis, care or treatment of a patient as described in section 68A.7(2), the fire rescue report would be a confidential record under section 68A.7.

In order to determine whether a fire rescue report is a "medical record," it is necessary to construe the statutory language. The legislature did not further define the term "medical." Under principles of statutory construction, therefore, we must look to the ordinary, everyday usage of the term. *See American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 143-44 (Iowa 1981). "Medical" is commonly defined as relating to or concerned with the practice of medicine. *Webster's New Collegiate Dictionary*, at 708 (1979). Accordingly, a "medical record" must relate to or be concerned with the practice of medicine.

We have little doubt that a fire rescue report constitutes a "medical record" under these principles. In the fire rescue report, an emergency medical technician responding to a rescue call collates a wide range of information concerning the vital signs and physical condition of the victim. The emergency medical technician records objective data such as the pulse and respiration rate, notes observable physical phenomena such as convulsions and loss of consciousness, documents the administration of emergency medical care such as splinting, and summarizes subjective data such as "patient history" and "complaint." Copies of the report are sent with the victim to the treating medical facility for consideration by the attending physician. In our opinion, a record which collates this information for subsequent consideration by an attending physician constitutes a record relating to or concerned with the practice of medicine.

Similarly, we have little doubt that the "medical record" is a record "of the condition, diagnosis, care, or treatment of a patient." Iowa Code §68A.7(2)(1981). The recordation of objective data and notation of observable physical phenomena are records of the "condition" at the scene. The documentation of the administration of emergency care and summary of the patient history and complaint are records of the care and treatment rendered. A patient, moreover, is commonly defined as "an individual awaiting or under medical care or treatment." *Webster's New Collegiate Dictionary*, at 833. We consider a victim who receives emergency care from an emergency medical technician to be "under medical care or treatment" and, therefore, to qualify as a "patient." Accordingly, we conclude that a fire rescue report is a medical record "of the condition, diagnosis, care, or treatment of a patient."

We recognize that the fire rescue report designed by the fire rescue unit additionally contains nonmedical information. As previously noted, the nonmedical information would include such facts as the departure and arrival

time of the rescue vehicle, the scene of the rescue call, and the location to which the victim was transported. We do not believe, however, that the inclusion of these nonmedical facts necessarily divests the fire rescue report of its "medical" character under section 68A.7(2).

Principles of statutory construction support our view. Section 68A.7(2) does not expressly require that medical records be composed exclusively of medical information. In construing the language, we observe the principle that statutes should be given a construction which is sensible, practical, workable, and logical. *Hansen v. State*, 298 N.W.2d 263, 265-66 (Iowa 1980). Applying this principle, we recognize that a report form which is designed to collate emergency medical information may necessarily include nonmedical information, including the facts surrounding the rescue call, for record keeping purposes. Minimally, the name and address of the victim must be recorded in order to identify the patient for whom the medical information is relevant. In view of the necessity of appending record keeping data, we do not believe that the legislature intended the inclusion of such data to disqualify the record from the confidentiality provisions of section 68A.7(2). Rather, we believe that the legislature intended the determination of whether a record is a "medical record" to be made based on the record as a whole. Ultimately, this determination must be made on a case-by-case basis.

As a corollary to the principle that the characterization of a "medical record" is based on the record as a whole, we point out that the public cannot compel the lawful custodian to redact nonmedical information from a medical record for the purpose of examination and copying. The statutory language of section 68A.7 supports this conclusion. Other confidentiality provisions in section 68A.7 distinguish between the confidentiality of *information contained in* public records and the confidentiality of public records. Section 68A.7(10), for example, designates as confidential "[p]ersonal information in confidential personnel records." Section 698A.7(2), by contrast, designates as confidential "medical records." Based on this statutory distinction, we conclude that the legislature did not intend to designate as confidential only medical *information contained in* medical records.

We point out that, although the lawful custodian cannot be compelled to redact nonmedical information, the lawful custodian can elect to do so. The determination whether to release confidential records under section 68A.7, including medical records, rests in the discretion of the lawful custodian. 1980 Op.Att'y.Gen. 825. Since the lawful custodian can release the entire record, we believe the lawful custodian would be equally empowered to release part of the record.

We stress that in exercising discretion to release all or part of any medical record, including a fire rescue report, the lawful custodian should not release information which could constitute an invasion of the patient's right of privacy. Records which are released under section 68A.7 may be examined and copied by the public and may be published by the news media. *See* Iowa Code §68A.2 (1981). One who gives publicity to a matter concerning private life of another may subject himself of herself to liability for invasion of privacy if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 291 (Iowa 1979). In our view, it is an open question whether the release of information which is highly offensive to a reasonable person and is not of legitimate concern to the public would be deemed an unreasonable exercise of discretion under section 68A.7 which could subject the lawful custodian to tort liability.

In summary, it is our opinion that a fire rescue report is a medical record under section 68A.7(2). The determination of whether any record is a medical record must be made on the basis of the record as a whole. The lawful custodian cannot be compelled to redact nonmedical information for examination and copying. The lawful custodian may exercise his or her discretion to release all or part of the record provided, however, that the information is not highly offensive to a reasonable person and is of legitimate concern to the public.

September 1, 1982

MUNICIPALITIES: Civil Service. Examinations. Iowa Code sections 400.8, 400.8(1), 400.9, 400.11, and 400.13 (1981). Chiefs of police and fire must be appointed from their respective civil service eligible lists. To be placed on the lists, applicants must take an original entrance examination. A civil service commission is vested with the authority to prescribe, in advance, rules relating to the necessity of an applicant to resubmit to an original entrance examination. Four considerations in prescribing such rules are offered. (Walding to Fisher, Webster County Attorney, 9/1/82) #82-9-4(L)

September 1, 1982

COUNTIES; COUNTY ATTORNEY: Replacement when absent, sick, or under disability: Iowa Code §§331.754(1), 331.756, and 331.759 (1981). The statutory duties of the county attorney devolve soley on that office, subject to the exceptions found in Iowa Code §§331.754(1) and 331.759. These statutory exceptions are not applicable in cases such as the present one, where the disputed matter did not involve litigation pending before the district court; instead, home rule authority authorizes the county attorney to request the board of supervisors to appoint a replacement. Correspondingly, neither the board of supervisors nor any other county official is independently authorized to appoint a replacement for the county attorney. Finally, because such an appointment is illegal, the board of supervisors is not authorized to pay a claim by the county sheriff for legal fees incurred by a private attorney hired by the sheriff to represent him in a matter in which the county was already represented by the county attorney or a duly-appointed replacement. (Weeg to Soldat, Kossuth County Attorney, 9/1/82) #82-9-5(L)

September 1, 1982

MUNICIPALITIES: Eminent Domain. Iowa Code chapters 471, 472, 403A (1981). A city can legally enter into an agreement under which the city agrees to acquire, using its power of eminent domain if necessary, real property for the development of a public parking facility, and subsequently to convey to a private party, at that party's option, the air rights above the property for the development of a housing project for the elderly and the handicapped. (Stoffregen to Chiodo, State Representative 9/1/82) #82-9-6(L)

September 1, 1982

MUNICIPALITIES: Urban Revitalization Areas. Notice of Public Hearing. Sections 362.3, 404.2(4), and 404.2(6), The Code 1981. The notice requirement in §404.2(4), The Code 1981, is twofold. A city is required to provide published notice in accordance with §362.3, The Code 1981. In addition to notice by publication, notification shall be given by ordinary mail to all owners of record of real property and occupants of city addresses located within a proposed revitalization area at least thirty days prior to a public hearing. Published notice alone will suffice for a second public hearing, provided for in §404.2(6), The Code 1981. (Walding to Pogue, City Development Board Chairperson, 9/1/82) #82-9-7(L)

September 2, 1982

MUNICIPALITES: Police and Fire Pensions. Section 411.6(12)(a), The Code 1981; Acts, 1980 Session, 68th G.A., chapter 1014, §33, Acts, 1979 Session, 68th G.A., chapter 34, §16. Section 411.6(12)(a), The Code 1981, provides for a single computation of the annual readjustment of pensions, without regard to the date of a member's retirement. (Walding to Running, State Representative, 9/2/82) #82-9-8(L)

September 7, 1982

IOWA CONSUMER CREDIT CODE: Notice of Right to Cure, §§537.5110, 537.5111 and 537.7103(5)(e). It is not a prohibited debt collection practice under §537.7103(5)(e) of the ICCC, Iowa Code 1981, for a creditor to send a mandatory notice of right to cure default under §§537.5110 and 537.5111 to the debtor in default even if the creditor knows the debtor is represented on the debt by an attorney whose name and address is known to the creditor. The creditor may change certain language in the form of the notice of right to cure contained in §537.5111(2) when the debtor is represented by an attorney. (Lowe to Ellins, J.C. Penney Co., Inc. 9/7/82) #82-9-9(L)

September 7, 1982

MUNICIPALITIES: Zoning; Nonconforming uses. Iowa Code chapter 135D (1981); Iowa Code §§414.1 and 414.2 (1981). A municipality has the power expressly granted by statute to enact ordinances regulating and restricting the location of mobil homes within its boundaries. Replacement of a mobile home, as a nonconforming structure which has become unusable from natural deterioration, is not permissible. But in the absence of any prohibitory provision, a mobile home may be restored after being damaged or destroyed by fire, storm, or other calamity. (Walding to Nystrom, State Senator, 9/7/82) #82-9-10(L)

September 13, 1982

STATE OFFICERS: Review of corporate public affairs leave of absence policy. Sections 56.29, 722.1, 722.2, 68B.2(9), 68B.5, Iowa Code (1981). Leave of

absence or time-off policy under which employees are given leaves of absence or time off with benefits under certain circumstances to hold public office may be lawful, dependent upon a factual determination. (Swanson to Stomer, Speaker of the House of Representatives, 9/13/82) #82-9-11(L)

September 14, 1982

GARNISHMENT: Iowa Code section 642.21 (1981); Consumer Credit Protection Act, Title III, 15 U.S.C. §1671. Amounts due to an independent contractor are not subject to the garnishment limitations of §642.21 unless payment due is for personal services and payment is due pursuant to an employer/employee relationship. The actual substance of the relationship between the parties controls in determining whether an individual is an employee or an independent contractor, not the labels attached or words used to describe the relationship. (McFarland Lura, State Senator, 9/14/82) #82-9-12(L)

September 15, 1982

COUNTIES: Taxation of real property, certificates of purchase. Iowa Code chapters 446, 447, and 448 (1981); Iowa Code §§446.18, 446.19, 446.29, 446.31, 446.37, 447.9, 448.1, 569.8 (1981). There is no statutory requirement that a county which holds a certificate of purchase for property obtained at a scavenger tax sale must act within a designated period of time to obtain a tax deed. However, in some circumstances a county's unreasonable delay in obtaining a tax deed in order to avoid liability for property which is not properly maintained may subject the county to tort liability. (Weeg to Maher, Fremont County Attorney, 9/15/82) #82-9-13(L)

September 15, 1982

COUNTIES: Exchange of Property. Iowa Code §331.361(2) (1981). A county may exchange real property owned by the county with any party, including a private individual or a governmental body, pursuant to Iowa Code §331.361(2) (1981). A county may also exchange personal property with any party pursuant to its grant of home rule authority. (Weeg to Heitland, Hardin County Attorney, 9/15/82) #82-9-14(L)

September 15, 1982

CRIMINAL LAW; UNIFORM CITATION AND COMPLAINT; CRIMINAL PENALTY SURCHARGE: Iowa Code §805.6 (1981); 1982 Iowa Acts, H.F. 2493, §§1-3. A criminal penalty surcharge shall be imposed on certain law violators who are subject to the uniform citation and complaint procedure. Thus the ten percent additional penalty should be added where applicable to the total amount of fines or forfeitures imposed and so designated on the the Uniform Citation and Complaint. (Foritano to Meyer, Judicial Magistrate, 9/15/82) #82-9-15(L)

September 20, 1982

TAXATION: Legal Assistance for the Assessor and Board of Review in Litigation Dealing with Assessments. Iowa Code §441.41 (1981). Taxing bodies, such as a school district, interested in the taxes received from a city assessing jurisdiction's assessments cannot be required to aid or assist the city legal department in litigation dealing with such assessments. (Kuehn to Mike Connolly, State Representative, 9/20/82) #82-9-16(L)

September 22, 1982

CONSTITUTIONAL LAW; GOVERNOR; ITEM VETO: Art. III, §16, Constitution of Iowa; Senate Files 2304 and 566, 69th G.A. The governor's attempted item veto of a condition in Senate File 2304 relating to an appropriation made in Senate File 566 is invalid. If the governor desires to veto a legislatively imposed qualification upon an appropriation, he must veto the accompanying appropriation as well, even where the appropriation and the qualification appear in different bills. (Hunacek to Avenson and Weldon, State Representatives, 9/22/82) #82-9-17(L)

September 27, 1982

JUVENILE LAW: Confidentiality of Complaints Alleging Delinquency. Iowa Code chapters 232.2(7), 232.2(33), 232.28, 232.147, 1981; 1982 Session, 69th G.A., H.F. 2460. The legislature intended to expand public assess to filed complaints alleging juvenile delinquency. However irrespective of age of the child or gravity of the delinquent act alleged, all complaints — alleging delinquency remain public records under Iowa Code section 232.147, 1982. (Allen to Short, Lee County Attorney, 9/27/82) #82-9-18(L)

September 27, 1982

COUNTIES; COUNTY OFFICERS: Clerk of Court. Iowa Code §331.704 (1981). The requirement of Iowa Code §331.704 (1981) that the clerk keep a record book of docket entries may be satisfied by keeping a set of loose cards in a bin or other container. These cards should at a later date be bound together in a more permanent fashion, but this latter requirement may be satisfied by either post-type, looseleaf, or formal stitched binding. (Weeg to O'Brien, Court Administrator, 9/27/82) #82-9-19(L)

September 27, 1982

COUNTIES: Community Action Programs; 28E Agreements. 1982 Iowa Acts, H.F. 2437; Iowa Code chapter 28E (1981); Omnibus Budget Reconciliation Act of 1981 §§671, 673, 675. A 28E agreement entered into by several governmental bodies for the purpose of establishing a community action agency to serve the entire area would not affect that agency's qualification for federal community services block grant money, assuming that agency is otherwise qualified to receive that money under applicable state and federal law. (Weeg to Carr, State Senator, 9/27/82) #82-9-20(L)

September 27, 1982

CRIMINAL LAW; UNIFORM CITATION AND COMPLAINT: Iowa Code chapter 805. Unsecured appearance bond provisions apply where the offense is a scheduled violation because court appearance is required; available means by which a defendant can avoid a court appearance do not effect the applicability of the provision. (Baustian to Long, Wright County Magistrate, 9/27/82) #82-9-21(L)

September 28, 1982

SECRETARY OF STATE; FILING FEES: Iowa Code sections 499.45 (2) and 4.6 (1981). The language of §499.45(2) is ambiguous and should be construed in a manner which gives full effect to the meaning of all of the words used in the statute and accomplishes the purpose of the statute as evidenced by legislative intent. Those goals are both met by construing the phrase "such excess" in §499.45(2) to refer to the part of the increase of authorized capital stock which, when the increase is added to existing authorized capital stock, exceeds $25,000. (McFarland to Odell, Secretary of State, 9/28/82) #82-9-22

The Honorable Mary Jane Odell, Secretary of State: You wrote to this office on July 15, 1982 requesting an opinion from the attorney general on the correct method to calculate filing fees assessed to cooperative associations under Iowa Code section 499.45(2) (1981). Section 499.45 provides, in part, as follows:

> Fees. The following fees shall be paid to the secretary of state.
>
> 1. Upon filing articles of incorporation or renewals thereof, ten dollars for authorized capital stock up to twenty-five thousand dollars, and one dollar per one thousand or fraction in excess thereof; or ten dollars if there be no capital stock.
>
> 2. Upon filing amendments, one dollar, and if authorized capital stock is increased to an amount exceeding twenty-five thousand dollars, an additional fee of one dollar per thousand dollars or fraction of *such excess.* [Emphasis supplied.]

* * *

In your letter, you stated the following regarding the interpretation of subsection 2 of section 499.45.

> Specifically, the question is whether fees are to be calculated in an amount of one dollar per thousand for each thousand dollars of increase in authorized capital stock over the amount of authorized capital stock existing prior to filing the amendment or whether the fee is to equal one dollar per one thousand dollars of authorized capital stock exceeding the first twenty-five thousand dollars of capital stock.
>
> For example: Under the first interpretation of the statute, if a cooperative initially established twenty-five thousand dollars in authorized

capital stock and its first amendment increased authorized capital stock to one million twenty-five thousand dollars, the fee would be calculated upon the basis of one dollar per thousand dollars of the one-million dollar increase. Then if the cooperative filed a second amendment increasing the capital stock from one million twenty-five thousand dollars to two million twenty-five thousand dollars, the filing fee for the second amendment would be calculated upon the basis of an increase in authorized capital stock of one million dollars, and therefore, would be one dollar per one thousand dollars of the million dollar increase.

Under the second interpretation of the statute in the above example at the time of filing of the first amendment increasing the capital stock to one million twenty-five thousand dollars the fee would be based upon one dollar per thousand dollars of a one million increase in capital stock. At the time of filing of the second amendment, the fee would be based upon one dollar per thousand dollars of an increase of capital stock in the amount of two million dollars.

Your question asks for a determination of whether the phrase "such excess" in section 499.45(2) refers to the total increase in authorized capital stock or the total amount of authorized capital stock including the increase, exceeding $25,000. A third interpretation of §499.45(2) would be that "such excess" refers to the portion of the increase in authorized capital stock which, when the increase is added to existing authorized capital stock, exceeds $25,000. By applying the third interpretation suggested above to the example you gave, the fee would be assessed on the total amount of the increase of authorized capital stock when the cooperative files both amendments one and two since authorized capital stock was initially $25,000. If authorized capital stock had initially been $15,000 and was increased by $1 million dollars, the filing fee would have been calculated on the basis of one dollar per 1,000 or fraction thereof of $990,000 under the third interpretation since $990,000 is the portion of the increase that, when the increase is added to the higher authorized capital stock, exceeds $25,000.

The third interpretation of §499.45(2) which is suggested above is the interpretation giving fullest import to the words used while accomplishing a reasonable result consistent with legislative intent. However, that interpretation is neither the literal interpretation nor the interpretation under which the statute has been construed over the years. A literal interpretation of §499.45(2) is that the phrase "such excess" refers to the total amount of capital stock exceeding $25,000. Your letter stated that for 47 years the office of the secretary of state has based its computation of filing fees assessed when cooperatives file amendments upon the interpretation that "such excess" refers to the total increase in authorized capital stock if authorized capital stock is increased to an amount exceeding $25,000. An application of tenets of statutory construction will demonstrate the third interpretation suggested in this opinion is the construction which should be adopted.

Statutory construction may be invoked when a statute contains such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning. *Janson v. Fulton*, 162 N.W.2d 438 (Iowa 1968). Statutory construction is properly employed when interpreting §499.45(2) since agency interpretation over a period of years has been contrary to the strict literal meaning of the statute.

It is well established in Iowa that the primary rule of statutory construction is to give effect to legislative intent. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). Iowa Code §4.6 (1981) specifies several factors that may be considered in determining legislative intent:

4.6 Ambiguous statutes — interpretation. If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

1. The object sought to be attained.

2. The circumstances under which the statute was enacted.

3. The legislative history.

4. The common law or former statutory provisions, including laws upon the same or similar subjects.

5. The consequences of a particular construction.

6. The administrative construction of the statute.

7. The preamble or statement of policy.

The construction which is adopted after considering one or a combination of the above factors, must be the construction which will best effect the purpose of the statute. *Shidler v. All American Life and Financial*, (Iowa 1980). Although consideration must first be given to the words used, the manifest intent of the legislature must prevail over the literal meaning of the words used. *Northern Natural Gas Co. v. Frost*, 205 N.W.2d 692 (Iowa 1973).

The clear language of §499.45(1) indicates that the legislature intended to develop a fee structure whereby a cooperative would pay, upon filing articles of incorporation, a flat fee if authorized capital stock is less than or equal to $25,000 and an additional amount per $1,000 of authorized capital stock exceeding $25,000. Presumably, the fees are authorized for the purpose of funding administrative costs that the secretary of state incurs in administering the filing provisions of chapter 499. Nothing in the language of chapter 499 indicates that the legislature authorized fees for the purpose of deterring certain activities.

Construing §499.45(2) by adopting the third interpretation suggested above would give the same structure to fee schedules applicable to cooperatives when they file amendments as the fee schedule applied when cooperatives initially file articles of incorporation; a flat fee if authorized capital stock is under $25,000 and an additional one dollar per thousand upon increases of authorized capital if authorized capital stock exceeds $25,000. This interpretation would accomplish legislative intent while giving full effect to the language of the statute.

According to the second interpretation of §499.45(2) mentioned above, under which the phrase "such excess" would refer to all authorized capital stock exceeding $25,000, cooperatives would pay one dollar per thousand of *all* outstanding capital stock exceeding $25,000 upon filing each amendment regardless of the number of times the cooperatives file amendments and the amount by which each amendment increases capital stock. Such an interpretation would render §499.45(2) a disincentive to cooperatives increasing capital stock gradually by amendment. Yet, there is no language in chapter 499 to suggest that the legislature intended to discourage cooperatives from increasing capital stock by amendment. Such a construction would yield severe consequences seemingly in derogation of legislative intent.

The first construction of §499.45(2) referred to above, under which "such excess" would refer to the increase in capital stock, should also be avoided since it

fails to give effect to all of the words of the statute. Every word is given its common meaning only if the phrase "such excess" refers back to the phrase "exceeding $25,000."

In summary, the language of §499.45(2) is ambiguous and should be construed in a manner which gives full effect to the meaning of all of the words used in the statute and accomplishes the purposes of the statute as evidenced by legislative intent. Those goals are both met by construing the phrase "such excess" in §499.45(2) to refer to the part of the increase of authorized capital stock which, when the increase is added to existing authorized capital stock, exceeds $25,000.

September 28, 1982

CRIMINAL LAW: Bail on Appeal from Magistrate's Judgment. Iowa Rule of Criminal Procedure 54. A defendant is not required to post an appeal bond in order to perfect an appeal from a judgment of guilt rendered by a magistrate. (Blink to Sklenar, Judicial Magistrate, 9/28/82) #82-9-23

The Honorable Joseph M. Sklenar, Sr., Judicial Magistrate: You have requested an opinion of the office of the attorney general concerning "Appeal bond in cases where a judgment of guilty by a magistrate is appealed to the district judge." Specifically, you have inquired:

1. Is a defendant required to post an appeal bond to successfully take an appeal from judgment rendered by a magistrate?

2. Who determines the amount of the appeal bond?

3. If an appeal bond is required and defendant fails to post the amount required or the amount set, what action should the clerk of court take, if any, with respect to accepting the transcript?

4. May the clerk of court refuse to accept the appeal if the appeal bond is not posted?

First, appeals from a judgment of conviction of simple misdemeanors are governed by Iowa R.Crim.P. 54 which states in relevant part:

> 1. ... an appeal may only be taken by the defendant and only upon a judgment of conviction. Execution of the judgment shall be stayed upon filing with the clerk of the district court an appeal bond with surety approved by the clerk, in the sum specified in the judgment. A party takes an appeal by giving notice orally to the magistrate at the time judgment is rendered that the party appeals or by delivering to the magistrate not later than ten days thereafter a written notice of appeal, and in either case the magistrate must make an entry on the docket of the giving of such notice. Payment of fine or service of a sentence of imprisonment does not waive the right to appeal, nor render the appeal moot....

Thus, the only requirement for perfection of an appeal is timely notice to the magistrate. Filing of an appeal bond merely stays execution of judgment. It is not

necessary for the perfection of an appeal. Contrary to earlier Iowa law, Rule 54 specifically states: "Payment of fine or service of a sentence of imprisonment does not waive the right to appeal nor render the appeal moot." Early precursers of Rule 54 did not contain the above-stated language. *See* Iowa Code section 762.43 (1958). Consequently, a defendant who voluntarily paid a fine in lieu of staying execution of judgment by appeal bond waived his right to appeal. *See City of Denison v. McCord*, 251 Iowa 1322, 1328, 105 N.W.2d 485, 487-488 (1960). Under the present rule, however, it is clear that posting an appeal bond, thereby staying execution of judgment, is not essential to the perfection of an appeal from conviction by a magistrate.

In response to your second question, subsection 5 of Rule 54 provides that "admission to bail shall be as provided in chapter 811." Iowa Code section 811.2(1), unless, the judgment sets out a fine to be paid by defendant, then the amount of the appeal bond is the "sum specified in the judgment." Iowa R.Crim.P. 54(1).

Because filing of an appeal bond is not necessary for the perfection of an appeal from conviction by a magistrate, your third and fourth questions need not be answered further.

September 28, 1982

TAXATION: Correction of Property Tax Assessment Errors. Iowa Code §§421.17(10), 443.6 and 445.60 (1981). If assessment errors are made by the assessor because of use of erroneous data in determining assessments for individual residential realty, the county auditor has no authority under §443.6 to correct such nonministerial errors. In addition, the board of supervisors has no authority, under §445.60, to order a refund of taxes paid upon such erroneous assessments. The director of revenue has authority, within the scope of §421.17(10), to consider such assessment errors. If the director corrects such errors, he/she can raise individual valuations but cannot reduce any valuation unless such reduction is recommended by the board of review. (Griger to Schwengels, State Senator, 9/28/82) #82-9-24(L)

September 28, 1982

IOWA CONSUMER CREDIT CODE: Inclusion of Commencement Date and Last Date in Computation of Loan Term. §§537.2401 and 537.2510(4)(b), Iowa Code, 1981. Revised Regulation Z (12 C.F.R., section 226, Appendix J.) Under the *Iowa Consumer Credit Code*, a lender may not count both the first day and the last day of the loan for purposes of computing one loan term for accrual of the finance charge on a closed-end-consumer credit loan. (Lowe to Pringle, 9/28/82) #82-9-25(L)

September 28, 1982

BOARD OF PHARMACY EXAMINERS: Iowa Code §217.38(9), Acts of the 69th General Assembly, Senate File 2304, section 96. The board of pharmacy examiners should adopt a rule to insure that pharmacists who reduce their charges to private benefit plans also reduce their charges by the same amount to the medical assistance (Medicaid) program and that co-payment requirements are applied equally to third-party payors and the Medicaid program. The board would not be bound by the rule now found in 770 IAC §79.1(4)(i). In our judgment, that rule has been repealed by the new legislation. (Robinson to Johnson, 9/28/82) #82-9-26(L)

OCTOBER 1982

October 1, 1982

SCHOOLS: Establishment Clause: Creationism: First Amendment, U.S. Const.; Iowa Code chapters 273 and 301, §§278.1(1); 279.28 (1981). Section 278.1(1) is not facially unconstitutional. Petitions requesting a school board to adopt a specific list of books as supplemental textbooks for school library and teacher resource use are not authorized by §278.1(1) because: 1) the electors hold power to direct the board to change textbooks but it is the board that selects, adopts and purchases textbooks; 2) the electors do not hold power under §278.1(1) to direct the adoption of supplemental textbooks for school library and teacher resource use and 3) the power of a district board and/or the area education agency to select and purchase books and other materials for school library and teacher resource use is not affected by the power exercised by the electorate under §278.1(1). It would not violate the Establishment Clause if the books listed on the petition were placed in school libraries. The Establishment Clause would be violated by a requirement that the creationist-science books be used in science classes, pursuant to *Lemon v. Kurtzman* and *McLean v. Arkansas Board of Education.* (Fleming to Anderson, State Senator, 10/1/82) #82-10-1

The Honorable Ted Anderson, State Senator, Eighteenth District: You have asked for our opinion regarding the legality and constitutionality of Iowa Code Section 278.1(1) (1981). Your questions are submitted because of petitions that have been circulated in school districts of the state concerning creationism.

Petitions were submitted to various school districts pursuant to §278.1(1) which provides:

> *Enumeration.* The voters at the regular election shall have the power to:
>
> 1. Direct a change of textbooks regularly adopted.

* * *

The petitions as submitted to the school districts contained the following wording (with addition of the district's name in the space indicated):

> We the undersigned electors of _____ hereby petition the Board of Directors of _____ School District to include the following question on the ballot at the next regular election pursuant to §278.1(1) and 278.2 of the Code:
>
> Shall the following books be adopted as supplementary textbooks for school library and teacher resource use in every school in this _____:
>
> Wysong, *The Creation-Evolution Controversy,* Inquiry Press, : K. Seagraves and R. Kofahl, *The Creation Explanation,* Creation-Science Research Center, : R. Kofahl, *Handy Dandy Evolution Refuter,* Creation-Science Research Center, : R. Bliss, *Origins: Two Models,* Creation Life Publishers, : R. Bliss, *The Eye: A Light Receiver,* Creation Life Publishers, : G. Parker, *Fossils: Hard Facts From the Earth,* Creation Life Publishers, : Wildersmith, *Natural Sciences Know Nothing of Evolution,* Master Books, :

B. Sauer, *Walk The Dinosaur Trail*, Creation Life Publishers, : G. Parker, *Origin of Life*, Creation Life Publishers, : D. Gish, *Fossils: Key to the Present*, Creation Life Publishers, : H. Morris, *Scientific Case for Creation*, Creation Life Publishers, : H. Slusher, *Critique of Radiometric Dating*, Creation Life Publishers, : T. Barnes, *Origin and Destiny of the Earth's Magnetic Field*, Creation Life Publishers, : H. Slusher, *The Age of the Earth*, Creation Life Publishers, : H. Slusher, *The Origin of the Universe*, Creation Life Publishers.

This wording was submitted to the Waterloo school district board of directors. Petitions containing this language were also submitted to the Des Moines, Council Bluffs and Cedar Rapids districts. We are aware that similar petitions were submitted in other districts but are not certain of the precise language appearing in other petitions. We gave informal advice to the State Superintendent of Public Instruction that petitions containing the wording set out above did not comply with §278.1(1) and were therefore not authorized by law. We are aware that the Des Moines, Council Bluffs, Cedar Rapids, and Waterloo district boards did not order the Commissioner of Elections to place the question on the ballot for the regular school election in September but such issues may have been on the ballot in other districts.

You express concern that implementation of an affirmative vote on such a question would violate the Establishment Clause of the United States Constitution and would interfere with the academic freedom of school administrators, teachers and students. The questions you present for our consideration are:

1. Whether Iowa Code Section 278.1(1) is facially unconstitutional.

2. Whether implementation following an affirmative vote on such a petition would violate the Establishment Clause.

In our opinion, the action requested by the petition set out above is not authorized by §278.1(1). We base our conclusion on three reasons: First, the electors hold power under §278.1(1) to direct the board *to change* textbooks but it is the board that holds power under Iowa Code chapter 301 (1981) *to select, adopt, and purchase textbooks*; second, the electors hold power to direct the board to change textbooks regularly adopted, not to *direct the adoption of supplemental textbooks*; and third, a district board's and/or the area education agency's powers to select and purchase books and other materials for school libraries and teacher resource use are not affected by the power granted to the electorate by §278.1(1).

Although we discuss the constitutional issues you present, we have concluded that any controversy concerning such petitions should be disposed of on statutory grounds.

I. THE MEANING OF THE STATUTE

A. Avoidance of Constitutional Issues.

When we are asked to give our opinion with respect to the constitutionality of a statute, we are guided by the principles followed by the courts when considering a claim of unconstitutionality. It is a well-established principle that every statute is presumed to be constitutionally valid. *Iowa Industrial Commission v. Davis*, 286 N.W.2d 658, 661 (Iowa 1979); *Millsap v. Cedar Rapids Civil Service Commission*, 249 N.W.2d 679, 684 (Iowa 1977). Courts will not interfere when constitutionality is only doubtful or debatable. *Iowa Industrial Commission v. Davis, supra; Board of Supervisors v. Department of Revenue*, 263 N.W.2d 227, 235 (Iowa

1978). The courts give a construction to an act, if possible, which upholds the law and avoids a declaration of unconstitutionality. *Iowa Industrial Commission v. Davis, supra; Long v. Board of Supervisors*, 258 Iowa 1278, 1283, 142 N.W.2d 378, 381 (1966). The practice of avoiding constitutional issues except when necessary for proper disposition of a controversy is a bulwark of American jurisprudence. *Salsbury Laboratories, Inc. v. Department of Environmental Quality*, 276. N.W.2d 830, 837 (Iowa 1979).

B. Principles of Statutory Construction.

Your question about the constitutionality of §278.1(1) is raised in the context of a specific request for action pursuant to that statute. We must determine, therefore, whether the particular petition is authorized by §278.1(1). We are guided by the principles of statutory construction of Iowa Code chapter 4 (1981) and decisions of the Iowa Supreme Court. In this particular circumstance, the applicable rule is that statutes relating to the same subject matter must be construed, considered and examined in the light of their common purpose and intent. *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 774 (Iowa 1969). Thus we must consider the purpose and intent of §278.1(1) in relation to other sections of the Code pertaining to the selection, adoption, changing, and acquisition of textbooks as well as books and other materials for school library and teacher resource use. The board of directors holds power with respect to textbooks and other supplies under the provisions of Iowa Code chapter 301 and §279.28 (1981). Other powers are exercised by the area education agencies which provide materials and services to local school districts pursuant to Iowa Code chapter 273.

In addition to consideration of other statutes on the same subject, we must consider the meaning of school laws in light of Dillon's Rule: the only powers of a school district are those expressly granted or necessarily implied in governing statutes. *McFarland v. Board of Education*, 277 N.W.2d 901, 906 (Iowa 1979); *Barnett v. Durant Community School District*, 249 N.W.2d 626, 627 (Iowa 1977); *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947).

The Constitution of Iowa assigns to the General Assembly the power to "provide for the educational interest of the state in any other manner that to them shall seem best and proper". Iowa Const. Art. IX, Sec. 15. Pursuant to that authority, the legislature has adopted a complex system of education for the people of Iowa. The principal responsibility for operating the elementary and secondary schools of the state is assigned to local school districts, subject to certain powers exercised by the State Board of Public Instruction, the State Superintendent and the relevant Area Education Agency. Within a school district, certain powers are delegated to the electors and other powers are assigned to the board of directors and the employees. Your questions require us to identify the boundaries between the power exercised by a school board with respect to textbooks, library books, and teacher resource materials and the power which may be, but need not be, exercised by the electors.

Your questions require us to determine what actions are encompassed by §278.1(1), i.e., what is authorizes the voters to direct. The polestar of statutory construction is legislative intent. *Doe v. Ray*, 251 N.W.2d 496, 500 (Iowa 1977). Our goal is to ascertain that intent. *Id.* Because §278.1(1) is brief and ambiguous we have explored the statutory history of the statute, chapter 301, and other related statutes in detail to determine the intent of the legislature.

C. The Statutory History.

Our review of the statutory history leads us to conclude that the power assigned to the electors in §278.1(1) is limited to whether a change in textbooks should be made. The power granted in §278.1(1) does not include the power to select the particular textbooks or series of textbooks to be adopted by the board or to select other books and materials for use in the schools.

The school laws of the State of Iowa were based on the school laws of the Territory of Iowa. In the 1850's and 60's, the voters of a school district assembled at least twice a year to conduct the affairs of the "body coporate," Iowa Code chapter 69, §§1108, 1114 (1851), but their powers could be delegated to the district board. In the beginning the school code contained no references to textbooks but did provide for the acquisition of libraries and books for the library and limited the amount of tax that could be levied for that purpose. Revised Statutes, Territory of Iowa, chapter 140, §13(5) (1843) (1912 Reprint); Iowa Code chapter 69, §1115(5) (1951). The office of Superintendent of Public Instruction was created in 1851, and that officer was assigned the duty to recommend a "uniform series of text books, to be used in the schools" of the state. Iowa Code chapter 67, §1082 (1851). Subsequently, the electors were granted the power to "determine the branches to be taught *and the textbooks to be used in the schools* of their district which power they may also delegate to the district board." 1860 Iowa Acts, chapter 139. The power of the electors to choose textbooks was eliminated from the school laws by 1862 Iowa Acts, chapter 172 (9th G.A.), which amended and consolidated the laws pertaining to the common schools. *See* 1862 Iowa Acts, chapter 172, §7 (powers of the electors). Almost all responsibility for operation of the schools was assigned to the school district board, *see* 1862 Iowa Acts, chapter 172, §§18-34, although the power exercised by the board was restricted by strict application of Dillon's Rule. The first limitation on the board's power to change textbooks was a one-paragraph enactment as follows:

> That hereafter the *board of directors* of *any district-township or independent district shall not order or direct or make any change in the schoolbooks, or series of text books,* used in any school . . . *more than once in every period of three years, except by a vote of the electors* . . ., and any laws or parts of laws, inconsistent herewith, be and the same are hereby, repealed.

1872 Iowa Acts, chapter 8, p. 85 (emphasis supplied). That Act was codified as Iowa Code §1728 (1873). This provision was clearly a limitation on the power of the board to spend and it was not linked to the power of the board to select textbooks. During that period of Iowa history, the students purchased their textbooks directly, not the school district.

The legislature in 1890 adopted sweeping changes with respect to textbooks. The board of directors or "each and every district," 1890 Iowa Acts, chapter 24, 51, was "authorized and empowered to adopt text-books for the teaching of all branches that are now or may hereafter . . . be taught . . . and to contract for and buy said books and any and all necessary school supplies . . . and to sell the same to the pupils . . . at cost." *Id.*

The limitation on the power of the board to change textbooks was re-adopted but boards could not change textbooks more often than once every five years without approval by the voters rather than the three year period of the previous Code. 1890 Iowa Acts chapter 24, §6. In other words, the limitation on the power of the board to spend was strengthened but no similar limitation on the power to *select* textbooks when it did so was imposed. The 1890 statute also provided that the voters of the rural districts of a county could adopt a uniform system of

textbooks for all the schools in the county. When such a uniform system was in use, it was the county board of education, not the various district boards, that selected and purchased the books. 1890 Iowa Acts chapter 24 §§8, 9, and 10. The purpose of those sections was to secure uniformity in cost and to minimize the cost of textbooks. 1907 Op.Att'yGen. 26. [1]

The 25th General Assembly amended the textbook provision to provide that a school district could furnish textbooks to "indigent pupils, when they are likely to be deprived of the school unless aided by the district with books." 1894 Iowa Acts chapter 34. In other action, the 25th General Assembly created a Code Commission to "carefully revise and codify the laws of Iowa, and shall rewrite the same." 1895 Iowa Acts, chapter 115. Pursuant to that assignment, the Code Commission rearranged and largely rewrote the school chapters. *Report of the Code Commission*, p. 80 (1896). The resulting Iowa Code (1897) was very different from the previous Code. [2]

The 1897 version of the school laws continued the limitation on the frequency of change in textbooks. Inasmuch as the board *could change* textbooks more often than once in five years *with voter approval*, the 1897 Code contained a corresponding delegation of power to the voters. The language of the statute adopted was precisely the same as it appears today: "To direct a change of textbooks regularly adopted." Iowa Code §2749(1) (1897). *Cf.* §278.1(1) set out above. [3] This corresponding statutory delegation was necessary in light of the vigor with which Dillon's Rule was applied during this period. *See Ries v. Hemmer*, 127 Iowa 408, 411, 103 N.W. 346, 347 (1905) (if the power is not expressly conferred, or necessar-

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1 The Iowa Code contained the provisions for uniform textbooks in Iowa counties until it was repealed by 1947 Iowa Acts, chapter 147, §21.

2 An interesting aspect of the 1897 Code is the provision that in any school election held "for the purpose of issuing bonds for school purposes or for increasing the tax levy, the right of any citizen to vote *shall not be denied or abridged on account of sex*, and women may vote at such elections, the same as men, ..." Iowa Code chapter 14, §2747 (1897). Moreover, "[a] school officer or member of the board *may be of either sex* ... and over twenty-one years of age," *Id.* §2748 [Emphasis supplied].

3 The voters exercised the power when "assembled at the annual meeting" Iowa Code §2749 (1897). The powers of the electors are exercised at the "regular election" rather than at the "annual meeting" pursuant to 1933 Iowa Acts, chapter 53, §15.

The major change in powers relating to textbooks adopted in 1890 also included the right of the voters to decide that free textbooks would be provided to the pupils in a public school. Iowa Code §§2836 and 2837 (1897). The voters hold that same discretion now. *Cf.* Iowa Code §§301.24-301.27 (1981) (voters may authorize board to loan textbooks free of charge and may also direct the board to discontinue loaning).

ily implied from the powers that are conferred, it does not exist, and *any fair doubt as to the existence of the power is to be resolved against its existence.* [Emphasis added]. [4]

In summary, we conclude that the statutory history demonstrates that the grant of power to voters "to direct a change of textbooks regularly adopted" was and is limited to whether textbooks should be changed and is not related to a school board's power to "adopt," *see* Iowa Code §301.1 (1981), or "determine" or authorize," *see* §301.2, textbooks "for the pupils in such schools." *Id.* This view finds support in contemporaneous opinions of this office. *See, e.g.*, 1898 Op.Att'yGen. 134, 135 ("this provision [the five year limit on the board to change textbooks] is made for the benefit of the publisher"); 1916 Op.Att'yGen. 89, 90 (the board "might be guided by the superintendent in the selection of books but they should not delegate to him the power to purchase and sell or loan the same to the pupils" and it is board's duty to adopt textbooks for use in the subjects taught); 1932 Op.Att'yGen. 173 (school board is not required to re-adopt textbooks at the end of five years but continue to use same ones).

D. The Meaning of the Terms "Change," and "Textbooks Regularly Adopted".

1. Iowa Code §278.1(1) states that the voters may direct a *change* of textbooks regularly adopted. The language of the petition set out above does not request that textbooks be changed; rather that certain books be "*adopted as supplementary textbooks* for school library and teacher resource use in every school."

A number of courts have defined the word change. *See, e.g., Town of Vernon v. Waukesha County*, 299 N.W.2d 593, 597 (Wis. App. 1980) (a change means a substitution, a putting of one thing in place of another, an alteration); *Royer v. United States*, 93 F.Supp. 694, 696 (D.C. Tenn. 1950) (change is to alter by substituting something else for, or by giving up for something else; to put or take another or others in place of). The word change, when used as a noun, as here, is defined as "an alteration, modification or substitution of one thing for another," 14 C.J.S. 395, and in this sense the word has been distinguished from the word "establish" in *Jenkins v. State Highway Commission*, 205 Iowa 523, 529, 218 N.W. 258, 259 (1928). *See also* Black's Law Dictionary p. 293 (Rev. 4th Ed.); Webster's Third New International Dictionary, pp. 373-374 (1976).

Given the meaning of the word "change," we conclude that the action requested by the petition set out above is not "change" and therefore is not authorized by §278.1(1).

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[4] The limitation on the frequency of change of textbooks remained in the Code until 1970. *See* 1970 Iowa Acts, chapter 1025, §63 (repealing Iowa Code §301.9 (1966).

2. Section 278.1(1) provides for change of *textbooks* regularly adopted. Where the legislature or courts have not defined a word in a statute it is given its ordinary meaning and the dictionary is an "accurate authority." *State v. Welton*, 300 N.W.2d 157, 161 (Iowa 1981). The dictionary meaning of the word is: "a book used in the study of a subject . . ." *Webster's supra*, p. 2366. Chapter 301 clearly contemplates that textbooks or series of textbooks taught in the schools. Traditionally, a textbook is the book used by each pupil in a class and acceptance of that meaning is apparent throughout the successive Iowa Codes. The term "supplemental textbooks" is not used in Iowa Code 1981 and was not located in previous Codes or session laws.

The term "*regularly adopted*" appears in §278.1(1). The power of the board to "adopt textbooks for the teaching of all branches" is found in Iowa Code §301.1 (1981). Moreover, §301.2 provides that *only* the textbooks *adopted by the board* may be "sold or rented" to the pupils in the school. The board also has the duty in purchasing textbooks "to take into consideration the books in use" in other districts. *See* §301.5. There is nothing in chapter 301 from which an inference may be drawn that the voters, pursuant to §278.1(1) may participate in the process of selecting textbooks. [5]

Support for the view that the voters may not interfere with selection of textbooks is found in *Neilan v. Board of Directors*, 200 Iowa 860, 205 N.W. 506 (1925). The voters had directed that bookkeeping be taught in junior high school pursuant to Iowa Code §§4217 and 4218 (1924). *Cf.* 278.1(3) (1981) (voters shall have power to "[d]etermine upon additional branches that shall be taught"). Neilan had challenged the way that bookkeeping was being taught. The court refused to interfere with the board's exercise of discretion in "carrying out the mandate of the electors to teach bookkeeping in the grade schools, and *its selection of the books to be used, the methods employed*, and *the character of the instruction* suitable *for the pupils* . . ." 200 Iowa at 861, 205 N.W. at 507 [emphasis added]. Similarly, we believe the power to direct "change in textbooks regularly adopted" does not include the power to decide what textbooks shall be selected pursuant to the board's power to adopt textbooks and to carry out the bidding procedures and other duties prescribed in Iowa Code chapter 301 (1981).

E. Library and Teacher Resource Materials.

The petition at issue asks that certain books "be adopted as supplementary textbooks for *school library and teacher resource use* in every school" in a district. In our opinion §278.1(1) does not grant to the voter the right to vote on that subject. The power of the board with respect to acquisition of library books and other resource or reference material is created by Iowa Code §279.28 (1981) as follows:

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[5] It may have been an oversight that §278.1(1) was not repealed by the legislature. *See* 1970 Iowa Acts, chapter 1025, which was an act "to revise, update and correct certain sections of the Code of Iowa and relating to schools, school corporations, and school elections." *Id.* That chapter repealed a wide range of provisions including Iowa Code §301.9 (1966) which provided that a board could not change a textbook or series of textbooks more than once in five years without approval of the voters. Other obsolete sections of chapter 301 pertaining to textbooks were also repealed. 1970 Iowa Acts, chapter 1025, §§64-70.

> [The board] may provide and pay out of the general fund to insure school property such sum as may be necessary, and *may purchase dictionaries, library books*, including books for the purpose of teaching vocal music, maps, charts, *and apparatus for the use of the schools thereof as deemed necessary by the board of directors* for each school building under its charge...

[Emphasis added]. This power to purchase library books as deemed necessary is quite separate from the power to adopt textbooks for "any branch determined by the board to be taught." Iowa Code §301.2 (1981). The power to purchase reference materials and "apparatus" was delegated to the board by the Ninth General Assembly. *See* 1862 Iowa Acts, chapter 172, §7. The assignment of power was expanded by subsequent sessions of the legislature. Early versions of what is now §279.28 placed economic limitations on the board but since 1862 the electors have not been involved in the process of selecting and purchasing library books. The financial limitation in earlier versions of §279.28 on the purchase of library and other resource materials was deleted and replaced by the "as deemed necessary by the board" language by 1965 Iowa Acts, chapter 245, §1. *See* historical notes to §279.28 and chapter 301 in Iowa Code Ann. (West).

Inasmuch as the power to purchase library books and other resource materials is, and has been, separate and distinct from the power of the board to adopt textbooks, we are of the opinion that Iowa Code §278.1(1) does not grant power to the voters to participate in the board's acquisition of such materials.

Moreover, the responsibility to acquire and supply library and other materials is shared with the relevant area education agency. For many years district boards shared the responsibility with the county superintendent and the county board of education. That responsibility was shifted to the area education agencies when the county system was abolished. *See Iowa Code chapter 273 (1981). State funds which were previously allocated to each school district for the purchase of library books and materials are now distributed to the area education agencies for that purpose. See* Iowa Code §292.1 (1981). There is nothing in the Code pertaining to the area education agencies that grants the electorate any direct authority to control the acquisition of library books and materials. In short, our review of the school code as it evolved over time leads us to conclude that power of the board and/or the area education agency to select and purchase library and other resource materials has been and continues to be separate and distinct from the powers in connection with textbooks.

For all of these reasons, it is our opinion that §278.1(1) does not authorize the voters to direct a school board to adopt particular materials "as supplementary textbooks for school library and teacher resource use" as requested in the petition set forth above.

II. THE CONSTITUTIONAL ISSUES

A. Section 278.1(1) is not facially unconstitutional.

Although we believe that any controversy concerning the petitions that gave rise to your request for our opinion should be resolved on statutory grounds, we shall address your questions in the alternative. The language of §278.1(1) is neutral and therefore we conclude that it is not *facially* unconstitutional.

B. The Establishment Clause Issue.

Your second question and the concerns you set forth in your request for an opinion require a more extended response. You state that you perceive the attempt to introduce creationism in the public school to be a statewide phenomenon and you refer to *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (E.D.Ark. 1982) in which the federal district court invalidated a state statute requiring that public schools give balanced treatment in science classes to "creation-science" and to "evolution-science." You ask whether placing the listed books in the public school system would violate the Establishment Clause of the First Amendment.

We note that the language of the petition merely requests that the listed books be adopted "as supplementary textbooks for school library and teacher resource use," and does not *require that the books be used for teaching any particular subject.*

The First Amendment contains two religious clauses: the Free Exercise clause and the Establishment Clause. The protections afforded by the First Amendment were extended to the States by the adoption of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939). The Supreme Court has interpreted the meaning of the religion clauses in a host of decisions and those cases reflect a continuing effort to strike and maintain a delicate balance of the "tension between the two Religious Clauses." *Thomas v. Review Board of Indiana*, _____ U.S. _____, 101 S.Ct. 1425, 67 L.Ed.2d 624, 635 (1981). Furthermore, many of the religion cases are directly or indirectly controlled by the Speech Clause rather than the Religious Clauses. *See, e.g., Widmar v. Vincent*, _____ U.S. _____, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 731 (1969). Moreover, the decisions turn on very specific factual circumstances and the nature of a statute or regulation that has been challenged. The Court also makes important distinctions between what a state or school district requires to be taught and what is made available to students in a school library. *Board of Education of Island Trees v. Pico*, _____ U.S. _____, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982).

Our review of the cases leads us to conclude that if a school board, either in response to requests from citizens or in the exercise of its broad discretion under Iowa Code §279.28 (1981), decided to place "creationist" books in a school library it would *not* be a violation of the Establishment Clause. In reaching this view, we assume that a district board had not exercised its discretion "in a narrowly partisan or political manner" and in an effort to suppress other ideas. *Island Trees v. Pico*, _____ at _____, 102 S.Ct. at 2810, 73 L.Ed.2d at 449. This conclusion is based on "the unique role of the school library" as "the principal locus" of the students' freedom "to inquire, to study and to evaluate, to gain new maturity and understanding." *Id.* at _____, 102 S.Ct. at 2809, 73 L.Ed.2d at 448. *See* Iowa Code §280.6 (1981) (religious books such as the Bible, the Torah, and the Koran shall not be exculded from any public school nor shall any child be required to read such religious books contrary to the wishes of his parent of guardian).

On the other hand, if a school board, either in response to requests from citizens or in exercising its power to adopt textbooks pursuant to Iowa Code chapter 301 (1981), were to require the use of "creationist" books in *science* courses, a dispute under the Establishment Clause could exist and the teaching of *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (E.D.Ark. 1982) would be persuasive.

The Supreme Court has established a test for courts to apply when deciding a challenge to a statute or regulation under the Establishment Clause as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). That test was applied recently in *Stone v. Graham*, 449 U.S. 391, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (Establishment Clause prohibits a state from requiring the posting of the Ten Commandments in public school classrooms).

This test was applied by the District Court in *McLean, supra*, and we believe it would be the applicable test if an Iowa school board required the use of "creationist" materials in science classes. We have not reviewed the books that were listed in the petitions but we note that some of those books were included in the materials reviewed in detail by the court in *McLean v. Arkansas Board of Education*, 529 F.Supp. at 1259-1272. After a ten-day trial and review of extensive documentary evidence, the district court decided, *inter alia*, that the work of creationists "is not science," 529 F.Supp. at 1268, that the requirement that "creationist-science" be taught advanced religion, 529 F.Supp. at 1264, and that the creationist concept of "creation out of nothing" is a concept that is "unique to Western religions." 529 F.Supp. at 1265. The District Court concluded that the only real effect of the Arkansas statute which required a balanced treatment of "creation-science and evolution-science" was to advance religion and therefore it failed both the first and second portions of the *Lemon v. Kurtzman* test set out above. The court also concluded that because of "the pervasive nature of religious concepts in creation science texts," the use of those materials would "create an excessive and prohibited entanglement with religion." *McLean*, 529 F.Supp. at 1272, *i.e.*, the third prong of the *Lemon v. Kurtzman* test was violated by the Arkansas statute.

We are aware that a substantial portion of Iowa citizens have a Judeao-Christian heritage and many Iowans would either not object or would favor the use of creationist materials in public school science classes. We believe a statement by the Court in *McLean* is relevant to what you describe in your request for our opinion as a statewide phenomenon:

> The application and content of First Amendment principles are not determined by public opinion polls or by a majority vote. Whether the proponents of [requiring creation-science to be taught] constitute the majority or the minority is quite irrelevant under a constitutional system of government. No group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others.

529 F.Supp. at 1274.

The court's analysis in *McLean* as well as the long line of Supreme Court Establishment Clause decisions lead us to conclude that if a school district were to require the use of "creationist-science" books in science courses, a violation of the Establishment Clause would be found. [6]

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[6] The parameters of "academic freedom" in the elementary and secondary education setting are not well-established. *See Board of Education of Island Trees v. Pico*, ____ U.S. ____, 102 S.Ct. 2799, 73 L.Ed.2d 435 (seven separate opinions). No actual dispute is described in your request and therefore we express no view with respect to your concerns about possible interference with the academic freedom of administrators, teachers and students.

If the books listed in the petition were included in materials for a comparative study of world religions or cultures, a challenge under the Establishment Clause would have a different result. *See Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980) *cert. denied*, 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251 (1980). As the court in *Florey* observed, "[t]he First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited." *Id.* at 1315 (emphasis by court). Moreover, the study of religion is not forbidden "when presented objectively as part of a secular program of education." *Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). The court concluded in *Florey*, that the primary purpose of the activity allowed by the challenged rules was secular, Florey, 619 F.2d at 1317. Under the *Lemon v. Kurtzman* test set out above, when the primary purpose served by a given school activity is secular, "that activity is not made unconstitutional by the inclusion of some religious content." *Florey*, 619 F.2d at 1316.

The Iowa General Assembly has expressly provided that the educational program "shall be taught from a multicultural, nonsexist approach," *see* Iowa Code §257.25 (introductory paragraph) (1981). Religious themes recur in Western art, literature and music and have acquired a significance which is no longer confined to the religious sphere of life but have "become integrated into our national culture and heritage." *Florey*, 619 F.2d at 1316. As Judge Heaney noted in *Florey* at 1316, "[i]t is unquestioned that public school students may be taught *about* the customs and cultural heritage of the United States and other countries," and that was the principal effect of the Sioux Falls rules. That finding is in sharp contrast to the conclusion in *McLean*, that the *primary* effect of the use of creationist materials in *science* classes is the *advancement* of *religion*.

We recognize that the distinctions we have discussed are fine ones. But in maintaining the delicate balance required by the First Amendment, the schools and courts are required to engage continually in drawing fine lines. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) in which the Supreme Court reviewed a laundry list of activities for which Ohio statutes authorized state aid to parochial schools. The court upheld some of the categories of aid and rejected others under the Establishment Clause. As the court said in *Florey*, 619 F.2d at 1318, "[t]he administration of religious training is properly in the domain of the family and church. The First Amendment prohibits public schools from serving that function."

CONCLUSION

In summary, we have concluded that Iowa Code §278.1(1) (1981) does not authorize submission of the petitions set forth above to the electors of a school district. This conclusion is based on three grounds: 1) the electors hold power to direct the board to change textbooks but it is the board that selects, adopts and purchases textbooks; 2) the electors do not hold power under §278.1(1) to direct the adoption of supplemental textbooks for school library and teacher resource use and 3) the power of a district board and/or the area education agency to select and purchase books and other materials for school library and teacher resource use is not affected by the power exercised by the electorate under §278.1(1).

In our opinion Iowa Code §278.1(1) is not facially unconstitutional. In our opinion it would not violate the Establishment Clause if the books listed on the petition were placed in school libraries. On the other hand, we believe the Establishment Clause would be violated by a requirement that the creationist-science books be used in science classes, pursuant to *Lemon v. Kurtzman* and *McLean*.

October 1, 1982

INSURANCE; LICENSING: Exempting nonresident insurance agents from continuing education requirements; cancelling existing insurance agents' licenses prior to the expiration of the term of those licenses. 1982 Iowa Acts, H.F. 846, sections 9, 10, 13; Iowa Code sections 4.1(1), 4.5, 4.7, 4.8, 4.13, 258A.1(1)(z), 258A.2(1), 258A.2(2)(a), 258A.2(3), 505.14, 508.13, 515.42, 522.1, 522.2, 522.4 (1981). Exempting all nonresidents from the Commissioner of Insurance's rules on continuing education for insurance agents is statutorily overboard to the extent that it exempts a nonresident agent even when the nonresident's state has no continuing education requirement for agents. Insurance agents' licenses in effect prior to July 1, 1982, may not be cancelled by the commissioner for nonpayment of the fee required for licenses issued after that date, until the prior licenses by their terms expire. (Haskins to Harbor, State Representative, 10/1/82) #82-10-2(L)

October 7, 1982

PUBLIC RECORDS: Iowa Code chapter 68A (1981); Iowa Code §§68A.7, 68A.7(5), 68A.7(9). (1) Requests for public records pursuant to §68A.7(5) should be directed to the lawful custodian of the records or to his or her authorized deputy. (2) Such requests must reasonably describe the records requested. A request is "reasonable" if it enables the lawful custodian who is familiar with the subject matter of the request to locate the records with a reasonable amount of effort. As such, a request for §68A.7(5) time, date, and location information is inherently specific. (3) A citizen may request §68A.7(5) information for a particular day or time, or for any number of days or times. The request is not required to specify the particular criminal incident for which the information is requested. (4) Disclosure or nondisclosure pursuant to §68A.7(5) does not depend on the nature or the document which contains that information. (5) The lawful custodian may not keep all §68A.7(5) information, including time, date and location information, confidential on the ground that part of it may be kept confidential, but the custodian may delete the confidential information before disclosure. (Weeg to Holt, State Representative, 10/7/82) #82-10-3

The Honorable Lee Holt, State Representative: You have requested an opinion of the Attorney General regarding the interpretation of Iowa Code §68A.7(5) as it relates to public access to certain police records. You state in your opinion request that the current practice by law enforcement officials handling requests for crime and incident information varies widely. Some officials make that information available upon receiving a general request, others require the requestor to specify the particular crime or incident for which information is desired, and a few refuse to release this information regardless of the specificity of the request. Given this situation, you pose the following questions:

> 1. To whom should an inspection request for the public information defined under Section 68A.7(5) be directed? What must be contained in the request? In what cases would a request for review of police information records — such as blotters, logs, dispatcher reports, or uniform reporting forms — for a given day or time be insufficient to require production of those documents and the crime/incident information? Similarly, when would a general request to see the police logs, blotters, dispatcher reports or uniform reporting forms be insufficient to require production of those

documents and in what instances can the records custodian require that the request be keyed to a specific crime or incident? In the bulk of the cases where a blanket request is appropriate, if the custodian knowingly withholds certain documents or certain items of public information covered by the request, has he or she violated the open records act?

2. Where routine law enforcement record keeping procedures exist, such as with the maintenance of blotters, logs, or uniform reporting forms, under what conditions can the records custodian withhold the blotter, log or uniform forms from inspection and copying by a member of the public or the press?

3. If part of the record covered by a request contains police information beyond that required to be produced under 68A.7(5), under what limited circumstances, if any, can the records custodian withhold the entire record and its contents rather than making available the public information on the record while segregating that police investigative material which appropriately may be withheld?

We will address each question in turn after first reviewing the relevant statutory provisions.

INTRODUCTION

Section 68A.2 of chapter 68A, the Iowa Public Records Act, provides that:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records....

This general rule is subject to express statutory exceptions, several of which are contained in §68A.7. That section provides in relevant part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:
>
> * * *
>
> 5. Peace officers' investigative reports, except where disclosure is authorized elsewhere in this Code.
>
> * * *
>
> 9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

* * *

Subsection 5 was recently amended by 1981 Iowa Acts, chapter 38, and became effective July, 1 1981. This subsection now states as follows:

> 5. Peace officers' investigative reports, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize and investigation or pose a clear and present danger to the safety of an individual.

Prior to this recent amendment, police investigative reports were generally classified as confidential, subject to the discretion of the lawful custodian of these documents. [1] However, as a result of this amendment, records documenting such basic information as the date, time, specific location, and brief description of a particular criminal incident are now public records, and may be kept confidential at the discretion of the custodian *only* when exigent circumstances, as defined in subsection 5, exist. In sum, this amendment reflects a legislative judgment that such information is not generally of a confidential nature and therefore not subject to special protection from disclosure.

We further note that chapter 68A expresses a policy that free and open examination of public records is generally in the public interest. *See* §68A.8. In *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980), the Iowa Supreme Court discussed this general policy by stating:

> In *Howard v. Des Moines Register and Tribune* (cite omitted), we endorsed the concept that [chapter 68A] established a liberal policy of access from which departures are to be made only under discrete circumstances. It is plain that our analysis must start from the premise that chapter 68A is to be interpreted liberally to provide broad public access to ... public records.

The Court later stated that there is a presumption in favor of disclosure, and that statutory exemptions are to be narrowly construed. *Id.* at 527.

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[1] We recently stated in Op.Att'yGen. #82-9-3:

> Interpreting the language of section 68A.7 in a prior opinion, we observed that the statute vests the courts and the lawful custodians with authority to release records which are otherwise confidential under these categories but fails to enumerate standards by which either a court or lawful custodian may determine that exception from confidentiality would be appropriate in any particular case. Accordingly, we concluded that the decision to release these records is left to the discretion of the lawful custodian. 1980 Op.Att'yGen. 825.

I.

We turn now to your specific questions. Your first question may be divided into three separate inquiries. You initially ask to whom requests for information pursuant to §68A.7(5) should be directed. It is our opinion that such requests should be directed to the lawful custodian of the records or to his or her authorized deputy or deputies. While no statutory provision expressly designates the person to whom requests for public records should be directed, both §68A.2 and §68A.3 consistently refer to the "lawful custodian" as the person who is in possession and control of the records and who oversees examination and copying of those records by the public. *See also* §68A.7 (certain records to be kept confidential "unless otherwise ordered by the court, *by the lawful custodian of the records*, or by another person duly authorized to release information"). [Emphasis added] It is therefore reasonable to conclude that this is also the person to whom requests for public records should be directed. We have previously held that the lawful custodian is the person entrusted to compile and maintain such records. 1980 Op.Att'yGen. 825. In the present case, we believe that either a municipal chief of police or a county sheriff would serve as an example of a "lawful custodian" within the meaning of chapter 68A. As previously mentioned, the lawful custodian could designate another person or persons to serve as an "authorized deputy."

Your second question relates to the form in which a request for information pursuant to §68A.7(5) must be made. More particularly, you ask how specific that request must be, and whether information such as the date, time, of description of a particular incident must be included in the request in order to obtain records from a law enforcement agency. It is our opinion that a request for public records pursuant to chapter 68A must reasonably describe the records requested. This description is "reasonable" if it enables the lawful custodian who is familiar with the subject matter of the request to locate the records with a reasonable amount of effort. Once a request satisfying this requirement is made, the date, time, and location information described in §68A.7(5) must be disclosed, unless there are "unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual."

Our office has not previously addressed the question of how specific requests for information under chapter 68A must be, and we find no relevant Iowa cases. Consequently, we refer to the federal courts' interpretation of the comparable federal provision found at 5 U.S.C. §552 (Freedom of Information Act) for guidance. *See, e.g., Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758 (Iowa 1971) (in absence of authority interpreting Iowa statute, Iowa court will refer to federal courts' interpretation of analogous federal provision for guidance). That Act requires federal governmental agencies to make their records available to the public, subject to several exceptions.

In addressing the question of how specific requests for agency records must be, the federal courts refer to the requirement contained in §552(a)(3)(A) that a request for records must "reasonably describe" the records requested. This requirement is interpreted, not as requiring a thorough identification of the records sought, but instead as calling for a "reasonable description enabling the Government employee to locate the requested records." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978); *Sears v. Gottschalk*, 502 F.2d 122, 125 (4th Cir. 1974); *National Cable Television Association v. Federal Trade Commission*, 479 F.2d 183, 190-191 (D.C. Cir. 1973); *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 828, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). However, this requirement is not to be used as a method of withholding records. *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d at 938. While the courts have been wary of allowing the "identifiability" require-

ment to become "a loophole through which federal agencies can deny the public access to legitimate information, it has been held that broad, sweeping requests lacking specificity are not permissible." *Marks v. United States*, 578 F.2d at 263 (and cases cited therein). In sum,

> [T]he Freedom of Information Act does not require that [the requestor] indentify records by providing the agency with a complete description down to the last detail of title and file number ... [The Act] places part of the responsibility for indentifying records on the agency itself. The responsibility of the person requesting records is that he provide sufficient information to permit the agency to accomplish this duty.

National Cable Television Association v. Federal Trade Commission, 479 F.2d at 190-191.

Applied to your particular questions, we believe this "reasonableness" standard should be implemented when determining how specific a request for information under chapter 68A must be. Beacuse of the wide variety of factual situations involving chapter 68A requests, and because of the general nature of your request, we are unwilling to speculate further as to what generally constitutes a sufficiently specific request for public records. However, specifically with regard to information requested under §68A.7(5), we note that the information that must be disclosed (absent exigent circumstances) is already explicitly described by the statute, i.e., the "date, time, specific location, and immediate facts and circumstances surrounding a crime or incident ..." As such, a request for this information is inherently specific. Further, the legislature did not require that a specific date, time, or incident be supplied with a request for §68A.7(5) information. Given the plain language of this section, and the statutory presumption in favor of openness, we are unwilling to imply such a requirement. Consequently, it is our opinion that a citizen may request §68A.7(5) time, date, and location information for a particular day or time, or for any number of days or times. Furthermore, the request is not required to specify the particular criminal incident for which the information is requested. A contrary result would force the requestor to obtain §68A.7(5) time, date, and location information from a source other than the one the legislature clearly intended, i.e., from enforcement agencies.

As the language of §68A.7(5) makes clear, the only circumstance in which time, date and location information need not be disclosed is when exigent circumstances exist. This "exigency" exception is limited by the very language of §68A.7(5) to those situations where an ongoing investigation would be seriously jeopardized by disclosure or a clear and present danger to a particular individual would occur as a consequence of disclosure. Absent a particular factual question before us, we again hesitate to elaborate further as to what constitutes exigent circumstances under §68A.7(5), but we note that given past interpretations of this chapter, this exception should be narrowly construed. *See City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d at 527.

There may be some extreme situations where a request for information pursuant to §68A.7(5) may be so burdensome as to render it unreasonable. Nonetheless, it is generally our opinion that the mere number of requests or the large number of days or times for which such information is requested does not generally constitute sufficient reason to deny a request for information. *See Sears v. Gottschalk*, 502 F.2d at 126; *Legal Aid Society of Alameda County v. Shultz*, 349 F.Supp. 771, 778 (N.D.Cal. 1972). This is true particularly in light of the fact that

§68A.3 authorizes the custodian of the records to charge the requestor the reasonable costs of examination and copying. [2] *See* Op.Att'yGen. #81-8-20(L); #81-8-18; #81-4-4.

In the event that requests for time, date, and location information pursuant to §68A.7(5) become an increasing burden for law enforcement agencies, we note that §68A.3 provides such agencies with authority to adopt and enforce rules regarding examination and copying as well as "protection of the records against damage or disorganization." We suggest that one possible exercise of this rulemaking authority would be for law enforcement agencies to maintain an additional record which would contain only that information generally required to be disclosed by §68A.7(5). In that way §68A.7(5) time, date, and specific location information would be compiled separately from other §68A.7(5) information which may be kept confidential at the discretion of the lawful custodian. This practice would facilitate more efficient disclosure of required information.

In the final part of your first question you ask whether the legal custodian of records violates chapter 68A if he or she knowingly withholds requested records. It is our opinion that if the documents requested are public records as defined in §68A.1 and no statutory exemption applies, they must be made available for inspection and copying by the public. *See* §68A.1; Op.Att'yGen. #81-1-4. In the event the custodian believes that a particular document should be protected from disclosure, but that record does not fall within a statutory exception, the custodian must seek an injunction restraining examination and copying pursuant to §68A.8. Barring a statutory exception or a §68A.8 injunction, failure to disclose the requested public record constitutes a violation of §68A.6, which provides as follows:

> It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

II.

Your second question asks when the lawful custodian of a law enforcement agency's records may withhold routine law enforcement records from inspection by the public. As discussed above, §68A.7(5) and (9) detail the specific invetigative report and arrest records information that must be disclosed to the public upon request, subject to the exigent circumstances exception of subsection (5). The provisions of subsection (5) and (9) do not specify the particular form such records must be kept in, or what particular record keeping documents must be disclosed; instead, they merely specify the contents of the information kept which must be disclosed. Date, time, and specific location information, or arrest

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[2] A fee cannot be charged simply as a precondition to allowing examination of a public record; however, a fee may be charged to cover the reasonable expenses of examination and copying. Op.Att'yGen. #81-8-18.

records, cannot be withheld solely on the ground that such information is contained in a particular blotter, logs, or uniform reporting form. [3] Conversely, blotters, logs, or uniform reporting forms containing information beyond that specified in subsections (5) and (9) are not subject to full disclosure simply because they are routine law blotters, logs, enforcement records and uniform reporting forms.

As set forth in our response to your first question, some law enforcement information must be disclosed pursuant to §68A.7(5) and (9), while other information may be kept confidential at the discretion of the lawful custodian pursuant to those same subsections. The question of severability of these records will be discussed further in response to your third question, below.

III.

Your third and final question asks under what circumstances the lawful custodian may withhold an entire record on the ground that, while part of the record is subject to disclosure pursuant to §68A.7(5), other parts may be kept confidential pursuant to that same provision. We have previously held that the lawful custodian may exercise his or her discretion in disclosing records that may be kept confidential pursuant to §68A.7 in part, in their entirety, or not at all. *See* Op.Att'yGen. #82-9-4 ("Since the lawful custodian can release the entire record, we believe the lawful custodian would be equally empowered to release part of the record."); 1980 Op.Att'yGen. 825. However, §68A.7(5) requires that the date, time, location and immediate facts of a criminal incident be disclosed upon request; the lawful custodian can exercise no discretion with regard to disclosure of this designated information.

Consequently, we believe that, absent a contrary statutory provision, [4] if a law enforcement agency receives a request for information contained in a peace officer's investigative report, the lawful custodian of the agency's records may, in the exercise of his or her discretion, disclose some all, or none of that report.

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[3] You have phrased your question in terms of "police blotters, logs, dispatcher reports, or uniform reporting forms." Some of the information contained in these records may not be investigative in nature and therefore would not fall within the §68A.7(5) exception. However, we assume for the purpose of your opinion request that information in these records is subject to that exception.

[4] *See, e.g.*, Iowa Code chapter 692 (1981) (criminal history and intelligence data as defined in §692.1 are not public records pursuant to chapter 68A and may be disseminated only in narrowly proscribed circumstances).

However, the lawful custodian is required by §68A.7(5) to release time, date, and specific location information, as well as a description of the immediate facts of the incident in question. If the custodian decides to disclose no other information but the required time, date, and location information, and the required information is contained in a document with other information which is to remain confidential, the custodian must take steps to segregate or delete the confidential, the custodian must take steps to segregate or delete the confidential information. In the absence of statutory authority to the contrary, it is our opinion that the custodian may not keep all information, including time, date, and location information, confidential on the ground that part of it may be kept confidential. A contrary result would contravene the general statutory presumption in favor of disclosure as well as contravene the clear legislative intent that time, date, and location information be made available in all situations except those involving exigent circumstances.

This conclusion is consistent with our prior analysis of §68A.7, the provision which ennumerates the confidentiality exceptions to chapter 68A. Several of those exceptions permit "records" to be kept confidential, while other exceptions permit "information" contained in public records to be kept confidential. We have concluded in the past that these distinctions were clearly intended by the legislature. *See* Op.Att'yGen. #82-9-3. Accordingly, with regard to confidential "records," we have held that the custodian may keep the entire record confidential without being required to disclose information contained in that record which may technically not be confidential in nature. *See* Op.Att'yGen. #82-9-3 (§68A.7(2) permits custodian to keep entire medical record confidential even though some information in that record may not constitute "medical information"). On the other hand, with regard to confidential information, we have previously indicated that the custodian may not keep the entire record confidential, but must disclose that information not statutorily specified as exempt from disclosure. See Op.Att'yGen. #81-1-4 (§68A.7(11) prohibits custodian from keeping entire personnel record confidential on the ground that some information in that record constitutes "personal information in confidential personnel records"). Section 68A.7(5) time, date and location information clearly falls within this latter category, i.e., information that may not be kept confidential on the ground that §68A.7(5) otherwise permits police investigative files to be kept confidential.

In conclusion: (1) requests for public records pursuant to §68A.7(5) should be directed to the lawful custodian of the records or to his or her authorized deputy. (2) Such requests must reasonably describe the records requested. A request is "reasonable" if it enables the lawful custodian who is familiar with the subject matter of the request to locate the records with a reasonable amount of effort. As such, a request for §68A.7(5) time, date, and location information is inherently specific. (3) A citizen may request §68A.7(5) information for a particular day or time, or for any number of days or times. The request is not required to specify the particular criminal incident for which the information is requested. (4) Disclosure or nondisclosure pursuant to §68A.7(5) does not depend on the nature of the document which contains that information, confidential on the ground that part of it may be kept confidential, but the custodian may delete the confidential information before disclosure.

October 11, 1982

STATE CONSERVATION COMMISSION: Navigation Regulation Jurisdiction: Iowa Code Chapter 106 (1981); Iowa Code §§106.1, 106.2(4) as amended by 1982 Iowa Acts, Senate File 399, §2, 106.2(5), 106.2(9), 106.2(13), 106.15(1), 106.17(1), (2), (3) (1981), as amended by 1982 Iowa Acts, Senate File

399, §26, 111.18 (1981), Iowa Code chapter 504A (1981). The navigation regulations of Iowa Code chapter 106 apply on a lake located in and owned by a city. The city may regulate any boating it permits on the lake only within the limits established by Iowa Code §106.17 (1981) as amended by 1982 Iowa Acts, Senate File 399, §§20-21. (Kniep to Kenyon, Union County Attorney, 10/11/82) #82-10-4(L)

October 11, 1982

TAXATION: Partial Payments of Delinquent Property Taxes. Iowa Code §§445.36 and 445.37 (1981). The county treasurer, in the exercise of sound discretion, can accept or reject partial payments of delinquent property taxes for partial satisfaction of delinquent amounts. (Griger to Spear, State Representative, 10/11/82) #82-10-5(L)

October 21, 1982

COUNTIES AND COUNTY OFFICERS: Official Misconduct: Public motor Campaigns. Chapter 721: §§721.4, 721.6. A county sheriff may not use his official vehicle at county expense for transportation around the county when his prime purpose is to campaign for re-election. (Pottorff to Norland, State Representative, 10/21/82) #82-10-6(L)

October 25, 1982

CONSERVATION COMMISSION; LIQUOR, BEER & CIGARETTES; ADMINISTRATIVE RULES: Consumption of beer in state parks. United States Constitution, Fourteenth Amendment; Iowa Const. art I, §6; Iowa Code chapters 17A, 111, 123 (1981); Iowa Code §§17A.19(8), 17A.19(8)(a), 17A.19(8)(b), 17A.19(8)(g), 111.3, 111.4, 111.11(1), 111.35, 111.47, 123.3(9), 123.46 (1981). If the Conservation Commission has a rational basis to conclude that regulating or banning keg beer is needed for proper public use of parks, it may adopt rules which are rationally related to this purpose. (Kniep to Wilson, Director, State Conservation Commission, 10/25/82) #82-10-7(L)

October 25, 1982

JUVENILE LAW: Application of Iowa's new drunk driving statutes to juveniles. 1982 Iowa Acts, House File 2369; 1982 Iowa Acts, Senate File 2197; Iowa Code chapter 321, 321B (1981); Op.Att'yGen. #80-9-10; Op.Att'yGen. #82-1-6. A peace officer who has taken into custody a juvenile driver for operating while intoxicated and has obtained a breath specimen of one hundredths or more, or has been refused permission to take said test, may seize the permanent license and issue a temporary driver's license to a juvenile in like manner as he or she would to an adult. (Hege to Anstey, Appanoose County Attorney, 10/25/82) #82-10-8(L)

October 25, 1982

CRIMINAL LAW, OWI, GUILTY PLEAS, RECORD: Iowa Code §602.60 (1981) as amended, 1982 Iowa Acts, chapter 1167, Section 26; Iowa R.Crim.P. 8 does not allow for electronic recording of guilty pleas. No exception is made for guilty pleas to first offense violations of Iowa Code §321.281 (1981) taken before judicial magistrates, and the parties may not vitiate the requirements of rule 8 by agreement. (Cleland to Poppen, Wright County Attorney, and Heitland, Hardin County Attorney, 10/25/82) #82-10-9(L)

October 25, 1982

CRIMINAL LAW, DANGEROUS WEAPON, NUNCHAKU: Iowa Code section 702.7 (1981). Whether a Nunchaku is a dangerous weapon constitutes a question of fact for the jury to decide. (Cleland to Heitland, Hardin County Attorney, 10/25/82) #82-10-10(L)

October 25, 1982

COUNTIES: Expenses of County Jail Prisoners. Iowa Code chapter 356 (1981); Iowa Code §§331.303(7); 356.15; 356.30 (1981). It is irrelevant whether a prisoner held at the county jail is arrested without a warrant. The county is responsible for the charges and expenses of maintaining and safekeeping all prisoners housed at the county jail except those prisoners expressly excluded by the terms of §356.15. The board of supervisors is responsible for setting these charges, and may exercise its discretion in determining the criteria to be used in setting those charges. (Weeg to Stream, Mahaska County Attorney, 10/25/82) #82-10-11(L)

NOVEMBER 1982

November 9, 1982

TAXATION: Mobile Home Tax Period. Iowa Code §135D.24 (1981), as amended by 1982 Iowa Acts, chapter 1251, §2. The semiannual tax periods for mobile home tax, as set forth in §135D.24, as amended, are March 1 through August 31 and September 1 through the last day of February. (Donahue to Bair, Director, Iowa Department of Revenue, 11/9/82) #82-11-1(L)

November 12, 1982

ENVIRONMENTAL QUALITY/WATER AIR AND WASTE MANAGEMENT/DELEGATION OF POWERS: Iowa Const. art. III, §1; 1981 Iowa Acts, chapter 1199, Section 4; Iowa Code §455B.5(3) (1981). Statutory provision that all rules enacted by Water, Air and Waste Management Commission to carry out a federal regulation must be no more restrictive than the federal regulation is an unconstitutional delegation of state legislative power to the federal government. (Ovrom to Ballou, Executive Director, Iowa Department of Environmental Quality, 11/12/82) #82-11-2(L)

November 19, 1982

RAILROADS: Real Property. Iowa Code §327G.77 (Supp. 1981). Where railroad abandons right of way acquired by conveyed easement, easement is extinguished and property reverts to grantor's successor; statutory reversion of railroad right of way does not apply to easement by conveyance where reversion is specified in grant. (Ewald to Anstey, Appanoose County Attorney, 11/19/82) #82-11-3

Mr. W. Edward Anstey, Appanoose County Attorney: On behalf of your county assessor, you have requested our opinion concerning the following situation:

In 1872 a Railroad Company acquired certain right of way by deed containing the following language:

> [Grantors] have bargained and sold and do by these presents grant, alien, sell and convey unto [Railroad Company] the *right of way for the construction, operation, maintenance and use of said [Railroad Company] for said railroad purposes* over and through the following described lands owned by said [grantors] ... to-wit: [legal description].
>
> * * *
>
> To have and to hold the same unto the said [Railroad Company], their successors and assigns *as long as the same shall be required by and used for Railroad purposes and no longer.* [Emphasis added.]

In 1982 the Railroad Company's successor in interest abandoned the right of way pursuant to order of the federal interstate commerce commission or the state transportation regulation authority, and the state department of transportation has not intervened. See §327G.77(1), (2), Iowa Code 1981.

Your question is: Who holds title to the abandoned right of way property?

The 1872 conveyance specifically granted the railroad company a "right of way". Generally, a conveyance of a "right of way" is a mere easement. *Atkin v. Westfall*, 246 Iowa 822, 826, 69 N.W.2d 523, 525 (1955); *Chicago & N.W. Ry. v. Sioux City Stockyards Co.*, 176 Iowa 659, 668, 158 N.W. 769, 772 (1916); *Brown v. Young*, 69 Iowa 625, 29 N.W. 941, 941 (1886); see M. Martell, *Acquiring Abandoned Railroad Right of Way in Iowa*, 30 Drake L. Rev. 545, 549-51 (1980).

The phrase in the deed "for the construction, operation, maintenance and use" of the railroad further indicates the conveyance of an essement as opposed to a fee. *Spencer v. Wabash Chicago, R.I. & P.R.R.*, 29 Iowa 276, 279-80 (1870). The reversionary language "as long as the same shall be required by and used for Railroad purposes and no longer" clearly reserves an interest in grantor. See *Keokuk County v. Reinier*, 227 Iowa 499, 503, 288 N.W. 676, 678 (1939).

Such an easement by conveyance is automatically extinquished upon abandonment. *Chicago & N.W. Ry. v. Sioux City Stockyards Co.*, 176 Iowa 659, 668, 158 N.W. 769, 772 (1916); *Johnson v. Burlington Northern, Inc.*, 294 N.W.2d 63, 67 (Iowa Ct. App. 1980); See M. Martell, *supra* at 557.

Statutory reversion of railroad right of way does not affect such an easement by conveyance where a reversion is specified in the grant; it applies only to railroad right of way acquired by condemnation. See §327G.77, Iowa Code 1981 (formerly §473.2); *Johnson v. Burlington Northern, Inc., supra*, M. Martell, *supra* at 553, 557, 558, and cases cited therein.

Thus, in the situation you have presented, the original grantor's successor in interest, as determined by the chain of title from the 1872 deed to the date of abandonment, would hold title to the abandoned right of way. The railroad would retain no interest.

November 19, 1982

ELECTIONS: Voter Registration; Challenge; Cancellation. Chapter 47: §47.4; Chapter 48: §§48.15 48.31. A registration may be challenged pursuant to section 48.15 upon allegation of a reason or reasons sufficient, under law, to invalidate the registration. A registration shall be canceled pursuant to section 48.31 upon any of the grounds specifically enumerated in subsection 1 through 6. The fact that an individual no longer resides at the residence at which he or she is registered is not sufficient, under law, to challenge a voter registration pursuant to section 48.15. The fact that an individual no longer resides at the residence at which he or she is registered is not one of the grounds upon which a voter registration shall be canceled pursuant to section 48.31. A challenge filed pursuant to section 48.31 should be processed directly after the challenge is received. The Code does not provide for any method by which the county commissioner of elections can intervene to correct or remove a challenged registration. Any attempt to selectively update or correct voter registrations may impact disproportionately among registered voters and

generate claims that the county commissioner of elections is discriminating among different classes of registered voters in violation of the doctrine or equal protection. If the voter registration is legitimately canceled pursuant to section 48.31 before the challenge is processed, the county commissioner should notify the registrant of the cancellation by the method provided in section 48.31 and notify the parties that the challenge is moot by first-class mail. A second regularly scheduled election which occurs more than seventy days after the challenge is filed cannot delay processing even if that election occurs less than seventy days after a preceding regularly scheduled election. A change in registration renders a challenge moot when the change corrects or obviates the defect alleged in the challenge. If the challenge is rendered moot, the commissioner should proceed to notify the parties. If the challenge is not rendered moot, the commissioner should continue to process the challenge with respect to the changed registration. The commissioner cannot require an allegation in good faith that one or more of the conditions set forth in section 48.31 exists as a prerequisite to processing a challenge. No statutory authority authorizes a commissioner to consider evidence in support of a challenge prior to an evidentiary hearing. (Pottorff to White, Assistant Johnson County Attorney, 11/19/82) #82-11-4

J. Patrick White, Assistant Johnson County Attorney: You have requested an opinion of the Attorney General concerning challenges to voter registrations filed pursuant to §48.15 of the Code. You point out that county auditors across Iowa have received large numbers of challenges to voter registrations over a short span of time. You further point out that a substantial number of these challenges allege that the registrant has moved from the address listed on the voter registration rolls. In view of the problems encountered in processing these challenges, you pose several specific questions. For the purpose of clarity these questions are separately considered in the following discussion.

Preliminarily it is necessary to consider the statutory provisions on which your questions are based. Section 48.15 of the Election Laws Supplement to the Code of Iowa currently states:

1. A person may challenge the registration to vote of any other person, by filing an individual challenge in writing with the commissioner of the county in which the person challenged is registered. The written challenge need not be in detail, but must allege one or more reasons why, under law, the registration of the person challenged should not have been accepted or should be canceled.

2. A challenge of a person's registration filed less than seventy days prior to a regularly scheduled election need not be processed by the commissioner prior to that election unless the registration, change of name or change of address has been recorded within twenty days prior to the date of the challenge.

3. The commissioner shall immediately give five days' notice of a hearing, by certified mail, to the person whose registration is challenged and to the challenger. The notice shall set forth the reason for the challenge as stated by the challenger. The person challenged may either appear in person at the hearing, or respond in writing addressed to the commissioner and delivered by mail or otherwise prior to the time set for the hearing. However, if the person challenged notifies the commissioner prior to the date set for the hearing that the person wishes to appear in person but will be unable to do so on the date specified, the commissioner may reschedule the hearing. On the basis of the evidence presented by the challenger and

the challenged elector, the commissioner shall either cancel the registration of the challenged elector or reject the challenge. Either party may appeal to the district court of the county in which the challenge is made, and the decision of the court shall be final.

This statute provides a procedural mechanism by which a person may challenge the voter registration of another person. The current language was recently enacted by the General Assembly as a revision and expansion of the procedural mechanism which had been available under section 48.15 of the 1981 Code of Iowa. *See* 1981 Session, 69th G.A., chapter 34 §20.

A separate but related statute controlls the cancellation of voter registrations. Section 48.31 of the Election Laws Supplement to the Code of Iowa currently provides that the registration of a qualified elector shall be canceled on any of the following grounds:

1. The elector fails to vote once in the last preceding four consecutive calendar years after the elector's most recent registration or change of name, address or party affiliation, or after the elector most recently voted. For the purpose of this subsection, registration includes the submission of a registration form which makes no change in the elector's existing registration.

2. The elector registers to vote in another place.

3. The elector dies.

4. The clerk of district court sends notification of an elector's conviction of an infamous crime or felony.

5. The clerk of district court sends notification, of a legal determination that the elector is severely or profoundly mentally retarded, or has been found incompetent in a proceeding held pursuant to section 299.27, or is otherwise under conservatorship or guardianship by reason of incompetency. Certification by the clerk that any such person has been found no longer incompetent by a court, or the termination by the court of any such conservatorship or guardianship shall qualify any such ward to again be an elector, subject to the other provisions of this chapter.

6. When first-class mail, which is designated "not to be forwarded", was addressed to the elector at the address shown on the registration records and is returned by the postal service.

Whenever a registration is canceled, notice of the cancellation shall be sent to the registrant at his last known address shown upon the registration records. Such notice shall be sent first-class mail and bear the words "Please Forward". However, notice is not necessary when the cancellation is due to death or if an authorization for the removal of his registration is received as provided in this chapter.

This statute sets out the grounds upon which the county commissioner shall cancel voter registrations.

With regard to these statutes you pose seven questions. Your first two questions can be treated together:

1. What are the reasons for which a registration may be challenged and what are the reasons for which a registration may be canceled?

2. Can a voter's registration be challenged and/or canceled when an individual no longer resides at the residence at which he or she is registered?

These questions focus on the reasons for which a registration may be challenged or shall be canceled.

In order to answer your first question it is necessary to refer to the specific language of section 48.15 and 48.31. Section 48.15 does not enumerate the grounds upon which a registration may be challenged. Rather, the statute provides that a written challenge "need not detail, but must allege one or more reasons why, under law, the registration of the person challenged should not have been accepted or should be canceled." Iowa Code (Election Laws Supp.) §48.15(1) (1981). We point out that the right to vote is a fundamental right protected by the United States Constitution. When this right is infringed, the infringement must be based on a compelling state interest. *Dunn v. Blumstein*, 405 U.S. 330, 335-36, 92 S.Ct. 995, _____, 31 L.Ed.2d 274, 280 (1972). In view of these constitutional principles, we believe that laws which authorize a challenge to the right to vote should be strictly construed. We further note that subsection 3 of section 48.15 requires an evidentiary hearing be held on the reason or reasons alleged. *See* Iowa Code §48.15(3) (Election Laws Supp.) (1981). It would be unreasonable to proceed to an evidentiary hearing, however, unless the allegation of reasons, if proved, were sufficient to invalidate the registration. We must conclude, therefore, that section 48.15 requires allegation of a reason or reasons sufficient under law to invalidate the registration.

The legislature did not attempt to delineate the reasons which would be sufficient to invalidate a registration. Indeed, a delineation would be an unwise and unwieldy undertaking. A challenge might be based on the allegations of such unique reasons as the reason that the voter is no longer qualified because he or she is residing outside the United States but has failed to maintain a valid passport, card of identity or alternative form of identification. *See* Iowa Code §47.4(3) (Election Laws Supp.) (1981). Accordingly, the determination of whether the allegation of any particular reason is sufficient under section 48.15 must be made on a case-by-case basis by the county commissioner of elections with whom the challenge is filed.

Section 48.31, by contrast, specifically enumerates the grounds upon which a registration shall be canceled by the county commissioner of elections without an evidentiary hearing. These reasons are provided in subsections 1 through 6. Under principles of statutory construction the enumeration of specific grounds in a statute creates the presumption of exclusivity. *See Iowa Farmers Purchasing Assoc. v. Huff*, 260 N.W.2d 824, 827 (Iowa 1977). We conclude, therefore, that the grounds enumerated in section 48.15 are the exclusive grounds upon which a county commissioner shall cancel a registration without an evidentiary hearing.

We observe that the reasons for which a registration may be challenged by another person and the reasons for which a registration shall be canceled by the county commissioner are only nominally interrelated. The reasons for which a registration shall be canceled under section 48.31 include some but not all of the reasons for which a registration may be challenged. For example, a person could allege as reason, under law, to challenge a registration that the elector has died or has been convicted of an infamous crime. These are grounds provided for cancellation under section 48.31. A person, however, could also allege as a reason, under law, to challenge a registration that the registrant is under age to be a qualified elector. *See* Iowa Code §47.4(1)(a). This ground is not provided for cancellation under section 48.31.

Your second question poses the inquiry whether a registration either may be challenged under section 48.15 or shall be canceled under section 48.31 if the registrant no longer resides at the residence where he or she is registered. In order to answer this question it is necessary to re-examine the reasons for which a registration may be challenged or shall be canceled.

We previously concluded that a registration may be challenged pursuant to section 48.15 only upon allegation of a reason or reasons sufficient, under law, to invalidate the registration. The fact that the registrant no longer resides at the residence where he or she is registered, however, may be insufficient to invalidate the registration as a matter of law. The Code does not require that an elector continuously reside at his or her voting residence in order to maintain a valid voter registration. Residence, for voting purposes, is defined as "the place which the person declares is his or her home with the intent to remain there permanently or for a definite or indefinite or undeterminable length of time." Iowa Code §47.4(1)(d) (Election Laws Supp.) (1981). A qualified elector may temporarily "reside" elsewhere without establishing a new voting "residence". The following examples are illustrative. A college student may "reside" on campus during the academic year without declaring campus his or her home and, thereby, retain his or her parental home as a residence for voting purposes. In certain circumstances a qualified elector may even leave the state permanently but retain the right to vote in his or her former Iowa precinct. This may occur if and for the period of time that the elector cannot meet the voter requirements at his or her new residence. *See* Iowa Code §47.4(2) (Election Laws Supp.) (1981). In view of these possibilities the mere allegation that the elector has moved or no longer resides at the residence where he or she is registered is not sufficient, under law, to invalidate a voter registration.

The fact that the registrant no longer resides at the residence where he or she is registered, similarly, is not sufficient to cancel the registration pursuant to section 48.31. We previously stated that the grounds upon which a registration shall be canceled by the county commissioner are specifically enumerated in section 48.31. We further stated that these grounds are exclusive. The fact that the registrant no longer resides at the residence where he or she is registered is not among the specifically enumerated. This fact, standing alone, therefore, is insufficient ground to cancel a registration.

Your third question provides as follows:

> 3. If a valid challenge is filed more than seventy (70) days prior to a regularly scheduled election, is there any way to correct or remove the registration and cause the challenge to be moot and thereby eliminate the need for sending out certified mail? What is the meaning of the word "immediate" as used in Section 48.15(3)?

This question pertains to the manner of processing filed challenges.

Section 48.15 requires that the commissioner "shall immediately give five days' notice of a hearing, by certified mail, to the person whose registration is challenged and to the challenger." The legislature did not further define the time period within which notice must be given. Generally, words which are not defined differently by the legislature or possessed of a peculiar and appropriate meaning in law, should be given their ordinary meaning. *American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 143-44 (Iowa 1981). The word "immediately" is ordinarily defined as "directly" or "without an interval of

time." *Webster's New Collegiate Dictionary* at 568 (2nd ed. 1974). Applying this definition, notice should be given directly after the challenge is received. In practical application, this means notice should be given as soon as the mechanics of preparing the notice can be completed.

We observe that section 48.15 does not specifically provide for any method by which the county commissioner of elections can intervene to correct or remove a challenged registration and, thereby, obviate the need to process the challenge at all. Moreover, we reiterate that the voting is a fundamental right under the federal constitution. *See Dunn v. Blumstein*, 405 U.S. at 330, 92 S.Ct. at _____, 31 L.Ed.2d at 280. Any attempt to selectively update or corret voter registrations may impact disproportionately among registered voters and generate claims that the county commissioner of elections is discriminating among different classes of registered voters in violation of the doctrine of equal production. For this reason, we do not advise the county commissioners of elections to attempt to selectively update or correct those registrations which have been challenged.

Your fourth question raises two related issues:

> 4. If a valid challenge is filed less than seventy days prior to an election, and if first-class mail designated "Do Not Forward" is addressed and sent to the challenged registrant:
>
> [A] And if that first-class mail is returned undelivered, can the registration be cancelled under Section 48.31(6) *Code of Iowa*, and the challenge be declared moot? If so, must the challenger or the registrant challenged then be notified, and if so, by what method?
>
> [B] Or, if the first-class mail is sent but *not* returned then how must the challenge be processed?

This question focuses on the impact of a first-class mailing carried out pursuant to section 48.31(6) upon a pending challenge.

Under certain circumstances cnacellation of the registration may render the challenge moot. The registration of an elector shall be canceled "[w]hen first-class mail, which is designated 'Not to be Forwarded,' was addressed to the elector at the address shown on the registration records and is returned by the postal service." Iowa Code §48.31(6) (Election Laws Supp.) (1981). If, through this process, the registration is legitimately canceled, no registration is pending subject to the filed challenge. Under these circumstances, the county commissioner of elections should notify the parties that the registration subject of challenge has been canceled.

The method of providing notice under these circumstances is addressed, in part, by the Code. Section 48.31(6) specifically provides that "[w]henever a registration is canceled, notice of the cancellation shall be sent to the registrant at his last known address shown upon the registration records. Such notice shall be sent first-class mail and bear the words 'Please Forward.'" Notice of the cancellation, itself, therefore, should be carried out in compliance with section 48.31(6).

The Code does not address the method by which parties to a registration challenge should be notified that the registration has been canceled pursuant to a separte provision of the Code and the challenge is, thereby, mooted. Due process does not require that notice of the termination of the proceeding be provided by extraordinary means. *See generally Carr v. Iowa Employment Security Commission*, 256 N.W.2d 211, 214-16 (Iowa 1977). Accordingly, this notice may be provided by first-class mail.

We again stress that any attempt to selectively update or correct voter registrations may impact disproportionately among registered voters and generate claims that the county commissioner of elections is discriminating among different classes of registered voters in violation of the doctrine of equal protection. First-class mailings which may ultimately cause the cancellation of registrations subject to pending challenges, therefore, should be the result of a uniform, widespread mailing rather than a selective, targeted mailing.

Your fifth question reads as follows:

> 5. If a challenge is filed less than seventy days prior to a regularly scheduled election, and a subsequent regularly scheduled election will occur less than seventy days after that prior election (so that a portion of the two 70-day periods overlaps), must the challenge be processed immediately after the first election or after the second?

This question focuses on the timetable for processing challenges.

Section 48.15(2) specifically addressed the effect which a regularly scheduled election has upon the processing of election challenges. This subsection provides that a challenge "filed less than seventy days prior to a regularly scheduled election need not be processed by the commissioner prior to *that election* unless the registration, change of name or change of address has been recorded within twenty days prior to the date of the challenge." [Emphasis added.] Under this language challenges filed less than seventy days prior to a regularly scheduled election need not be processed prior to that election unless certain described conditions exist.

In order to determine the impact which a second regularly scheduled election held less than seventy days after the first regularly scheduled election would have upon the obligation to immediately process the challenge, it is necessary to construe the statutory language. Generally, referential relative or qualifying words and phrases refer only to the immediately preceding antecedent. *State v. Lohr*, 266 N.W.2d 1, 3 (Iowa 1978). Under this rule of construction, the phrase "need not be processed by the Commissioner prior to *that election*" refers back to the immediately preceding antecedent, i.e., a regularly scheduled election less than seventy days prior to which a challenge had been filed. The relevant criteria in determining if a regularly scheduled election will delay processing, therefore, is whether the challenge was filed less than seventy days before the regularly scheduled election. Consequently, a second regularly scheduled election which occurs more than seventy days after the challenge is filed cannot delay processing even if that election occurs less than seventy days after a preceding regularly scheduled election.

Your sixth question reads as follows:

> 6. If a change of registration is received after a challenge is filed, how shall the change and the challenge be processed?

This question relates to the impact which a change of registration has upon a pending challenge.

Generally, a change of registration becomes effective a short time after the form is completed. *See, e.g.*, 845 I.A.C. §2.3(47) (registration by mail effective on date of postmark); Iowa Code §48.11 (Election Laws Supp.) (1981) (registration during period registration closed effective on date registration reopens). There is no authority in section 48.15 to delay the effective date established by rule or statute.

The change in registration, however, may render the pending challenge moot depending upon the underlying circumstances. Mootness, which we have alluded to in our previous discussion, arises when a case no longer presents a justiciable controversy because the issues involved have become academic or nonexistent. *Hamilton v. City of Urbandale*, 291 N.W.2d 15, 17 (Iowa 1980). Applying this principle, we conclude that a change in registration renders the challenge moot when the change corrects or obviates the defect alleged in the challenge. This determination must be made by the commissioner of elections on a case-by-case basis. If the challenge is rendered moot, the commissioner should proceed to notify the parties as outlined in response to question number four. If the challenge is not rendered moot, the commissioner should continue to process the challenge with respect to the changed registration.

Your seventh and final question poses the following inquiry:

> 7. May the county commissioner of elections decline to process a challenge absent an allegation on good faith that one or more of the conditions set forth in section 48.31 exists? If the challenge is based on the allegation that the person being challenged no longer resides at the address at which he or she is registered, can the county commissioner of elections require evidence that first-class mail has been returned before accepting that challenge as valid?

This question pertains to the interrelationship between challenges filed pursuant to section 48.15 and grounds for cancellation carried out pursuant to section 48.31.

The issues raised in this question have been resolved by our answers to your previous questions. We previously stated that challenges filed pursuant to section 48.15 may allege but are not restricted to the reasons for cancellation set out in section 48.31. In view of this conclusion, the county commissioner of elections cannot require an allegation on good faith that one or more of the conditions set forth in section 48.31 exists as a prerequisite to processing a challenge.

We also previously stated the allegation that an individual no longer resides at the address at which he or she is registered is insufficient, under law, to invalidate a registration. Moreover, we find no statutory language in section 48.15 which would authorize the county commissioner of elections to consider evidence in support of the allegation of reasons prior to an evidentiary hearing. Accordingly, the county commissioner of elections cannot require evidence that first-class mail addressed to the registrant has been returned in order to augment the allegation that the registrant no longer resides at the address at which he or she is registered.

In summary, in response to your questions, it is our opinion that:

1. A registration may be challenged pursuant to section 48.15 upon allegation of a reason or reasons sufficient, under law, to invalidate the registration. A registration shall be canceled pursuant to section 48.31 upon any of the grounds specifically enumerated in subsection 1 through 6.

2. The fact that an individual no longer resides at the residence at which he or she is registered is not sufficient, under law, to challenge a voter registration pursuant to section 48.15. The fact that an individual no longer resides at the residence at which he or she is registered is not one of the grounds upon which a voter registration shall be canceled pursuant to section 48.31.

3. A challenge filed pursuant to section 48.31 should be processed directly after the challenge is received. The Code does not provide for any method by which the county commissioner of elections can intervene to correct or remove a challenged registration. Any attempt to selectively update or correct voter registrations may impact disproportionately among registered voters and generate claims that the county commissioner of elections is discriminating among different classes of registered voters in violation of the doctrine of equal protection.

4. If the voter registration is legitimately canceled pursuant to section 48.31 before the challenge is processed, the county commissioner should notify the registrant of the cancellation by the method provided in section 48.31 and notify the parties that the challenge is moot by first-class mail.

5. A second regularly scheduled election which occurs more than seventy days after the challenge is filed cannot delay processing even if that election occurs less than seventy days after a preceding regularly scheduled election.

6. A change in registration renders a challenge moot when the change corrects or obviates the defect alleged in the challenge. If the challenge is rendered moot, the commissioner should proceed to notify the parties. If the challenge is not rendered moot, the commissioner should continue to process the challenge with respect to the changed registration.

7. The commissioner cannot require an allegation in good faith that one or more of the conditions set forth in section 48.31 exists as a prerequisite to processing a challenge. No statutory authority authorizes a commissioner to consider evidence in support of a challenge prior to an evidentiary hearing.

November 19, 1982

TAXATION: Reasonable Cause Precluding Payment of Penalty. Iowa Code §§422.25(2), 422.68(1) (1981). The Department of Revenue has the responsibility to make case by case factual determinations of what constitutes reasonable cause under Iowa Code §422.25(2) (1981). (Schuling to De Groot, State Representative, 11/19/82) #82-11-5(L)

November 19, 1982

ENVIRONMENTAL QUALITY; HAZARDOUS WASTES: Iowa Code §455B.134 (1981); 1981 Iowa Acts chapter 152, sections 2(6), 3(1), 3(4); 42 U.S.C. 6921 *et seq*; 400 I.A.C. §45; 40 C.F.R. §122.23. Iowa's hazardous waste site licensing law exempts facilities which existed on the effective date of the Department of Environmental Quality rule listing the waste and which have met certain other requirements. Existing hazardous waste facilities which have interim status under federal Environmental Protection Agency rules are likely to be exempt from Iowa's site licensing law. (Ovrom to Rapp, State Representative, 11/19/82) #82-11-6-(L)

November 19, 1982

COUNTIES AND COUNTY OFFICERS — PRISONERS: Sections 356.2, 356.15, Code of Iowa 1981. When an individual, arrested and charged with the commission of a felony, is temporarily detained in a municipal jail pending transfer to the county jail, the cost of his medical expenses is the responsibility of the county wherein the criminal charge was filed, rather than of the municipality. (Hunacek to Shirley, Dallas County Attorney, 11/19/82) #82-11-7(L)

November 19, 1982

CRIMINAL LAW, RESTITUTION: 1982 Iowa Acts chapter 1162. Restitution is no longer only imposed as a "condition of probation". Restitution must be ordered in addition to imposition of other sentencing alternatives. (Blink to Loebach, Judicial Magistrate, 11/19/82) #82-11-8(L)

November 19, 1982

HEALTH: Ambulances; Emergency Medical Services; Fees charged by tax supported services. Iowa Code §§331.422(25), 347.14(13), 359.42, 384.24(3)(1) and 613.17, as amended by 1982 Iowa Acts, chapter 1198, §1. An emergency medical unit, funded with local property taxes may charge a fee to persons using the service. If the voluntary personnel or the unit itself receives more than a nominal compensation for these services, the volunteers or the unit would lose the coverage of the "Good Samaritan" law. A publicly funded unit may charge fees to nonresidents who require the service. Fees charged should be deposited with the county general fund, the general fund of the city, the treasurer of the county hospital or the township clerk, depending on Representative, 11/19/82) #82-11-9(L)

November 24, 1982

DEPARTMENT OF SOIL CONSERVATION: Abandoned Mine Land Reclamation Program. 12 U.S.C. 1231 et. seq. Iowa Code §§83.21, 83.22, 83.23. 780 I.A.C. chapter 27. The Department of Soil Conservation has the authority under Iowa law to conduct the Abandoned Mine Land Reclamation Program in accordance with federal law. The rules contained in 780 I.A.C. chapter 27 are in accordance with Iowa and federal requirements for the A.M.L. program. (Norby to Gulliford, Director, Department of Soil Conservation, 11/24/82) #82-11-10(L)

November 30, 1982

STATE OFFICERS AND DEPARTMENTS: Professional Licensing Boards; Dispensing of prescription drugs. 1980 Session Laws, 68th G.A., chapter 1036, §33. Laws enacted by the legislature but printed only in the session laws and omitted from the permanent edition of the Code of Iowa because they are not of "a general and permanent nature" have full force and effect. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws is effective "until legislation has been enacted to affirm or modify the attorney general's opinion" issued on July 5, 1979. The law enacted in section 33 of chapters 1036 of the 1980 Session Laws is effective "until legislation has been enacted to affirm or modify the attorney general's opinion" issued on July 5, 1979. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws entitles any individual practitoner "to continue the practices" which all practioners of the respective profession had generally followed under the laws of this state prior to issuance of the attorney general's opinion on July 5, 1979. The law enacted in section 33 of chapter 1036 of the 1980 Session Laws does not prohibit any licensing board from issuing a declaratory ruling on the subject of the standard of practice with respect to dispensing which was in effect prior to issuance of the attorney general's opinion on July 5, 1979. (Pottorff to Schwengels, State Senator, 11/30/82) #82-11-11(L)

DECEMBER 1982

December 2, 1982

EXTRADITION; FEES AND EXPENSES; SHERIFFS; COUNTY AND COUNTY OFFICERS: Iowa Code, §§820.7, 820.8, 820.9, 820.12, 820.24, 820.25 (1981); Supplement to the Iowa Code, §§331.652(b), 331.653(73), 331.902(1) (1981). 1. Under §820.24, the state reimburses the county for the expenses incurred in returning a fugitive to Iowa when; (1) requisition is made on the governor of the asylum state; (2) the statutory punishment of the crime with which the fugitive is charged shall be confinement in the penitentiary; and (3) the governor of Iowa certifies the expenses. 2. The costs and expenses which a county incurs in returning a fugitive must be paid from the sheriff's budget when a sheriff or deputy acts as the governor's agent in returning a fugitive. 3. When a county is reimbursed for extradition expenses, the amount received is paid into the general fund in accordance with Supplement to the Iowa Code §331.902 (1981). (Hansen to Smith, Assistant Clinton County Attorney, 12/2/82) #82-12-1(L)

December 27, 1982

MOTORCYCLE LICENSE: Iowa Code section 321.177 and 321.189, 1981; Rule 820 Iowa Administrative Code [07,C] 13.7(1). Iowa Code section 321.189 does not authorize issuance of a "motorcycle only" license to a person under the age of eighteen who has not completed driver education. Rule 820 Iowa Administrative Code [07,C] 13.7(1) does not create a "de facto" motorcycle license. (Fitzgerald to Royce, 12/27/82) #82-12-2(L)

December 27, 1982

STATE OFFICERS AND DEPARTMENTS: State Licensing Boards. §§258A.2(2)(c)(d) and (g), 258A.1(2), 56.29, 56.9, 56.11(3). 553.5, Iowa Code 1981, 15 U.S.C., §2. A licensing board may limit its approval of continuing education courses to those sponsored by professional colleges or nonprofit organizations provided it follows statutory requirements pertaining to such education and establishes rules assuring maintenance of professional skills. Continuing education courses may not be used for means of raising money for a political action fund if nonprofit corporation collects and transfers funds for use as contributions to political campaigns or candidates. It would not constitute antitrust violation for licensing board to approve courses sponsored only by colleges or nonprofit associations, unless specific intent were shown to attempt to monopolize. Intent and market considerations are fact questions which cannot be resolved in an opinion of the attorney general, but only by a court. (Swanson to Priebe, State Senate, and Schroeder, House of Representatives, 12/27/82) #82-12-3(L)

December 27, 1982

OPEN MEETINGS LAW: Sections 28A.1 and 28A.2(1), Iowa Code 1981; Chapter 78 §19, Acts 69th G.A. (1981). The county mental health and mental retardation coordinating board and advisory board and governmental bodies within the meaning of §28A.2(1)(a) and §28A.2(1)(b). (Munns to Krewson, State Representative, 12/27/82) #82-12-4(L)

December 27, 1982

COUNTIES; AUTHORITY TO TAX: Iowa Code §§331.301(7), 331.422(26) (1981). Absent an express statutory provision, a county is not authorized to levy a tax for the operation of a wastewater management district created pursuant to home rule authority. However, a service fee imposed on users of the district would be permissible providing that fee is reasonable and related to the expenses of administration. (Weeg to Miller, Guthrie County Attorney, 12/27/82) #82-12-5(L)

December 29, 1982

CIVIL RIGHTS/STANDING TO FILE COMPLAINT: 601A.2(2), 601A.15(1), The Code 1981. Section 601A.15(1) grants standing to private associations which file complaints with the Iowa Civil Rights Commission alleging either injury to themselves as entities or actual, or even threatened, injury to one or more of their members. (Nichols to Reis, Civil Rights Commission, 12/29/82) #82-12-6(L)

December 29, 1982

SCHOOLS: Establishment Clause; Free Speech Clause; Use of School Facilities; First Amendment, U.S. Const.; Iowa Code §§278.1(4), 297.9 (1981). If a school district allows community organizations to use school facilities when those facilities are not in use for school purposes, it may not refuse to grant access to religious groups on the same terms and conditions that apply to other groups; the school district may not regulate the content of religious speech during such use. A school district should not grant permission to a religious group for the purpose of providing religious instruction to the pupils in a particular school immediately before or after school to avoid the appearance of official sanction or sponsorship. (Fleming to Doyle, State Senator, 12/29/82) #82-12-7(L)

December 29, 1982

COUNTIES; CLERK OF COURT: Satisfaction of Judgments. Iowa Code §§624.20 and 624.37 (1981). The requirement of §624.37 relating to proper execution of instruments attesting to satisfaction of judgments is applicable in all cases, including those where the judgment debtor has paid the judgment directly to the clerk of court instead of to the judgment creditor. (Weeg to Anderson, Dickinson County Attorney, 12/29/82) #82-12-8(L)

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