REPORT OF THE ATTORNEY GENERAL FOR THE Year Ending June 30, 1979
To the Honorable Senate and House of Representatives

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1979.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
FRANCIS X. BELLOTTI

First Assistant Attorney General
Thomas R. Kiley

Assistant Attorneys General

Jose Allen
James Aloisi  1
Nicholas Arenella
Charles Barry  20
Michael Barry  41
Annette Benedetto  2
W. Channing Beucler
Robert Bohn
John Bonistalli  3
Margot Botsford
John Bowman  42
Jonathan Brant
Roberta Brown  4
Laurie Burt
James Caruso
William Carroll  5
Francis Chase  6
Paul Cirel  7
Robert Cohan
Garrick Cole
Charles Corkin II  43
Leah Crothers
Mary Dacey  8
Stephen Delinsky
Ernest DeSimone
Maureen Dewan
Paul Donaher
Michael C. Donahue
Elizabeth Donovan  9
Robert Dewees  19
Irene Emerson  40
Joan Entmacher  45
Michael Farrington
Stephen Fauteux  11
Peter Flynn  12
Harriet Fordham  13
Susan Frey
Gloria Fry
Carol Fubini
Robert Gaines  14
Charles Gamer  46
Frank Gaynor
Brian Gilligan  47
Dwight Golann
Paula Gold
Paul Good
Joseph P. Gordon
Alexander Gray, Jr.
Robert V. Greco
Steven Greenfogel

Robert Griffith  15
Richard Gross
Catherine Hantzis
Thomas Hoffman  16, 48
David Hopwood
Andra Hotchkiss  18
William Howell
Edward Hughes
John Hurley
Linda Irvin  19
Daniel Jaffe
Ellen Janos
Paul Johnson
Anne Josephson  20
Thomas Keaney
Carolyn A. Kelliher
Sally Kelly
James R. Kirk  22
Kevin Kirrane
Alan Kovacs
Elizabeth Laing  23
Kenneth Lenz
Steven M. Leonard
William F. Linnehan
Robert Lombard  24, 50
William Luzier  25
Alan Mandl
Bernard Manning
Michael McCormack
Andrew McElaney  51
Eugene McAuliff  27
Denzil McKenzie
Edward McLaughlin
James McManus
Leo McNamara
William McVey
James Mechan
John Mendlesohn  29
Michael Meyer
Thomas Miller
William Mitchell
Anton T. Moehrke
John R. Montgomery
Paul T. Muello
Robert Mydans  30
Henry O'Connell, Jr.
Terence O'Malley
Kathleen Parker
Malcom Pittman III  31
Steven Platten
Assistant Attorneys General Assigned to Department of Public Works

Elizabeth Bowen
Edward Clancy, Jr.
Allan Gottlieb
James J. Haroulos
Leslie Hedgebeth
F. Timothy Hegarty, Jr.
Michael Marks

Assistant Attorneys General Assigned to Division of Employment Security

Joseph S. Ayoub
George J. Mahanna

Chief Clerk
Edward J. White

Assistant Chief Clerk
Avis Reardon
1
2
Appointed January 1, 1979
3
Appointed January 1, 1979
4
Appointed September 15, 1976
5
Appointed December 27, 1978
6
Appointed March 29, 1979
7
Appointed March 21, 1979
8
Appointed September 18, 1978
9
Appointed January 1, 1979
10
Appointed June 19, 1979
11
Appointed September 6, 1978
12
Appointed May 7, 1979
13
Appointed December 4, 1978
14
Appointed December 27, 1978
15
Appointed January 1, 1979
16
Appointed November 13, 1978
17
Appointed January 24, 1979
18
Appointed September 11, 1978
19
Appointed July 10, 1978
20
Appointed September 5, 1978
21
Appointed October 2, 1978
22
Appointed January 1, 1979
23
Appointed January 1, 1979
24
Appointed August 28, 1978
25
Appointed January 24, 1979
26
Appointed December 8, 1978
27
Appointed May 21, 1979
28
Appointed November 1, 1978
29
Appointed May 21, 1979
30
Appointed December 4, 1978
31
Appointed October 10, 1978
32
Appointed January 8, 1979
33
Appointed September 18, 1978
34
Appointed January 1, 1979
35
Appointed August 1, 1978
36
Appointed January 24, 1979
37
Appointed May 8, 1979
38
Appointed January 1, 1979
39
Terminated February 23, 1979
40
Terminated May 25, 1979
41
Terminated July 18, 1979
42
Terminated March 31, 1979
43
Terminated April 13, 1979
44
Terminated February 23, 1979
45
Terminated July 4, 1978
46
Terminated December 29, 1978
47
Terminated June 8, 1979
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Terminated December 1, 1978
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Terminated January 26, 1979
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Terminated March 16, 1979
51
Terminated November 14, 1978
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Terminated May 11, 1979
53
Terminated August 23, 1978
54
Terminated September 30, 1978
55
Terminated December 29, 1978
56
Terminated November 13, 1978
57
Terminated July 27, 1978
58
Terminated September 29, 1978
59
Terminated November 15, 1977
60
Terminated August 30, 1978
61
Terminated August 31, 1978
62
Terminated December 31, 1978
63
Terminated April 21, 1979
64
**Schedule 1**

**DEPARTMENT OF THE ATTORNEY GENERAL**  
**STATEMENT OF FINANCIAL POSITION**  
**FOR FISCAL YEAR ENDED**  
**JUNE 30, 1978**

<table>
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<tr>
<th>Account Number</th>
<th>Account Name</th>
<th>Appropriation</th>
<th>Expenditures</th>
<th>Advances</th>
<th>Encumbrances</th>
<th>Balance</th>
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<td>0810-0100</td>
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<td>GRAND TOTAL</td>
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**Total**  

|               | $8,501,023.22 | $7,253,580.54 | .00      | 347,367.41 | 900,075.27 |
## Federal Grants

**Receipts and Disbursements**

**July 1, 1978 to June 30, 1979**

<table>
<thead>
<tr>
<th>Account Number</th>
<th>Account Name</th>
<th>Balance</th>
<th>July 1, 1978</th>
<th>Receipts</th>
<th>Disbursements</th>
<th>Balance</th>
<th>June 30, 1978</th>
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<tr>
<td>0810-6610</td>
<td>Attorney General Trust Fund</td>
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<td>Committee on Criminal Justice: State Organized Crime Unit</td>
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<td>Violent Crime Unit</td>
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<td>Organized Crime Unit</td>
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<td>0810-6638</td>
<td>Federal Energy Administration: Office of Consumer Services</td>
<td>15,002.43</td>
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### SUSPENSE FUNDS

**Receipts and Disbursements**  
**July 1, 1978 to June 30, 1979**

<table>
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<tr>
<th>Account Number</th>
<th>Account name</th>
<th>Balance</th>
<th>July 1, 1978</th>
<th>Receipts</th>
<th>Disbursements</th>
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<th>June 30, 1979</th>
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<tr>
<td>0810-6701</td>
<td>Dexter Nursing Home Case</td>
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<td>Miami Vacation Inc., d/b/a</td>
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<td>0810-6704</td>
<td>Hotel Association Trust Account</td>
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<td>Thomas C. McMahon vs. Nyanza, Escrow Account</td>
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Schedule 4

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1979

Account Number
0801-40-01-40  Fees, Filing Reports, Charitable Organizations                  $100,821.00
0801-40-02-40  Fees, Registration, Charitable Organizations                   13,331.60
0801-40-03-40  Fees, Professional Fund Raising Council                       180.00
0801-41-01-40  Fines and Penalties - Miscellaneous                           —
0801-41-02-40  Fines and Penalties, Civil Actions                            22,360.16
0801-62-01-40  Reimbursements for Services, Cost of Civil Actions            18,119.50
0801-62-02-40  Reimbursements for Services, Cost of Investigations           3,060.75
0801-67-01-40  Reimbursements, Indirect Cost Allowances                      596,040.97
0801-69-99-40  Miscellaneous                                                2,196.77

TOTAL INCOME $756,110.75
In accordance with the provisions of section 11 of Chapter 12 and of section 32 of Chapter 30 of the General Laws, I hereby submit the Annual Report of the Department of the Attorney General. This Annual Report is the fifth that I have filed as Attorney General of the Commonwealth. It covers the period from July 1, 1978 to June 30, 1979 and therefore includes not only the last six months of the term for which I was elected in November of 1974, but also the beginning of my second term.

In the inaugural address which marked the commencement of my second term, I attempted to link the accomplishments of the previous four years with the goals of the years ahead. In that address, I reiterated the one campaign promise I made to the people of Massachusetts throughout the 1978 election period. I vowed to recommit myself and the resources of this office to the pursuit of legal excellence in an attempt to serve the general public interest. While the phrase public interest has become somewhat hackneyed, serving the public interest is the essence of all the legal work performed by this Department. I have attempted to serve that interest during both of my terms by bringing cases which have the greatest possible effect on the way the people of Massachusetts live.

I believe the activities of this Department chronicled in the ensuing pages graphically illustrate the success of these efforts during the past fiscal year. Whether one speaks of the traditional defense work performed by the Civil Bureau, or the white collar prosecutorial work of the Criminal Bureau, we have remained faithful to our underlying obligation to handle each and every case in conformity with the public interest.

It is perhaps easiest to identify this aspect of our cases in the work of the Public Protection Bureau. That Bureau is composed of seven divisions, each of which seeks to vindicate rights inhering in the general public rather than the state as a sovereign entity. Last year the lawyers assigned to the bureau emphatically demonstrated that such a unit, which is the first of its kind in any state Attorney General's office, can effectively bring major public interest litigation.

In an effort to protect the Massachusetts fishing and tourist industries and to preserve one of the world's primary sources of fish protein, we sought to enjoin the federal government from leasing certain tracts of seabed in and around Georges Bank for oil and gas exploration and development. The purpose of this lawsuit was not to permanently prevent the national quest to locate and tap precious fossil fuels, but to postpone the lease sale until adequate regulations are in place to safeguard our environment and the livelihood of thousands of Massachusetts citizens. Lawyers assigned to the Environmental Protection Division obtained an injunction halting the proposed lease sale and have since been working with state and federal officials to promulgate the regulations necessary to balance our ecological and energy concerns.

The other divisions of the Bureau were equally successful in their pursuit of the public interest. The Consumer Protection Division, for instance, negotiated a million dollar settlement with General Motors to resolve a national dispute over the placement of Chevrolet engines in higher priced automobiles. Attorneys from that division also drafted amendments to the federal bankruptcy acts which were signed into law by the President during
the reporting period and which provide much greater protection to consumers. On a more local level, we amicably resolved a dispute with the Boston Red Sox baseball team over the advertising of ticket prices. Under the terms of the settlement some 10,000 free tickets were provided to underprivileged children.

Many of the other highlights of the Public Protection Bureau’s year have a decidedly financial flavor. The Antitrust division, which I believe handles cases which are the logical extension of our consumer efforts, obtained almost a half million dollars for the Commonwealth and its political subdivisions in fiscal 1979. Attorneys assigned to the Utilities Division intervening in rate cases before the Department of Public Utilities, shaved more than one hundred million dollars from the requests of the various Massachusetts public utilities. The Insurance Division similarly prevented massive increases in automobile insurance rates and brought cases against various insurance agencies resulting in direct restitution of a quarter of a million dollars to Massachusetts citizens. Another major effort by the Civil Rights Division resulted in the payment of some four hundred thousand dollars to women whose maternity benefits had been wrongfully withheld.

In the Civil Bureau, we also recovered substantial sums of money for the Commonwealth. The Torts, Claims and Collections Division, for instance, recovered nearly six hundred thousand dollars for the State. Of more long lasting significance may be the initiation of lawsuits against designers of certain educational facilities for faulty architectural work. Indeed, as fiscal year 1979 wound down, I had begun my Service on the Special Commission Concerning State and County Buildings; which promises to suggest the need for increased scrutiny of public works in the years ahead.

Not all of our public interest civil cases were affirmative in nature. Many of the cases we defend have important public interest overtones. This is particularly true when we defend duly enacted state statues affecting fundamental social policies. Perhaps the two most noteworthy cases handled by the Department last year were our successful appearance before the Supreme Court of the United States in defense of the Commonwealth’s veterans preference law and our so-called implied consent statute. In those statutes the legislature had respectively identified significant societal interests in easing the transition from military to civilian life and in keeping drunk drivers off our highways. The methods chosen to serve those ends, extending a civil service hiring preference to veterans and requiring motor vehicle operators to take a chemical breathalyzer test or face a temporary loss of license, were challenged and those challenges reached the highest court of the land last year. In both instances this Department prevailed, thus preserving the legislative policy implicit in the two statutes.

An even better example of serving the public interest in defending civil actions arises from the way Government Bureau lawyers handled a series of cases involving the mentally retarded. At the very outset of my first term I made a determination that conditions at several state institutions were below minimal constitutional standards. I therefore informed the Governor that I would “defend” the state only if we could meet our obligations to our least fortunate citizens. In the last year of that term, we entered into final decrees affecting the Fernald and Monson state schools and interim decrees
affecting Wrentham and Dever facilities.

One does not often think of criminal prosecutions as public interest cases, but they clearly do fall within that category. Criminal laws condemn certain conduct that society finds unacceptable and by prosecuting individuals who violate those laws, we promote the interests of the general public. In this Department we have been able to take that concept one step further by targeting particulate types of crimes which we believe can be deterred by effective enforcement efforts. Until the twelve month period covered by this report, there had never been a systematic pursuit of those who failed to file state personal income tax returns. As a result, many Massachusetts citizens were paying their federal taxes but not paying their fair share of the state’s taxes. During the past year we prosecuted thirty-nine individuals and corporations on a series of indictments alleging the failure to pay half a million dollars in taxes. Virtually all of these prosecutions resulted in convictions and the recovery of previously unpaid taxes. More important, an atmosphere of deterrence was created so that more people voluntarily filed their state returns and assumed their share of the Commonwealth’s fiscal burden.

All but one of the arson for profit cases mentioned in last year’s Annual Report ended in conviction. This systematic prosecution of arson for profit cases was demonstrably successful in reducing the incidence of suspicious fires in the Commonwealth.

Not only did this Department bring criminal prosecutions, but the Organized Crime Control Council of which I am chairman, filed with the General Court a Report on Proposed Organized Crime Legislation aimed at facilitating successful prosecution of future crimes against the public by organized crime. The legislative packet and report is the first legislative packet in the history of the Commonwealth ever to propose comprehensive revisions to those laws affecting organized crime. If enacted into law, the recommended legislative changes can continue to protect the public long after I have left office.

There were many more accomplishments during the past years than I could hope to set forth in these few paragraphs. I offer the foregoing highlights only to demonstrate that the everyday activities of this Department truly involve the public interest. The full scope of our activities is set forth in the pages which follow.

MONEY RECOVERED AND SAVED FOR THE COMMONWEALTH AND ITS CITIZENS

I. MONEY RECOVERED FOR THE COMMONWEALTH TREASURY:

1. Civil Penalties in Environmental Protection Cases $ 370,00
2. Collections from Industrial Accident Second Injury Fund 114,73
3. Rent Collected 124,20
4. Public Charities:
   1) Filing fees 111,42
   2) Escheats 192,41
5. Releases and Executions in Tort Cases 208,80
6. Collection Cases 388,084
7. Restitution in Tax Fraud cases 294,109
8. Overpayments Collected in Medicaid Fraud cases 1,374,920
9. Recoveries in Employee Fraud Unemployment Compensation Cases 199,542

TOTAL: $ 3,378,242

II. MONEY RECOVERED AND SAVED FOR THE COMMONWEALTH'S CITIZENS:

1. Restitution to Consumers in Automobile and Health Insurance Cases $ 250,000
2. Rights Secured by Way of Assignment in Automobile and Health Insurance Cases 100,000
3. Savings to Consumers From Handling of Complaints 21,202
4. Refunds to Consumers From Handling of Complaints 168,178
5. Judgments in Consumer Protection Court Cases 1,651,486
6. Savings in Rate Cases 100,000,000
7. Recovery of Retroactive Maternity Benefits Wrongfully Withheld 400,000
8. Antitrust Recoveries 462,800
9. Additional Fuel Assistance Funds to Massachusetts Citizens Gained Through Litigation 15,000,000

TOTAL: $ 118,053,666

I. CIVIL BUREAU

CONTRACT DIVISION

The responsibility of the Contracts Division generally involves three areas: 1) Litigation involving matters in a contractual setting; 2) Advice and counsel to state agencies concerning contractual matters; 3) Contract review.

1. LITIGATION The Contracts division represents the Commonwealth, its officers, and agencies in every state of litigation involving contract disputes.

Until July 1978, General Laws Chapter 258 had been the controlling statute concerning contract actions against the state. However, on July 20, 1978, the Massachusetts Legislature, in an apparent oversight, deleted the provision of Chapter 258 applicable to contracts. The Acts of 1979, Section 1 appears to have restored to the superior court the power to enforce claims against the Commonwealth not arising in tort. However, further corrective legislation appears to have been warranted, but had not been enacted prior to the end of the fiscal year.
As of June 30, 1979, there were approximately two hundred and sixty-five cases in the Division. One hundred and forty-one cases were closed during the fiscal year.

A major portion of the pending cases concern state highway, building or public work construction claims. Most of those cases involve contract or specification interpretation and entail extensive preparation and investigation. Discovery, principally depositions and interrogatories, are mandated in all cases. Consultation with engineers and architects is routine in every instance. The work of the division in the preparation and trial of contract matters continues to be greatly facilitated by the recent augmentation of the staff with the services of a professional engineer. His assistance in investigation, practical advice and expertise has been invaluable to the attorneys.

Trials are prolonged, not solely because of the complexity of issues, but also because of the fact that most cases involve at least three or four parties. Increasingly, the trend has been toward claims alleging deficiencies in plans and specifications necessitating separate or third-party actions involving consultant engineers.

The general economic picture has generated litigation in contesting the award of contracts, particularly, in the data processing area, resulting in allegations of failure to meet public bidding requirements.

The Contracts division has continued to intensively oppose the issuance of preliminary, or temporary, injunctive relief against the Commonwealth, its agencies and officers. The allowance of such relief would delay normal contract procedure and would result in increased costs. To date, we have succeeded in defeating all attempts at securing injunctive relief.

In the past year the Division has brought a number of direct actions against designers and contractors for breaches of their contracts and warranty obligations. One such action alleges that a designer of a seven-million dollar steam line at the University of Massachusetts, Amherst, furnished inadequate plans and specifications. Another notable action has also been brought against four general contractors and the designer of seven buildings at Cape Cod Community College.

II. ADVICE AND COUNSEL TO STATE AGENCIES

On a daily basis, the Division receives requests for legal assistance from state agencies and officials. Their problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and numerous other miscellaneous matters.

All materials, supplies and equipment purchased by the state (except military and legislative) must be advertised, bid, and awarded by the Purchasing Agent. We receive, each week, new requests for assistance in purchasing matters. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

We also have an equivalent relationship with the Department of Public Works, Metropolitan District Commission, Secretary of Transportation, Regional Community Colleges, Data Processing Bureau, Mental Health, Youth Services, Water Resources, State Lottery Commission, etc.

III. CONTRACT REVIEW

We review all state contracts, leases and bonds submitted to us by state
agencies. During the fiscal year, we approved, as to form, a total of 2,092 such contracts. In 275 cases, we rejected the documents and approved them only when the deficiencies were eliminated.

All contracts are logged in and out and a detailed record is kept. The Monthly Count For The Fiscal Year Was:

<table>
<thead>
<tr>
<th>Month</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>July, 1978</td>
<td>311</td>
</tr>
<tr>
<td>August</td>
<td>225</td>
</tr>
<tr>
<td>September</td>
<td>237</td>
</tr>
<tr>
<td>October</td>
<td>187</td>
</tr>
<tr>
<td>November</td>
<td>158</td>
</tr>
<tr>
<td>December</td>
<td>174</td>
</tr>
<tr>
<td>January, 1979</td>
<td>182</td>
</tr>
<tr>
<td>February</td>
<td>165</td>
</tr>
<tr>
<td>March</td>
<td>205</td>
</tr>
<tr>
<td>April</td>
<td>160</td>
</tr>
<tr>
<td>May</td>
<td>166</td>
</tr>
<tr>
<td>June</td>
<td>197</td>
</tr>
<tr>
<td></td>
<td>2,367</td>
</tr>
</tbody>
</table>

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

**EMINENT DOMAIN DIVISION**

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

The Division also provides a legal advisor to the Real Estate Review board to assist in settling damage claims on takings of government-owned land for highway purposes, and in some instances, we are called upon to testify before the Executive Council before they will approve land damage payments.

Advisory services, both written and oral, are rendered to practically every state agency in existence, whether it be Executive or Legislative in nature. Every agency which has an eminent domain or real estate question or problem either writes or calls this division for consultation and advice. This division also appears before Legislative Committees to give advice on legislation of importance to this office as well as other state agencies. We were instrumental in convincing the Legislature of the necessity of passing Senate 741 filed by the Attorney General which provided protection for state land damage appraisals until after completion of trial. This Bill passed as Chapter 230 of the Acts of 1979 with an emergency preamble on June 1, 1979.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking
agency makes an offer of settlement known as a pro tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the event of a finding by the court of jury, the pro tanto payment is subtracted from the verdict and the taking agency pays the balance, with interest, running at the rate of 6% from the date of the taking to the date of the judgment. In years past, during the road building boom of the sixties, land damage matters caused congestion in the civil sessions of the Superior Court. Special land damage sessions, including summer sessions, were set up to accommodate the trial of these cases and it was the practice to refer cases to auditors for their findings. The auditor system was not entirely satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature pass Section 22 of Chapter 79 which provides for the trial of land damage matters to a judge in the Superior Court, jury-waived in the first instance; a trial may be had first only if both parties file waivers, in writing, waiving their right to a jury waiver trial. The statute also requires the court to make subsidiary findings a fact when the case is heard. If either party is aggrieved by the finding they may reserve their right to jury trial by so filing, within ten day of the finding.

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

If occupied buildings are situated on parcels acquired by the eminent domain, the occupants remaining become tenants of the Commonwealth and obligated to pay rent under a lease agreement or for use and occupancy. The problem of rent collection is handled by a Special Assistant Attorney General who is assigned to the Department of Public Works at 100 Nashua Street on a full time basis. He is under the direct supervision of the Right of Way Division with review supervision from the Eminent Domain Division. His primary function is to represent the Department of Public Works in all matters related to state owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectables, suits to enforce the payment of rent, as well as eviction matters. In those cases wherein rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney assigned handles both matters at time of trial.

In addition, this division has the responsibility of protecting the Commonwealth's interest in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without our office being given a full and complete opportunity to be heard. Some of these issues are tried out to a judicial con-
clusion while others are, for the most part, amicably agreed upon and the rights of the Commonwealth are protected by stipulation. In addition, the Land Court determines water rights. This is becoming a new problem area in that many rivers and streams have been cleaned and improved as a result of federally funded projects, bringing into question the Commonwealth’s rights and responsibilities. Also, the tidal areas of the Commonwealth are creating additional litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting adverse possession and prescriptive rights in the flats of the tidelands and access to beaches.

One of the most recent cases of this type is presently pending before the Land Court after a four day trial. (Daley v. Town of Swampscott, et al). The litigation involves Whales Beach in Swampscott and the public’s use of said beach. Such action is necessary to protect the public interest in public access to beaches in general and the necessity for the preservation of those areas involved in which the public does have the use of tidelands. The other areas involved are the waterfront maritime areas which are being converted into condominiums, changing the uses provided for in the early 18th century statutes. The most recent example being the Boston Waterfront Development Corporation, otherwise known as the Lewis Wharf case and the construction given to the statutes enacted in the early 1830’s.

Further, all rental agreements, pro tanto releases, general releases, deeds of grants and conveyance, and documents relating to land under the control of any of the states’ departments or agencies find their way to the Eminent Domain Division to be reviewed and approved as to form.

This past fiscal year, we met with officials from the U.S. Department of Transportation Federal Highway Administration, wherein an inspection was conducted for the purpose of evaluating the settlements and awards function as administered by the Massachusetts Department of Public Works and the Eminent Domain Division of the office of the Attorney General. This review or inspection was made to ascertain whether or not the program is effective and in compliance with applicable department of Public Works and Federal Highway Administration procedures and regulations.

The review concerned cases settled as pro bare pactos, jury-waived and jury verdicts in federally aided interstate, primary, urban and secondary projects. This inspection concerned layout orders dated between 1968 and 1975. Final disposition and payment on these cases occurred between 1975 and 1979.

Case files of 29 parcels on 20 federally aided projects acquired during a seven year time period were evaluated. These cases were selected randomly from such cities as Boston, Danvers, Peabody, New Bedford, Georgetown, Fairhaven, Fall River, Holyoke, Worcester, Pittsfield, Chicopee, Revere, West Boylston, Southampton and Leominster.

In addition, personal interviews were conducted by the Federal Highway Administration with the Administrative Trial Clerk and more extensively
with the Division Chief. The Division files were reviewed concerning case analyses, settlement recommendations, memoranda, and trial reports which should reflect the justification for out-of-court settlements, pro bane, as well as jury-waived and jury awards. The inspection and review concluded that the Attorney General's documentation was complete and that the trial attorneys of this division were in complete compliance with Federal Highway Administration regulations and procedures. The Eminent Domain Division was acknowledged by the U.S. Department of Transportation for the excellent cooperation provided during the course of their inspection.

The Division consists of a Chief, nine full time trial attorneys, two special attorney generals, three investigators, one agency liaison legal engineer, one administrative assistant, one administrative trial clerk and three legal secretaries. We also have the service of one assistant attorney general in Western Massachusetts, as well as the services on occasion of one special assistant attorney general.

During the fiscal year July 1, 1978 through June 30, 1979, the following statistics are indicative of the activity of this extremely busy division.

<table>
<thead>
<tr>
<th>Category</th>
<th>Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Land Court Cases</td>
<td>219</td>
</tr>
<tr>
<td>Land Court Cases Closed</td>
<td>238</td>
</tr>
<tr>
<td>Land Court Cases Pending</td>
<td>232</td>
</tr>
<tr>
<td>New Land Damage Complaints Received</td>
<td>151</td>
</tr>
<tr>
<td>Land Damage Cases Disposed of in Superior Court</td>
<td>76</td>
</tr>
<tr>
<td>Land Damage Cases Disposed of by Settlement</td>
<td>96</td>
</tr>
<tr>
<td>Land Damage Cases Pending</td>
<td>644</td>
</tr>
</tbody>
</table>

Total Cases Pending  876
Cases argued before the Supreme Judicial Court  4
Cases argued before the Appeals Court  4
Rent Cases closed by Special Assistant Attorney General  226
Rent owed to Commonwealth - collected by Special Assistant Attorney General $124,201.00

During fiscal year 1978-1979, this very busy division noted an increase in new complaints received over the prior year. The Department of Public Works has advised us that under the present administration they expect this trend to continue. The Department of Environmental Management is expected to go forward on the Lowell Heritage State Park Project which is considered to be their biggest undertaking ever, expecting to cost in the vicinity of 60 million dollars. The Metropolitan District Commission, as well as other state agencies, also advise us that they also anticipate a very busy fiscal year 1979-1980.
INDUSTRIAL ACCIDENTS DIVISION

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

There were 12,071 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 329 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,807 new claims for compensation, and 143 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 135 claims by lump sum agreements and 16 by payments without prejudice.

This Division appeared for the Commonwealth on 1,160 formal assignments before the Industrial Accident Board and before the Courts on appellate matters. In addition to evaluating new cases, this Division continually reviews the accepted cases; that is, those cases which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1978 to June 30, 1979 were as follows.

<table>
<thead>
<tr>
<th>General Appropriation (Appropriated to the Division of Industrial Accidents)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Incapacity Compensation</td>
<td>$4,517,508.71</td>
</tr>
<tr>
<td>Medical Payments</td>
<td>2,098,579.47</td>
</tr>
<tr>
<td><strong>TOTAL DISBURSEMENTS</strong></td>
<td><strong>6,616,088.18</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Metropolitan District Commission (Appropriated to M.D.C.)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Incapacity Compensation</td>
<td>$486,392.59</td>
</tr>
<tr>
<td>Medical Payments</td>
<td>19,360.07</td>
</tr>
<tr>
<td><strong>TOTAL DISBURSEMENTS</strong></td>
<td><strong>505,752.66</strong></td>
</tr>
</tbody>
</table>

This Division also has the responsibility of collecting payments due the "Second Injury Fund" set up by Chapter 152, section 65, and defending the fund against claims for reimbursement made under Chapter 152, sections 37 and 37A. During the past fiscal year this division appeared on 67 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1979, the fiscal status fund was:

| Unencumbered Balance | $ 72,541.76 |
| Invested in Securities | 724,000.00 |
| **TOTAL** | **$796,541.76** |
| Payments Made to Fund | $ 114,736.75 |
| Payments Made Out of Fund | 272,087.80 |
Pursuant to Section 11A (Acts of 1950, C. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. This involves reviewing and acting upon claims for compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties. During the past fiscal year the Chief of this Division appeared at both sittings of this Board and acted on 22 claims.

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

During the past fiscal year the attorneys of this division were called upon numerous times to assist workers in private industry who contacted this division regarding problems they were having with their compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to persons or agencies wherein the solution to their particular problems lay.

**TORTS DIVISION**

The Torts Division presently has seven lawyers in addition to the Chief. There are three investigators presently assigned to the division.

Since the passage of the new Torts Claims Act and the subsequent decisions in the Vaughn and Kerlinsky cases, we have been successful in having judgement entered for the Commonwealth in many of our older pending cases. During fiscal 1979 we opened 157 Tort cases and closed 319. As of June 30, 1979, we had 495 Tort cases open and active. The number of Tort cases may well increase when the new Tort Claims Act gets working, as presently all Tort claims are going to the agencies in the first instance. The amount contained in Releases & Executions received during fiscal 1979 amounted to $208,807.10.

Incoming Violent Crime Compensation Cases recently appear to be on the rise. This may be because of the fact that more people are becoming aware of the existence of M.G.L. C. 258A. During fiscal 1979 we have opened 412 Violent Crime Cases and we have closed 427 cases. As of June 30, 1979, we had 688 Violent Crime Cases open and active. Under the new Rule 150 which we were instrumental in having promulgated many of our cases have been disposed of by agreement. We are continuing to resist those cases which we feel do not come within the provisions of the Act and those which we consider to be unwarranted and unfounded. We have been quite successful in having the courts follow the recommendation of this office in such cases. During fiscal 1979, the Office of the Treasurer has paid out $465,697.64 in awards.

The total collections received during the fiscal year amounted to $388,084.51 as per attached report. Collections on Treasury Probate are being to level off now as the number of bank books on file begin to lessen.
<table>
<thead>
<tr>
<th>Departments</th>
<th>Amount Collected</th>
<th>No. of Claims Processed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental Health</td>
<td>$138,425.11</td>
<td>74</td>
</tr>
<tr>
<td>Public Health</td>
<td>74,214.40</td>
<td>164</td>
</tr>
<tr>
<td>Public Works</td>
<td>30,170.91</td>
<td>196</td>
</tr>
<tr>
<td>M.D.C.</td>
<td>2,981.55</td>
<td>17</td>
</tr>
<tr>
<td>M.D.C. (property rec'd in lieu of payment)</td>
<td>5,193.53</td>
<td>1</td>
</tr>
<tr>
<td>Education</td>
<td>17,761.08</td>
<td>401</td>
</tr>
<tr>
<td>State Colleges</td>
<td>15,575.79</td>
<td>445</td>
</tr>
<tr>
<td>Administration &amp; Finance</td>
<td>9,063.43</td>
<td>9</td>
</tr>
<tr>
<td>Commission of the Blind</td>
<td>2,047.40</td>
<td>2</td>
</tr>
<tr>
<td>Corrections</td>
<td>270.00</td>
<td>5</td>
</tr>
<tr>
<td>Environmental Management</td>
<td>9,500.00</td>
<td>1</td>
</tr>
<tr>
<td>Human Services</td>
<td>135.00</td>
<td>10</td>
</tr>
<tr>
<td>Lottery Commission</td>
<td>182.70</td>
<td>1</td>
</tr>
<tr>
<td>Marine &amp; Fisheries</td>
<td>840.00</td>
<td>8</td>
</tr>
<tr>
<td>Military Division</td>
<td>225.00</td>
<td>4</td>
</tr>
<tr>
<td>Public Safety</td>
<td>4,9995.82</td>
<td>19</td>
</tr>
<tr>
<td>Retirement Board</td>
<td>180.19</td>
<td>1</td>
</tr>
<tr>
<td>Secretary of State</td>
<td>25.00</td>
<td>1</td>
</tr>
<tr>
<td>Treasury Department</td>
<td>200.00</td>
<td>1</td>
</tr>
<tr>
<td>Treasury Department (Probate Collections)</td>
<td>76,097.60</td>
<td>—</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$388,084.51</strong></td>
<td>1360</td>
</tr>
</tbody>
</table>

**NOTE:**

215  No. of claims completed  
1021  No. of claims being paid on account  
279  No. of claims opened  
1316  No. of claims referred  
1856  No. of claims disposed of as being uncollectible.

**II. CRIMINAL BUREAU**

In fiscal year 1978-1979, consistent with the Attorney General's role as chief law enforcement officer of the Commonwealth, the Criminal Bureau continued its efforts to prosecute crime particularly in the areas of economic crime and public corruption. To carry out this task, the Bureau is organized into the following components: Trial Section, Organized Crime Unit, Medicaid Fraud Control Unit, Appellate Section, Violent Crime Unit, and Employment Security Division. Some of the accomplishments and responsibilities of those components will be highlighted below:

**Trial Section:** In last year's report, it was noted that a comprehensive attack on arson and arson related crimes had been launched. Culmination of that effort was the return of well over 100 indictments, in principally two counties, Suffolk and Essex. Fiscal year 1978-1979 saw the final disposition of a substantial majority of those cases - with all but one case ending in conviction after trials or upon pleas of guilty. However, while that series of cases may be in its waning stages, the commitment of the Attorney general in this area has remained steadfast. Other investigations have begun and ad-
ditional indictments obtained. Moreover, it is anticipated that the award of a federal grant will ensure that the problem will continue to be attacked in a systematic fashion. Under that grant, the efforts of police, firefighters, investigators and prosecutors will be coordinated, and the community itself will be involved.

In March of 1979, it was revealed that the Criminal Bureau, along with the Massachusetts State Police, the F.B.I., the district attorneys of Norfolk and Worcester Counties, and the New England Organized Crime Strike Force was involved in a long-term undercover project aimed at members of organized crime throughout New England who benefited financially from truck hijacking and the fencing of stolen good. "Operation Lobster", as it was termed, led to the indictment of 46 individuals on various state and federal charges. It resulted in the recovery of over 3 million dollars in merchandise, such as coffee, razor blades, cigarette, liquor and electrical appliances. In several of the cases prosecuted by the Attorney General's Office, there have already been convictions with the imposition of sentences to state prison.

The investigation and prosecution of corruption within the Vocational Education Program of the Department of Education continued. Most notable of the prosecutions was the trial and conviction of a state senator for conspiracy to bribe and steal. The defendant was sentenced to 2 years in the house of correction and fined $5,000.

The prosecution of state tax violators continued. In the 12 month period, 93 indictments containing 716 counts were returned against 39 individuals and corporations, involving a half million dollars in unpaid taxes. This effort expanded into the area of sales, meals and excise taxes, in addition to personal income and wage withholding violations. At the end of the fiscal year, the successful prosecution of these cases had resulted in fines and restitution amounting to over $300,000. To ensure a permanent commitment also in this area, the Criminal Bureau has received a federal grant to fund a special unit to prosecute tax cases.

In the Spring of 1979, a series of cases were disposed of involving schemes to defraud the Somerville and Watertown Housing Authorities. In the most notable of these an architect hired by the Somerville Housing Authority pled guilty to charges of larceny and soliciting a bribe. In addition to being committed to jail, the defendant was ordered to pay $77,000 in restitution.

The above listing, of course, by no means meant to be exhaustive, but only indicative of the trial work handled by the Criminal Bureau.

**Organized Crime Unit:** In addition to its participation in the arson investigations and prosecutions, the Organized Crime Unit continued to be involved in such diverse area as gaming, bribery, cigarette smuggling and theft from state agencies. This Unit also cooperates with other agencies in combating the activities of criminal organizations and provides technical assistance to law enforcement officers and district attorneys. Included in the technical assistance supplies are photographic aid and advice and expert testimony in such novel areas as voice print identification.

**The Medicaid Fraud Control Unit** was certified in August 15, 1978. Prior to that time, Attorney General Bellotti had established a Nursing Home Task Force which was actively investigating and prosecuting medicaid fraud
perpetrated by nursing home providers. With certification, the Task Force became the Medicaid Fraud Control Unit and began its efforts to meet its enlarged responsibilities as mandated by Public Law 95-142, including (1) the investigation and prosecution of provider Medicaid fraud and the physical abuse of patients, (2) the creation and continued establishment of an effective and visible deterrent force, (3) the drafting and proposing of both legislation and regulations to ensure deterrence to continue provider fraud and to create a more efficient and equitable medicaid system, and (4) the identification for recovery and return to the taxpayers of overpayments made to providers.

Upon certification, it became necessary for the Unit to find office space for its enlarged and growing staff outside of the Attorney General’s primary location in Boston. During the same time, the Unit initiated hiring procedures, interviewing investigators, auditors and support staff applicants for employment. On September 12, 1978, the Unit moved to its present location at 18 Oliver Street, Boston.

On November 14, 1978, the Chief Justice of the Massachusetts Superior Court convened a special grand jury sitting in Suffolk County to investigate allegations of Medicaid fraud and other serious matters presented to it by the Unit. The grand jury was convened to sit for a six month period and was discharged on May 14, 1979, at which time a second special grand jury was sworn.

The overall conviction rate on all cases brought by the Unit and its predecessor, the Nursing Home Task Force, since November of 1976 has been 100%. Not one defendant has been acquitted, indeed most have plead guilty. The high percentage of pleas is to some significant extent contributed to the Unit’s recognition of the absolute need of total preparation for trial.

In the course of these investigations, $3,399,453.60 in overpayments have been identified by the Unit and $1,374,920.90 collected. The $3,399,453.60 is an actual overpayment identification figure. It is not a projection nor an extrapolation of what future savings may be involved as a result of suspending, putting on probation, or stopping current practices of known cheats or abusers from the program.

Appellate Section: The caseload of the Appellate division continued to increase this fiscal year. 172 new cases were opened, an increase of 24. 128 were closed. Since at the beginning of the fiscal year 155 were pending, the attorneys in this Section were actively involved in 199 cases.

The bulk of these cases involves civil litigation arising from underlying criminal convictions rather than direct appeals. Of the 91 cases filed in the various state courts, 64 sought relief in the Superior Court either by state habeas corpus, declaratory judgment, mandamus or constitutional civil rights damage actions. Twenty suits in the form of writs of error or proceedings pursuant to G.L. c.211, §3 were brought in the Single Justice Session of the Supreme Judicial Court. Seven appeals were argued before the Full Benches of the Supreme Judicial Court and Appeals Court.

On the federal side, 61 cases were filed in the Federal District Court: 43 petitions for writ of habeas corpus, 17 civil rights actions, and 1 petition for removal. Nine cases were argued in the Court of Appeals for the First Circuit.
Attorneys for the Section successfully opposed 9 petitions for writ of certiorari in the Supreme Court of the United States. The one case argued in the Supreme Court, Commonwealth v. White, resulted in the summary affirmance by an equally divided court. Thus, the decision of the Supreme Judicial Court from which we sought review stands. One petition for writ of certiorari was filed at the request of the Suffolk County District Attorney (Commonwealth v. Meehan) and is pending.

The "protective custody cases" (Commonwealth v. Blaney) continued to require a substantial allocation of resources.

The Appellate Section also processes demands for the rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and Governors of other states are examined and an opinion rendered as to the legal adequacy of each demand. Approximately 190 rendition demands were processed during fiscal 1978-1979: 112 foreign requests and 78 requests from Massachusetts authorities. In addition, an attorney must appear in court whenever a rendition warrant is challenged.

The Appellate Section also administers the Commonwealth's Criminal Usury Law, G.L. c. 271, §49.

Violent Crime Unit: 1978 was the final year of the L.E.A.A. funding for the Violent Crime Unit. During the last year of its operation, the Unit assisted the Boston Police Department's Community Disorders Unit and worked with that Unit and the District Attorney's Office on numerous incidents, including serious matters in Dorchester and in East Boston. As a result of an East Boston fire bombing, three men were indicted and prosecuted by the Attorney General's Office on charges of arson and burglary. One individual was sentenced to a term of 7 to 12 years at M.C.I. Walpole. The second individual was sentenced to not less than 5 nor more than 10 years at Walpole. One individual currently awaits trial.

The Unit met with and reviewed plans of the Community Relations Services of the United States Department of Justice respecting law enforcement activities and community participation in areas of racial violence. They further assisted attorneys for the city of Boston in evaluating law enforcement response to serious incidents occurring in the City's housing projects.

Employment Security Division: The purpose and intent of the Attorney General's Office in the Employment Security division is to provide its Director with whatever legal assistance and representation is necessary to enforce the Employment Security Law, Otherwise known as Chapter 151A of the General Laws, and designated in section 42A of the Law. During the fiscal year ending June 30, 1979, the direction of the Employment Security Division in the Department of the Attorney General has been redefined in accord with Attorney General Bellotti's philosophy that the resources of this Division should be used to its maximum potential for a statewide impact in providing an effective remedy to enforce a social program designed to serve the people of the Commonwealth.

Whenever an employer fails to comply with the Employment Security Law and does not file the necessary reports or pay the taxes due on his account with this Division, the matter is referred to the Attorney General for criminal prosecution under the provisions set forth by the Law. The Assistant Attorneys General make every effort to fully inform the employers of
their rights and obligations under the Law. As a result, a certain percentage of the tax matters are settled immediately thereby avoiding the expense of prosecuting the offender and collecting the taxes owed through court action - a savings to the Commonwealth and its taxpayers.

During the fiscal year ending June 30, 1979, 1110 employer tax cases were handled by this Division. 827 cases were on hand July 1, 1978. 283 additional cases were received during the fiscal year, and 89 were closed leaving the balance of 1021 employer tax cases on June 30, 1979. Criminal complaints were brought in the Boston Municipal Court, charging 265 individuals with non-payment of taxes totalling $1,795,981.54, owed on 188 delinquent tax accounts. $1,625,302.04 in overdue taxes was collected during fiscal year ending June 30, 1979. Monies collected were deposited to the Unemployment Compensation Fund.

Whenever individuals are found to be collecting unemployment benefits fraudulently on claims they filed while gainfully employed and earning wages, the fraudulent matters are referred to the Attorney General’s Office for prosecution of the criminal offense. Criminal complaints are brought only when the facts surrounding the offense have been investigated and reviewed with the individual involved and criminal intent is found. Action is brought in the court holding jurisdiction over the offense, under G.L. c. 266, §30 or G.L. c. 151A, §47, to reclaim monies stolen from the Division of Employment Security.

During the fiscal year ending June 30, 1979, 1047 fraudulent claims matters were handled by this Division. 930 cases were on hand July 1, 1978. 117 additional cases were received during the fiscal year, and 144 cases were closed leaving a balance of 903 cases on hand June 30, 1979. Criminal complainants were brought in the courts holding jurisdiction over the offenses, charging 61 individuals with larceny of $104,695.00 in unemployment benefits fraudulently collected from the Division of Employment Security.

The amount of $199,542.32 was collected during the fiscal year ending June 10, 1979, and returned to the Division of Employment Security for deposit to the Unemployment Compensation Fund.

In addition, 37 cases were argued in the Supreme Judicial Court. The Court upheld the Division’s position in 26 cases; found against this Division in one case; dismissed one case; and remanded 8 cases to the Board of Review for further review and action.

The Division is also active in the investigation and prosecution of CETA fraud and intent fraud.

III. GOVERNMENT BUREAU

The Government Bureau has four main functions:
(1) Defense of state officials and state agencies principally in lawsuits raising issues of administrative law, constitutional law, and statutory interpretation;
(2) Initiation of affirmative litigation on behalf of state agencies and the Commonwealth;
(3) Preparation of Opinions of the Attorney General; and
(4) Legal review of all newly enactment municipal by-laws pursuant to G.L. c.40, §32.

A report on those functions as well as several additional responsibilities that the Bureau has for the Commonwealth is provided in the following paragraphs.
DEFENSE OF STATE AGENCIES

The Government Bureau represented the Commonwealth and its officials and agencies in defensive litigation in state and federal courts, and, in exceptional cases, before certain state and federal administrative agencies. These proceedings typically involve administrative law and constitutional issues in diverse areas of public law.

During fiscal 1978-1979, the Bureau received 665 new cases and closed out a total of 427 already open cases. By subject matter and client, these new cases fell into the following categories (with miscellaneous cases omitted):

<table>
<thead>
<tr>
<th>Type of Lawsuit</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile surcharge</td>
<td>220</td>
</tr>
<tr>
<td>Civil Service</td>
<td>59</td>
</tr>
<tr>
<td>Welfare</td>
<td>41</td>
</tr>
<tr>
<td>Registry of Motor Vehicles</td>
<td>37</td>
</tr>
<tr>
<td>Alcoholic Beverage Control Commission</td>
<td>35</td>
</tr>
<tr>
<td>Education cases</td>
<td>30</td>
</tr>
<tr>
<td>Defense of cases brought against judges</td>
<td>29</td>
</tr>
<tr>
<td>Taxation</td>
<td>27</td>
</tr>
<tr>
<td>Rate Setting Commission</td>
<td>20</td>
</tr>
<tr>
<td>Personnel Administration</td>
<td>19</td>
</tr>
<tr>
<td>Insurance cases</td>
<td>17</td>
</tr>
<tr>
<td>1983 (Civil Rights) cases</td>
<td>15</td>
</tr>
<tr>
<td>Boards of Registration cases</td>
<td>14</td>
</tr>
<tr>
<td>Housing</td>
<td>13</td>
</tr>
<tr>
<td>Public Health</td>
<td>12</td>
</tr>
<tr>
<td>Department of Public Utilities</td>
<td>11</td>
</tr>
<tr>
<td>Retirement Board</td>
<td>8</td>
</tr>
<tr>
<td>Public Safety</td>
<td>8</td>
</tr>
<tr>
<td>Racing Commission</td>
<td>7</td>
</tr>
<tr>
<td>Mental Health</td>
<td>7</td>
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<tr>
<td>Banking Department</td>
<td>4</td>
</tr>
<tr>
<td>Lottery Commission</td>
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</tbody>
</table>

The relative time spent representing specific agencies cannot be measured by the number of cases. The representation of certain agencies involved a significant commitment to complex litigation, although the total number of law suits brought against those agencies might be quite small. For example, as in the previous three fiscal years, substantial Government Bureau resources were devoted to the implementation of consent decrees in the five cases seeking improvement in the conditions and treatment in state institutions for the mentally retarded. McEvoy v Mahoney, et al. (and related cases). Four Bureau lawyers had responsibility for these cases. During FY 1978-1979 final decrees were reached with respect to the Fernald and Monson state schools cases and interim decrees were reached for Wrentham and Dever State Schools. These decrees set forth significant capital improvements to buildings at all four institutions and addressed in detail the entire spectrum of services that will be made available to residents of those institutions.

During FY 1978-1979 lawyers from the Government Bureau argued several cases before the United States Supreme Court. These included a class action
lawsuit, in which a motorist contended that the Massachusetts breathalyzer statute operated unconstitutionally in violation of due process of law. The motorist argued that the statute did not afford a driver, arrested upon suspicion of drunken driving, a prior hearing opportunity to contest the fact of his refusal of the breathalyzer, resulting in a 90 day suspension of the driver’s license. The federal district court for Massachusetts struck down the breathalyzer statute. The Attorney General appealed that decision to the United States Supreme Court and won a reversal, arguing that the public interest in highway safety and the availability of a prompt post-suspension hearing justified due process. Mackey v. Montroyd.

In a second Supreme Court case, Califano v. Westcott, the Commissioner of Public Welfare litigated the issue of the proper remedy for the statutory gender bias in the federal-state AFDC-UF program without attempting to reconstruct the program.

In the United States Court of Appeals for the First Circuit, Bureau attorneys defended a state statute requiring mortgagees to pay interest on certain tax accounts (First Federal Saving & Loan Inc. v. Greenwald); successfully defended a statute requiring revocation of the driver’s license for one year of any person convicted of operating a motor vehicle while intoxicated (Arnold v. Panora); and successfully defended a charge of discrimination brought against the Commissioner of Public Health by a former employee (Blizzard v. Frechette).

Further, in Preterm v. King, the Court of Appeals adopted the Attorney General’s argument that states are not required to reimburse health care providers for all “medically necessary” services delivered to Medicaid recipients. The Court went on to determine that a state statute denying Medicaid reimbursement for most “medically necessary” abortion services was nonetheless inconsistent with certain general provisions of Title XIX of the Social Security Act, the federal Medicaid statute. However, the Court’s conclusion in this regard lacked immediate impact because of its further conclusion that the so-called federal “Hyde Amendment” permitted the Commonwealth to restrict Medicaid reimbursement. The Court, therefore, remanded the case to the District Court for further proceedings involving plaintiffs’ challenge to the constitutionality of the “Hyde Amendment”.

Government Bureau attorneys also obtained review in the Supreme Court of the United States of a decision of the District of Massachusetts declaring unconstitutional G.L. c. 112, §12S, a statute requiring physicians to obtain parental consent before performing abortion surgery on minors. The Supreme Court, in Bellotti v. Baird, affirmed the District Court’s judgment, but a majority of the Court was unable to agree on the basis for holding the statute unconstitutional. However, a plurality opinion written by Justice Powell suggested ways in which a state legislature might enact a constitutional statute in this difficult area.

Government Bureau lawyers argued fifteen cases in the Massachusetts Supreme Judicial Court during fiscal 1979. These included a case in which a District Court judge challenged procedures by which the Committee on Judicial Conduct had proceeded on a complaint against that judge. Those procedures were successfully upheld in a decision which clarified the way in which complaints are brought against sitting judges. McKenney v. Commission on Judicial Conduct. In a second case, various physicians challenged
the propriety of Blue Shield’s methods of compensating physicians. Those methods, which had been approved by the Division of Insurance were successfully upheld. Nelson v. Blue Shield of Massachusetts, Inc.

In the area of utilities decisions, Government Bureau lawyers successfully defended a Department of Public Utilities decision setting rates and charges for Massachusetts Electric Company, Massachusetts Electric co. v. Department of Public Utilities and a Department of Public Utilities decision which has disallowed modifications of the telephone company’s tariff.

Other cases argued by Government Bureau attorneys included the following: 1) A constitutional challenge to a statute requiring school committees to loan textbooks to pupils who are attending private sectarian and non-sectarian schools (Bloom v. Sullivan); 2) A case brought to determine whether the State Division of Hearing Officers has final authority at the agency level to determine questions of law and the rate of return to providers of health care (Cliff House Nursing Home, Inc. v. Rate Setting Commission); 3) A challenge to a by-law in Brookline regulating the conversion of apartment buildings into condominiums (Grace v. Town of Brookline); 4) An enforcement effort on behalf of the State Revenue Commissioner seeking to achieve full and fair cash values on a state-wide basis, (Commonwealth v. Town of Andover); 5) A tax case in which the Dow Chemical Corporation challenged the practice of the Commonwealth’s Department of Revenue by which items derived by income of foreign subsidiaries were taxed; (Dow Chemical v. Commissioner of Revenue); 6) Another tax case upholding that a contractor is liable for sales and use taxes on materials purchased and used in the construction of turn-key housing. (Northgate Construction Co. v State Tax Commission).

In the state Appeals Court, Bureau lawyers successfully defended a significant hospital charge control regulation promulgated by the Rate Setting Commission (Affiliated Hospitals Center v. Rate Setting Commission), and defended a number of state agency decisions, including those of the Civil Service Commission, Alcoholic Beverages Control Commission, Rate Setting Commission and Department of Public Utilities.

In addition to the cases discussed above, the Bureau also committed significant amounts of time to settlement of a federal court class action discrimination suit (Culbreath, et al v. Dukakis), which alleged that the state’s Civil Service system discriminated in all its phases against racial minority applicants. Final settlement of this case committed the state to continue many of the affirmative action reforms it had begun or planned to initiate, set deadlines for such reforms and tied the program to specific hiring goals and time tables. After the settlement was submitted to federal court, a number of state unions sought to intervene for the purpose of amending or cancelling the consent decree. Following briefing and argument, the federal court found that the unions could not intervene and the court proceeded to bind the decree.

**AFFIRMATIVE LITIGATION**

The Attorney General established the Affirmative Litigation Division within the government Bureau in April, 1975. It was created to provide agencies of the Commonwealth with litigation services when performance of their statutory functions requires resort to the state and federal courts.
During its fourth full year of existence, the Affirmative Litigation Division continued to increase the scope and intensity of its activities, commenced a number of major actions, and brought to conclusion significant litigation begun in prior years.

Cases which the affirmative Litigation Division brings may be divided into three broad, and often overlapping, categories: (1) advocacy litigation; (2) grant-in-aid related litigation; and (3) enforcement litigation. The first category subsumes cases which the Attorney General commences either on behalf of a state agency with an advocacy responsibility or in furtherance of his own obligation to advance the public interest. In prior years, suits related to the imposition of taxes by the state and federal governments and increases in postal rates, have comprise the bulk of this litigation category, and similar matters were the subject of litigation during FY 79. Litigation related to grant-in-aid programs, most significantly the various public assistance programs operated by the Department of Public Welfare, accounted for a substantial portion of the Affirmative Litigation Division's efforts. These cases also tend to be the most significant ones undertaken by the Division when financial value is the common denominator. Finally, the Division continues to perform traditional Attorney General enforcement functions by commencing suit on behalf of state regulatory and licensing agencies. The following paragraphs contain brief descriptions of representative cases drawn from each of these broad categories.

**Advocacy Litigation**

The Attorney General continued to litigate several substantial advocacy matters begun in prior years during the reporting year. *Brouillette v. New Hampshire*, an action which the Attorney General commenced against the state of New Hampshire to recover tax payments made by Massachusetts residents pursuant to an unconstitutional commuter tax, progressed to interlocutory decision on the defendant's motion to dismiss in the New Hampshire Superior Court. While several of the Commonwealth's claims survived, the most substantial financial claims were dismissed. At the close of the reporting year, the Department of Revenue was evaluating the options available to it at this juncture in litigation.

The Attorney General commenced a significant *quo warranto* action against the Mayor of the City of Boston challenging the Mayor's announced determination to refuse to appoint permanent members to the board of the Boston Redevelopment Authority. *Attorney General v. Mayor of the City of Boston*, Civil Action No. 78-206 Civil, Supreme Judicial Court for Suffolk County, challenged the right of the Mayor's so-called "hold over appointees" to continue as members of the BRA's board of directors. The Attorney General agreed to dismiss this action when, after the matter was set for reservation and report to the full Court, the Mayor conceded and agreed to reappoint to full statutory terms the current members of the agency's board.

**Grant-in-Aid-Litigation**

The Affirmative Litigation Division's most significant grant-in-aid litigation commenced during an earlier reporting year. *In re Massachusetts Social Security Services Claims*, an administrative proceeding before the United States Department of Health, Education, and Welfare, was settled during
the fall of the reporting year. Final payments of the settlement amount, seventy-four million five hundred thousand dollars, were received during October, 1978.

A controversy similar to that which occurred during the previous reporting year erupted in February, 1979, between the Department of Community Affairs and the United States Community Services Administration over CSA’s regulations governing its “crisis intervention program.” While the previous dispute had focused on the time limitations governing applications for assistance, this case, Commonwealth v. Olivarez, C.A. No. 79-414-G (D. Mass 1979), challenged certain regulatory provisions which drastically limited the availability of funds to needy families in the Commonwealth. The Attorney General commenced litigation to obtain modifications in the regulations and settled the case with CSA on terms having the practical effect of making available an additional fifteen million dollars in federal fuel assistance funds to low-income Massachusetts citizens.

The Attorney General commenced another significant piece of grant-in-aid litigation in the United States District Court for the District of Columbia during the last month of the reporting year. This case, Commonwealth v. Califano, was filed to prevent the United States Department of Health, Education, and Welfare from withholding from the Commonwealth’s Department of Public Welfare approximately fifty million dollars in federal reimbursement due the Commonwealth under the Social Security Act for expenditures incurred in the course of operating its programs of medical and family assistance (Medicaid and AFDC). The Attorney General was able to secure HEW’s agreement to continue providing reimbursement pending resolution of the litigation in the District Court, and full reimbursement was ultimately provided as a result of Congressional action.

The Affirmative Litigation Division also devoted substantial time to examining grant-in-aid problems for their potential amenability to solution through litigation. Generally, this effort consists of advising a major department of government concerning its rights and duties under federal and state law and an approved plan for program operation. The increasing complexity of federal grant-in-aid programs and the substantial reliance which the Commonwealth places upon federal reimbursement revenues in order to maintain the delivery of important social services has required the Affirmative Litigation Division to devote ever increasing attention to the complicated legal issues to which these federal-state relationships give rise. Regulatory Enforcement

The Affirmative Litigation Division continued to prosecute and commence a number of significant regulatory enforcement actions during the reporting year. These cases generally sought judicial enforcement of state agency determinations or compliance with statutory requirements by private entities or units of local government.

A case which the Attorney General commenced during the prior reporting year, Commonwealth v. Town of Andover, Mass. Ad. Sh. (1979) 1619, an action to require an initial group of twenty-three cities and towns in the Commonwealth to appropriate funds required by their boards of assessors to perform revaluation of real property as directed by the Commissioner of Revenue, was briefed and argued before the Supreme Judicial Court.
Another matter from the prior reporting year, Commonwealth v. Norwood Housing Authority, Civil Action No. 123722, Sup. Ct. Norfolk Cnty., an action which the Attorney General brought to require members of the Authority and its staff to make restitution to the Commonwealth of Authority funds which they improperly spent for personal purposes, continued during the reporting year.

The Attorney General commenced an action against the Town of Wellesley in June, 1979, on behalf of the Alcoholic Beverages Control Commission seeking a determination of the validity of certain special licenses which the Town’s board of selectmen have issued to certain educational and social organizations in the Town. Litigation was selected as a means of obtaining a final resolution of a controversy between the ABCC and the Town which has existed for several years.

The Attorney General settled litigation commenced in the prior reporting year on behalf of the Department of Public Health to enforce the Commonwealth’s Determination of Need law against the Newton-Wellesley Hospital and the Waltham Hospital. In another DoN case involving the Wing Memorial Hospital, the Attorney General obtained a decision declaring the Hospital’s operation of certain “satellite” clinics to be a violation of the statute and a permanent injunction against their further operation. The Hospital appealed from this judgment to the Appeals Court, and the judgment and injunction were stayed pending appeal.

The Attorney General continued to work with the Department of Public Health to assure adherence to the Commonwealth’s clinic licensure statute and regulations by a variety of non-hospital based health care providers, e.g., free-standing out-patient surgical centers, group practices, neighborhood health care clinics, and similar entities. The vast number of providers involved and the vagaries of the statutory scheme prompted the Attorney General to select an initial group of providers, those using names which the statute reserved for licensed clinics but not possessing a license, for first consideration. Since civil enforcement actions were precluded by the doctrine of “criminal equity,” the Attorney General determined to commence criminal prosecutions against those providers who, after adequate notice, refused to apply for a clinic license or to change their names. At the close of the reporting year, most providers in this initial group had determined to comply with the law, and the legislature was considering amending the statute to exempt certain providers, particularly group practices, from its provisions.

The Attorney General commenced a significant regulatory enforcement action against the Affiliated Hospitals Center, Inc., to enforce the Commonwealth’s hospital cost control statutes. As part of its review of the Affiliated Hospitals Center’s cost control reports, the Commonwealth’s Rate Setting Commission determined that Affiliated had included improper costs in its costs reports, and the Attorney General brought suit to recover the civil penalty which the statute imposes on hospitals which violate the Commonwealth’s cost control laws and regulations. At the close of the reporting year, discovery had commenced and Affiliated was seeking dismissal of the Commonwealth’s complaint.

Finally, a long-standing action which the Attorney General commenced
on behalf of the Department of Public Welfare and the Rate Setting Commission against a nursing home operator to recover an amount in excess of five hundred thousand dollars in over-payments reached judgment in the Superior Court Department of the Trial Court in the Commonwealth's favor. The defendant nursing home operator has appealed this judgment, thus preventing enforcement of the judgment until resolution of the appeal.

**OPINIONS**

By G.L. c. 12, §3, the Attorney General is authorized to render legal advice and opinions to state departments, agencies and officers on matters relating to their official duties.

(1) **Standards for Issuing Opinions**

Following in large part the established practice of previous Attorneys General, the Attorney General gives opinions only to state agencies, departments and the officials who head those entities. The Attorney General does not render opinions to individual employees of a state agency. He does not answer legal questions posed by county or municipal officials or by private persons.

The questions which the Attorney General considers in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions or questions which ask generally about the meaning of a particular statute, with no factual underpinning, will not be answered.

The Attorney General does not render opinions on questions raising legal issues which are or soon will be the subject of litigation or concern collective bargaining. He also refrains from making findings of fact, as well as answering questions relating to the wisdom of legislation or administrative or executive policies. Finally, he does not generally undertake the task of construing federal statutes or the constitutionality of proposed state or federal legislation.

(2) **Procedures in Requesting an Opinion**

In an effort to make the Attorney General's opinion-rendering function as effective, helpful and efficient as possible, the Department of the Attorney General has established a number of procedural guidelines to govern opinion requests.

Opinion requests from state agencies (or heads of state agencies) which come under the jurisdiction of a cabinet or executive office must be first sent to the appropriate executive secretary for his or her consideration. If the secretary believes the question raised by a request is one which requires resolution by the Attorney General, the secretary requests the opinion on behalf of the agency or sends the agency's request with the secretary's approval noted on it.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, take quite a while to prepare. If a question can be satisfactorily resolved more quickly within the agency or executive office -- by agency legal counsel or otherwise -- everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for the Attorney General to place himself in the midst of an administrative or even legal dispute between these two entities.
The rule, therefore, helps to ensure that the agency and its executive office speak with one voice insofar as opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel prepares a written memorandum explaining the agency’s position on the legal question presented and the basis for it. The memorandum is sent with the request.

When an agency request raises questions of direct concern to agencies, governmental entities or organizations in addition to the requestor, this Department will solicit the views of such other agencies or organizations before the Attorney General renders an opinion. We seek to obtain as much information as possible, both legal and factual, relating to every opinion request, in an effort to make sure that we do not overlook significant and relevant considerations.

The Attorney General strongly discourages the issuance of informal opinions. Informal opinions are often relied on as though they are formal opinions of the Attorney General. In a number of instances, this reliance has been seriously misplaced. As a result, the Attorney General is intent upon limiting the issuance of informal opinions to situations of absolute necessity.

(3) Opinions for 1978-79

Approximately 163 requests for opinions of the Attorney General were received during FY 1979. Because many of these requests were from private individuals, municipal officials and other persons or organizations, who are not entitled to an opinion of the Attorney General, those requests were declined.

During FY 1979, 31 formal opinions of the Attorney General were issued. These opinions covered a variety of subjects, including controversial and timely public policy issues.

Two opinions dealt with the confidentiality of public records. The Commissioner of Probation asked about the scope of his obligation to disclose information contained in sealed criminal records to municipal police chiefs inquiring about the criminal records of applicants for gun licenses. At issue were the competing privacy considerations underlying the sealed records statute, G.L. c 276 §100A, and the requirements of the firearms license laws. The Attorney General concluded that the Commissioner of Probation must inform an inquiring police chief (1) whether the applicant has a record of a felony conviction, or, if not, (2) whether the applicant has a record of a misdemeanor conviction for violation of the drug laws. In the view of the Attorney General, dissemination of this limited information concerning a sealed criminal offender record was consistent with the decision of the Supreme Judicial Court in Rzeznik v. Chief of Police of Southampton, Mass. Adv. Sh. (1978) 461, and would best accommodate the varied provisions of and interests served by the sealed record law, the criminal offender record (CORI) statutes, and the gun license law.

The Acting Commissioner of Public Health asked whether the design of the proposed Management Information System developed within the Department’s Division of Alcoholism complies with confidentiality requirements imposed by federal law. The Attorney General concluded that
the system, including the gathering and the restrictions of dissemination of patient identifying information, did comply with federal requirements and that the system, therefore, could be implemented.

The Attorney General issued two opinions concerning the restrictions upon the expenditure of the public funds for abortions, contained within the fiscal year 1979 budget.

The fiscal year 1979 budget act contained a proviso which prohibits funds appropriated in Item 4402-5000 for the Medicaid program to be used for abortions which are not necessary to prevent the death of the mother or in certain instances of rape. In light of this proviso, the Commissioner of Public Welfare asked three questions: (1) was he permitted to use Medicaid funds to pay claims of Medicaid providers for abortions performed before July 1, 1978, the effective date of the FY 1979 budget, that were valid under the proviso; (2) could he use those funds to pay similar claims of Medicaid providers for then-valid abortions performed between June 1 and July 7, 1978, the date on which the Legislature overrode the Governor’s veto of the “anti-abortion” proviso in Item 4402-5000; and (3) did he have the authority to pay claims for abortions performed between July 7 and August 1, 1978 that were valid under the Department’s then existing regulations but not under the proviso. Reading Item 4402-5000 to operate prospectively, the Attorney General answered the first two questions “yes” and the third “no.”

Thereafter, the Group Insurance Commission asked four questions concerning its responsibility to implement provisions within the fiscal year 1979 budget which prohibit the use of funds appropriated for public employees health insurance to pay for certain abortions. The Attorney General ruled that neither the terms of the Commission’s existing group health insurance contracts nor the provisions of the collective bargaining agreement between the Commonwealth and the Allicane remove the Commission’s obligation currently to implement the abortion proviso in the FY 1979 budget act.

In addition to the Commissioner of Public Health’s request discussed above, the Attorney General issued two other opinions relating to relationships between the state and federal governments. Responding to a request by the Secretary of Transportation and Construction, the Attorney General concluded that the MBTA and regional transit authorities are “instrumentalities” of the Commonwealth, as that term is defined in the Federal Intergovernmental Cooperation Act of 1968, and, therefore, entitled to retain interest on federal transportation grant funds which they have received. The Attorney General concluded that the Director of the Division of Employment Security was obligated to implement the provisions of St. 1978, c. 4 (which had been enacted after the February, 1978, blizzard to provide unemployment benefits to those unable to work and were unpaid as a result of the storm), notwithstanding an interpretation of certain provisions of that statute by a regional official of the federal Department of Labor as being inconsistent with a related federal unemployment tax statute. A final determination by the Department of Labor that the statute contravened the related federal statute would jeopardize federal financial participation in the Massachusetts unemployment compensation scheme.

In response to a request by the Registrar of Motor Vehicles, the Attorney
General issued an opinion concerning the effect of the court reform act passed by the Legislature in 1978 upon the arrest provisions of G.L. c.90, §21. The Attorney General concluded that these arrest provisions were unaffected by the court reform legislation and, accordingly, officers authorized under §21 to make arrests may continue to arrest motor vehicle operators pursuant to the provisions of that section.

Other significant opinions concerned the pledge of liquor licenses for tax liability to the Commonwealth; the authority of a city or town to withdraw unilaterally from a regional planning district; the entitlement of retired state employees to a retirement allowance while working for another unit of government after retirement; standard rules for adjudicatory procedures before state agencies; the investment of state employees’ and teachers’ retirement funds; and the authority of the State Auditor to conduct audits of the State Election Campaign Fund.

**BY-LAWS**

Town by-laws and home rule charters and amendments thereto are reviewed and approved by the Attorney General. During the fiscal year ending June 30, 1979, this office reviewed over 1600 by-laws and 22 home rule charter actions.

Almost all towns have brought their zoning by-laws into conformity with the new zoning act which became effective June 30, 1978. There are still a continuing number of zoning enactments pertaining to flood plains as towns adjust to the requirements of the Federal flood insurance program.

The dominant themes for general by-laws reviewed during the year, other than governmental organizations, were to protect the ecology and to control public disturbances.

**IV. PUBLIC PROTECTION BUREAU**

As a result of this year’s reorganization, the Public Protection Bureau now consists of seven divisions, an investigative unit, a complaint mediation section and a public information line. The seven divisions are Antitrust, Civil Rights, Consumer Protection, Environmental Protection, Insurance, Public Charities, and Utilities. The Bureau also administers the Local Consumer Aid Fund.

One primary focus of the Bureau during the past fiscal year has been to provide a forum for multi-divisional efforts in those areas where the concerns of several divisions overlap. An example of this approach is the Bureau’s work in the energy area. A number of the divisions have undertaken energy-related projects. Both the Utilities Division and the Environmental Division have been heavily involved in extensive proceedings before the Nuclear Regulatory Commission and Department of Public Utilities on the licensing of Pilgrim II. The Public Charities Division has been reviewing the filings of charitable organizations to determine which ones could lend assistance to needy individuals who experience difficulty paying for home heating oil. The Consumer Protection Division has investigated and prosecuted a number of cases involving overcharging or fraudulent billing for fuel. The Bureau has coordinated many of these efforts as well as taking a number of actions on its own. For example the Bureau prepared a petition on behalf of the Attorneys General of nine states directed to the federal Department of Energy requesting that the
Department analyzes the projected availability and price of home heating oil next winter. It also intervened in DOE proceedings which deal with the question of whether there is significant competition at the refiner level of the oil industry.

The Bureau has also been active in litigating a number of cases where there is overlap between divisions, such as when discrimination is charged in a company’s consumer credit policies or when a charitable nursing home is sued under the Consumer Protection Act. A decision of importance to all Divisions in the Bureau was *Lowell Gas Co. et. al. v. Attorney General* (Mass. Adv. Sh. (1979)) 49, where the Supreme Judicial Court ruled that under the statutes and common law of the Commonwealth, the Attorney General possesses broad powers to institute suits on behalf of the public interest.

The Bureau has also undertaken a number of special projects. One major effort was to obtain disability benefits for women employees who missed work because of maternity related disabilities.

**INVESTIGATIVE SECTION**

This section continues to work in such consumer areas as real estate developments, advertising motor vehicle sales and repairs, home improvement, health care and insurance. There are three major on-going efforts in the motor vehicle area. First, consumer complaints are analyzed in order to spot any pattern of unfair or deceptive trade practices. Secondly, dealerships are monitored for compliance with the Attorney General’s Motor Vehicle Regulations. And, finally, the section has developed a system for the investigation and prosecution of odometer cases.

In addition to these efforts, the Bureau has undertaken three new major surveys, the Maternity Survey, the Hill-Burton Survey and a Housing Discrimination Survey.

The purpose of the Maternity survey was to check major employers for compliance with M.G.L. c. 151B §4 and c. 149 §105D. This developed into a two phase operation. Phase one consisted of on-site visits by investigators to check for compliance with the posting requirements of the above-mentioned statutes. Phase two dealt with various companies disability policies which were found to be discriminatory toward maternity related disabilities. To date, 360 companies were visited and 110 were not in compliance with the posting regulations. Settlements were made with those companies which were found to have discriminated against maternity related disabilities.

The Hill-Burton Survey was developed in order to check participating facilities for compliance with the Hill-Burton Regulations. This project consists of on-site visits to the 131 participating facilities at which time a 15 page questionnaire is filled out. To date, 101 facilities have been visited and 76 were not in compliance according to our results.

The Housing Discrimination Survey is designed to identify those landlords who discriminate against families with children. The survey was just getting underway as the fiscal year closed.

In addition to the above, during the past fiscal year 2,209 consumer complaints were assigned and 1,869 were closed; 324 civil investigations were assigned and 131 were closed. Refunds to consumers totaled $168,178.14
and 14,358.82 was recovered in savings.

**COMPLAINT AND INFORMATION SECTION**

The Complaint Section expanded in this period to serve the needs of the entire Public Protection Bureau. We have established a Civil Rights Intake Unit and received 5,463 inquiries about Civil Rights matters. In addition, that Unit handles calls that concern inquiries about other divisions within the Bureau, especially Public Charities.

During the period of July 1, 1978 to June 30, 1979 the Complaint Section logged in 10,005 new complaints and closed 7,775. We recovered $577,972.91 for consumers in refunds, savings and the value of goods or services they would not have otherwise received but for our investigations.

Almost a hundred individual businesses were investigated for patterns or practices which resulted in several dozen Requests for Attorney or Requests for Investigator litigation has resulted in many cases.

During this period, all consumer complaints dating back to January 1, 1977 have been computerized and a Computer Correction Program has begun, to weed out multiple listings on the computer.

**PUBLIC INFORMATION LINE**

Last year the 8400 Line staff handled 177,295 phone calls; an average of almost 20,000 calls per person. 19,870 complaint forms were sent and information was given to 18,933 people. 78,542 persons were referred to agencies that could more appropriately handle their complaints.

**LOCAL CONSUMER AID FUND**

In July of 1978 the Massachusetts Legislature appropriated $250,000 to provide regional consumer groups throughout the Commonwealth with supplemental funding for their consumer complaint operations. This funding is distributed through the Local Consumer Aid Fund and administered by the Department of the Attorney General.

Through the success of this program consumer complaints of 80% of the cities and towns of the Commonwealth are now serviced at the local level.

These funds have been distributed amongst twenty-six groups in the following manner:

<table>
<thead>
<tr>
<th>GRANT RECIPIENT</th>
<th>AMOUNT AWARDED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agawam Consumer Advisory Commission</td>
<td>$7,800</td>
</tr>
<tr>
<td>Arlington Office of Consumer Affairs</td>
<td>8,500</td>
</tr>
<tr>
<td>Berkshire County Consumer Advocates</td>
<td>10,100</td>
</tr>
<tr>
<td>Boston Consumers Council</td>
<td>4,500</td>
</tr>
<tr>
<td>Brockton Consumer Advisory Commission</td>
<td>8,000</td>
</tr>
<tr>
<td>Cape Cod Consumer Assistance Council, Inc.</td>
<td>4,900</td>
</tr>
<tr>
<td>Fall River Community Development Service Center</td>
<td>6,000</td>
</tr>
<tr>
<td>Hampshire-Franklin District Atty. Office</td>
<td>6,000</td>
</tr>
<tr>
<td>Haverhill Community Action Commission</td>
<td>12,832</td>
</tr>
<tr>
<td>Holyoke Community College Consumer Aid Center</td>
<td>7,600</td>
</tr>
<tr>
<td>La Alianza Hispana</td>
<td>1,910</td>
</tr>
</tbody>
</table>
Greater Lawrence Community Action Council, Inc. $ 4,600
Lowell Community Teamwork, Inc. 5,040
Medford Consumers Council 9,200
Newton Department of Human Services 4,500
North Shore Community Action Program 11,061
North Worcester County Consumer Protection Agency 8,800
Peabody Municipal Consumer Protection Agency 8,800
Quincy Consumer Council 11,300
Revere Consumer Affairs Office 10,900
Somerville Multi-Service Center 7,131
Springfield Consumer Action Center 12,400
On the Corner Taunton Area Consumer Protection Program 11,000
Worcester Consumer Protection Coalition, Inc. 14,782
So. Middlesex Consumer Protection Office 13,000

The program is growing simultaneously with its success and additional funds will be required in the future not only to maintain the current program, but to reach the goal of 100% of cities and towns being serviced at the local level.

ANTITRUST DIVISION

A. Introduction

Through the use of continuing federal funding, new state legislation, and increased staff capabilities, the Antitrust Division has continued to increase its activities in preventing unreasonable restraints of trade and monopolistic practices within the Commonwealth.

B. Legislation

On August 10, 1978, Governor Dukakis signed into law the new Massachusetts Antitrust Act (G.L. c. 93, as amended). This new Act gives the Attorney General broad powers to investigate and prosecute, civil and criminally, antitrust violations throughout the Commonwealth of Massachusetts. Similar to the federal Sherman and Clayton Acts, the legislation prohibits restraints of trade, monopolization, and illegal tie-ins. The statute provides for broad civil investigative demand powers by the Office of the Attorney General to permit appropriate investigations. The statute permits the Attorney General to bring civil actions on behalf of the Commonwealth and its political subdivisions as well as on behalf of all natural persons residing within the Commonwealth for damages sustained by such bodies and natural persons under the statute. The Act also provides for civil penalties of up to $25,000. In addition, the Act provides for criminal penalties of up to one year in prison as well as fines of up to $100,000.00 for a corporation or of up to $25,000.00 for an individual. The legislation also provides for the creation of an antitrust enforcement fund wherein recoveries will be used to fund the Antitrust Division in the Office of the Attorney General.

C. Federal Funding

The Antitrust Division continued to receive its operating funds from a
federal grant authorized under the Crime Control Act of 1976. In September, 1977, the Attorney General was awarded $320,681.00 to establish and develop the antitrust division. In March of 1979, the Attorney General was awarded an additional $305,091.00 to continue the development of an antitrust enforcement program in the Commonwealth of Massachusetts. Such funds are presently being used to fund much of the work of the Antitrust Division.

D. Litigation

As of June 30, 1979 the Antitrust Division had eleven cases which were various stages of litigation both the federal and state court systems.

   Northern District of Georgia

The Commonwealth brought suit against 37 major producers of chicken in the United States charging them with conspiring to raise the price of chicken throughout the United States. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. A settlement in excess of $35 million has been reached in this global class action and the Commonwealth is presently awaiting hearings to determine the adequacy of the settlements and for a final determination of the potential recoveries available to the Commonwealth.

2. Commonwealth of Massachusetts v. Amstar Corp., et al
   Eastern District of Pennsylvania

The Commonwealth brought suit against 7 refiners of sugar alleging that they conspired to fix prices of sugar in violation of the Federal Antitrust laws. The Commonwealth is representing itself in its proprietary capacity as well as the Cities of Boston and Cambridge. Partial settlements of nearly $25 million have been achieved in this litigation and the Commonwealth is awaiting a determination of distribution to discover what its share of the recovery will be. The remaining portions of this litigation are scheduled to go to trial in October of 1979 in Philadelphia.


The Commonwealth alleged that defendants who are distributors of medical oxygen services in the New England area conspired to fix prices for their services and products as well as to divide territories in which they do business. This case was brought on behalf of the Commonwealth in its proprietary capacity and as parens patriae on behalf of the consumers of the Commonwealth of Massachusetts. This case is presently in pretrial discovery.

   Northern District of Georgia

The Commonwealth of Massachusetts, on behalf of itself and its political subdivisions in their proprietary capacity, brought suit against three major armored car carriers alleging that they conspired to fix the price of armored car services throughout the United States. A settlement of $11.8 million has been approved. The Commonwealth is presently awaiting a determination of the appropriate division of the settlement amounts in order to determine
its share of the recovery in this case.

5. Commonwealth of Massachusetts v. Ahern Corp., et al
   District of Massachusetts

The Commonwealth, on behalf of itself and its political subdivisions, brought action against 7 distributors of liquid asphalt products in the Commonwealth of Massachusetts alleging that they conspired to fix prices, rig bids, and allocate customers among themselves in the sale of liquid asphalt products in the Commonwealth. This case is presently in class discovery phases.

6. Commonwealth of Massachusetts v. Leviton, Inc. et al
   Eastern District of New York

The Commonwealth brought suit on its own behalf for injunctive relief under the Federal Antitrust Laws as well on behalf of the consumers of the Commonwealth under G.L. c. 93A alleging that the major wiring device manufacturers in the United States conspired to fix prices on wiring device products to the Commonwealth and to its citizens. This case is presently in pretrial discovery.

   Eastern District of Pennsylvania

The Commonwealth, on behalf of itself and its political subdivisions, brought an action against 15 major paper manufacturers charging them with conspiring to fix the prices of fine paper products throughout the United States. The Commonwealth has been certified as a class representative of its political subdivisions in this action. Presently there are more than $30 million in settlements in this action. These settlements are from 6 of the 15 defendants. Pretrial discovery is ongoing against the 11 remaining defendants in this action.

   Eastern District of Pennsylvania

The Commonwealth has brought suit on behalf of four municipally-owned gas works alleging that the 3 major manufacturers of gas meters throughout the United States have conspired to fix prices and rig bids on gas meters. This case has been settled for in excess of $15 million and the Commonwealth is presently awaiting a final resolution of the method in which the settlement monies will be distributed in order to determine how much will be recovered for the four municipally-owned gas works.

9. Commonwealth of Massachusetts v. Campbell
   Hardware, Inc., et al.
   District of Massachusetts

The Commonwealth, on behalf of itself and its political subdivisions, brought suit against 12 distributors of architectural hardware in the Commonwealth of Massachusetts alleging that they had conspired to rig bids on governmental building projects within the Commonwealth of Massachusetts. This case is presently in pretrial discovery.

    Hampshire County Superior Court

The Commonwealth, on behalf of its citizens, is seeking a $25,000.00 civil penalty and restitution for consumers as a result of an alleged conspiracy to fix and raise the rate of real estate brokerage commission fees in the Amherst area.
This case is presently in pretrial discovery.

11. Commonwealth of Massachusetts v. Massachusetts Nurses Association

The Commonwealth of Massachusetts brought suit against the Massachusetts Nurses Association seeking a $25,000.00 civil penalty under the new state Antitrust Statute alleging that the Massachusetts Nurses Association has conspired with its members to submit fixed fee schedules in violation of the Massachusetts Antitrust Statute. That case is presently in pretrial discovery.

In addition to the above cases the Commonwealth has also disposed of a number of cases without having had to file formal proceedings against the respondents therein.

In the matter of Levi Strauss & Company

The Commonwealth accepted a Consent Decree from Levi Strauss regarding certain alleged activities concerning resale price maintenance. In addition, the Commonwealth accepted a civil penalty of $20,000.00 as well as in excess of $8,300 in costs.

In the matter of Massachusetts Wholesale Drug Companies

The Commonwealth accepted Letters of Assurance of Discontinuance from 5 wholesale drug companies doing business in Massachusetts regarding alleged activities concerning their participation in a program sponsored by the National Wholesale Drug Association. The five companies paid $62,500 to the Commonwealth in settlement of this matter.

In the matter of Massachusetts Board of Real Estate Appraisers

The Commonwealth accepted an Assurance of Discontinuance from the Massachusetts Board of Real Estate Appraisers wherein they agree to eliminate a ban on competitive bidding which was contained in their by-laws.

In the matter of Massachusetts Interscholastic Athletic Association

The Commonwealth accepted an Assurance of Discontinuance from the Massachusetts Interscholastic Athletic Association wherein they agreed to eliminate any requirements regarding non-members makeing payments to officials at fees which the M.I.A.A. had negotiated.

In the matter of Steyr Daimler Puch of America Corporation

The Commonwealth of Massachusetts accepted an Assurance of Discontinuance from Steyr Daimler Puch of America Corporation wherein they agreed not to engage in activities regarding possible resale price maintenance in the Commonwealth.

In the matter of L.D. Plastics

The Commonwealth has accepted an Assurance of Discontinuance from L.D. Plastics wherein it was agreed that L.D. Plastics would not refuse to supply dealers who did not sell at the normal list price.

In the matter of United X-ray Corporation Massachusetts

The Commonwealth received a Letter of Assurance of Discontinuance from United X-ray Corporation of Massachusetts wherein they agreed to not refuse to deal with any individual or entity who sought to purchase parts
for x-ray machines.

In the matter of New England Home Furnishing Representatives Association Inc.

The Commonwealth of Massachusetts accepted a Letter of Assurance from the New England Home Furnishings Representatives Association Inc. wherein they agreed not to seek to curtail the right of sales personnel insofar as where they could sell or to whom they could sell.

In the matter of Metropolitan Buick-Opel Dealers Advertising Association Inc.

The Commonwealth of Massachusetts accepted a Letter of Assurance of Discontinuance from the Metropolitan Buick-Opel Dealers Advertising Association Inc. wherein they agreed not to jointly advertise automobiles with pricing.

E. Other Activities

The Antitrust Division concluded a lengthy review of all regulatory boards of the Commonwealth of Massachusetts in an attempt to determine whether or not any of the rules or regulations posed a problem insofar as antitrust violations were concerned. On the advice of the Antitrust Division, the Board of Public Accountancy passed an emergency regulation repealing its Rule E-3 relative to the ban on competitive bidding.

New England Bid Monitoring Project - Using federal antitrust grant monies the Commonwealth of Massachusetts began a pilot program to determine the feasibility of collecting and analyzing masses of bid data in order to determine whether antitrust violations were occurring in the sale of certain specified products. Through the cooperation of state and municipal purchasing officials, the Commonwealth has been able to analyze data from over 100 cities and towns throughout the Commonwealth on over 100 separate products. The data that has been collected is presently being analyzed in conjunction with data that is also being collected by the five other New England states. Great interest has been generated throughout the United States by this program and it is anticipated that the Department of Justice will grant a supplementary grant to the 6 New England states to continue the expansion and development of this program.

CONSUMER PROTECTION DIVISION

1. Introduction

The Consumer Protection Division of the Department of the Attorney General underwent significant growth and development during the previous fiscal year. In that time period the non-legal functions of the Division, including investigation and mediation work, were transferred to the Public Protection Bureau. In addition, separate Divisions responsible for insurance and utility matters were established. Finally, local group coordination was also handled outside the Division.

This reorganization left the personnel of the Division free to focus on its primary responsibility, namely the enforcement of G.L. c. 93A, the Massachusetts Consumer Protection Act. While the non-legal functions described above are not formally within the Consumer Protection Division as currently constituted, there remains sufficient coordination and interac-
tion among all units of the Department working on consumer issues so that the Attorney General maintains a unified approach in this area.

II. Division Reorganizations

As part of our effort to maximize our potential for effective litigation, a complete review of the procedures for case control and movement was undertaken during this past fiscal year. This resulted in a major reorganization of the Division’s operational policies. For the first time, the Consumer Protection Division has standardized orientation, case control, and oversight policies which should insure the best possible utilization of our limited resources. The policies provide for a standard format for case organization, computerized quarterly work-product goals for all attorneys, and the improvement of the consent-judgement monitoring system to insure that all judgments obtained during the Bellotti administration are regularly checked for compliance. The Division’s procedures are set out in the Consumer Protection Division Attorney Manual.

We have also moved toward the establishment of case-area specialities. Each attorney in the Division has developed expertise in a particular area of consumer law, including for example, franchising, advertising, and major automobile defects. Perhaps the most significant of these is the health specialty. We have identified consumer health issues as an important, but previously unidentified, area of consumer law. A health specialty team, consisting of two attorneys and support staff, was created in the Division in May of 1979. Since then, the health specialists have brought one major piece of litigation, discussed below, and initiated a series of important investigations. Other specialty teams will be created as necessary in the future.

Finally, we have addressed the problem of unenforceable judgments which has been raised on occasion in the past by some judges. Following a comprehensive review of procedures governing the entry of consent judgments, we modified our standard form judgment to reflect its binding and enforceable nature. We also proposed a formal rule for the consideration of the Superior Court to bring uniformity to the system by which such judgments are entered. Then we met with the Chief Justices of both the Superior and District Court Departments to clarify that c. 93A consent judgments were enforceable by contempt in the manner proposed by the Attorney General.

III. Statistics

During the past fiscal year, there were 251 active cases in the Consumer Protection Division. Of those, 98 were continued on an active status from the previous year and 153 were commenced as original matters.

Also, during the year, the Consumer Protection Division entered into 49 consent judgments, received 14 judgments after litigation, and accepted 25 assurances of discontinuance pursuant to G.L c. 93A, §5. The total dollars recovered from these completed actions and other settled matters was approximately $1,622,000.

It is the goal of the Division to maintain manageable caseloads for all attorneys. Currently, there are 112 open cases in the Division which is consistent with our view that each attorney should maintain a manageable
ceeding. Of course, each attorney also has long-term investigations and other projects which occupy his or her time.

IV. MAJOR CASE AREA

A. Automobile Defect Cases

1. Saab -- This case was the most significant one under the Motor Vehicle Regulations to date. It involved an investigation of a manufacturing defect in the paint on certain models produced in the company's Belgian factory. After extensive negotiation following our 5-day notice of intent to sue, Saab entered into a settlement resolving the problem. The settlement, included both a consent judgment and an assurance of discontinuance, was significant in several respects. It was the first recognition by an automobile manufacturer of implied warranty obligations extending beyond the terms of its express warranty. Also, it was the first time a manufacturer agreed to send the notices of defect required by the Attorney General's Motor Vehicle Regulations. Over 1000 Massachusetts Saab owners will receive the benefits of this action.

2. Chrysler Corporation -- During this past year we sued Chrysler, following unsuccessful negotiations, for its failure to promptly notify Massachusetts consumers of the defect arising out of its carburetor problem which had previously been the subject of a NHTSA-initiated recall. Our suit seeks an injunction requiring future defect notices and restitution for the several thousand affected Massachusetts owners of defective Chryslers.

B. Bankruptcy Cases

1. Holliston Junior College -- In this case, we successfully protected a large number of students who were threatened with the loss of deposits because of the failure of this two-year school. The bankruptcy court ordered the segregation and repayment of advance tuition deposits. We also arranged for transfer of credits and a teach-out for those students who were caught unaware at mid-term by this problem.

2. In re Vincent Hale -- This is a bankruptcy appeal in which we are trying to establish the important principle that judgments rendered under c. 93A are non-dischargeable in bankruptcy. If we succeed, defendants will not be able to avoid paying restitution for unfair or deceptive practices by filing bankruptcy, as was attempted in this case. This principle has already been recognized by Congress in its adoption of the "Bellotti Amendments" to the Bankruptcy Reform Act. Pub. L. No. 95-598 in 1978. These amendments, drafted, and lobbied for by the Consumer Protection Division, recognize a priority status for prepaying consumer creditors ahead of federal and state taxes. These amendments become effective on October 1, 1979.

3. Graham Junior College -- In this case, which for most of the year was an operating Chapter XI reorganization, we arranged for the protection of prepaying students and for credits for students who received less than a full-year's education when the school closed prematurely. Since then, the case has been converted into a straight liquidation, and we are seeking to have the benefits of our consent judgment with the school recognize that proceeding.
4. Design Research -- In this major bankruptcy, we are trying to firmly establish the principle that prepaying consumers are entitled to the protection of a constructive trust when the company with whom they have deposited their funds knew or should have known it was unable to honor such contracts. The results of this case are particularly important in this period of financial instability.

C. Enforcement Actions, Including Contempt

1. Neighborhood Reader's Service -- This case, tried during the summer of 1978, was brought to enforce a consent judgment obtained during Attorney General Richardson's term. The judgment prohibited the defendant from using the word "free" in connection with its magazine sales program. After a three-day trial, the defendant plead guilty and agreed to close for a period of eight weeks at a total cost of $250,000 in lost sales.

2. Beltone Hearing Aid and Ranaan Katz -- These are two cases in which the division successfully brought enforcement actions for defendants' failure to comply with Civil Investigative Demands issued under c. 93A, §6. In both cases, following hearings, the defendants were ordered to produce documents and fined substantial amounts of money.

3. Hampden Village -- A case involving a mobile home park operator in Springfield produced this contempt. The park operator was enjoined from expanding his park until he had corrected the drainage problems already existing. After a lengthy trial, the Court found that he had indeed expanded without correcting the drainage and ordered the defendant to fund a substantial drainage construction project. The total cost, including an award of attorney fees, exceeded $12,000.

4. Kenneth Wasil -- The defendant was found guilty and fined, after trial, of several violations of an order prohibiting him from further automobile sales business.

5. Randolph Messineo/William Hartwick -- Defendant Hartwick was ordered to file monthly reports with the Attorney General and the Court regarding the construction business he was engaged in with Defendant Messineo. The reports were false and failed to reveal substantial deposits taken from consumers. We brought contempt charges against both defendants. Hartwick plead guilty and was sentenced to 2½ years in jail for his contempt; Messineo went to trial and was found guilty by a jury. He was sentenced to 2½ years, with all but four months of the term suspended. Both men will receive consideration if they repay the $48,000 which they took from consumers improperly.

D. Health Care

1. Diamedic, Inc. -- This was an action for injunctive relief and restitution against a promoter of a diet plan which guaranteed weight loss. The Superior Court enjoined any further business activity by the defendant pending full restitution to all injured consumers. The Division is seeking repayment of up to $250,000 in this case.

2. Genesis Laboratory, Inc. -- This was an action for injunctive relief and damages against a medical testing laboratory which was certifying medical test results at a time when we believe it had no ability to accurately
perform the tests. The Appeals Court, on our petition to review the inaction of the Superior Court, ordered the laboratory to cease testing until it met specified standards acceptable to the Division and until it had a qualified director. The action for permanent relief and damages continues in the Superior Court.

3. Heritage Hill and Resthaven -- These are two cases brought by the Division to place nursing homes operating at substandard care levels in receivership. The homes both contested the actions and the courts have responded with unusual and creative orders in a situation which we believe will become increasingly common.

4. Urea Formaldehyde Foam Insulation -- This is an action against the manufacturers of urea formaldehyde foam insulation, a common home insulating product which, if improperly installed and at other times, may constitute a danger to the health of residents in the homes. The Division indicated its intention to sue the manufacturers to withdraw the product, and constructive, extensive negotiations ensued. Immediately prior to the entry of an agreement to protect the public, the Department of Public Health determined that proceedings to ban the product were in order. Thus, further negotiation by the Consumer Protection Division became impossible. This issue was not finally resolved at the end of the fiscal year.

E. Real Estate

1. Land and Leisure -- In a suit brought in Massachusetts, the Division seeks a declaration that the defendant falsely advertised improvements to vacation property in Florida that it was marketing. In order to recover funds to pay any judgment, the Division has filed a petition to attach the proceeds of a bond filed with the Florida Department of Land Sales Registration and will appear there in the future to argue this case.

2. Kaufman and Broad Homes, Inc. -- The Division entered into a settlement agreement with this subsidiary of the second largest residential home builder in the United States. The agreement provided for repurchase of a condominium development in the event that certain defects were not cured by the developer within a specified period. Because of the nonperformance by the developer prior to that time of ancillary obligations under the agreement, the Division brought suit to enjoin the developer from building unsafe and/or uninhabitable homes in the Commonwealth, to establish an implied warranty of habitability in the sale of homes in the Commonwealth, and to order the defendant to repurchase, at full equity, the homes it had already built in Massachusetts. Extensive litigation is expected.

F. Advertising

1. Columbia Research Company -- This was a suit against a company which promised a "free" vacation and other benefits for the payment of $15.95. Hundreds of Massachusetts residents lost money in this scheme. The Division secured a refund of all monies paid. Many other states, and the F.T.C., brought suit against this Illinois corporation, but only Massachusetts, to date, has successfully recovered all outstanding money owed.

2. Boston Red Sox Ticket Case -- This was an investigation of allega-
tions of ticket price false advertising during the previous season. In settlement, the Red Sox offered to reduce the price of approximately 10,000 reserved and unreserved bleacher tickets by $1.00 each and to offer 10,000 reserved bleachers, at $3.00 each, to groups of underprivileged youth in Massachusetts.

3. J.M. Fields Liquidation -- Major discount store liquidation being conducted in apparent violation of Massachusetts going-out-of-business and warranty laws was investigated and responded to promptly by the Division. An Assurance of Discontinuance was negotiated which provided for compliance with all applicable laws and notification from liquidators of all future liquidations in Massachusetts as well as maintenance of adequate security to cover problems arising from this sale.

G. Automotive

1. General Motors Engine Interchange Litigation -- This settlement agreement, negotiated by the Consumer Protection Divisions of forty-four states led by Massachusetts, was finally put into full effect this year. After a number of problems, including an adverse opinion of the 7th Circuit Court of Appeals, General Motors extended the offer of $200.00 and an extended warranty plan to all 67,000 eligible Oldsmobile owners, including over 1,600 Massachusetts residents. Thus, the largest negotiated settlement of a consumer protection action anywhere was finally put into effect.

2. Colonial Motors -- This was a summary judgment against an odometer spinner under both state and federal provisions. This case was a precedent-setting action establishing that, in the absence of contrary documentary evidence, odometer liability will be found against offending dealers.

3. 128 Sales -- This is an action for breach of warranty against retail automobile dealer. It is notable for its injunction requiring the dealer to honor revocations of acceptance within a specified period for defective automobiles and to make repairs in a merchantable manner. The case continues on restitution.

H. Miscellaneous

1. Cuna Mutual -- This is an action to enforce a C.I.D. against a prospective defendant. The Superior Court ruled that, regardless of the theory on which the Attorney General issued the C.I.D., enforcement was required because of the broad scope of investigatory powers conferred. The defendant has appealed.

V. LEGISLATION AND REGULATIONS

A. Breton v. Haas.

In this case, the defendants challenged the constitutionality of the Attorney General's regulatory authority under c. 93A §2(c) in general, and Regulation XV(c) in specific. The Consumer Protection Division intervened to contest both points and to urge the Court not to rule on either as they had not been raised below. The Supreme Judicial Court ruled that the Housing Court had no jurisdiction over c. 93A in the first place, and thus did not rule on the constitutional questions.
B. Debt Collection Regulations.

After over two years of work, four drafts, and two public hearings, the Attorney General promulgated Debt Collection Regulations under c. 93A, §2(c). A copy of the regulations appears as Appendix A to this division’s Report. A comprehensive enforcement program is planned for Fiscal 1979.

C. “As Is” Legislation

In part as the result of extensive lobbying by the department, a bill proposed by the Massachusetts Automobile Dealers Association to allow “no guarantee” used car sales suffered a significant defeat in the House. By a tie vote, the House failed to move the bill to vote on the floor, and it was referred to a “study” in the Senate Ways and Means Committee.

VI. FEDERAL ACTIVITIES

A. Hearing Aid Testimony

During the past year, the Division prepared testimony on behalf of the Attorney General opposing proposed preemptive regulations of the Food and Drug Administration which would deny Massachusetts consumers the protection of our statute on hearing aid sales. Because of our strenuous opposition to the position advocated by the federal government, further hearings will be held in Boston in the fall to take additional testimony.

B. F.T.C. Used Car Sales Rule

The Division also submitted testimony to the Federal Trade Commission on behalf of the Attorney General concerning the proposed trade regulation rule on used car sales disclosures. While we generally favor increased disclosure and support Commission efforts in this direction, we noted several areas where Massachusetts law was more protective than federal and asked for specific exemption language. No final rule has been promulgated yet.

C. Urea Formaldehyde Foam Insulation

Members of the Consumer Protection Division led the effort of the National Association of Attorneys General in bringing the problem of potentially dangerous emissions of formaldehyde from this product to the attention of various federal agencies. The CPSC has already reacted positively in this area and other federal agencies are also expected to do so.

VII. CONSUMER PROTECTION CASE LIST

A. ADVERTISING

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Status/Disposition</th>
<th>County/Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA Rental Corp.</td>
<td>Consent Judgment</td>
<td>Middlesex</td>
</tr>
<tr>
<td>Aaron Glickman, d/b/a</td>
<td>Consent Judgment</td>
<td>Suffolk</td>
</tr>
<tr>
<td>Aaron’s Advertising Agency</td>
<td>Assurance</td>
<td>Norfolk</td>
</tr>
<tr>
<td>B &amp; G Industries, Inc.</td>
<td>Litigation</td>
<td>Hampden</td>
</tr>
<tr>
<td>Boisvert, Richard</td>
<td>Settled</td>
<td>Suffolk</td>
</tr>
<tr>
<td>Boston Red Sox</td>
<td>Consent Judgment</td>
<td>Middlesex</td>
</tr>
<tr>
<td>Chala Foods</td>
<td>In Litigation</td>
<td>Hampden</td>
</tr>
<tr>
<td>Cohen, Leon d/b/a</td>
<td>Consent Judgment</td>
<td>Suffolk</td>
</tr>
<tr>
<td>Aqua King Pool Co.</td>
<td>Consent Judgment</td>
<td>Hampden</td>
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<tr>
<td>Columbia Research</td>
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<tr>
<td>Edward’s Wayside Furniture Inc.</td>
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</table>
Lane’s Furniture  Appeal Decided  S.J.C.
Lechmere Sales  Closed  Hampden
Leonard, Paul  Consent Judgment  Norfolk
M & M Publications  In Litigation  Hampden
Max Okun Furniture Co. Inc.  Consent Judgment  Middlesex
National Business  Assurance  Assurance
Association Directory  In Litigation  Middlesex
Northeast Marketing  Consent Judgment  Plymouth
Precision Motors Rebuilders  In Litigation  Essex
Pyramid Slenderizing  S and L Sound Services  Assurance  Suffolk
Salon  Assurance  Suffolk
Rautio, James, d/b/a  Seiden Sound Inc.  Consent Judgment  Hampden
Treasure Chest  Sherman’s  Assurance  Suffolk
Advertising Co.  In Litigation  Suffolk
S and L Sound Services  In Litigation  U.S.D.C.
d/b/a K and L Sound  Seiden Sound Inc.  Consent Judgment  Suffolk
Stavis, Steve  Sherman’s  Assurance  Suffolk
Swiss Fabric Outlet  In Litigation  U.S.D.C.
Volkswagen of America  Closed
Young Enterprises, d/b/a  In Litigation  Middlesex
Neighborhood Readers  Contempt  Suffolk
Service

Additional three cases in this area are under active investigation.

B. ANTI-TRUST

Defendant  Status/Disposition  County/Court
Atlantic Richfield Co.  Closed  Hampden

One additional case in this area in under active investigation.

C. AUTOMOBILES

Defendant  Status/Disposition  County/Court
Aamco Trans. Inc.  Closed  Suffolk
Abel Ford  In Litigation  Middlesex
Ace Motors Of Somerville  In Litigation  Middlesex
Alewife Motors  Closed  Suffolk
Back Bay Motors  In Litigation  Hampden
Borlen, Edward J. d/b/a  In Litigation  Suffolk
City Auto Sales  In Litigation  Hampden
Cape Motors  Consent Judgment  Suffolk
Carol Cars, Inc.  Settled  Suffolk
Chrysler Corp.  In Litigation  Hampden
Colonial Motors Sales, Inc.  Final Judgment  Worcester
& Bruce Milton
Darryl Riverside, d/b/a  In Litigation  Bristol
Lakeside Auto Sales  In Litigation  Norfolk
DeSautels, William  Consent Judgment  Hampden
Eck, David, d/b/a,  Consent Judgment  Hampden
Eck’s Auto Sales  Consent Judgment  Hampden
Elro Enterprises
General Motors Corp.
Fife, Walter
Foreign Auto Imports
Hallissey Chevrolet
Highland Auto Repair Inc.
Holyoke Auto Corp. d/b/a Toyota of Holyoke
Joe Cullinan Ford Inc.
Lamolino, Don & Michael B. Iscaldi, d/b/a, Don’s Getty Service
Lord Toyota Inc.
McManus, Thomas L./ 128 Sales
Medeiros Williams Chevrolet
Muzzi Motor Inc.
O’Connor, Francis A. d/b/a Car Finders
O’Connor, Thomas/ O’Connor Bros
Pandy Pontiac
Richard Ryll and Automotive Products
Saab of America
Santilli Auto Sales
Schaffer Motor Car Co.
Stop & Go Transmissions
Sullivan Motors
The Bug Hospital
Topor Motor Sales
Valley Chevrolet
Village Chevrolet
Wasil, Kenneth
West Springfield Chrysler - Plymouth, et al.
Wilmington Sales, Inc.

In Litigation
Settled
In Litigation
Consent Judgment
In Litigation
Closed
Consent Judgment
In Litigation
Consent Judgment
Consent Judgment
In Litigation
Consent Judgment
In Litigation
Consent Judgment
Assurance
Closed
In Litigation
Final Judgment
In Litigation
In Litigation
Consent Judgment
Assurance
Assurance
Contempt
Consent Judgment
In Litigation

Plymouth
Middlesex
Middlesex
Middlesex
Hampden
Middlesex
Hampden
Suffolk
Suffolk
Hampden
Norfolk
Hampden
Middlesex
Essex
Berkshire
Suffolk
Norfolk
Essex
Plymouth
Norfolk
Hampden
Suffolk
Suffolk
Hampden
Middlesex

Two additional cases in this area are under active investigation.

D. BANKING AND CREDIT

Defendant
Allied Bond & Collection Agency
Bassett Furniture
Bealieu, Rene, etc
Capital Banking
Commercial Bank
Cuna Mutual Insurance Society
Ford Motor Credit Corp.
H & H Furniture Co. Inc.
Industrial National Bank Of R.I.
In re: Vincent Hale

Status/Disposition
In Litigation
In Litigation
In Litigation
Settled
Settled
On Appeal
Assurance
Settled
On Appeal
In Litigation

County/Court
Suffolk
Middlesex
Suffolk
Appeals Court
Suffolk
Middlesex
Appeals Court
U.S.D.C.
North Shore Agency                  Closed
Northampton National Bank          On Appeal Appeals Court
Ramos, Frank                       Closed U.S.D.C.
St. Anne’s Credit Union, et. al.   In Litigation
Van Ru Credit Corp.                Consent Judgment Suffolk

Seven additional cases in this area are under active investigation.

E. CONTRACTS

Defendant                        Status/Disposition County/Court
Cuffee, Welton                   Closed Suffolk
Depasquale/Hub Contracting       In Litigation Essex
Gray, Edward, d/b/a              Final Suffolk
Picture Your World
Gesner, James                    Consent Judgment Norfolk
International Magazine Service of Boston
Kiddy Photographs                Assurance Norfolk
Paglia, Gene d/b/a               In Litigation Suffolk
American International Holidays

F. HEALTH

Defendant                        Status/Disposition County/Court
Interchurch Team Ministries      In Litigation Plymouth
E. & S. Enterprises, d/b/a, Beltone Hearing Aid Service Suffolk
Genettis, Andrew, d/b/a          In Litigation Norfolk
Genesis Laboratory and Hospital Services Inc.

Four additional cases in this area are under active investigation.

G. EDUCATION

Defendant                        Status/Disposition County/Court
Graham Jr. College Inc.          Consent Judgment Suffolk
Holliston Jr. College            Final Judgment U.S.D.C.

H. HOME IMPROVEMENTS/APPLIANCE REPAIRS

Defendant                        Status/Disposition County/Court
Andrews, Frederick               Partial Judgment Norfolk
Economy Engineering              In Litigation Suffolk
Home Insulation of New England  In Litigation Hampden
Johnson, Paul, d/b/a             Final Judgment Middlesex
Factory Heating Service Jones, John W. Suffolk
Rigione, Ralph                   Consent Judgment Hampden
Siano, William Jr.,              In Litigation Bristol
Benjamin Stanley, d/b/a          In Litigation Norfolk
B. & L. Paving et al Supreme Remodeling Inc. Contempt
Sutter, William, d/b/a, Sutter’s Home Improvements Closed

I. INSURANCE
Defendant | Status/Disposition | County/Court
---|---|---
Aetna Life & Casualty | In Litigation | Suffolk
Bay Colony Insurance, Inc. | In Litigation | Suffolk
Roche, John C. | Consent Judgment | Suffolk

**J. LICENSING**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Status/Disposition</th>
<th>County/Court</th>
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<tbody>
<tr>
<td>Colonial Travel Service</td>
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<td>Middlesex</td>
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<tr>
<td>Doe, John d/b/a Prestige Coins</td>
<td>Final Judgment</td>
<td>Suffolk</td>
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<tr>
<td>Eastern Atlantic Tractor Training School</td>
<td>Consent Judgment</td>
<td>Hampden</td>
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<tr>
<td>New England Tractor Trailer Training of Connecticut</td>
<td>Consent Judgment</td>
<td>Hampden</td>
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<td>South Eastern Academy, d/b/a New England Academy</td>
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<td>Plymouth</td>
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</table>

**K. MOBILE HOMES**

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<th>Defendant</th>
<th>Status/Disposition</th>
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<tbody>
<tr>
<td>Bluebird Acres Mobile Home Park, Inc.</td>
<td>Consent Judgment</td>
<td>Hampden</td>
</tr>
<tr>
<td>Hampden Village Inc.</td>
<td>Contempt</td>
<td>Middlesex</td>
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<tr>
<td>Mogan’s Mobile Home Park</td>
<td>Consent Judgment</td>
<td>Bristol</td>
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<td>Suburban Mobile Home Park</td>
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**L. NURSING HOMES**

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<th>Defendant</th>
<th>Status/Disposition</th>
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<tr>
<td>East Village Nursing Home</td>
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<td>Middlesex</td>
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<tr>
<td>Jewish Nursing Home</td>
<td>In Litigation</td>
<td>Hampden</td>
</tr>
<tr>
<td>John E. Hill, Jr., Nursing Home</td>
<td>In Litigation</td>
<td>Middlesex</td>
</tr>
<tr>
<td>Joseph Hill, Jr./Heritage Hill</td>
<td>In Litigation</td>
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<tr>
<td>Idak</td>
<td>In Litigation</td>
<td>Suffolk</td>
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<tr>
<td>Kenwood Nursing Home</td>
<td>In Litigation</td>
<td>Worcester</td>
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<tr>
<td>Kimwell Nursing Home</td>
<td>In Litigation</td>
<td>Norfolk</td>
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<tr>
<td>Lewis Bay Convalescent Nursing Home</td>
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<tr>
<td>Linden Nursing Home</td>
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<tr>
<td>Logan Nursing Home</td>
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<tr>
<td>Q.T. Services, d/b/a Harvard Manor Nursing Home</td>
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<td>Resthaven Corp.</td>
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<td>Middlesex</td>
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<tr>
<td>St. Patrick Manor Nursing Home</td>
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Three additional cases in this area are under active investigation.

**M. PRICING/FOOD**

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Status/Disposition</th>
<th>County/Court</th>
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Bi-Lo Warehouse, Inc.  Assurance
First National Stores  Assurance
Purity Supreme, Inc.  On Appeal

**N. REAL ESTATE/HOUSING**

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<th>Defendant</th>
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<tr>
<td>Acres 'n Acres</td>
<td>In Litigation</td>
<td>Essex</td>
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<tr>
<td>Alba Realty</td>
<td>In Litigation</td>
<td>Middlesex</td>
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<tr>
<td>Apartment Showcase Co., Inc</td>
<td>Consent Judgment</td>
<td>Hampshire</td>
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<tr>
<td>Aubin, William E.</td>
<td>In Litigation</td>
<td>Hampden</td>
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<tr>
<td>Bonnie Rigg Camping Inc.</td>
<td>Assurance</td>
<td>Barnstable</td>
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<td>Capewide Development</td>
<td>Consent Judgment</td>
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<tr>
<td>Cohen, Terry</td>
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<td>Middlesex</td>
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<tr>
<td>Country Shore Homes, et al.</td>
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<td>Equity Realty</td>
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<td>Friend Lumber Co.</td>
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<td>Middlesex</td>
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<tr>
<td>Gladstone, Alfred, et al.</td>
<td>Closed</td>
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<td>Gramatan Home Investors Inc</td>
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<td>Florida</td>
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<td>Greenway Estates Inc. et al.</td>
<td>Consent Judgment</td>
<td>Middlesex</td>
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<td>Katzeff, Margy</td>
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<td>Land &amp; Leisure</td>
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<td>Ledgemere Farms</td>
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<td>Murphy, Christopher</td>
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<td>Nat Sergi Enterprises, Inc.</td>
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<td>Essex</td>
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<td>Randy's Realty Trust</td>
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<tr>
<td>Santullo, Anthony, et al.</td>
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<td>Middlesex</td>
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<tr>
<td>Souther Development Co. and Crest Realty</td>
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<tr>
<td>Walo, William and Levine, d/b/a, Homes by Design</td>
<td>Contempt</td>
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</table>

Two additional cases in this area are under active investigation.

**O. SALES PRACTICES**

<table>
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<tr>
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<tbody>
<tr>
<td>Air Temp Engineering Corp.</td>
<td>Judgment</td>
<td>Middlesex</td>
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<td>Bragel, Shirley, d/b/a</td>
<td>Assurance</td>
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<td>American International Holidays</td>
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<td>Bulk Meat Co. d/b/a</td>
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<td>Holyoke Packing Co. Inc.</td>
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<td>Suffolk</td>
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<td>Chalue, Robert E.</td>
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<td>Diamedic Weight Loss Clinic</td>
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<td>Diversified Health, d/b/a</td>
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<td>Roman Health Spa</td>
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<td>Jacks Radio and TV, d/b/a</td>
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<td>John Debie</td>
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<td>Worcester</td>
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<td>Kasparian, Charles</td>
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### P. SWIMMING POOLS

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<td>Associated Pool Distributors</td>
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<td>Norfolk</td>
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<tr>
<td>Houghton, Richard d/b/a Alco Aluminum Pool and Siding Co.</td>
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<td>Hampden</td>
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</table>

One additional case in this area is under active investigation.

### Q. WEIGHTS AND MEASURES

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<tr>
<td>Admiral Petroleum Corp.</td>
<td>Consent Judgment</td>
<td>Suffolk</td>
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<td>Butcher's Pride</td>
<td>Assurance</td>
<td>Suffolk</td>
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</table>
Feinstein, George, d/b/a Maynard Market
Holding, R.J., Oil & Gas
Ray S. Iga Store, et al.
Russo Oil Co. Inc.
Ralph DiRusso
Schultz Lubricants Inc.

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Status/Disposition</th>
<th>County/Court</th>
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</thead>
<tbody>
<tr>
<td>Feinstein, George, d/b/a Maynard Market</td>
<td>Closed</td>
<td>Suffolk</td>
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<tr>
<td>Holding, R.J., Oil &amp; Gas</td>
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<td>Suffolk</td>
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<td>Russo Oil Co. Inc.</td>
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<td>Ralph DiRusso</td>
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<tr>
<td>Schultz Lubricants Inc.</td>
<td>Assurance</td>
<td>Suffolk</td>
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R. MISCELLANEOUS

<table>
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<td></td>
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<tr>
<td>Defendant</td>
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</table>

Defendant
Anderson, Ralph
Celsius Insulation Resources
Chateau DeVille
Clene Heat
Colonial Travel Service
Coastal Furniture Company Inc.
Deltex Distributing Corp.
Diversified Products Corp.
Doucette, Paul d/b/a Paul's Furniture
Goldstein & Gurwitz Autioneers, Inc.
Indiana Merchandising Corp. and Sam Nassi Assoc. d/b/a N.I. Associates
Ledger Publications
Mego Inc.
North American Travel
Philipoff, Thomas E.
Sheridan, Paul, d/b/a Sherry Decorators
Troob, Bruce
Wholesale Marketing Inc. Joanne L. Sheff
Zuker, Alan

<table>
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<th>Defendant</th>
<th>Status/Disposition</th>
<th>County/Court</th>
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<td>Clene Heat</td>
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<td>Colonial Travel Service</td>
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<td>Joanne L. Sheff</td>
<td>Consent Judgment</td>
<td>Norfolk</td>
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Four additional cases in this area are under active investigation.

940 CMR: OFFICE OF THE ATTORNEY GENERAL

940 CMR is amended by adding the following chapters:
940 CMR 7.00: DEBT COLLECTION REGULATIONS

Section
7.01 Purpose of Regulations
7.02 Scope
7.03 Definitions
7.04 Contact With Debtors
7.05 Contact With Persons Residing In The Household Of A Debtor
7.06 Contact With Persons Other Than Debtors Or Persons Residing In The Household Of A Debtor
7.07 General Deceptive Acts Or Practices
7.08 Inspection
7.09 Post Dated Checks
7.10 Relation To Other Laws
7.11 Pre-emption by Federal Law

7.01 Purpose Of Regulations

The purpose of these regulations is to establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts.

7.02 Scope

These regulations apply only to the collection of debts, as defined herein, and no conduct which is not the collection of debts or any part thereof is affected.

7.03 Definitions

(1) "Communication" or "communicating" means conveying information directly or indirectly to any person orally through any medium excluding non-identifying communications.

(2) "Creditor" means any person and his agents, servants, employees, or attorneys engaged in collecting a debt owed or alleged to be owed to him by a debtor provided, however, that a person shall not be deemed to be engaged in collecting a debt, for the purpose of these regulations, if his activities are solely for the purpose of repossessing any collateral or property of the creditor securing such a debt.

(3) "Debt" means money or its equivalent which is, or is alleged to be, more than 30 days past due and owing, unless a different period is agreed to by the debtor, under a single account as a result of a purchase, lease, or loan of goods, services, or real or personal property, for personal, family or household purposes or as a result of a loan of money which is obtained for personal, family or household purposes; provided, however, that money which is, or is alleged to be, owing as a result of a loan secured by a first mortgage on real property, or in an amount in excess of $25,000, shall not be included within this definition of "debt".

(4) "Debtor" means a natural person, or his guardian, administrator or executor, present or residing in Massachusetts who is allegedly personally liable for a debt.

(5) "Non-identifying communication" means any communication with any person other than the debtor in which the creditor does not convey any information except the name of the creditor and in which the creditor makes no inquiry
other than to determine a convenient time and place to contact the debtor.

(6) "Person" means any natural person, corporation, trust, partnership, incorporated or unincorporated association and any other legal entity; provided, however, that if a creditor comprises or employs more than one natural person, all such individuals shall be deemed to be one and the same "person" with respect to any debt owed to alleged or be owed to such a creditor.

7.04: Contact With Debtors

(1) It shall constitute an unfair or deceptive act of practice for a creditor to contact a debtor in any of the following ways:

(a) Threatening to sell or assign to another the obligation of a debtor with an attending representation or implication that the result of such sale or assignment would be that a debtor would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;

(b) Threatening that nonpayment of a debt will result in:
   1. Arrest of any debtor; or
   2. Garnishment of any wages of any debtor or the taking of other action requiring judicial order without informing the debtor that there must be in effect a judicial order permitting such garnishment or such other action before it can be taken;

(c) Using profane or obscene language;

(d) Communicating by telephone without disclosure of the name of the business or company of the creditor and without disclosure of the personal name of the individual making such communication provided, however, that any such individual utilizing a personal name other than his own shall use only one such personal name at all times and provided that a mechanism is established by such creditor to identify the person using such personal name;

(e) Causing expense to any debtor in the form of long distance telephone calls, or other similar charges;

(f) Engaging any debtor in communication via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor’s residence and two calls in each thirty-day period other than at a debtor’s residence, for each debt, provided that for purposes of this division, a creditor may treat any billing address of the debtor as his place of residence;

(g) Placing telephone calls at times known to be times other than the normal waking hours of a debtor called, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M.;

(h) Placing any telephone calls to the debtor’s place of
employment if the debtor has made a written or oral request that such telephone calls not be made at the place of employment, provided, that any oral request shall be valid for only ten (10) days unless the debtor provides written confirmation postmarked or delivered within seven (7) days of such request. A debtor may at any time terminate such a request by written communication to the creditor;

(i) Failing to send the debtor the following notice in writing within 30 days after the first communication to a debtor at his place of employment regarding any debt, provided that a copy of the notice shall be sent every six months thereafter so long as collection activity by the creditor on the debt continues and the debtor has not made a written request as described in the previous division, but only if such first communication is made after the effective date of these regulations:

NOTICE OF IMPORTANT RIGHTS
YOU HAVE THE RIGHT TO MAKE A WRITTEN OR ORAL REQUEST THAT TELEPHONE CALLS REGARDING YOUR DEBT NOT BE MADE TO YOU AT YOUR PLACE OF EMPLOYMENT. ANY SUCH ORAL REQUEST WILL BE VALID FOR ONLY TEN (10) DAYS UNLESS YOU PROVIDE WRITTEN CONFIRMATION OF THE REQUEST POSTMARKED OR DELIVERED WITHIN SEVEN (7) DAYS OF SUCH REQUEST. YOU MAY TERMINATE THIS REQUEST BY WRITING TO THE CREDITOR.

(j) Visiting the household of a debtor at times other than the normal waking hours of such debtor, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M., provided however that in no event shall such visits, initiated by the creditor, exceed one in any thirty-day period for each debt, excluding visits where no person is contacted in the household, unless a debtor consents in writing to more frequent visits, provided, further, that at all times the creditor must remain outside the household unless expressly invited inside by such debtor; and provided further, that visits to the household of a debtor which are solely for the purpose of repossessing any collateral or property of the creditor (including but not limited to credit cards, drafts, notes or the like), are not limited under this division;

(k) Visiting the place of employment of a debtor, unless requested by the debtor, excluding visits which are solely for the purpose of repossessing any collateral or property of the creditor, or confrontations with a debtor regarding the collection of a debt initiated by a creditor in a public place excluding courthouses, the creditor’s place of business, other places agreed to by a debtor, offices of an attorney for the creditor, or places where the conversation between the creditor and debtor cannot be reasonably overheard by any other person not authorized by the debtor;
(1) Stating that the creditor will take any action, including legal action, which in fact is not taken or attempted on such debtor's account, unless an additional payment or a new agreement to pay has occurred within the stated time period. For purposes of this division the time period in connection with such statement shall be presumed to expire 14 days from the date the statement is made, unless otherwise indicated by the creditor;

(2) Subject to applicable law, after notification from an attorney for a debtor that all contacts relative to the particular debt in question should be addressed to the attorney, a creditor may contact the debtor only to perfect or preserve rights against the debtor or collateral securing the debt;

(3) Divisions (j) and (l) of Subsection (1) and Subsection (2) of this section shall not apply to telephone, gas and electric utility companies regulated by Massachusetts General Laws, Chapter 164 and the Department of Public Utilities.

7.05: Contact With Persons Residing In The Household Of A Debtor

(1) It shall not constitute an unfair or deceptive act or practice for a creditor to assume that all contacts directed to the debtor's household are received either by the debtor or persons residing in the household of the debtor unless the creditor knows or should know information to the contrary.

(2) It shall constitute an unfair or deceptive act or practice for a creditor to imply the fact of a debt, orally or in writing, to persons who reside in the household of a debtor, other than the debtor.

(3) It shall constitute an unfair or deceptive act or practice for a creditor or debt collector to contact or threaten to contact persons who reside in the household of a debtor, other than the debtor, in any of the following ways:

(a) Using profane or obscene language;
(b) Placing telephone calls, disclosing the name of the business, or company of the creditor, unless the recipient expressly requests disclosure of the business or company name;
(c) Causing expense to any person in the form of long distance telephone calls, or other similar charges;
(d) Engaging any person in non-identifying communication via telephone with such frequency as to be unreasonable or to constitute a harassment to such person under the circumstances, and engaging any person in communications via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each thirty-day period other than at a debtor's residence, for each debt;
(e) Placing telephone calls at times known to be times other than the normal waking hours of the person called, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M.;

(f) Visits to the place of employment of any person, unless requested by such person, or confrontations regarding the collection of a debt in a public place, excluding courthouses, the creditor’s place of business, places agreed to by the person, offices of the person’s attorney or of the attorney for the creditor or debtor, or places where the conversation between the creditor and such person cannot reasonably be overheard by anyone not authorized by such person;

(g) Using language on printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the communication relates to the collection of a debt, which in the normal course of business may be received or examined by any such person residing in the household of a debtor.

(4) Nothing in this section shall prohibit any contact required by law to be made by a creditor or attorney acting on his behalf engaged in collection activities, including notices required prior or subsequent to repossession.

7.06: Contact With Persons Other Than Debtors Or Persons Residing In The Household Of A Debtor

(1) It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons, other than the debtor and those residing in the household of the debtor, in any of the following ways:

(a) Implying the fact of the debt to any such person;

(b) Using language on envelopes indicating or implying that the contact relates to the collection of a debt;

(c) Using language on any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the contact relates to the collection of a debt, which in the normal course of business, may be received or examined by persons other than the debtor.

(2) The following contacts shall not be deemed unlawful:

(a) Any contact with any such persons which results solely from efforts to contact the debtor at the debtor’s place of residence or at places other than a debtor’s residence pursuant to Division 7.04 (1)(f), provided the creditor limits the contact to disclosing only his personal name unless the recipient expressly requests the disclosure of the business or company name, provided, however, that any such individual using a personal name other than his own shall use only one such name at all times and provided that a mechanism is established
by such creditor to identify the person using such personal name; and provided further, that with respect to contacts made at the debtor's place of employment, the debtor has not made a request pursuant to Division 7.04 (1)(h) that such contact not be made.

(b) Any contact with any such person made for the purpose of and limited to determining the current location of the debtor, provided the creditor, after making reasonable attempts to locate the debtor, does not have correct information as to the debtor's current residence or location and provided further, that the creditor reasonably believes that the earlier response of such person, if any, is erroneous or incomplete and that such person now has correct or complete locational information, and in no event shall such contacts exceed three per person contacted in any twelve-month period for each debt. The creditor in making said contacts may reveal only his personal name unless the recipient expressly requests the disclosure of the business or company name, provided, however, that any such individual using a personal name other than his own shall use only one such personal name at all times and provided that a mechanism is established by such creditor to identify the person using such personal name. Any contacts at the debtor's place of employment, made pursuant to this division, shall be lawful, notwithstanding a request made by the debtor, pursuant to Division 7.04 (1)(h), that such contacts not be made.

(c) Any contact with respect to such debt to any attorney or other person employing or employed by the creditor, or to any attorney employed by the debtor; to a consumer reporting agency; or, where there are actual negotiations or arrangements for assigning or purchasing or settling of accounts, to potential assignees or purchasers or the like; or to persons who have any interest in property securing all or part of the debt; or to any bona fide credit counseling agency not connected to the creditor and designated in writing by the debtor;

(d) Any Communication of the fact of such debt by an attorney involved in litigation in connection with such debt, or after a judgment on the debt has been entered by a court of competent jurisdiction;

(e) Any contact required by law to be made by a creditor engaged in collection activities, including notices required prior or subsequent to repossession.

7.07: General Deceptive Acts Or Practices

It shall constitute a deceptive act or practice to engage in any of the following practices:

(1) Any false representation that the creditor has information in his possession or something of value for the debtor;
(2) Any knowingly false or misleading representation in any communication as to the character, extent or amount of the debt, or as to its status in any legal proceeding, provided, however, that an incorrect or estimated bill submitted by a gas or electric utility company regulated by Chapter 164 of the Massachusetts General Laws, and the Department of Public Utilities shall not be prohibited by this Section;
(3) Any false or misleading representation that a creditor is vouched for, bonded by, affiliated with, or is an instrumentality, agency, or official of the state, federal or local government;
(4) Any false or misleading representation that a creditor is an attorney or any other officer of the court;
(5) The use, distribution or sale of any written communication which simulates, or which is falsely represented to be, or which otherwise would reasonably create a false impression that it was, a document authorized, issued or approved by a court, a government official or other governmental authority;
(6) Any representation that an existing obligation of a debtor may be increased by the addition of the attorney’s fees, investigation fees, service fees, or any other fees or charges, if in fact such fees or charges may not legally be added to the existing obligation;
(7) Any solicitation or obtaining of any written statement or acknowledgement in any form containing an affirmation of any obligation by a debtor who has been adjudicated bankrupt, without clearly and conspicuously disclosing the nature and consequences of such affirmation.

7.08: Inspection

It shall constitute an unfair or deceptive act or practice for a creditor to fail to allow a debtor or an attorney for a debtor to inspect and copy the following materials regarding a debt during normal business hours of the creditor and upon notice given to such creditor not less than five business days preceding the scheduled inspection:
(1) All papers or copies of papers in the possession of the creditor which bear the signature of the debtor and which concern the debt being collected;
(2) A ledger, account card, or similar record in the possession of a creditor which reflects the date and amount of payments, credits, and charges concerning the debt.

7.09: Post Dated Checks

It shall be an unfair or deceptive act or practice for a creditor to request or demand from a debtor a post dated check, draft, order for withdrawal or other similar instrument in payment for the debt or any portion thereof, or for a creditor to negotiate such instrument before the due date
a creditor to negotiate such instrument before the due date of the instrument.

7.10: Relation To Other Laws
This chapter does not exempt any person from complying with existing laws or canons of ethics with respect to debt collection practices. To the extent that any provision of this chapter is specifically inconsistent with the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, as currently appearing in Supreme Judicial Court Rule 3:22 and then only to the extent of the inconsistency, this chapter is not applicable.

7.11: Pre-emption By Federal Law
In the event any conflict exists between the provisions of these regulations and the provisions of Federal statutes or regulation's relating to the collection of debts, such Federal law shall control but only to the extent that such Federal statutes or regulations relating to the collection of debts, such Federal law shall control but only to the extent that such Federal law mandates actions or procedures prohibited by these regulations.

REGULATORY AUTHORITY
940 CMR 7.00: M.G.L. c. 93A, §2(c).
(940 CMR 8.00 - 940 CMR 15.00 are reserved for future consumer protection regulations).

CIVIL RIGHTS AND LIBERTIES DIVISION

A. Introduction
The Civil Rights and Liberties Division operates to protect the civil rights and civil liberties of citizens in the Commonwealth. Specifically, the division initiates affirmative litigation on behalf of citizens, citizen groups, agencies and departments of the Commonwealth in matters involving constitutional protections, and defends government agencies in cases which raise constitutional issues. In addition, staff of the division advise the Attorney General of developments and issues in the area of civil rights, draft legislation, comment on agency regulations and investigate complaints of violations of civil rights brought to the attention of the division by citizens of the Commonwealth. Finally, the Division is given the authority, pursuant to the provisions of G.L. c.151B, §§5 and 9, to initiate complaints before the Massachusetts Commission Against Discrimination (MCAD), to represent that agency before trial and appellate courts when judicial review of MCAD decisions is sought, and to bring legal actions for violations of Chapter 151B in the Massachusetts Superior Court.

In FY-79, the division was staffed by a Chief, six assistant attorneys general, one of whom directed the Women's Rights Unit and another of whom supervised a privacy and public records section, and appropriate support personnel. In addition, the general counsel to the Security and Privacy Council was located physically within the division and was available for specific case assignments in areas consistent with her expertise.
II. Description of Activities

Through Fiscal Year 1979, the activities of the division were catalogued according to the nature of the division's involvement in any one of several substantive areas involving the protection of civil rights and civil liberties.

Activity was divided generally into litigation and non-litigation matters. Cases in litigation were those cases in which a division attorney represented a plaintiff or a defendant in a legal cause of action before a court or an administrative agency and included affirmative lawsuits or administrative matters initiated by the division in response to perceived patterns and practices of discrimination. Such patterns were generally found to exist following self-initiated investigations or were brought to the division's attention through citizens' complaints. Non-litigation activities included cases disposed of through preliminary negotiations or activities not of a litigation nature, such as drafting of legislation or position papers. Matters in which staff of the division were involved, whether through litigation or non-litigation, occurred in the following areas:

1. Correctional/Youth Services
2. Credit Discrimination
3. Developmentally Disabled
4. Equal Educational Opportunities
5. Employment Discrimination
6. Health
7. Housing
8. Privacy
9. Public Accommodation
10. Public Records
11. Voting Rights
12. Farm Labor

A representative description of cases in each of the several areas of involvement follows.

1. CORRECTIONAL/YOUTH SERVICES

*Inmates of the John Connolly Detention Center v. Dukakis.*

In FY-79, we continued to represent the Department of Youth Services in this class action suit brought against the Department alleging unconstitutional conditions at the John Connolly Detention Center. After numerous hearings, the parties were able to negotiate a consent decree remedying the alleged abuses and providing the DYS with flexibility necessary to administer the detention center. Ongoing monitoring continues.

*In re MCI Walpole.*

In October, 1977, we were asked by the Governor to investigate allegations of physical abuse and related matters at MCI Walpole.

On February 21, 22 and 23, 1979, an attorney within the division, with an assistant district attorney from Norfolk County, presented information to a Norfolk County investigative grand jury concerning allegations of excessive use of force by the officers at Massachusetts Correctional Institute, Walpole. Several indictments were obtained against prisoners for acts of violence committed by them in a series of disturbances occurring in

2. CREDIT DISCRIMINATION
Attorney General v. Standard Oil Co.
In FY-1978, a complaint was filed against Amoco Oil Company for discriminating against credit card applicants by “redlining” certain Massachusetts communities. The complaint alleges that Amoco penalizes all credit applications from residents of 36 Massachusetts zip code areas regardless of the personal qualifications of the applicants. The complaint alleges further that Amoco’s practice is unfair to individuals and has a disproportionately heavy impact on black Massachusetts residents because the penalized zip code areas include most of the black neighborhood of Boston.

3. DEVELOPMENTALLY DISABLED
Ricci v. Greenblat
With attorneys from the Government Bureau, we continue to represent the Department of Mental Health and other state defendants, in this suit challenging the conditions of the facility and the nature of care provided to mentally retarded residents at the Belchertown State School and four other state institutions for the mentally retarded. Efforts in fiscal year 1979 have concentrated on implementation of a consent decree and on continuation of the transition from an institution-based to a community-based delivery system.

Architectural Barriers Board v. Clark
This is a Superior Court action brought to require a shopping center to make its common area accessible to the physically handicapped.

Guardianship of Bassett
In February, 1979, the Appeals Court upheld the authority of a Probate Court judge to order limited guardianship for a mentally retarded person.

Architectural Barriers Board v. Maxwell Silverman’s
In February, 1979, a consent agreement was reached in this case brought in 1978 to compel a Worcester restaurant to provide access to the handicapped. As a result of the agreement, the restaurant is constructing a new addition which will be modified to be fully accessible.

4. EQUAL EDUCATIONAL OPPORTUNITIES
Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.
On July 2, 1979, the Supreme Judicial Court issued its unanimous decision in this case brought to enjoin the Association from enforcing its rule absolutely prohibiting any boy from playing on any girl’s interscholastics athletic team. The Court held the rule invalid under the State Equal Rights Amendment and enjoined its enforcement.

Department of Education v. New Bedford School Committee
In FY-79, we continued to represent the Department of Education in this administrative action against the New Bedford School Committee for its failure to implement G.L. c. 71A, the Transitional Bilingual Education Act. The suit’s objective, filed in FY-78, was to ensure that every student within
the New Bedford School system had access to education in his or her primary language.

*Morgan v. McDonough*

In FY-79, we continued to represent the State Board of Education in the implementation of the United States District Court's decision and order requiring the establishment of a unified school system in the City of Boston.

*Ashbury v. Tri-County Regional School Committee*

Plaintiff sued, claiming religious objections, to have her son admitted to school without the required vaccination. School Committee chose not to contest the matter and the boy was admitted.

*Holyoke School Committee v. Bardige*

In this case, the Division of special Education has charged the School Committee and School Superintendent with discrimination against Black and Hispanic students in the special education program. Before a decision was rendered, the School Committee sought an injunction directing the Hearing Officer to prohibit intervenors from participating further and from considering the intervenors' testimony. After hearing, a Superior Court judge denied the injunction.

5. EMPLOYMENT DISCRIMINATION

*Mary Day Fewlass v. Allyn and Bacon; Bette Boughton v. Addison-Wesley and Katrina Richardson and Lynn Stevens v. Houghton Mifflin*

These are three employment cases alleging that publishing companies discriminate in their employment practices on the basis of sex and race. After receiving right to sue letters, the cases were filed in the United States District Court. In FY-79, extensive discovery continued. A class has been certified in the Addison-Wesley case.

*Lie Detector Tests*

During the period of March through May, 1979, we settled a complaint against Quinlan Publishing Company and Addison Getchell Publishing Company, and complaints against two other Massachusetts corporations, alleging they had violated state law by requiring employees to take lie detector tests. The companies agreed to void the tests, not to give any more, and to rehire employees terminated for refusal to take required tests.

*Maternity-Related Disability*

In FY-79, attorneys in the Division joined with others in the Public Protection Bureau and, in one case, with the Massachusetts Commission Against Discrimination, to enforce women's rights to receive disability benefits for maternity related disabilities. Settlement agreements were signed with dozens of employers, including major manufacturers, banks, insurance companies, and retailers, among others. To date, over $400,000 in retroactive benefits has been paid.

6. HEALTH

*Custody of a Minor*

In FY-79, we represented the Department of Welfare in the second trial and appeal of the Chad Green matter arguing that parents do not have the right to withhold necessary chemotherapy for lymphocytic leukemia where chemotherapy has a strong likelihood of saving the child's life and no alter-
native therapy is offered. In the first appeal, the Supreme Judicial Court held that where parents seek to withhold necessary life-saving medical treatment from a child, the state, acting through the care and protection process, should intervene to protect the child. The Court concluded that parents cannot assert privacy interests on behalf of their children where to do so will lead to the death of the child.

In January, 1979, we represented DPW in the second trial of the matter where the parents attempted to show that so-called "metabolic therapy" utilizing laetrile was a viable alternative therapy. Our evidence, introduced through expert witnesses and blood tests, demonstrated that Chad was suffering from chronic cyanide poisoning from laetrile and from hyper-vitaminosis A as a result of megadoses of vitamins. The Court agreed and ordered these substances not to be administered. In the meantime, the parents fled with the child to Mexico. They have been held in civil contempt and warrants have been issued. Their second appeal to the Supreme Judicial Court has been argued.

Green v. Truman
The Federal District Court granted our motion to dismiss efforts by the Greens challenging, in federal court, the first state court determination.

Health Guardianship Cases
We have filed numerous petitions in Probate Court seeking authorization for administration of various medical procedures under the Saikewicz doctrine.

Commissioner of Correction v. Myers
This case, filed in December, 1978, was concerned with whether an inmate who had received hemodialysis for one year could refuse the treatment in order to secure different security classification. We represented the treating physicians from the Department of Public Health. The Superior Court ordered treatment and reported the case to the Supreme Judicial Court.

Commonwealth v. Marmer
Marmer v. Benedict
Marmer v. Frechette
In these three cases, we represent the Commonwealth in criminal matters and related civil matters challenging the Constitutionality of the childhood lead paint poisoning statute. The Superior Court has dismissed the landlord's attempted collateral attack on the criminal proceeding. The criminal appeal will be tried before a jury in August, 1979.

United States v. Rutherford
In March, 1979, on behalf of the Department of Public Welfare, we submitted a brief to the United States Supreme Court as amicus curiae supporting the Food and Drug Administration's ban on laetrile. Our argument discussed the medical dangers from cyanide poisoning in laetrile and the un-workability of any limited exceptions to an absolute ban.

In June, the United States Supreme Court reversed the decision of the United State Court of Appeals for the Tenth Circuit and upheld the Food and Drug Administration's ban on laetrile.
7. HOUSING

Department of Community Affairs v. Massachusetts State College Building Authority

In FY-79, the Supreme Judicial Court issued its opinion in this housing case declaring that the relocation assistance statute applies to the Authority. The Court significantly limited the autonomy claims of independent authorities and thus the decision will have significant impact on future regulation of quasi-independent authorities.

Attorney General v. Orantes

In FY-79, this suit alleging that defendant refused to sell an apartment house to interracial couple was settled favorably to plaintiff.

Attorney General v. Wedgewood Realty
Attorney General v. Liberty Real Estate Co.
Attorney General v. Corcoran Management Co.

In May, we filed three cases, two against Boston real estate firms and one against a large south shore developer, for discrimination against families with children in apartment rentals in violation of M.G.L.c. 151B §4 (11). Shortly after the cases were filed, two defendants agreed to a consent judgment.

Attorney General v. Longfellow Management

In a fourth case involving complaints of discrimination against families with children, we reached a settlement without the necessity of filing a formal complaint.

In the Matter of Maverick Square Housing Project

On April 10, 1979 two of three white co-defendants accused of setting fire to a black couple's apartment in this East Boston housing project pleaded guilty to arson and breaking and entering. This criminal prosecution followed months of investigation by Boston Police and State Police attached to this Department and was accomplished in concert with an attorney from the Criminal Bureau.

Attorney General v. Mariano and Pike Realty Company

In February, a consent agreement was approved in this case brought to enjoin the defendants from blockbusting in the Hyde Park section of Boston.

Classified Advertising of Residential Housing

After an investigation of classified residential housing advertising in the Boston Globe, we obtained the voluntary agreement of the Globe to carry a public notice in its Sunday classified section that discrimination against families with children is unlawful.

Anti-Snob Zoning

The Division participated in negotiations between a non-profit developer, various state agencies and the Town of Saugus in efforts to ensure that the statutorily-granted appeal processes were not being used to frustrate the construction of low and moderate income housing. As a result of our intervention in this matter, the Town subsequently dropped its appeals and the housing is being constructed.
8. PRIVACY MATTERS

New Bedford Standard Times v. Clerk of the Third District Court of Bristol
In March, 1979, the Supreme Judicial Court reversed the Superior Court and upheld the validity of part of the Criminal Offender Record Information Act which limited public access to alphabetical indexes concerning criminal offenders. The Court upheld the privacy statute over objections that it violated the doctrine of separation of powers and the First Amendment guarantees of free press.

Suffolk Franklin Savings Bank, et al. v. Commissioner of Banking
This and related cases concerned the Commissioner of Bank’s redlining study. Citizens groups and the Attorney General argued that the study should be made public. The banks sought to prevent its release. At the close of FY-79, discovery was continuing.

Allston Finance Co. v. Commissioner of Banking
The Superior Court granted our motion for Summary Judgment and upheld the Commissioner of Banking in this case involving the release of information pertaining to an insurance premium finance agency. Plaintiff’s appeal is pending.

Swartz v. Department of Banking and Insurance
In this case, the Supreme Judicial Court reversed the Superior Court and stated that a solo practitioner selling insurance could claim protection under the Fair Information Practices Act.

Opinion of The Attorney General
The Division drafted an opinion of the Attorney General to the Department of Public Health concerning aspects of the Proposed Management Information System for Alcoholism.

9. PUBLIC ACCOMMODATIONS

U.S. Labor Party
Upon complaint of this group that it was denied access to the public sidewalk and parking lot outside Registry of Motor Vehicles offices in Brockton and Quincy for purpose of leafletting and selling its newspapers, an agreement was reached that RMV officials would not deny access and that citizen harassment complaints against the group would be handled by the local police.

Attorney General v. Sambo’s Restaurants, Inc.
In FY-79, this action to enjoin defendants from using the name “Sambo’s” was filed in Superior Court under state laws prohibiting discrimination in, and discriminatory advertising of, places of public accommodation. The Superior Court denied a preliminary injunction and discovery continues.

Sambo’s of Massachusetts, Inc. v. Smith, et al.
In March, an amicus memorandum was submitted in opposition to plaintiff’s motion for summary judgment. The memorandum addressed the issues of the power of the state to regulate the use of trade names; the breadth of the “public good” standard employed by licensing authorities; and the liability of public officials for damages.
10. PUBLIC RECORDS

Attorney General v. Collector of Lynn

The Supreme Judicial Court reversed the Superior Court, overturned its own 1945 decisions and declared that lists of delinquent property tax records are a public record.

Cunningham v. Health officer of Chelsea

The Appeals Court declared health inspection reports to be public records.

Boston Globe v. Boston Retirement Board

In March, 1979, we intervened in this case involving the issue of whether disability information is a public record.

Attorney General v. Winchester School Committee

This case involving the issue of whether the Supervisor of Public Records was correct in his ruling that Parent/Teacher Association evaluations of secondary school teachers were public records was settled after we sought to enforce the Supervisor’s ruling.

Attorney General v. Assistant Real Property Commissioner of Boston

This case involves the issue of whether lists of the Mayor of Boston’s long distance telephone calls are public. The Superior Court granted partial relief. Our appeal is pending.

Martin v. Registrar of Motor Vehicles

Upon our intervention on behalf of the Registrar of Motor Vehicles, a stipulation of dismissal was filed in this suit which sought disclosure of Registry reports of fatal accident.

Crooker v. Commissioner of Probation

This case, brought under the public records law, sought disclosure of records of an investigation by the Commissioner of Probation of a probation officer who was charged with mishandling the cases of a prisoner. After an in camera inspection of the requested documents, a Superior Court Justice ruled that the records requested were exempted from disclosure under G.L. c. 4, §7 (26)(a) on the grounds that they were a report by a probation officer to the Commissioner of Probation and because the documents contained CORI information about the prisoner.

Attorney General v. Housing Rehabilitation Committee of Leominster

This public records and open meeting law case filed in March sought disclosure of names of recipients of housing rehabilitation subsidies. In June, summary judgment for the plaintiff was granted by the Superior Court.

Francis X. Bellotti v. George Bennett

This public records suit seeks to compel disclosure of the address of eligible applicants for CETA public service employment jobs with the City of Boston.

Attorney General v. Revere Housing Authority

This case seeks to enforce a ruling of the Supervisor of Public Records that names of landlords receiving state funds from the Authority for rent
subsides, and terms of leases between the Authority and landlords, are public records.

11. VOTING RIGHTS

Worcester Registrars of Voters

Upon complaint of improper procedures by Worcester voting registrars, an agreement to conform to statutory registration procedures was negotiated.

12. FARM LABOR

Commonwealth v. Palumbo

We brought three cases against persons employing farm laborers who had not obtained certificates of occupancy from the Department of Public Health. The Superior Court ordered compliance.

13. OTHER MATTERS

Additional activities in FY-79 included the following:

a. Substantial amendments to the mental health laws to provide necessary civil rights protections for women in the Worcester Intensive Care Unit were written with members of an advisory committee.

b. Members of the division drafted a state civil rights bill which was filed with the legislature as part of the Attorney General’s legislative package. The bill provides for private causes of action as well as suits for injunctive relief or criminal penalties initiated by the Attorney General.

c. An attorney in the division has formulated and submitted a grant application for an arson program to be conducted from this Department in coordination with the Secretary of Public Safety and the state police.

d. On June 5, an attorney in the division presented testimony in Washington, D.C., to a subcommittee of the U.S. Senate Banking Committee on legislation to ban redlining in the provision of unsecured credit. Our testimony included the first statistical findings concerning the racial impact of credit card redlining practices and the first description of the weight of redlining in credit evaluations.

e. On June 20, 1979, written comments were filed with the Federal Reserve Board on proposals to amend sections of Regulation B as they apply to credit scoring systems. The Attorney General opposed those proposals that would effectively exempt creditors using scoring systems from the current requirements regarding the treatment of income from part-time employment, alimony, child support, public assistance, and social security or other retirement benefits. Other proposals commented upon were those concerning the applications to credit scoring systems of Regulation B’s requirement that applicants for credit be given specific reasons for adverse action by creditors.

f. In FY-79, the Federal Reserve Board adopted a regulation we had supported and on which we had filed written comment extending Regulation B to arrangers of credit such as real estate brokers and car dealers.

g. In FY-79, comments were filed concerning the Department of Corrections’ regulations regarding the use of force.

h. In FY-79, comments were filed concerning the Department of Corrections’ proposed regulations concerning visitation rights.

i. Through informal negotiation, we clarified with the Massachusetts
Department of Revenue that the common law rule that a married woman's domicile was that of her husband may not be used in determining residency for tax purposes.

j. In April, we reviewed and commented on the State Office of Affirmative Action's proposed revision of Executive Order No. 116.

k. In June, a petition was filed with the Commissioner of Insurance requesting promulgation of regulation requiring inclusion of benefits for pregnancy related disability in comprehensive employee disability insurance policies.

l. On June 9, the Department co-sponsored a conference on women's issues in Worcester County. Approximately 280 women attended the one-half day conference which was held at the Worcester YMCA. Workshops were held on employment issues, finances, housing and governmental benefits, divorce and separation, patient rights and women and politics.

m. In FY-79, a follow-up investigation of conditions was conducted at New Chardon Street, a D.P.W. shelter providing emergency housing for women and children. Conditions were found to have significantly improved.

n. Following passage of the Abuse Prevention Act in October, 1978, the Department sponsored a meeting for police departments, court clerks, and women's groups, to discuss the changes made by the new law.

o. An attorney from the Division spoke to the American Bar Association Family Law Committee on medical consent issues.

p. An attorney from the Division represented the Attorney General on the Criminal History Systems Board and the Committee on Criminal Justice.

ENVIRONMENTAL PROTECTION DIVISION

General Laws c.12, §11D established the Environmental Protection Division. The Division is litigation counsel to the agencies of the Commonwealth charged with protecting the environment, principally those within the Executive Office of Environmental Affairs. Cases handled on their behalf account for the bulk of the Division's work. The Division also represents the Energy Facilities Siting Council. In addition, the Division initiates cases on behalf of the Attorney General pursuant to the mandate of G.L. c.12, §11D, which authorizes the commencement of actions on behalf of the environment of the commonwealth in both judicial and administrative forms.

As a result of its role in environmental enforcement (particularly enforcement of state and federal air and water pollution standards), the Division has been the recipient of substantial grant money from the United States Environmental Protection Agency. In fiscal year 1979, the Division received one hundred and seventy-five thousand dollars ($175,000.00) in such funds, which are used primarily for staffing.

The Division's vigorous enforcement policy has included seeking monetary penalties (usually civil) in appropriate cases. During the fiscal year the Division obtained a total of approximately three hundred and seventy-thousand dollars ($370,000.00) in such penalties.

At the end of the fiscal year, the Division was staffed by a Chief, seven
Assistant Attorneys General, a Wetlands Scientist and six secretaries.

CATEGORIES

AIR

Air pollution cases are usually referred from the Department of Environmental Quality Engineering, Division of Air and Hazardous Materials, and involve violations of the state Air Pollution Regulations. The statutory authority is G.L. c.111, §42.

WATER

Water Pollution cases are referred from the Division of Water Pollution Control. Most of these cases involve violations of discharge permits issued jointly by the Division of Water Pollution Control and the United States Environmental Protection Agency. Others seek to recover costs expended in cleaning up oil spills. The statutory authority is G.L. c.21, §§26-53.

WETLANDS

Wetlands cases are generally referred from the Department of Environmental Management, Wetlands Section or Department of Environmental Quality Engineering, Wetlands Division. Others begin with citizen complaints. The cases fall into two categories: (1) those involving the permit program for altering of wetlands under G.L. c.131, §40 and (2) those challenging the development restrictions the state imposes on inland and coastal wetlands pursuant to G.L. c.130, §105 and G.L. c131, §40A.

SOLID WASTE

Solid waste cases originate in the Department of Environmental Quality Engineering, Division of General Environmental Control. They involve the manner in which refuse is disposed and the enforcement of the state’s sanitary landfill regulations. The statutory authority is G.L. c.111, §150.

HAZARDOUS WASTE

Hazardous waste cases are referred by both the Division of Water Pollution Control and the Department of Environmental Quality Engineering. They involve the transport and disposal of certain hazardous substances in violation of state regulations. The statutory authority is G.L. c.21, §§57-58.

BILLBOARD

Billboard cases are referred from the Outdoor Advertising Board. A majority are defenses to petitions for judicial review of decisions of the Outdoor Advertising Board. The statutory authority is G.L. c.93, §§29-33

OTHERS

A number of the cases handled by the Division do not fall into any of the above categories. Some of them involve representation of state agencies, for example, the defenses, in federal court, of the Massachusetts Coastal Zone Management Program and the Energy Facilities Siting Council. Others are brought pursuant to the Attorney General’s statutory authority to prevent environmental damage. These are frequently in areas of broad concern, such as energy policy, the siting of nuclear facilities and the interpretation of state and federal environmental statutes. They involve the initiation of or intervention in proceedings in a variety of forums, judicial and administrative, state and federal.
SPECIFIC SIGNIFICANT CASES

Following are brief descriptions of several of the most significant cases the Division handled during the past fiscal year.

_Cassidy v. Kendall_ - The Division successfully defended the first serious attack on the commonwealth's wetland restriction program. In February of 1978 two landowners in Millis obtained an injunction against Department of Environmental Management enforcement of that portion of the Millis restriction order applying to their land, and in May they obtained an injunction against operation of the program throughout the state. Relief from both injunctions was sought in the Appeals Court, and in August Judge Brown vacated the state-wide injunction; with respect to the first injunction he reserved and reported eight questions to the full court. Among the questions reported were: 1) whether the Millis restriction order constituted a taking without compensation, 2) whether the mapping and boundary delineation techniques employed by DEM described with sufficient particularity the land being restricted, 3) whether DEM's landowner notification procedures violated due process and 4) whether the order issued complied with the enabling legislation. After hearing oral argument, the Appeals Court panel returned the matter to Judge Brown, who wrote an extensive opinion upholding the DEM position on all questions but that concerning mapping, which he did not reach because of an insufficient record. The original injunction was ordered vacated, and the matter returned to the Superior Court for further proceedings.

_Department of Environmental Quality Engineering v. Town of Manchester_

This case marked the first use of an innovative technique for the application of fines to the solution of environmental problems. The Division had filed a Petition for Contempt for violation of a judgment which required the Town to bring its sanitary landfill into compliance with the Department's regulations. After trial the court ordered the town to pay a civil penalty of $30,000 for its violation of the judgment. At the Division's suggestion, the order directed the Department and the Attorney General to solicit proposals for projects designed to enhance or restore the natural resources of the Commonwealth from cities, towns and non-profit organizations. The Court will then select projects to receive grants from the penalty fund.

_Division of Water Pollution Control v. Charles F. Redler_

The defendant was convicted on two counts of violating the Massachusetts Clean Waters Act for discharging waste motor oil from a garage in Kingston into a tributary of the Jones River and fined $4,500. This was the Division's first criminal prosecution under the Act.

_Attorney General v. Kingston Steel Barrel Company_

Acting on information supplied by an informant, the Division, in conjunction with the M.D.C., apprehended an employee of the defendant corporation as he was about to empty the contents of a tank truck into an M.D.C. sanitary sewer. The tank contained highly toxic chemical residue from recycled 50-gallon steel drums. The sewer into which the discharge was attempted emptied into Boston Harbor from the Deer Island Treatment Plant. The corporation pled guilty to one count of violating the Massachusetts Clean Water Act and agreed to pay a total penalty of $20,000.
Medical Area Total Energy Plant v. Department of Environmental Quality Engineering

In a significant victory for the commonwealth’s air pollution regulations, the Division successfully defended a challenge by a consortium of hospitals to DEQE’s authority to prevent construction of a disapproved plant. The plaintiff argued, in effect, that so long as it did not operate the plant, it was free to construct it in spite of DEQE’s disapproval.


The Division has continued its involvement in the litigation surrounding the possible leasing of tracts for oil and gas exploration on Georges Bank. Our objective is to ensure that, if drilling occurs, it does not jeopardize other economically valuable activities, particularly the billion dollar a year fishing industry.

After obtaining a preliminary injunction if federal district court halting the lease sale in January 1978 and successfully opposing a motion for stay in the First Circuit, the Division argued the appeal. In February 1979 the First Circuit, the Division argued the appeal. In February 1979 the First Circuit vacated the injunction on the ground that there was no longer a scheduled lease sale. The court suggested, however, that the environmental impact statement was inadequate and that it should be redone before any further lease sale was attempted.

The Department of Interior is redrafting the EIS, and the Division is monitoring the results. In addition, we are watching closely Interior’s response to the nomination of Georges Bank as a marine sanctuary. Marine sanctuary designation would assure that all activity, including oil and gas

American Petroleum Institute v. Knecht

The oil industry filed suit in federal district court in Washington to prevent the Department of Commerce from approving Massachusetts’ Coastal Zone Management Program. The Division intervened on behalf of the Program. After hearing, the court dismissed the suit on the grounds advanced by the Division—that the plaintiffs lacked standing and the issues were not ripe. The case is on appeal, but the program is fully in operation.

Pilgrim 2 Nuclear Power Plant

The Division has continued its participation in the NRC licensing hearings for construction of the Pilgrim Unit 2 in Plymouth. Our overriding concern is that, if and when the plant is built, there has been adequate assurance that Massachusetts’ citizens can be protected from serious harm.

In response to 1978 decisions of the NRC Licensing and Appeal Boards, the NRC staff issued a new environmental impact statement on alternative sites. The Division filed extensive comments on the draft statement with respect to the staff’s methodology and its treatment of population densities and accident risks. We also introduced a new contention in the hearings on evacuation and emergency planning.

New Jersey v. EPA

We have intervened in an action brought by the state of New Jersey in the Court of Appeals for the District of Columbia Circuit challenging EPA’s attainment status designations with respect to photochemical oxidants.
(ozone). EPA has determined that most of the northeast quadrant of the country, including Massachusetts, is in violation of the national standard for ozone. The rest of the country was found to be in attainment or "unclassifiable", in spite of considerable evidence that virtually all of the United States east of the Mississippi experiences frequent violations of the ozone standard. Ozone can be transported hundreds of miles beyond its point of origin, and much of the northeast's ozone pollution problem can be traced to these other states. The purpose of the suit is to force correction of the erroneous designations. Without such correction, those states currently designated as in attainment or unclassifiable with respect to ozone will not have to adopt the stringent pollution control measures mandated by the Clean Air Act. This would have two serious consequences for Massachusetts. First it will make it much more difficult for the northeastern states to achieve compliance with national standards. Second, it will place us at a competitive disadvantage since industry will tend to migrate out of the northeast into those areas where pollution abatement is not required. The case has been briefed, and we are awaiting oral argument.


This was an action brought by community organizations in Cambridge to enjoin further construction of the Red Line subway extension. The extension will provide rapid-transit access to downtown Boston for thousands of additional suburban commuters. Its construction is probably the largest public works project going on in the commonwealth. The Division represented the Executive Office of Transportation and Construction.

The plaintiff's motion for preliminary injunction was heard before a magistrate in federal district court, who recommended that it be denied. The court has not yet acted on the magistrate's report.

Department of Environmental Quality Engineering v. Westport Sand & Gravel Corporation - This action, under the Massachusetts Clean Air Act, sought to compel the defendant to install noise abatement devices on its rock-crushing equipment. Noise pollution is a new field in environmental regulation, one that will become increasingly important. As a result of negotiations, the defendant agreed to install the equipment and to pay damages in the amount of $5,000.00

Division of Water Pollution Control v. James River, Massachusetts - For improper sludge disposal, the defendant agreed to pay a civil penalty of $97,000, immediately cease its discharges and develop acceptable plans for future sludge handling.

Division of Water Pollution Control v. City of Gloucester -

After protracted negotiations, the city has committed itself to a long term pollution abatement program that includes construction of a wastewater treatment plant in Gloucester Harbor and the sewer of a number of outlying districts that are currently discharging directly into the Atlantic Ocean.

City of Lynn v. Division of Water Pollution Control - The city agreed to remedy the chronically sub-standard quality of its drinking water by taking certain interim measures, constructing a $15,000,000 treatment plant and
replacing or relining all of its water delivery pipes.

*Division of Water Pollution Control v. Town of Shrewsbury and Division of Water Pollution Control v. Town of Westboro* - These two towns were referred to the Division for failure to construct a joint treatment plant as called for in their respective facilities plans. They have been feuding for years over governance of the plant, but after our intervention and chairing of a series of meetings an agreement was reached that has subsequently been ratified by both town meetings.

**STATISTICS**

Cases opened in Fiscal Year 1979, by category:

**AIR** 5  
**WATER** 37  
**WETLANDS** 30  
**SOLID WASTE** 27  
**BILLBOARDS** 21  
**MISCELLANEOUS** 5  
**TOTAL** 125

Cases closed in Fiscal Year 1979, by category:

**AIR** 5  
**WATER** 20  
**WETLANDS** 13  
**SOLID WASTE** 8  
**BILLBOARDS** 6  
**MISCELLANEOUS** 9  
**TOTAL** 61

**INSURANCE DIVISION**

During 1978-1979, the Insurance Division expanded its legal staff to four lawyers. The Division concentrated its efforts primarily on automobile and health insurance. In these areas the Division intervened in various administrative rate proceedings and initiated a number of actions under Chapter 93A.

**93A cases:** In separate automobile and health insurance cases commenced under Chapter 93A, the Division recovered approximately $250,000 in restitution for consumers in 1978-1979. In addition, we have secured rights by way of assignment of commissions or agency sale proceeds to an additional $100,000. These cases have involved overcharges on automobile insurance to the elderly.

**Rate proceedings:** In the area of automobile rates, the Division played a prominent role as an intervener in hearings to fix and establish 1979 rates. The hearing consumed sixteen days, and resulted in a 2% reduction in the average statewide premium. In the Spring of 1979, the Commissioner decided, primarily on the basis of evidence presented by the Insurance Division, to fix and establish rates for 1980. During 1978-79, the Division also commented on rules promulgated by the Commissioner of Insurance governing the Massachusetts Motor Vehicle Reinsurance Facility; and participated in the rate hearing before the Insurance Premium Finance Board.

In the area of health insurance, the Insurance Division played a major role...
in hearings which considered the approval by the Commissioner of Insurance of the method of compensation utilized by Massachusetts Blue Shield to compensate positions providers. In addition, the Division commented on regulations proposed by the Commissioner of Insurance governing the content and marketing of health and accident insurance sold to the elderly.

**INSURANCE**
**93A CASES**

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<th>CASE NAME</th>
<th>DISPOSITION</th>
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<td>9. Commonwealth v. Cross Country</td>
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<td>Motor Club, Inc.</td>
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PUBLIC CHARITIES DIVISION

During the past fiscal year, we have developed a system for dealing with the large volume of paper work that the Division handles. The staff has transferred the file of nearly 13,000 charities from an alphabetic to a numeric system to enable the files to be more easily retrieved. This task entailed a complete review of the contents of each file.

In conjunction with this effort, each registered charity was entered on the computer. To date, the Division has received alphabetic and numeric print-outs laying the foundation for developing a system to analyze pertinent financial data and locate delinquent charities. (See Attachment I for statistics involving public charity filing).

The division has also been involved in 18 affirmative litigation cases (see Attachment II) as well as 195 probate cases. Many of the affirmative litigation cases raise important issues such as the application of the first amendment to religious charities and the fiduciary responsibility of corporate directors.

We have undertaken two projects utilizing information to maximize the effect of funds donated for public charitable use.

1) An effort to identify sources of private aid for persons and families who may need fuel assistance this winter has been initiated. Thus far this has entailed meeting with representatives of private philanthropy to discuss strategy as well as research, using the Division’s records, into possible untapped charitable funds as well as existing available funds for this purpose.

2) The Division has begun a series of inquiries directed to the charitable trust funds held by the cities and towns of the Commonwealth. Issues concern trust restriction and guidelines for distribution.

I. Probate Matters & Cases

In addition to the cases specifically mentioned above, the Division regularly handles numerous “probate” matters relating to preservation of charitable interests. This year we have been involved in over 5,261 actions. These include allowance of wills, fiduciary accountings and various petitions as well as suits in which the Attorney General is named a party in order to protect charitable interests. (See Attachment III).

II. Fees and Escheats Collected during the Fiscal Year

Pursuant to Mass. G.L. c 68, §19 and c.12, §8F the Attorney General collects fees for the filing of annual financial reports and for issuing certificates for solicitation.

Total fees of $111,427 were collected from July 1, 1978 to June 30, 1979. (See Attachment I).

Total escheats received from public administrations during the same period were $192,416.62. (See Attachment IV).
ATTACHMENT I
FORM PC STATISTICS

1st Quarter - July 1, 1978 through September 30, 1978

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3rd Quarter - January 1, 1979 through March 30, 1979

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BREAKDOWN

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PC GRAND TOTAL $111,427.00

ATTACHMENT II

I. AFFIRMATIVE ACTION CASES:

A. Opened and/or Pending at Fiscal Year End - Total 6

Bellotti v. Christian Broadcasting Network
Suffolk Probate Court No. 27644

Suit to require registration and filing of financial statements. Defendant claims statutory exemption and constitutional protection as a religious organization.

Bellotti v. Aids to Community, Inc.
Supreme Judicial Court

Suit to dissolve 32 charitable corporations for failure to file annual financial reports.

Bellotti v. Silver
Suffolk Superior Court No. 31575

Suit to invalidate mortgage of and transfer of charitable corporation’s assets to private persons contrary to corporate powers and purposes. State action in abeyance pending Federal bankruptcy proceeding.
Bellotti v. Hippocrates Health Institute
Suffolk Superior Court No. 31736
Suit to compel defendant to register and file annual financial reports, to refund tuition charges and to cease offering or advertising certain courses of study without Department of Education license. Consent judgment entered.

Bellotti v. Star Island Corporation
Suffolk Superior Court No. 27645
Suit to compel filing annual financial report. Defendant argued that it was entitled to a statutory religious exemption and constitutional protection. The Court granted defendant’s Motion for Summary Judgment.

Bellotti v. World Changers, Inc.
Suffolk Superior Court No. 25343
Suit to restrain solicitation in Massachusetts where defendant not properly registered. Consent judgment entered.

Bellotti v. Torch Products, Inc.
Suffolk Superior Court No.
Consent judgment entered requiring Torch Products to disclose profit-making status in sales and advertising of household products.

Bellotti v. Richard E. Byrd, Jr. et al
Suffolk Probate Court No.
Suit to remove trustees for breach of fiduciary duty. Agree judgment entered.

Bellotti v. Boston Mental Health Foundation, Inc.
Suffolk Probate 1574
Suit filed to investigate the financial activities of defendant. After reaching agreement regarding items of information which would become public records, the defendant voluntarily allowed Division to examine all its books and records. The Division determined that there was no misuse of funds. Case dismissed.

Bellotti v. Swedish Mission Fund
Suffolk Probate 1703
Suit filed to investigate activities of defendant and require defendant to file an accounting. Case was settled and suit dismissed.

Bellotti v. Mary Brooks School, Inc. et al.
Suffolk Superior Court 33763
Suit filed seeking to hold directors personally liable for property taxes incurred by School as a result of director’s failure to use property as a school or dispose of property. School merged with another school and directors paid one-half of outstanding taxes owed. Consent judgment entered.

Bellotti v. Roger Slawson (3 cases)
Hampshire Probate Court Nos. C.A. 247, 248, 249
Suit to hold defendant in contempt for failure to file accountings for 3 public administration estates. Subsequently, defendant did file accounts. Suit dismissed with an award of costs to the Attorney General.
II. Significant Cases to Which Attorney General was Named as Necessary Party -

State Street Bank v. F.X. Bellotti et al
SJC 79-25

Complaint for instructions. Plaintiff is trustee u/will of Charles Farnsworth who died leaving funds in 3 trusts. Income from the trusts was paid to a life tenant and, upon her death, all funds were to be used to construct and maintain a home for aged people in the Boston area.

On the death of the life tenant, the trust had a value of approximately $6 million. After consulting with the Attorney General, the trustee petitioned the Court seeking permission to use a portion of the Trust to construct model congregate housing for the elderly, the remainder of the funds to be invested with income to be used to provide assistance to the elderly.

Fitzgerald et al v. FXB
Worcester Probate Court No. 1426

Complaint for Instructions brought by Trustees of Worcester Public Library seeking permission to sell manuscripts and anatomical drawings valued at $1 million. The materials were part of a restricted gift to Library made is 1858. The Court determined that the Library could sell the materials.

Boston v. Attorney General et al
Supreme Judicial Court no. 79-155

Suit by the Mayor and the City of Boston against the Attorney General and the Trustees of the Boston Athenaeum seeking the Court’s declaration that the Gilbert Stuart portraits of George and Martha Washington were held by the Athenaeum in trust for the City. Extensive research was done on standing issue, since only the Attorney General has standing to sue on behalf of the public to enforce charitable trusts. Investigation was made into whether a trust was created by acquisition of the portraits. After considerable publicity, the City dismissed its action and the trustees agreed to attempt fund-raising to retain the portraits and reiterated their agreement to inform the Attorney General of and seek court approval for any transfer of the portraits.

Kidwell v. Rich
Plymouth Superior Court No. 77-5920

The Attorney General participated in extensive Master’s hearings regarding the validity of certain mortgages executed by a church minister without authorization from his congregation. The Attorney General also filed a cross-claim against the Shawmut First County Bank as constructive trustee of certain funds pledged by the minister in derogation of restricted trust uses.

Chase v. Peavear
Essex Probate Court No. 282207

Suit involving accounts of trustee of charitable remainder trust. Issues concern prudence of investments and amount of trustee fees. Extensive master’s hearings were held as well as considerable court involvement in hearings regarding the Master’s report and applications for fees by various counsel.
ATTACHMENT III

TOTAL STATISTICS

WILLS: 1,391

ACCOUNTS:

Trustee 2,334
Executor 676
Administrator 48
Conservator 80
Guardianship 14

PETITIONS:

Trustee appointment 39
Real Estate 90
Miscellaneous 74

NO INTEREST:

No Heirs 25

REFERRALS: 22

NEW CASES: 100

TOTAL CASE ACTIONS: 195

(From and Pending)

ATTACHMENT IV

PUBLIC ADMINISTRATION ESCHEATS

1st Quarter 18 Estates $39,105.61
2nd Quarter 25 Estates 53,559.21
3rd Quarter 11 Estates 25,119.43
4th Quarter 28 Estates 74,632.37
82 TOTAL $192,416.62

NEW PUBLIC ADMINISTRATION ESTATES

1st Quarter 45
2nd Quarter 45
3rd Quarter 40
4th Quarter 43
173

CLOSED PUBLIC ADMINISTRATION ESTATES

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UTILITIES DIVISION

The Utilities Division represents the public interest pursuant to G.L. c.12, §11E in administrative and judicial proceedings affecting electric, gas, and telephone rates. The Utilities Division employs a staff of seven lawyers, one accountant, two utility rate analysts, one grant coordinator, and three secretaries. The Utilities Division continued its past practice of appearing in
every utility proceeding of importance to the Massachusetts consumer in the past year.

A summary of cases handled by the Utilities Division follows. First, the Division represented the public in every electric and gas rate case before the Department of Public Utilities (D.P.U.) in the past year, a total of 13 rate cases. Of the approximately $180 million requested in these cases, the Utilities Division was successful in arguing reductions of over $100 million. Second, the Division continued its representation of the public in the three adjudicatory proceedings before the D.P.U. which are controlling the installation of time-of-use (or peak-load) rates, an important reform which will result in significant long-run savings to the Massachusetts consumer. Third, the Division represented the public interest in various proceedings involving nuclear power plants: the hearings before the Atomic Safety and Licensing Board of the United States Nuclear Regulatory Commission concerning the licensing of Pilgrim II, the hearings before the D.P.U. on the propriety of the construction of Pilgrim II, and the hearings before the D.P.U. of the propriety of purchases by Massachusetts utilities of increased shares in Seabrook I & II. Fourth, the Division represented the public interest before the Energy facilities Siting Council in its review of all of the electric utility companies' long-range energy and demand forecasts. Fifth, the Division participated in a wide range of additional cases involving utility issues: a petition to the U.S. Securities and Exchange Commission concerning two gas companies' holding company structure, various appeals from regulatory decisions of administrative agencies, an action before the U.S. Supreme Court to attempt to invalidate a Louisiana tax on natural gas, and several financing approval cases before the D.P.U.

In sum, the Utilities Division continues to operate as the major, and in most cases the only, representative of public interest in utility matters affecting Massachusetts citizens. Its statutory budget of $250,000 pursuant to G.L. c.12, §11E has recently been supplemented by a United States Department of Energy grant of approximately $200,000, which has permitted the employment of additional professional personnel and which has also permitted the making of sub-grants to Massachusetts consumer groups who have advocated additional points of view in utility proceedings.

V. ELECTIONS DIVISION

A. CAMPAIGN AND POLITICAL FINANCE.

The primary responsibility of the Elections Division is to oversee the investigation and prosecution of violations of the Commonwealth's election laws.

Under statutory mandate (G.L. c.55) the Division is directly engaged in the enforcement of laws pertaining to campaign and political finance. In fiscal 1979 the Office of Campaign and Political Finance alone reported 178 disclosure reports. Compliance with the statute was affected in 153 instances by administrative action, and in 16 instances by the institution of civil litigation. There are currently 9 such suits in litigation. In addition a
substantial number of required filings by local candidates was affected upon reports of violations to the Division by city and town clerks.

B. LOBBYISTS.

The Elections Division also enforces the statute requiring legislative agents and their employers to file financial disclosure statements with the Office of the Secretary of the Commonwealth. (G.L. c.3, §§43, 44, 47). In fiscal year 1979, 17 violations of that section were reported by the Secretary. As a result of administrative action by this Division, the require statements were filed by all reported violators.

C. 1978 STATE ELECTION AND PRIMARY.

During the period encompassing the 1978 biennial state and primary elections, the Elections Division was extremely active in the defense of challenges to various state election laws and to the decisions of state election officials. Over a half-dozen separate attempts to enjoin the state primary and general elections were successfully opposed in both state and federal courts, while the validity of statues pertaining to the position of candidates names on the state ballot and entitlement of candidates to public campaign financing were upheld in DeCara v. Guzzi, and Crampton v. Guzzi. Also of note is Farland v. Guzzi, which upheld the use of voting machines against a challenge that they imposed an unconstitutional impediment to write-in candidates. In all, the Division successfully represented the Secretary of the Commonwealth and the State Ballot Law Commission in 22 lawsuits during that period alone.

D. INITIATIVES.

The Division received and processed eight initiative petitions during the August 1978 filing period. Currently, it represents the Senate Clerk in King v. O'Neil, a suit challenging legislative proceedings during consideration of an amendment to State Constitution proposed by initiative petition.

E. OPEN MEETING LAW.

Enforcement of the “Open meeting law” at the state level, both administratively and through litigation is another important responsibility of the Elections Division. In that area, Bellotti v. Andrade, a case before the State Appeals Court, is noteworthy for clarifying what is permissible in the conduct of collective bargaining sessions vis-a-vis the open meeting law.

VI. VETERANS DIVISION

The Veterans Division continues to function primarily as an informational agency, referring private citizens to appropriate federal and state officials and agencies regarding veterans’ benefits. The Division also provides counsel to the Commissioner of Veterans Services and the Veterans Affairs Division of the Department of the Treasury.

The Division is presently involved in a number of cases pending before various State and Federal courts. The most noteworthy of these cases - Feeney v. Dukakis, an appeal to the United States Supreme Court from a decision of the Federal District Court ruling that the Massachusetts Veterans’ Preference laws are unconstitutional. The United States Supreme Court reversed the Federal District Court and found that the Veterans’ Preference law was constitutional. Pending in the United States
District Court are the cases of *Reynolds v. Dukakis*, challenging the exclusion of conscientious objectors from state veterans' benefits and *Houle v. Veterans' Commissioner, Governor, and Executive Council*, claiming that veterans' hearings before state agencies do not conform with due process. *Allard v. Governor, et al.*, is pending in the state superior court claiming that certain regulations of the Commissioner of Veterans' Services are invalid. *Pelargano v. Commissioner of Veterans' Services* and *Sanastano v. Civil Service Commissioner*, are cases assigned to the Division in the state superior courts involving the eligibility of individual plaintiffs for state veterans' benefits.

The Division also represented several state and community colleges at hearing before the Veterans' Administration involving the administration of Federal veterans' education benefits.

**VII. SPRINGFIELD OFFICE**

The primary function of the Springfield Office of the Department of the Attorney General is to handle all matters of concern to the Attorney General in Hampden, Hampshire, Franklin, and Berkshire counties. To that end, the office in Fiscal year 1978-79 handled all division references and requests for assistance pertaining to Eminent Domain, Criminal, Torts, Contracts, Collection, Public Charities Victim of Violent Crime, and election law cases in the four western counties. Only consumer protection matters originate in the Springfield Office.

The office supplies personnel to the Board of Appeal on Motor Vehicles Liability Policies and Bonds for monthly sittings which consider approximately 20 cases per sitting.

During the fiscal year the Springfield Office was responsible for 10 Eminent Domain cases, 27 Victim of Violent Crime cases, 16 Tort matters, 18 Collection matters and 5 Administrative cases. The actual number of matters handled for the Government Bureau is difficult to determine because many of the actions taken by this office on these cases involve the filing of a particular pleading, hearing on motions, and the gathering of information with out actually handling the entire case.

The Consumer Protection Section of the Springfield Office continued to actively pursue enforcement of consumer protection laws and regulations. Additionally the office provided assistance and information to the local consumer groups in the four western counties and aided individual consumer groups where no local consumer groups existed. In 1978-79, the office handled 182 such complaints resulting in savings of $6844.07 to consumers.

The bulk of the Consumer Protection section's work involved 43 separate investigations of firms involved in unfair or deceptive practices. These investigations resulted in 10 Consent Judgments, 4 Assurances of Discontinuance, 2 injunctions, 1 contempt citation and recovery of $29,486 for consumers. Investigations covered automobiles, trailer parks, health spas, career schools, land sales, tour and swimming pool sales. Additionally, investigators initiated a wide scale review of automotive repairs and sales contracts throughout the four counties. The Springfield Office in 1978-79 also conducted public hearings on proposed debt collection regulations and fulfilled speaking engagements for numerous groups.
The staff consists of the chief administrator, two assistant attorneys general, two investigators and two secretaries.

Number I

Joseph P. Foley
Commissioner of Probation
206 New Court House
Pemberton Square
Boston, Massachusetts 02108

Dear Commissioner Foley:

You have asked three questions concerning your obligations as Commissioner of Probation with respect to criminal records you have sealed under G.L. c.276, §100A, in cases where municipal police chiefs request information about the criminal records of applicants for licenses to sell and carry firearms and to sell ammunition.1 The three questions are in substance the following:

1. When a police chief requests the Commissioner of Probation for information about the criminal record of an individual who has applied for a license to sell or to carry firearms or to sell ammunition, is the Commissioner required to provide any information other than the fact that the applicant has a sealed record?

2. If the Commissioner is required to furnish more information, will he satisfy the “need to know” aspects [?] of G.L. c. 140, §§122, 122B and 131 if he responds to a police chief’s inquiry by stating whether the license applicant does or does not have a felony conviction included in his or her record?

3. If the answer to Question 2 is “no,” is the Commissioner required to: (a) break the seal of the criminal record of a license applicant upon the demand of the licensing authority; and (b) disseminate the information in the record to the authority?

For the reasons discussed below, I answer your questions as follows. As Commissioner you may not answer a police chief’s inquiry about a firearm license applicant who has a sealed record by simply stating that there is a sealed record on file in you office. Rather, you must inform the police chief whether the applicant has a felony conviction or a misdemeanor
conviction for the unlawful use, possession or sale of narcotic or harmful drugs, 3 whether or not the applicant’s record has been sealed pursuant to statute. You are not required, however, to provide a police chief with any other information which may be contained in the applicant’s sealed record.

Before considering your questions, it is useful to review their statutory background and the reasons they have recently arisen. Under G.L. c. 140, §§122, 122B and 131, municipal police chiefs, after investigation, may grant the firearm and ammunition licenses described in those statutes (see n. 1 supra) to any applicant except a minor, an alien, or a person who has been convicted of either a felony or the unlawful possession, sale, or use of narcotic or harmful drugs. Knowledge of such felony or drug convictions is thus essential to the police chief’s investigation.

The firearm statutes must be read in conjunction with G.L. c.276, §100A. That statute permits any person who has been convicted of a misdemeanor or a felony to request and require that the Commissioner of Probation seal the person’s record of court appearances and dispositions 10 years (in the case of misdemeanors) or 15 (in the case of felonies) after conviction or termination of sentence, whichever is later, provided that he has not been found guilty of any other criminal offense within the 10 years preceding his request and can meet certain other statutory standards. When the Commissioner seals such a record, he is to notify the clerks and probation officers of the appropriate courts, and these officials are also to seal their own records concerning the individual. Id. 4

You indicate in your opinion request that when police chiefs have inquired in the past about firearm or ammunition license applicants with sealed records, the practice of your office has been to respond only that the applicant had a sealed record. The responses have not indicated whether or not a record showed a felony or drug conviction. You state, however, that the recent decision of the Supreme Judicial Court in *Rzeznik v. Chief of Police of Southampton*, Mass. Adv. Sh. (1978) 461, has called this established practice into question. You request my opinion to determine whether or not past practice continues to be valid in light of the *Rzeznik* decision, and if not, what kind of modifications are called for.

In *Rzeznik*, the court upheld the right of a police chief to obtain information concerning a person’s prior criminal record even though sealed by the Commissioner of Probation pursuant to G.L. c. 276, §100A, and to use the information in considering whether or not the person would be eligible for firearm licenses issued pursuant to G.L. c. 140, §§122, 122B and 131. Mass. Adv. Sh (1978) at 469. The court in reaching this result referred to the language in §100A which provides that the Commissioner, “in response to inquiries by authorized persons other than any law enforcement agency . . . shall in the case of a sealed record . . . report that no record exists” (emphasis supplied); it concluded that “[t]his provision must be read to

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3. Criminal offenses involving narcotic or harmful drugs are now designated as offenses relating to “controlled substances,” and are set forth in G.L. c. 94C.

4. General Laws, c. 276, §§100B and 100C, also authorize the sealing of certain records by the Commissioner: §100B applies to certain records of juvenile proceedings; and §100C concerns records of criminal cases where the defendant has been found not guilty or for other reasons has not been convicted. Since these statutes do not involve records of criminal convictions, however, they are not pertinent to the questions you raise. Similarly, G.L. c. 94C, §44, which involves the sealing by a court of certain criminal records relating to controlled substances offenses, has no relevance here: it does not apply to convictions. General Laws, c. 94C, §34, which has related sealing provisions, is discussed in n. 9 infra.
imply that law enforcement agencies . . . *do have access* to criminal records which have been sealed'" (emphasis supplied). *Id.* at 467. See also *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, Mass. Adv. Sh. (1978) 685, 695, 697-698 (recognizing availability of information in sealed records to certain law enforcement agencies.)

General Laws, c. 276, §100A, does not expressly require you to disseminate information about sealed criminal records to law enforcement agency officials. Nevertheless, implicit in the *Rzeznik* opinion is the conclusion that under §100A, you may not merely inform police chiefs who inquire about gun license applicants that an applicant has a sealed record. Rather, you appear to have an obligation to provide an inquiring police chief with relevant, substantive information about an applicant's criminal offender record; only in this way will he be able to complete the mandatory investigation of the license application.

The remaining issue, and the subject of your second and third questions, is how much information must be supplied. The *Rzeznik* opinion itself does not answer or directly consider the character or quantity of sealed criminal record information which you must give to a police chief. However, the criminal offender record information (CORI) statutes, G.L. c.6, §§167-178, offer guidance on this issue. General Laws, c. 6, §172, as amended through St. 1977, c. 841, provides in part:

Except as otherwise provided in [G.L. c.6, §§173-175] inclusive, [?] criminal offender record information . . . shall be disseminated, whether directly or through any intermediary, only to (a) criminal justice agencies; [and] (b) such other agencies and individuals required to have access to such information by statute . . . The extent of such access shall be limited to that necessary for the actual performance of the criminal justice duties of criminal justice agencies under clause (a); [and] to that necessary for the actual performance of the statutory duties of agencies and individuals granted access under clause (b) . . .

As the court noted in *Rzeznik, supra*, Mass. Ave. Sh. (1978) at 468, police chiefs are members of "criminal justice agencies" as defined in G.L. c.6, §167, and are also individuals authorized under G.L. c.276, §100A, to have access to criminal record information. (See N. 5 *supra.*) The quoted provisions of G.L. c. 6, §172, thus specify that while these police officials are entitled to obtain criminal record information, their access must

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1The court referred to the statutes governing the maintenance and dissemination of criminal offender record information (CORI), G.L. c., §§167-178, and stated that its reading of c. 276, §100A, was consistent with these statutes: the CORI statutes authorize dissemination of criminal record information to "criminal justice agencies" and statutorily authorize individuals and agencies. The defendant police chief qualified under both categories. *Rzeznik v. Chief of Police of Southampton*, Mass. Ave. Sh. (1978) 461, 468.

2In *Rzeznik* the defendant police chief granted the plaintiff firearms licenses, and then later revoked them on the basis of the plaintiff's prior felony conviction. It appeared that the police chief know of the conviction independently of an inquiry to the Commissioner of Probation, Mass. Ave. Sh. (1978) at 463-464, and the opinion does not treat the Commissioner's dissemination of information under G.L. c. 276, §100A.

3These sections have no relevance to your questions.
be restricted to only that information needed for performance of their duties.  

In order for a police chief to determine whether a person with a sealed record is entitled to obtain a firearm license, he would need to know whether the person's record contained a notation of (1) a felony conviction or (2) a conviction of a drug offense which was a misdemeanor. These statutory creation needs in turn define your obligation to disseminate information about sealed records. You have informed me that the sealing method which your office uses would permit someone to determine whether or not a record contained a felony conviction without breaking the seal. Accordingly, in cases where an individual record does indicate a felony conviction, you may inform the inquiring police chief of that fact, and need not break the seal and disseminate any additional information.  

If, however, the outside of a record shows that the individual has only a misdemeanor conviction, you will be required to break the seal in order to determine whether that conviction relates to the possession, use or sale of a narcotic or harmful drug. If it does not, you may inform the police chief that the sealed record does not contain a drug offense conviction. If the conviction is for a drug offense, you must tell the chief of the existence and the nature of the offense.

My conclusion finds support in the Supreme Judicial Court's opinion in Police Comm'r of Boston v. Municipal Court of the Dorchester District, Mass. Adv. Sh. (1978) 685. In that case the court considered in what circumstances, if any, a Juvenile Court judge had the power, independent of statute, to order certain juvenile records expunged. In the course of its opinion the court reviewed the CORI statutory scheme as well as various record sealing statutes, including G.L. c. 276, §100A. Mass. Adv. Sh. (1978) at 694-704. In both its analysis of these statutes and its separate treatment of the juvenile record question, the court stressed the legislative intent and the need, respectively, to balance the privacy and other interests of a criminal record holder with legitimate law enforcement concerns. See id. at 697-698, 701, 704, 707-708 and n. 11, 712-713; cf. Utz v. Cullinane, 520 F. 2d 467, 474-483 (D.C. Cir. 1975). By limiting your transmittal of information about a sealed criminal record to the facts of whether or not it indicates a felony or drug offense conviction, you would satisfy a police chief's "need to know" about such convictions and at the same time protect the confidentiality of the individual's record to the greatest degree possible.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

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2 See, e.g., G.L. c. 94C, §§38, 39. I note, however, that in certain circumstances, a record of a conviction under G.L. c. 94C, §34, which a court has ordered sealed pursuant to that section, is not to be used to disqualify a person for any purpose. See also id., §35. In the case of a person who comes within these statutory provisions, you would have no obligation to disseminate information about the person's sealed record.

3 The prohibition in G.L. c. 140, §§122, 122B and 131, against granting firearm licenses to anyone convicted of a felony are separate from the other statutory disqualifications, and sufficient in themselves to preclude the issuance of a license. In the case of any individual whose sealed record shows a felony conviction, therefore, it would not be necessary to determine in addition whether any misdemeanor conviction listed on the outside of the record was for a drug offense.
Number 2
Frederick P. Savucci
Secretary of Transportation
One Ashburton Place
Boston, Massachusetts 02108

July 24, 1978

Dear Secretary Salvucci:

You have requested my opinion whether the Massachusetts Bay Transportation Authority (MBTA) and various regional transit authorities (RTAs), are agencies or instrumentalities of the Commonwealth within the meaning of the federal Intergovernmental Cooperation Act of 1968, Pub. L. 90-577, 42 U.S.C. §§4201 et seq. (1970) (the Act). The question arises because under this Act, transit authorities which quality as state “agencies” or “instrumentalities” may retain interest on federal grant funds, while authorities classified as “political subdivisions” may not.

For the reasons set forth below, it is my opinion that the MBTA and the RTAs are agencies or instrumentalities of the Commonwealth for purposes of the Act. They therefore may retain interest earned on grant-in-aid funds disbursed to them by the federal Department of Transportation.

The background of your opinion request is the following. The United States Department of Transportation, through its Urban Mass Transit Administration (UMTA), oversees a variety of federal transit programs. UMTA’s responsibilities include the awarding of federal funds to regional transit authorities to assist in the development of improved mass transportation. See 49 U.S.C. §§1601-1613. UMTA notified its grantees in July, 1977, that a ruling of the United States Comptroller General permitted transit authorities to retain interest on federal funds if the authorities were defined under state law as “instrumentalities” of the state, but not if state law defined them as “political subdivisions.” The Comptroller General’s ruling was based on his interpretation of two sections of the Act: 42 U.S.C. §4213, governing the scheduling of all federal grants-in-aid to states, and §4201. This latter section contains the definitions which apply to all the provisions of the Act, including §4213. Its critical definitions, for purposes of this opinion, are those of the terms “State” and “political subdivision.” They read as follows:

... (2) The term “State” means any of the several states of the United States ... or any agency or instrumentality of a State, but does not include the governments of the political subdivisions of the State.

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1 Both the MBTA and the RTAs are under the jurisdiction of the Executive Office of Transportation and Construction, G.L. c. 6A, §19. Questions relating directly to their activities, therefore, are of concern to you as Secretary of Transportation and Construction.

2 Section 4213 provides:

Heads of Federal departments and agencies responsible for administering grant-in-aid programs shall schedule the transfer of grant-in-aid funds consistent with program purposes and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State ... States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes. [Emphasis supplied.]
(3) The term "political subdivision" or "local government" means a local unit of government, including specifically a county, municipality, city, town, township, or a school or other special district created by or pursuant to State law. [Emphasis supplied].

Accepting, for this opinion, the Comptroller General's reading of 42 U.S.C. §§4213 and 4201, I am asked to resolve the issue whether, under Massachusetts law, the MBTA and the RTAs fit within the definition of "State" set forth in 42 U.S.C. §4201 (2), and thus become entitled to retain interest on federal grants pursuant to §4213. I will consider the issue in relation to the MBTA and the RTAs separately.

The MBTA was established pursuant to St. 1964, c. 563, §18, enacting G.L. c. 161A. General Laws, c. 161A, §2, provides in part as follows: The territory within and the inhabitants of the fourteen cities and towns and the sixty four cities and towns are hereby made a body politic and corporate and a political subdivision of the Commonwealth under the name of Massachusetts Transportation Authority.

This section shows that, in contrast to the transportation authority described in the Comptroller General's opinion, the MBTA is specifically defined as a "political subdivision of the commonwealth." Nevertheless, I do not read that opinion as intending to limit the scope of my inquiry to the description of the MBTA contained on the face of its enabling statute. An examination of other statutes defining the MBTA's relationship to the Commonwealth, as well as any decisions of the state courts in which the nature of the MBTA has been discussed, should also be undertaken in determining the authority's status. In the case of the MBTA such an analysis leads me to conclude that the language of G.L.c. 161A, §2 should not be read to establish the MBTA as a "political subdivision" within the meaning of 42 U.S.C. §4201(3).

In light of its central importance to the questions you raise, the Comptroller General's opinion at issue here, No. B-180617, 56 Comp. Gen. 353 (1977), requires further discussion. It was issued in response to a request by UMTA to clarify the proper meaning of 42 U.S.C. §§4201 (3) and 4313, in order to resolve a dispute between UMTA and a Pennsylvania regional transit authority. UMTA had determined that the transit authority was a "political subdivision" and therefore not entitled to retain interest on federal grants under §4213. Its decision was based on the Bureau of Census' classification of the authority as a "special district." See U.S. Bureau of the Census, Census of Governments, 1972, Vol. 1 at 437 (1973). In UMTA's view of the legislative history of §§4201 and 4213, the Census classification in and of itself established the Pennsylvania authority's status as a "political subdivision" for purposes of §§4201 and 4213. The transit authority's challenge to this ruling focused on its state enabling statute, describing the authority as "a separate body corporate and politic which . . . shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 56 Comp. Gen. at 355. Additionally, the authority relied on decisions of the Pennsylvania courts which defined it as a state agency.

The Comptroller General accepted the Pennsylvania transit authority's argument. He ruled that neither the Act nor its legislative history required the Bureau of Census classification of an entity to be dispositive of the question whether it was a state "agency or instrumentality," or a "political subdivision." 56 Comp. Gen. at 356-357. Rather, for purposes of the Act, a federal grantor agency . . . is bound by the classification of the entity in State law. Only in the absence of a clear indication of the status of the entity in State law may [the grantor agency] make its own determination based on reasonable standards, including resort to the Bureau of the Census' classification. It would not be unreasonable . . . for UMTA to require a transit authority to get an opinion for the State Attorney General as to whether such authority is a State agency or instrumentality. . . . Id. at 357.

It bears mention at the outset that I only treat here the proper classification of the authorities as "state instrumentalities" or "political subdivisions" for purposes of the two pertinent federal statutes. It may be that under other federal or state statutes using these terms the authorities would be differently classified; I do not consider such questions.

The statutory distinction between the 14 cities and towns and the 64 cities and towns relates to differences in the manner in which a particular city or town is assessed a percentage of the annual deficit of the Authority, if any. See G.L.c. 161A, §§9-12.

However, the MBTA, like the Pennsylvania Authority, is classified by the Bureau of Census as a "special district." Under the prior UMTA practice, therefore, it was not permitted to retain interest earned on federal funds.

I hold the same view with respect to the RTAs, discussed below.
First, it has been recognized that the term "political subdivision" may connote both a unit of local government and an instrumentality of the state.⁸ In Commissioner of Internal Revenue v. Shamberg's Estate, 144 F. 2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945), the court stated:

The term "political subdivision" may be used in statutes in more than one sense. It may designate a true governmental subdivision such as a county, town, etc., or, it may have a broader meaning, denoting any subdivision of a state created for a public purpose although authorized to exercise a portion of the sovereign power of the State only to a limited degree.

See Boston Elevated Ry. Co. v. Welsh, 25 F. Supp. 809, 810 (D. Mass. 1939) (considering whether transit company was "political subdivision" or private corporation under Social Security Act). No decisions of the Commonwealth's appellate courts have construed the term "political subdivision" as it appears in G.L. c. 161A, §2.⁹ Nevertheless, a review of the statutes defining the purposes and responsibilities of the MBTA clearly shows that the MBTA is a political subdivision in the second sense described in the Shamberg's Estate case, viz., a governmental entity of the state.

The MBTA is an agency included generally within the Executive Office of Transportation and Construction, G.L. c. 6A, §19 its capital investment program and mass transportation plans are prepared specifically under that Office's "direction, control and supervision . . . ." G.L. c. 161A §5(g); and the State Auditor annually audits the MBTA's accounts, id., §17. In addition, the Commonwealth is obligated to fund annually any cost of service deficit the MBTA may experience as well as deficits in operating revenues, and may pledge its credit to meet these financial obligations, id., §§12, 13; see also id., §§28, 28A. I note further that the Governor appoints and may remove the authority's board of directors, id., §6;¹⁰ and he has specific statutory authority in an emergency to take over and operate the MBTA through any department or agency of the Commonwealth, id., §20.¹¹

These statutes manifest a high degree of direct state involvement with the operations of the MBTA and with its financial operations in particular.¹² Viewing the MBTA against this statutory framework, I believe it clear that the authority should not be classified as a "political subdivision," as that term is defined in 42 U.S.C. §4201(3). The MBTA does not fit within the explicit provisions of the definition since it is not a "county, municipality, city, town, township, or a school or other special district . . . ." Cf. Massachusetts Bay Trans. Authority v. Labor Relations Comm'n, 356 Mass. 563, 566 (1970). Nor does it appear to come within the definition's

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⁸Because 42 U.S.C. §4201(2) makes the terms "state" (including "agency or instrumentality of a state") and "political subdivision" mutually exclusive, I am required in this instance to define the MBTA as either one or the other.

⁹Nor did research uncover any Massachusetts decisions which interpret the term as used in other state statutes, or elsewhere. Accordingly, judicial guidance on this issue is lacking with respect to both the MBTA and the RTAs.

¹⁰Moreover, the directors and employees of the MBTA are considered "state employees" for purposes of the Commonwealth's conflict of interest statute, G.L. c. 268A. See, e.g., Conf. Op. Atty Gen. Nos. 823, 795.

¹¹I note as well that in a previous opinion, I ruled that the MBTA qualifies as a "purchasing agency" under a program established by St. 1976, c. 484 (G.L. c. 7 App. §§2-1 et seq.), 1976-77 Op. Atty. Gen. No. 25. The purchasing program statute specifically defines "purchasing agency" as "any agency, department, board, commission, office of authority of the commonwealth." St. 1976, c. 484, §2(4) (G.L. c. 7 App., §2-24).

¹²Given the subject matter of the federal statutes under review here—the handling of federal grants-in-aid—the degree of state participation in the MBTA’s financial and fiscal operations would seem to be one of the most significant factors in determining whether it is a state instrumentality.
implicit scope as suggested by the entities enumerated in the statute. I conclude, therefore, that for purposes of 42 U.S.C. §§4201 and 4213 (and the Comptroller General’s ruling), the MBTA is properly defined as a “state instrumentality.”

The provisions of G.L. c. 161A, §29, lend support to this conclusion. Section 29 reads in part:

It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, overrule any inconsistent provisions of this chapter.

This statutory language is significant, for it shows a legislative intent that the statutory label given the MBTA’s structure not hinder its ability to maximize the receipt of available federal funds. Interest earned on federal grants-in-aid can provide a significant source of funds to the MBTA, as you suggest in your opinion request. Section 29 in effect overrides any inference that the MBTA’s designation as a “political subdivision” in G.L. c. 161A, §2 should control the authority’s classification for purposes of 42 U.S.C. §§4201 and 4213, and thereby render it unable to retain the interest on federal funds to which it might otherwise be entitled.13

I now turn to the question whether the RTAs are state agencies or instrumentalities. The RTAs’ statutory structure strongly resembles that of the MBTA: each RTA is a “body politic and corporate and political subdivision of the commonwealth,” G.L. c. 161B, §2; all RTAs are within the Executive Office of Transportation and Construction, G.L. c. 6A, §19; RTAs are required to prepare and annually revise their public mass transportation programs in consultation with the Office, G.L. c. 161B, §8(f);14 the Commonwealth is obligated to fund in the first instance any deficits in the RTAs’ cost of service and any inability of the RTAs’ to meet their current obligations, and may pledge its credit for these purposes, id., §§10, 11 (see also id., §23); and the RTAs are subject to audit by the State Auditor on an annual basis, id., §12. In addition, every RTA must obtain prior approval from you in order to issue bonds, and as Secretary of Transportation and Construction you are required to establish guidelines for allocating and distributing the principal of such bonds among the RTA’s, id., §17. Finally, the statute creating RTAs, St. 1973, c. 1141, contains a section substantively identical to the portion of G.L. c. 161A, §29, quoted above, which provides that:

... any federal law, administrative regulation or practice governing federal assistance for the purpose of this chapter shall, to the extent necessary to enable the commonwealth or

13I recognize that G.L. c. 161A, §29 has limits; it cannot be relied upon to transform automatically every governmental entity into a “state instrumentality” for the purpose of increasing available federal funds. In the case of the MBTA, however, I believe there are sufficient indicators of its status as a state instrumentality independent of §29. I cite §29 only insofar as it reinforces this judgment. I reach the same conclusion with respect to the RTAs, discussed below.

14Moreover, the RTAs must annually report on their operations and mass transit programs to the Governor, to you as Secretary of Transportation and Construction, and to the Legislature, G.L. c. 161B, §8(g).
its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of . . . this act . . . . St. 1973, c. 1141, §10.

In my view, the characteristics of RTAs enumerated here are sufficient to qualify them as state agencies or instrumentalities within the meaning of 42 U.S.C. §§4201 and 4213.

In reaching this result, I recognize that the RTAs present a closer case than the MBTA. For example, while G.L. c. 161B, §2 provides for the creation of certain RTAs, other cities and towns, either singly or in combination, may form an additional RTA, subject to your approval. G.L. c. 161B, §3. There is no comparable provision applicable to the MBTA. Additionally, every RTA is managed by an administrator appointed by an advisory board composed of municipal officials, id., §§4,5. As noted above, the MBTA is managed by a board of directors appointed by the Governor, see G.L. c. 161A, §6. Nevertheless, although there is greater municipal involvement in the management of the RTAs than is true of the MBTA, I do not believe the differences between the two types of authorities require that RTAs be classified as "political subdivision[s]" as defined in 42 U.S.C. §4201(3). The RTAs' financial relationship with the Commonwealth is substantially the same as that of the MBTA, and in any event is a very close one. As I have indicated, I consider the financial aspects of both types of authorities' operations to be the most critical for purposes of determining whether they qualify as state agencies or instrumentalities under 42 U.S.C. §§4201 and 4213. See n 12, supra. I therefore conclude that the RTAs as well as the MBTA do so qualify, and both may retain interest on federal grants-in-aid.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 3
John R. Buckley
Secretary of Administration
and Finance
Executive Office of Administration
and Finance
State House
Boston, Massachusetts 02133

July 31, 1978

Dear Secretary Buckley:

You have requested an opinion concerning your efforts to implement St. 1978, c. 60 ("c. 60"), a recently-enacted statute which provides in pertinent

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1The substance of c. 60, discussed in the text below, was originally enacted in St. 1977, c. 965, which was approved on January 11, 1978 without an emergency declaration or express effective date. Corrective amendments were made by c. 60, which replaced in toto the provisions of the earlier bill. Chapter 60 took effect by its express terms on April 11, 1978.
part: "[t]he commissioner of administration 2 shall file with the state secretary prior to July first, nineteen hundred and seventy-eight, rules and regulations for the conduct of adjudicatory hearings . . ." You state that you were unable to draft and promulgate the rules and regulations called for by c. 60 ("standard rules") prior to July 1 because of the magnitude of the task and the necessary participation of a large number of state agencies, but that you plan to file the standard rules within three months. You ask whether the July 1, 1978 date in c. 60 is mandatory or directory. The underlying question is whether the failure to meet the statutory deadline will affect the validity of either the standard rules you ultimately file or adjudicatory proceedings before state administration agencies in the interim.

My conclusion, based on clear judicial precedent, is that the filing date which c. 60 prescribes for the standard rules is directory in nature rather than mandatory. Accordingly, in my view the failure to file the rules by July 1 will have no effect on their ultimate validity, provided that you proceed to promulgate them as speedily as possible. Until the standard rules are in effect, agencies should continue to use their existing procedural rules to conduct adjudicatory proceedings, and the delay in promulgating the standard rules will not undermine the validity of these proceedings. I state my reasons below.

The pertinent portion of c. 60 amends §9 of the state Administrative Procedure Act ("APA"), G.L. c. 30A, §9, to require that the Commissioner of Administration promulgate and file with the State Secretary a single set of "standard rules" to govern adjudicatory proceedings before all state administrative agencies subject to the APA.3 The standard rules will replace the separate sets of rules for adjudicatory proceedings which each agency from time to time has adopted under the original version of G.L. c. 30A, §9. See St. 1954, c. 681, §1.4

Under c. 60, §1, adoption of the standard rules is expressly made subject to the rulemaking provisions of G.L. c. 30A, §§2 and 3. The standard rules will not, however, become effective until 90 days after publication by the State Secretary and will govern only adjudicatory proceedings "commenced" after the effective date. Chapter 60, §1, ¶ 1.5 Cf. G.L. c. 30A, §§5, 6. Substitute rules, if any, go into effect at the same time.

Two points emerge from this review of the provisions of c. 60. First, existing agency rules and regulations governing adjudicatory proceedings which were adopted pursuant to the original mandate of G.L. c. 30A, §9, remain in effect at the present time. Second, these rules will be in effect for an indefinite period in the future, as the standard rules will not apply to adjudicatory proceedings commenced prior to the rules' effective date.

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1 The substance of c. 60, discussed in the text below, was originally enacted in St. 1977, c. 965, which was approved on January 11, 1978 without an emergency declaration or express effective date. Corrective amendments were made by c. 60, which replaced in totus the provisions of the earlier bill. Chapter 60 took effect by its express terms on April 11, 1978.
2 The Secretary of the Executive Office of Administration and Finance is also the Commissioner of Administration. G.L. c. 7, §4.

3 General Laws, c. 30A, §§1(1) and (2), respectively, delineate the scope of adjudicatory proceedings and the state agencies which are subject to the APA. See also 1961/62 Op. Atty. Gen. at 43.

4 Even under c. 60, agencies will be able to promulgate rules which "... substitute in whole or in part, or are additions to the standard rules filed by the commissioner." Agencies must, however, secure your approval to adopt substitute rules. Chapter 60 provides that agencies shall promulgate and file substitute rules with the State Secretary within 60 days after he publishes the standard rules.

5 Thus the standard rules would not have been in effect at the present time even if you had filed them with the State Secretary by July 1, 1978, since c. 60 contemplated an effective date 90 days thereafter, or about October 1, 1978 (depending on the precise date of publication by the State Secretary).
The question presented is the appropriate construction in these circumstances of c. 60's command that the standard rules "shall" be filed with the State Secretary prior to July 1, 1978. The Supreme Judicial Court has noted that:

The word 'shall' as used in statutes, although in its common meaning mandatory is not of inflexible signification and not infrequently is sustained as permissive or directory in order to effectuate a legislative purpose.

Swift v. Board of Registrars of Voters of Quincy, 281 Mass. 271, 276 (1932).

Moreover, when referring in particular to statutory time requirements the court early stated:

As to a statute imperative in phrase, it has often been held that where it relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done, it is only a regulation for the orderly and convenient conduct of public business and not a condition precedent to the validity of the act done.

Cheney v. Coughlin, 201 Mass. 204, 211 (1909).6

Applying these principles to the present case, I believe that the filing date specified by c. 60 should be treated flexibly and not as a prerequisite to the validity of the standard rules.

The primary legislative purpose of c. 60 is to make more uniform the procedures governing adjudicatory hearings before administrative agencies. The number of such agencies and the matters entrusted to them have greatly increased since the enactment of the APA in 1954, and uniformity would appear to be a matter of increasing interest to parties to adjudicatory proceedings, the lawyers who represent them and the courts which review those proceedings under G.L. c. 30A, §14. These considerations underscore the importance of careful preparation of the standard rules. You have indicated that you were not able to meet the July 1 deadline primarily because of the time it takes to obtain the comments, suggestions and advice of the various agencies and departments which will be affected by the standard rules. Your efforts in seeking agencies' views of the draft rules are intended to enhance their ultimate quality and usefulness. At the same time agencies' existing procedural rules remain in effect, so that the failure to file the standard rules by July 1 has not created a procedural vacuum. These circumstances indicate that the underlying aims of c. 60 will best be served by construing the word "shall" in a directory rather than mandatory sense.7

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7See Torrey v. Millbury, 21 Pack. 64, 66 (1838) where the court stated that flexibility in interpreting and applying legislative directives as to time is appropriate where a statutory time requirement is "intended to promote method, system and uniformity in the modes of proceeding..." See also 1976-77 Op. Attty. Gen. No. 10, at 2.

The conclusion that "shall" in c. 60 has been used in a directory sense is also bolstered by comparison of c. 60 to prior amendments to APA. In St. 1969, c. 308, §10, the Legislature provided that agency regulations became "null and void" if the State Secretaries failed to compile and publish them within six months. See also St. 1970, c. 168. No comparable provision appears in c. 60, and the draconian result prescribed by the earlier amendments should not be inferred lightly.
While I have concluded that the July 1 filing date is directory, you should nevertheless seek to complete and file the standard rules with the State Secretary as soon as possible. The Legislature’s directives are to be respected, and a long-continued failure to file the rules could not be justified. Cf. *West Broadway Task Force, Inc., v. Commissioner of the Dept. of Comm’y Affairs*, 363 Mass. 745, 751 (1973). However, in the particular situation at hand, I do not view a delay of three months as unreasonable.

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 4
Robert Q. Crane
*Treasurer and Receiver General*
State House
Boston, MA 02133

July 31, 1978

Dear Treasurer Crane:

You have asked two questions relating to the investment of the funds of the state employees’ and teachers’ retirement systems, pursuant to G.L. c.32, §23(1) (a) and (b). The questions may be summarized as follows:

1. Does the Treasurer, as treasurer-custodian of “funds and securities” of the state employees’ and teachers’ retirement systems, have custody for investment purposes over solely the employee and teacher contributions, or does his custody extend as well to the annual amount appropriated as the Commonwealth’s contributions to these statements?

2. Should funds appropriated by the Legislature in the annual budget to provide for the Commonwealth’s share of financing the state employees’ and teachers’ retirement systems be transferred to the control of the investment committee of the two systems upon passage of the annual budget?

You pose these questions on behalf of the investment committee of the two retirement systems, appointed under G.L. c.32, §23(1) (a). You have indicated that the committee wishes to know whether it may have a duty to take control over all legislative appropriations for the systems at the beginning of each fiscal year, since if the full amounts of the appropriations were separately invested, interest accruing on the investments would inure to the specific benefit of the retirement systems’ members.1

In response to your first question, it is my opinion that the “funds and securities” referred to G.L. c. 32, §23 (1) (b), signifies the employee contributions to the retirement systems. Therefore, as treasurer-custodian your custody for investment purposes extends only to the monies which these contributions represent, and not to the amounts appropriated by the Legislature. My answer to your second question is that the funds annually appropriated
by the Legislature for the state employees' and teachers' retirement systems should not be transferred to the systems' investment committee at the time the budget is passed or at any other time. My reasons are set forth below.

Your first question in essence asks for an interpretation of the term "funds" in G.L. c. 32, §23 (1) (b). In order to appreciate this problem of statutory construction fully, it helps to examine the statutory framework and administrative practices which govern the retirement systems.

Both the state employees' and teachers' "funds." See G.L. c. 32, §22(1)-(5). The funds are the following:

(a) an "Annuity Savings Fund," in which regular salary or wage deductions of current members of the system accumulate (G.L. c. §22[1]);
(b) an "Annuity Reserve Fund," to which regular accumulated contributions of a member of the system are transferred when the member becomes eligible for retirement benefits (id., §22[2]);
(c) a "Pension Fund," to which all amounts appropriated by the Commonwealth for payment of pensions to members are credited (id., §22[3]);
(d) a "Special Fund for Military Service Credit," in which are placed special contributions made by the Commonwealth for retirement allowances of member-employees who are veterans (id., §22[4]);
(e) an "Expense Fund," which contains all moneys appropriated for payment of the expenses of administration of the system (id., §22[5]);

The first two funds are composed of employees' contributions; the remaining three are funded by legislative appropriations.

Your current practice as treasurer-custodian of the two systems is to take custody of and to invest only the employee-contributed annuity savings and annuity reserve funds, as advised by the investment committee established under G.L. c. 32 §23(1)(a). Monies used to satisfy the legislative appropriations for the other three funds remain commingled with all Commonwealth revenue until the respective retirement boards, pursuant to G.L. c. 32, §23(1) (b), present vouchers to you in your capacity as state Treasurer to accommodate monthly payments to members. G.L. c. 32, §13. At that point you withdraw sufficient funds from the Treasury to satisfy the amounts called for in the vouchers.

The question whether G.L. c. 32, §23 (1) (b) authorizes and directs the investment committee or you as treasurer-custodian to assume custody over all funds annually appropriated for two retirement systems at the beginning of each fiscal year arose in large part because the meaning of the word "funds"...
in that section is ambiguous. The rule is well settled that words used in statutes, when not specially defined, are ordinarily to be given "their usual and accepted meanings..." which may be ascertained from other statutory or legal contexts or dictionary definitions. Commonwealth v. Zone Book, Mass. Adv. Sh. (1977) 743, 746. "Funds" is generally defined to mean monies and related assets such as securities, notes, bill, checks, drafts, proceeds from the sale of other assets, etc. See Black's Law Dictionary at 802 (Rev. 4th ed. 1968); see also Salter v. Salter, 338 Mass. 391, 393 (1959).

On the other hand, as the summary of G.L. c. 32, §22 above demonstrates, the retirement statute in some places uses the term "fund" or "funds" (albeit in conjunction with other words, "annuity", "annuity reserve", "pensions", etc.) specifically to designate the five components of each retirement system's assets. If "funds" in c. 32, §23(1) (b) is interpreted in its more general sense, as indicating existing available cash and similar assets, then as treasurer-custodian you would assume custody only of the employee contributions to the two systems as they were made. If "funds" means the five components described in c. 32, §22, however, then you would have a duty to assume custody of the appropriated monies as well, and to invest them in accordance with the directions given in §23 (1) (b).

In my judgment, "funds" as used in §23 (1) (b) should be given its ordinary, general meaning, and should not be read as referring to the specific funds established and described in G.L. c. 32, §22. I reach this result primarily by reading §23 (1) (b) in conjunction with statutory provisions touching upon related matters of state appropriations and finance; it is a governing principle of statutory interpretation that "[i]n construing the language of the statute in question, consideration must be given to the general body of statutory law relating to the same subject..." Davis v. School Comm. of Somerville, 307 Mass. 354, 361 (1940); see School Comm. of Gloucester v. Gloucester, 324 Mass. 209, 212 (1949).

Turning, then, to related statutes, the provisions of G.L. c. 29 generally govern the expenditure of state appropriations by all state departments, agencies and officers. There is nothing in G.L. c. 32 to suggest that appropriations for the three Commonwealth-contributed retirement funds are not subject to c. 29, or that they are to be treated differently than other legislative appropriations. Yet several sections of c. 29 are inconsistent with the concept of transferring the entire appropriation for the state employees' and teachers' retirement systems to you as treasurer-custodian immediately upon passage of the annual budget.

The most significant provision in G.L. c. 29, for purposes of the question you have raised, is §22. It states:
Except as otherwise expressly provided, no greater sum from an appropriation shall be drawn from the treasury at any one time than is necessary to meet expenses then incurred.

In the context of the retirement statute "expenses" plainly seems to refer to administrative expenses associated with the state-operated retirement systems, see G.L. c.32, §22(5), and the monthly payments of benefits to retired members, see id., §13. Under the terms of §22, a one-time transfer of the total retirement systems' appropriations from the Treasury to the respective retirement boards or to you as treasurer-custodian, independent of actual expenses, would not be permitted. Only by reading G.L. c.32, §23(1)(b), to refer to "funds" in the general sense of "monies" can a conflict between c. 29, §22 and c. 32, §12(1) (b) be avoided. It is therefore the reading which I adopt. See, e.g., Goldsmith v. Reliance Inc. Co., 353 Mass. 99, 102 (1967).

Another bar against interpreting the term "funds" in G.L. c. 32, §23(1) (b) to include the legislative appropriations can be found in G.L. c.29, §47. The Commonwealth relies on the receipt of tax revenues throughout the year in order to fund budget appropriations; it does not actually have the full amounts appropriated by the Legislature on hand at the beginning of a fiscal year. In order for you as treasurer-custodian to take custody of the full appropriations for the state employees' and teachers' retirement systems at the beginning of the fiscal year, you might well be required to borrow the money. General Laws,

The state treasurer may borrow at any time during the fiscal year, in anticipation of the receipts for that year . . . such sums of money as may be necessary for the payment of ordinary demands on the treasury and other legal obligations of the commonwealth, and may issue notes therefor . . .

In my view, payment of money to the systems' treasurer-custodian for investment is not an "ordinary demand" on the Treasury, giving those works their usual and ordinary meaning. See Prudential Insurance Co. of America v. Boston, Mass. Adv. Sh. (1976) 182, 188.

Finally, when construing an ambiguous statute, which G.L. c. 32, §23(1) (b) decidedly is, the long-established practice of the administrator charged with implementing the statute is entitled to weight. See, e.g., Ace Heating Service, Inc. v. State Tax Commission, Mass Adv. Sh. (1976), 2490, 2492. As discussed above, your practice has been to invest as treasurer-custodian of the two retirement systems, only the employee-contributed funds. This long-standing practice offers useful guidance as to the proper construction of the statute at issue.

1General Laws, c. 29, §9B, the so-called allotment statute is also relevant. That statute directs the Governor to divide the fiscal year into equal periods and to allot to each state office and department for each period the pro rata portion of its annual appropriation. The statute thus precludes making the total annual retirement systems' appropriations available to you at the time the budget passes.
2Your letter suggests that G.L. c.32, §25 § 4, constitutes the kind of "legal obligation" on the Commonwealth which would justify borrowing money. Section 25, § 4, provides that "[i]the payment of all annuities, pensions, retirement allowances, and refunds [in the case of the state employees' and teachers' retirement systems] . . . are hereby made obligations of the commonwealth . . ." This section has been interpreted to mean that retirees who qualify for a retirement allowance have a contractual right to their benefits. Opinion of the Justices, 364 Mass. 847, 860 (1973). But there is no suggestion that the section entitles a retiree to a lump sum payment being set aside in advance and separately invested in order to obtain additional interest. In interpret the contract described in §25, § 4, to provide that payments will be made at the time that the contract prescribes they are to be made, i.e. on a monthly basis, G.L. c. 32, §13.
You have also asked whether the legislative appropriations to the state employees’ and teachers’ retirement systems should be transferred to the investment committee established under G.L. c. 32, §23(1) (a), at the time the budget is passed. My answer to your first question indicates that funds representing the appropriations for the systems should not be withdrawn from the Treasury when the budget passes or at any time except to pay actual expenses; the identity of the proposed transferee is irrelevant. Moreover, the unambiguous language of §23(1) (a) and (b) establishes that you as treasurer-custodian are to retain custody of the two retirement systems’ “funds and securities.” The investment committee is to have “general supervision of the investment and reinvestment” of those monies (§23[1] [a]), and your investment decisions are subject to its approval (§23 [i] [d]), but nothing in the statutes authorizes the committee to acquire actual control over the funds. These clear statutory directives must be respected. See, e.g. Hoffman v. Howmedica, Inc., Mass. Adv. Sh. (1977) 1488, 1493. I therefore answer your second question “no”.

Very Truly Yours,
FRANCIS X. BELLOTTI
Attorney General

Number 5
Alexander E. Sharp
Commissioner of Public Welfare
Department of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Sharp:

You have asked my opinion on three questions arising from the following limitation on the Medicaid appropriation in the fiscal year 1979 general appropriations statute, St. 1978, c. 367, §2, Item 4402-5000:

... no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for the medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest in reported to a licensed hospital or law enforcement agency withing thirty days after said incident.

Your three questions may be summarized as follows:

1. May you authorize the payment of claims of Medicaid providers
for abortions they performed prior to the effective date of the appropriations act, in cases where the claims would be payable but for the quoted provisions of Item 4402-5000.

2. May you authorize payment of claims for abortions performed between July 1, 1978 and July 10, 1978, the date on which the appropriations act was signed by the Governor.

3. May you authorize payment of claims for abortions performed between July 10, 1978 and August 1, 1978, the date by which the Department complied with certain notice requirements set forth in federal Medicaid regulations it believes controlling in this instance.

For the reasons set forth below, it is my view that you may authorize and approve payments to providers for abortion services provided to eligible Medicaid recipients through July 7, 1978\(^2\) out of the funds appropriated under c. 367, Item 4402-5000. You may not, however, authorize and approve payments out of that appropriation for abortions performed between July 7 and August 1, 1978 other than those necessary to prevent the death of the mother or in cases of rape or incest.

I first address the issue of payment for abortion services provided to Medicaid recipients prior to July 1, 1978, The language of Item 4402-5000 expressly prohibits payment for abortions unless necessary to prevent the death of the mother and allows payment for necessary medical procedures in reported cases of rape or incest. However, the item does not indicate whether the Legislature intended it to apply prospectively or retroactively. Several considerations convince me that the statute should be read to apply prospectively.

Initially I note that although Item 4402-5000 appears as part of an appropriations measure, St. 1978, c. 367, that statute is an Act of the Legislature and general rules of statutory construction apply to it. Cf. \textit{Tennessee Valley Authy, v. Hill}, U.S. \textit{_______}, 98 S.Ct. 2279, 2299 (1978). Statutes are presumed to operate prospectively where substantive rights are involved absent a clear expression of legislative intent that the statute is to have retrospective effect. \textit{Austin v. Boston Univ. Hosp.}, Mass. Adv. Sh. (1977) 1166, 1170; \textit{See Goodwin Bros. Leasing, Inc. v. Nousis}, Mass. Adv. Sh. (1977) 1663, 1667. Here, the substantive rights of providers of abortion services are clearly involved, for at issue is their ability to receive payment for abortions already performed. A retroactive reading of the pertinent prohibitory language in c. 367 would interfere with those rights. Since the statute does not expressly provide that it is intended to achieve this result, I believe it properly should be interpreted to apply solely to Medicaid abortions performed after the statute’s enactment.

This conclusion is supported by the rule that statutes, where possible, are to be construed to avoid constitutional doubts. E.g, \textit{Baird v. Attorney General}, Mass. Adv. Sh. (1977) 96, 100; \textit{Juvenile v. Commonwealth}, Mass. Adv. Sh. (1976) 1237, 1246. You have informed me that the Department has entered into contracts which authorize the provision of abortion services to Medicaid recipients and require that the providers be reimbursed at rates

\(^2\)See p. 6, n. 6 infra.
approved by the Rate Setting Commission. See G.L. c. 6A, §§32-36. The United States Supreme Court has recently stressed the continued vitality of the impairment of contracts clause of the United States Constitution, Art. 1, §10, especially as applied to impairments of a state's own contracts. United States Trust Co. v. New Jersey, 421 U.S. 1, 22-23 (1977); see Allied Structural Steel Co. v. Spannaus, _U.S._, 98 S. Ct. 2716, 2721-2723 and n. 15, (1978).

In the United States Trust Co. case, the Court held that in order to successfully withstand a constitutional challenge under the contracts clause in cases where a state statute impairs the rights of a party who has contracted with the state, the state must demonstrate that the statute is both reasonable and necessary to serve an important governmental purpose. 431 U.S. at 29. See Allied Structural Steel Co., supra at 2722. It is likely that a retroactive application of Item 4402-5000 to prohibit payment for services provided under a contract with the Department would not pass constitutional muster under this contracts clause test. The state would be refusing to honor obligations legally incurred at the time the services were performed, and such refusal would be neither necessary nor reasonably related to carrying out an important state purpose.3 See United States Trust Co. v. New Jersey, supra; cf. American Manufacturers Mut. Ins. Co. v. Commissioner of Insurance, Mass. Adv. Sh. (1978) 58; Wasser v. Congregation Agudath Sholom of Chelsea, 262 Mass. 235, 237 (1928).4 Accordingly, in my judgment the limiting language of c. 367 should be interpreted as operating prospectively. The statute therefore does not prohibit you from authorizing and approving payment for abortion services provided to eligible Medicaid recipients prior to July 1, 1978.5

My answer to your first question applies as well to your second, concerning abortions performed between July 1, and July 7, 1978.6 Although c. 367 states that it shall take effect as of July 1, 1978 see c. 367, §72, there is no specific indication that the Legislature intended the July 1 effective date to

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1 In Roe v. Doe, U.S. 410 (1975), the Supreme Court upheld a Pennsylvania statute which restricted the funding of abortions on childbirth. The limitation contained in Item 4402-5000 arguably has a similar purpose if applied prospectively, but a retroactive application to prohibit payment for abortions which have already been performed could hardly be said to serve such a goal. 452 U.S. at 445-446. Instead, retroactive application could only be read as a punitive measure aimed at those who have exercised a constitutionally protected right with the justifiable expectation of reimbursement based on statutes existing at the time of their action.

2 Assuming the Legislature might pass an additional appropriations measure at some time in the future to satisfy the claims of Medicaid providers for authorized abortions performed before July 1, 1978, a retroactive reading of c. 367 would still raise constitutional doubts. A portion of the fund appropriated by Item 4402-5000 is allocated to pay the prior year's bills. See n. 6, infra. If these funds may not be used to pay for one particular class of authorized medical services, abortions, the proscription may give rise to a claim that the statute violates the equal protection clause of the Fourteenth Amendment by making it more difficult and burdensome for providers of abortion services to obtain reimbursement than for providers of other medical services.

3 Moreover, Item 4402-5000 itself contains a separate proviso stating that "an amount not exceeding [5120,000,000] may be expended from this item for expenses incurred in the prior year." You have stated that the abortions performed before July 1, 1978 for which payment is now claimed were authorized under the Commonwealth's Medicaid statute, G.L. c. 118E, and the Department's regulations at the time the services expenses does not expressly prohibit the Department from paying for any abortion services which were reimbursable when performed. I recognized that Item 4401-5000's limitation on utilizing "funds appropriated under this item" for payment could be construed to apply to the separate proviso quoted immediately above. Given the constitutional implications of such a construction, however, see pp. 4-5 and n. 4, the proviso itself can be said to authorize the Department to approve payment for any valid obligations incurred in the 1978 fiscal year for services which were reimbursable when rendered.

4 Subsequent to receiving your opinion request I was informed that you were uncertain as to which date Item 4402-5000 was enacted. I construe the date of enactment as the date upon which the General Court overrode the Governor's veto of the Item, July 7, 1978, rather than the date that the Governor signed the remainder of c. 367. See Mass. Const., Articles of Amendment, art. 63, li. Part 2, c. 1 §1, art. 2. Thus the operative period for purposes of your second question is July 1 through July 7 rather than July 1 through July 10.
apply to Item 4402-5000's limitation on the payment for abortions services.\(^7\) Like the payment claims for abortions performed prior to July 1, claims for abortions performed between July 1 and July 7 relate to Medicaid services which were reimbursable when rendered. For the reasons given in response to your first question, I do not believe the portions of Item 4402-5000 at issue should be interpreted in such a way as to prohibit payment for authorized abortion services rendered before the Medicaid portion of the budget was enacted on July 7, 1978.

Your final question asks whether you may use the funds appropriated by c. 367, Item 4402-5000 to pay for abortions performed between July 7 and August 1, 1978, the date you completed the process of notifying Medicaid recipients of the new statutory limitation on abortion services.\(^8\)


The Legislature, in appropriating funds for the Medicaid program in St. 1978, c. 367, has determined that no funds shall be expended for abortions except in the circumstances enumerated in Item 4402-5000. Although I have construed the relevant language of the item as not prohibiting you from authorizing payments for abortions performed prior to its enactment, it is clearly intended to proscribe such expenditures for most abortions performed thereafter. I recognize the possibility that since your Department made abortion services available to eligible Medicaid recipients until August 1, 1978, failure to pay the providers of these services could subject the Commonwealth to possible sanctions by the Department of Health, Education and Welfare, including the withholding of federal funds. *See, e.g., Rosado v. Wyman, 397 U.S. 397, 407-420 (1970).* However, an executive or administrative officer such as yourself may not expend state funds for a purpose other than that for which the Legislature appropriated them, and may be subject to criminal penalties if he does so. *See G.L. c. 29, §§26, 66; cf. 1976/1977 Op. Atty. Gen. No. 8; Compare Opinion of the Justices, Mass. Adv. Sh. (1978) 1811, 1815-1816.* These governing principles of state law control here and preclude your authorizing the use of funds appropriated by

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\(^7\) The July 1, 1978 effective date for c. 367 was required in order to authorize payments for services, salaries and other obligations which the Commonwealth had incurred between June 30, 1978, the end of the 1978 fiscal year, and the date of enactment of a budget for the 1979 fiscal year.

\(^8\) You have informed me that you construe federal law, in particular the Department of Health, Education and Welfare's Medicaid regulation appearing in 45 C.F.R. 205.10(a)(4)(iii), to require that abortion services authorized by state law prior to July 7 continue to be provided until the Department's regulations were changed on August 1, and eligible recipients duly notified of the reduced availability of abortion services. You have not asked whether your interpretation of this regulatory provision is correct and therefore I make no judgment on the question. For purposes of this opinion I accept your interpretation, and address the question whether, notwithstanding recipients' entitlement to full abortion services until August 1, 1978, you are precluded from authorizing payment to providers who performed those services between July 7 and August 1, 1978 from the funds appropriated in Item 4402-5000.
Item 4402-5000 for any abortions performed between July 7 and August 1, 1978 other than those described in the Item.9

In reaching this conclusion I do not mean to suggest that providers who furnished full abortion services to eligible Medicaid recipients between July 7 and August 1 are not entitled to be paid for their services. See Massachusetts General Hospital v. Sargent, 397 F. Supp. 1056 (D. Mass. 1975); see also Massachusetts General Hospital v. Department of Public Welfare, 359 Mass. 306 (1971).10 As these cases demonstrate, both the federal and Massachusetts courts have recognized the right of a provider to be reimbursed for authorized Medical services rendered to eligible recipients. Nevertheless, the specific language of Item 4402-5000 makes plain that the funds it appropriates may not be used to satisfy such rights, and that language is binding on you with respect to the period from July 7 to August 1, 1978. Accordingly you may not now authorize and approve the payment for claims for abortions performed during that period which were not necessary to prevent the death of the mother. You may, of course, authorize and approve payment for medically necessary services rendered during that period from the prompt treatment of reported cases of force rape of incest.

Very truly yours,

FRANCIS X. BELLOTTI
Attorney General

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9My opinion to you with respect to expenditures for the Department’s Emergency Assistance Program, another federal-state welfare program, does not apply to this case. 1976/1977 Op. Atty Gen. No. 20. There, you asked whether a federal court order holding invalid a recent state statute restricting state expenditures for the program required you to withdraw from it entirely in order to implement the offending statutory provision. In that case the court order had altered the situation which the Legislature has faced in enacting the statute, and I was asked to interpret the legislative intent in light of the judicial order. In the present situation there is no comparable judicial determination. It is true that on July 28, 1978, a judge of the Federal District Court for the District of Massachusetts enjoined the implementation of St. 1978 bursed abortions authorized by Section 299 of Public Law 95-205, 91 Stat. 1460, commonly known as the Hyde Amendment. See Jaffe v. Sharp, C.A. No. 78-1637-C (D. Mass., order for preliminary injunction, dated July 28, 1978); Preterm, Inc. v. Dukakis, C.A. No. 78-1633-C (D. Mass. order, dated July 28, 1978). However, neither the district court’s preliminary injunction nor its subsequent enlargement by the First Circuit Court of Appeals affects the questions you have presented because the injunction did not take effect until August 1, 1978. Of course the courts’ injunctive orders apply to your implementation of Item 4402-5000 after that date.

10In that case, the court was faced with a claim by providers that the Commonwealth had failed to pay promptly for services rendered to eligible Medicaid recipients, resulting from the lack of appropriated funds sufficient to meet Medicaid expenses. Id. at 1058. The Court first ruled that the plaintiff providers had standing to challenge the Commonwealth’s alleged failure to comply with federal Medicaid requirements regarding payment for services, and then held that the Medicaid statutes, 42 U.S.C. §§1396 et seq., entitled plaintiffs to full and prompt payment by the state for the hospital inpatient services involved in the case. Id. at 1062. The court entered a declaration that the Commonwealth’s failure to pay providers for services rendered under the Medicaid program violated the Social Security Act and the supremacy clause of the United States Constitution. Id. at 1057. Additionally, the court noted as follows:

It appears that the ... requirement for full and prompt payment to providers is embodied in the formal statutory structure of the Massachusetts Medicaid law. Mass. G
You have requested my opinion whether you may refrain from implementing certain provisions of St. 1978, c. 4 (c.4), which was enacted as a reaction to the severe snowstorm of February, 1978. Chapter 4 amends the Commonwealth's unemployment compensation law, G.L. c. 151A, by waiving the ordinary prohibition against receiving benefits during the first week of unemployment for persons unable to work and unpaid because of the storm. The specific provisions in c. 4 which concern you related to the manner in which the benefits are charged to employers. The Regional Administrator For Employment and Training of the United States Department of Labor (DOL) has interpreted these portions of c. 4 as inconsistent with the Federal Unemployment Tax Act. For the reasons which follow, I conclude that you may not refrain from implementing those disputed provisions of c. 4 at the present time.

The unemployment benefits system is a cooperative venture between the states and the federal government. See Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 363-364 (1939) citing Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937) (focusing on provisions of the Social Security Act from which the current provisions of the Federal Unemployment Tax Act were derived). Unemployment benefits are financed by taxes imposed on employers by both the states and the federal government. States are given wide latitude in determining what type of employment compensation system they will establish. See Steward Machine Co., supra, 301 U.S. at 592-595; see also Howes Brothers Co. v. Unemployment Compensation Commission, 296 Mass. 275, 294 (1931). However, as an inducement for states to develop sound, effective unemployment programs, Congress has

G.L. c. 151A, §23

You have provided me with a copy of a letter dated April 27, 1978 from Region I Administrator Luis Sepulveda to you. References to the Regional Administrator's interpretation made later in this opinion refer to this letter.

established financial incentives to states whose systems conform to federal statutory standards. See Steward Machine Co., supra, 301 U.S. at 575, 594.

The most significant of these incentives provides a credit against federal unemployment taxes for employers who also pay into a state system which the Secretary of Labor has deemed to be consistent with the Federal Unemployment Tax Act requirements. I.R.C. §§ 3302(a), (c); 3304. In addition, employers are eligible for further tax credits if the Secretary of Labor finds that the state law includes a valid "experience rating" system under which variations in an employer's tax rate bear a direct relation to his employment risk experience. I.R.C. §§ 3302, 3303. This "additional credit allowance" provision constitutes the focal point of your inquiry.

General Laws, c. 151A establishes an experience rating system determined valid by the Secretary of Labor, at least prior to the enactment of c. 4. Under the system, employers' state taxes are paid into a state unemployment compensation fund from which all benefits are then paid. The fund is divided, for bookkeeping purposes, into two types of accounts: individual employer accounts and solvency account. G.L. c. 151A, § 14(c). When benefits are paid for unemployment which is in some sense attributable or "chargeable" to a particular employer (e.g., due to layoffs), the employer's account is charged and his "experience rating," which may in turn vary his tax rate, is affected. G.L. c. 151A, §14(d). When benefits are not chargeable to a particular employer (e.g., when a worker involuntarily leaves through no fault of the employer), the general solvency account is charged. G.L. c. 151A, §14(e). With several minor exceptions not here relevant, the cost of funding the solvency account is shared by all employers.

In authorizing unemployment benefits for storm victims, c. 4 addresses the problem of how those benefits would be charged. Specifically, it states that storm-related benefits are to be charged to the solvency account, but "... only to those employers who did not pay their employees" during the storm week. By letter dated April 27, 1978, the Regional Administrator informed you that he construes the statute's quoted proviso (see n. 7) to require that only certain employers, i.e., those who did not pay their employees during the storm week, bear the cost of charges made to the solvency account. He further stated that he considers the proviso to be inconsistent with I.R.C. §3303(a)(1), which he interprets to prohibit solvency account charges from being imposed on only a certain class of employers.

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1 Federal unemployment taxes are presently set at either 1.2 or 1.4 percent of an employer's payroll. I.R.C. § 3301.

2 The fund consists of employers' contributions and some federal moneys relating to certain special benefits programs. There See G.L. c. 151A, §§14(c)(8) and (6).

3 The relevant portion of the statute is found in c. 4, §1:

All payments for the [storm] period, ... to employees made eligible for benefits because of [the storm] or to employees otherwise experiencing total or partial unemployment because of severe weather conditions, ... shall be charged to the solvency account established pursuant to [G.L. c. 151A, §14], provided, further, that notwithstanding the provisions of [G.L. c. 151A, §14], any additional amount charged to the solvency account pursuant to the provisions of this Act shall, subject to the rules and regulations of the Division of Employment Security, be chargeable only to those employers who did not pay their employees for the [storm] period on any part thereof who could not work because of severe weather conditions.

Chapter 4 originated as Mass. S. 1534, proposed by the Governor. This bill provided that storm-related benefits would be charged simply to the solvency account. The proviso quoted above was added on the floor of the House of Representatives. DOL is required to assess the conformity of any new state unemployment statute with the conditions governing the additional credit allowance set forth in I.R.C. §3303(a). See id., §3303(d)(3); 20 C.R. §§601, et seq. As discussed below, the federal assessment begins with the Regional Administrator. See p. 9, n. 12, infra.
In his view, no differentiation among employers can be made for solvency account charges.9

Your question is whether, in view of the Regional Administrator's interpretation of c. 4, you can refrain from implementing the two provisions which he considers to conflict with federal law.10 As a general matter officials of the executive branch of the Commonwealth are required to carry out state legislative mandate. See Opinion of the Justices, Mass. Adv. Sh. (1978) 1412, 1421; Opinion of the Justices, Mass. Adv. Sh. (1978) 1811, 1814; G.L. c. 29, §26. It is not usually within their province to refuse to implement statutes they believe to be unconstitutional or otherwise invalid. Assessors of Haverhill v. New England Telephone & Telegraph Co., 332 Mass. 357, 362 (1955). However, where a court of competent jurisdiction finds that a state legislative mandate conflicts with federal law, the state law must give way under the Supremacy Clause of the United States Constitution.11 In such a case, state officials would have to refrain from implementing the state statute or at least the invalid portions of it.

In cooperative federal-state programs such as the unemployment compensation system, federal law is binding only if the state elects to participate in the scheme. See Townsend v. Swank, 404 U.S. 282 (1971). If a court finds state and federal law to conflict in such a situation, the state could avoid the conflict by withdrawing from the federal program and continuing to implement the state law. Alternatively, the state statute might be subject to a construction which avoids the Supremacy Clause conflict and permits the state to remain in the federal program. The appropriateness of these alternatives is likely to turn on an analysis of legislative intent: did the state Legislature intend to withdraw from the federal program if necessary to save the offending provision of state law? See 1976/77 Op. Atty. Gen. No. 20 at 5-6.12


9The Regional Administrator has also interpreted inconsistent with I.R.C. §3303(a)(1) a provision of c. 4 directing that the solvency account be charged for benefits paid to persons who have "reopened" unemployment claims because of the snowstorm. Whenever employees receive benefits for two distinct periods of unemployment within a calendar year, the Regional Administrator takes the position that the second set of benefits must be charged to their employers' accounts and not to the solvency account. Thus, benefits paid to persons who had collected benefits within a year of the storm, had resumed working and then had been forced into partial or total unemployment again because of the storm, must, according to the Regional Administrator, be charged to their employers' accounts to satisfy federal law.

10Implicit in your opinion request is the question of whether c. 4 conflicts with G.L. c. 151A and thereby can be ignored by the Director of the Division of Employment Security. It is a fundamental principle of statutory construction that statutory provisions must be reconciled where possible so as "to accomplish harmoniously the legislative purpose." Doliny v. Planning Board of Mills, 343 Mass. 1, 5 (1961). However, you imply that c. 4 and the provisions of c. 151A are contradictory. See p. 4, supra. In such circumstances, the general statute (c. 151A) would yield to the specific statute (c. 4), particularly where the specific statute is the more recent of the two, Pereira v. New England LNG Co., Inc., 364 Mass. 109, 118 (1973); see Island Properties, Inc. v. Martha's Vineyard Comm'n, Mass. Adv. Sh. (1977) 555, 557. Thus, c. 4 must be enforced by the Director of the Division of Employment Security if it becomes necessary to do so because the state statute and federal statute conflict with G.L. c. 151A.


12The cited opinion was rendered to the Commissioner of Public Welfare in connection with a ruling by a federal judge that certain provisions of the Commonwealth's Aid to Families with Dependent Children (AFDC) statute (G.L. c. 118, were unconstitutional under the Supremacy Clause as long as the state participated in the federal AFDC program under 42 U.S.C. §601 et seq. The Commissioner asked my opinion whether he was required to withdraw from the federal program in order to carry out the offending section of c. 118. I concluded that G.L. c. 118 taken as a whole evinced an overriding legislative mandate to obtain the maximum available federal financial participation in state run welfare programs, and the specific provision found invalid contained no language to indicate a contrary intent. In these circumstances, I ruled that the Commissioner possessed the authority not to implement the unconstitutional provisions of state law and thereby protect the state's ability to obtain federal funds for its AFDC program.
(1976) 1064, 1068-1071; see also St. 1977, c. 720; St. 1971, c. 940 (both amending G.L. c. 151A for express purpose of conformity with federal law). However, in contrast to the facts surrounding the earlier opinion (see n. 12 supra), there is not yet a sufficiently clear indication that c. 4 conflicts with federal law. Accordingly, at the present time it is not necessary to choose between the general statutory intent of G.L. c. 151A to remain in conformity with federal law and the specific intent of c. 4.

The process by which the Labor Department assesses the conformity of state and federal law is set out in I.R.C. §3303(b) (3):

The Secretary of Labor shall, within 30 days after any State law is submitted to him for such purpose, certify to the State agency his findings [as to conformity]. After making such findings, the Secretary of Labor shall not withhold his certification ... of such State law ... unless, after reasonable notice and an opportunity for hearing to the State agency, the Secretary of Labor finds that the State law no longer contains the provisions specified in subsection (a) or the State has ... failed to comply substantially with any provision.

This provision should be read in conjunction with the accompanying regulations promulgated by the Secretary of Labor, 20 C.F.R. §§601 et seq. (1977), as amended by 43 Fed. Reg. 13,828 (March 31, 1978).13

To characterize the Regional Administrator’s interpretation of c. 4 as final would be inconsistent with the review process established by §3303(b) and the regulations promulgated thereunder. It seems that DOL review of c. 4 ceased just prior to the point at which matters are to be presented to the Secretary,14 and the Regional Administrator’s interpretation cannot be considered a certification of the Secretary within the meaning of I.R.C. §3303(b) (3).

Moreover, treating the Regional Administrator’s interpretation as final would contravene the principle that administrative decisions are not deemed final unless a judicial appeal may appropriately be taken from them. See Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970). Under the Federal Unemployment Tax Act a state may not bring a court appeal until the Secretary himself has determined to withhold certification of the state’s law. I.R.C. §§3310; see id. §3303(b).

In these still fluid circumstances, I must advise you that you have an obligation at present to carry out the express intent of the Legislative clearly set forth in c. 4 Opinion of the Justices, Mass. Adv. Sh. (1978) 1412, 1421.

13 The Regional Administrator’s April 27, 1978, letter to you appears to represent only the position of the Employment and Training Administration, and not of the Secretary. The letter makes no mention that the matter has been referred to Secretary, and indeed suggests that the state and federal officials were seeking to resolve the problem so that it would not need to reach the Secretarial level.

14 Under the cited regulations, states seeking approval of experience rating systems submit a copy of their law to the Regional Administrator who reviews the law in conjunction with the Office of the Assistant Secretary for Employment and Training, Id. §§601.2(b), 601.3(b). “If questions are raised concerning such conformity, negotiations to resolve them are undertaken with state officials.” Id. §601.3(b). Only if those questions are not satisfactorily resolved is the issue presented to the Secretary. Id. If the Secretary is unable to certify that the state law conforms to federal law, he orders further negotiations with state officials, Id. §601.3(c). If these fail, he must offer the state agency an opportunity for a hearing at which it can present arguments on behalf of its law, Id. §601.5(b), (d); see S. Rep. No. 752, 91st Cong., 2nd Sess. (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 3606, 3640-3641. Finally, a state may appeal adverse decisions of the Secretary of Labor to the appropriate federal circuit court of appeals, I.R.C. §3310, with the court having full jurisdiction to review the Secretary’s findings of law. Cf. I.R.C. §3304(b), (c); S. Rep. No. 752, supra.
The question whether the express intent of c. 4 must, if ever, yield to the
general intent of c. 151A to remain in conformity with federal law must
await further action by DOL. For the foregoing reasons, I conclude that you do not have the authority
to refrain from implementing the provisions of c. 4 which the Regional Ad-
ministrator interprets as inconsistent with the additional credit provisions of
the Federal Unemployment Tax Act.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 7
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi;

By letter dated September 11, 1978, you have asked me whether the
following question is one of public policy in accordance with G.L. c.53, §19:

"Shall the Senator from this District be instructed to sup-
port and vote in favor of legislation providing for a mand-
datory deposit on containers in which malt beverages or
soft drinks are sold?"

It is my opinion that the question is an "important public question" in
which "every citizen of the Commonwealth has in interest" and is therefore
a question of "public policy" within the meaning of G.L. c.53, §19. See,
Consequently, the question may properly be included on the election ballot
in the Senatorial District which you have mentioned, namely, the 2nd
Worcester.

You have further requested that I supply your office with a simple, une-
quivocal and adequate form of the question best suited for presentation on
the ballot. In my opinion, the question should be printed in the form in
which it was submitted to you.

15This is not to suggest that a finding of c. 4's nonconformity with federal law can be considered final only after all possible
 avenues of administrative and judicial appeal are exhausted. The Division itself should exercise its discretion in deciding
 whether to request a hearing to dispute an adverse finding by the Secretary, keeping in mind the intent of the Legislature. As to
 judicial review available under I.R.C. §3310, as legal representative of the Division, G.L. c. 151A, §42A, I am responsible for
deciding whether to appeal.
Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

September 29, 1978

Number 8
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:
By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c. 53, §19:

"Should the State Representative be instructed to oppose the Charter Revision changes as proposed by the town meeting and support the development of a charter commission for the town of Saugus?"


Although the proposal involved in the question is certainly an important question in the Town of Saugus, it cannot be said that it is a question in which "every citizen of the Commonwealth has an interest." Id. Furthermore, the laws authorizing charter revisions by town charter commissions provide for such revisions by vote of a town meeting. They do not contemplate legislative involvement in the process of charter revision by a town charter commission. See, Const. Amend. Art. 2, 89; G.L. c.43B, §§1 et seg.

I am therefore of the opinion that the question does not meet the requirements of G.L. c.53, §19, and should not be included on the election ballot in the 9th Essex Representative District.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 9
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

"Shall the Representative from the District be instructed to vote to approve passage of a bill which:

(A) Sets a property tax limit of 2½% of full cash value as the maximum property tax.

(B) limits authority of the State Legislature and the State Treasurer to impose and assess costs on Cities and Towns unless the State provides full financing for its programs, including State Aid to Education.

(C) amends school fiscal autonomy to allow the reduction or deletion of increases in school budgets by a two-thirds vote of town meeting or city council.

(D) establishes a maximum limit on State Tax Revenue each year. The percentage increase in State Tax Revenue shall be limited to the percentage increase in total Massachusetts personal income?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote to approve the passage of a bill which: (a) sets a property tax limit of two and one half percent (2½%) of the full cash value as the maximum property tax; (b) limits the authority of the state to impose and assess costs on municipalities, including educational assessments, unless
full state funding is provided; (c) limits the fiscal autonomy of schools by allowing the reduction or deletion of increases in school budgets upon a two-thirds vote of the town meeting or city council; (d) establishes a maximum yearly limit on state tax revenue and provides that the percentage increase in such revenue be limited to the percentage increase in the total personal income of Massachusetts?"

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 10
The Honorable Paul Guzi
Secretary of the Commonwealth
State House
Boston Massachusetts 02133

Dear Secretary Guzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

"Shall the Senator from this District be instructed to vote to approve the passage of a bill requiring the reduction and limitation of local property taxes by substituting revenue from state taxes; and providing that all state and local taxes combined shall not take a larger percentage of the total personal income in Massachusetts than the average percentage taken in the three year period immediately preceding approval?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the form in which it was submitted to you.
Very truly yours

FRANCIS X. BELLOTTI
Attorney General

Number 11
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

“Shall the Representative from this District be instructed to vote for the passage of a bill requiring that before an elementary school is closed, a Neighborhood Impact Statement describing all alternatives to the closing and the impact of the closing on the affected neighborhood must be prepared?”


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the form in which it was submitted to you.

Very truly yours,

FRANCIS X. BELLOTTI
Attorney General

Number 12
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter date September 11, 1978, you have asked me whether the follow-
ing question is one of public policy in accordance with G.L. c.53, §19:

“Do you favor a moratorium on the construction of nuclear power plants until safe methods of waste disposal are devised?”


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation of the ballot. In my opinion, the question should be printed on the ballot in the following form:

“Shall the Representative from this District be instructed to vote in favor of the passage of a measure which would require a moratorium on the construction of nuclear power plants until safe methods of waste disposal are devised?”

Very Truly Yours
FRANCIS X. BELLOTTI
Attorney General

Number 13
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

“Shall the Representative from this District be instructed to vote for legislation assuring citizens clean air by restricting smoking to separate and clearly posted areas in enclosed places by the general public, with fines for non-compliance?”


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote for the passage of legislation which would assure citizens clean air by restricting smoking by the general public to separate and clearly posted areas and which would provide for fines in the event of non-compliance?"

Very truly yours,

FRANCIS X. BELLOTTI
Attorney General

Number 14
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

"Shall the Representative from this District be instructed to vote in favor of legislation to require the democratic selection of all legislative leadership, committee chairpersons, and committee members, within the Massachusetts House of Representatives, to require an open vote to be taken on every bill, and to require that legislative salaries be based on recommendations by a citizen panel?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation of the ballot. In my opinion, the question should be printed on the ballot in the
following form:

"Shall the Representative from this District be instructed to vote in favor of legislation which would require the democratic selection of all legislative leadership, committee chairpersons and committee members within the Massachusetts House of Representatives, the taking of an open vote on every bill, and the fixing of legislative salaries on recommendations by a citizen panel?"

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 15

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

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c. 53, §19:

"Shall the Representative from this District be instructed to vote for the passage of a bill which makes youth employment, with affirmative action concentrating on low income youth, a top priority for immediate state action with the creation of 10,000 new, productive jobs for youth by the end of 1979, through the use of three percent increase in the corporate profits tax and through all available federal resources, and with the development of a plan and timetable for achieving full employment for youth within five years?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed in the form in which it was submitted to you.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General
Number 16

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

"Should Amesbury allow a resource recovery plant (trash incinerator) to be built?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote for the passage of a measure which would allow a resource recovery plant (trash incinerator) to be built in the town of Amesbury?"

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 17

The Honorable Paul Guzzi
Secretary to the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the
following question is one of public policy in accordance with G.L. c.53, §19;

"Should Amesbury allow a landfill (dump) larger than needed to dispose of its own solid waste?"

While the proposal involved in the question encompasses a small area geographically, the problem of solid waste disposal is one of concern to the Commonwealth in general. In addition, the provisions of G.L. c.53, §19 have consistently been given a broad interpretation in prior opinions of the Attorney General. See, e.g., 1974/75 Op. Atty. Gen. No. 11 at 54; 1966/67 Op. Atty. Gen. No. 34 at 77.


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote for the passage of a measure which would allow a landfill (dump) in Amesbury larger than that needed to dispose of the town's solid waste?"

Very truly yours
FRANCIS X. BELLOTTI
Attorney General

Number 18
The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letter dated September 11, 1978, you have asked me whether the following question is one of public policy in accordance with G.L. c.53, §19:

"Do you support a moratorium on the MBTA Red-Line Extension through Cambridge pending further study of the environmental impact of a terminus at Alewife, the need to use
Russell Field as a staging area and the effects of noise, dust and air pollution?"


You have further requested that I supply your office with a simple, unequivocal and adequate form of the question best suited for presentation on the ballot. In my opinion, the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote in support of the passage of a measure requiring a moratorium on the MBTA Red-Line Extension through Cambridge pending further study of the environmental impact of a terminus at Alewife, the need to use Russell Field as a staging area and the effects of noise, dust and air pollution?"

Very truly yours,

FRANCIS X. BELLOTTI
Attorney General

Number 19

Hon. Thaddeus Buczko
State Auditor
State House, Room 209
Boston, Massachusetts 02133

Dear Mr. Buczko:

You have requested my opinion concerning the scope of your obligation and authority under G.L. c. 10, §45, to conduct audits of the State Election Campaign Fund (SECF).¹

¹The SECF is established as a separated fund on the books of the Commonwealth pursuant to G.L. c.10, §42 (added by St. 1975, c.774). The fund consists of revenues which the Commonwealth receives as a result of voluntary taxpayer contributions to public financing of statewide election campaigns under G.L. c.62, §6C (also added by St. 1975, c.774). Pursuant to G.L. c. 10, §45 (also added by St. 1975, c. 774), the State Auditor is to conduct a post-audit of "all accounts and transactions involving" the SECF.
Specifically, you ask whether you may conduct audits of the depository accounts of candidates who have received “limited public financing” in the form of monies from the SECF pursuant to G.L. c.10, §44 and c. 55A.

An analysis of the relevant statutes and case law leads me to conclude that you are required to conduct audits of the SECF itself, the primary election account, the state election account, and all primary and state election candidate accounts other than those involving candidates for state auditor. You are neither obligated nor required, however, to audit the depository accounts of individual candidates who have received public financing from the SECF; that authority rests with the Director of the Office of Campaign and Political Finance. My reasons are set forth below.

Chapter 774 of the Acts of 1975, enacting G.L. c.10, §§42-45, c.55A, and c.62, §6C, creates a system for providing limited public financing of statewide political campaigns. This public financing is available to primary and state election candidates for statewide office who (1) have qualified for the ballot, (2) are opposed by ballot-qualified candidates running in the same election, (3) have filed a request for public financing with the Director of Campaign and Political Finance, and (4) have received the required level of qualifying contributions as established by G.L. c.55A, §§4 and 6. The actual funds distributed to such eligible candidates originally come from the SECF.

Under the scheme set forth in St. 1975, c. 774, the Comptroller of the Commonwealth divides the SECF into a “primary election account” and a “state election account” on June 30 of every year in which a statewide election is to be held. G.L. c. 10, §43. He then further subdivides these two accounts into as many accounts as there are candidates for statewide elective office who are eligible for public campaign financing (primary candidate accounts and state election candidate accounts). Id. These various candidate accounts are then credited with portions of the primary election and state election accounts according to a statutory formula. Id.

At specified times before the primary and statewide elections, the State Treasurer is required to distribute funds from each primary and state election candidate account to the specific depository account which has been designated by each qualifying candidate. G.L. c.10, §4; see G.L. c.55A, §§5 and 7. The amounts to be distributed are determined and certified to the Treasurer by the Director of Campaign and Political Finance. Id. Once received by the candidate’s depository account, the funds may be used to defray legitimate campaign expenses, see G.L. c.55A, §9; p c. 55, §6. Any unexpended funds are to be returned to the Commonwealth or, in the case of primary election funds, are to be credited against the amount available to the candidate for the general election. G.L. c. 55A, §9; c. 10, §44.

1 Candidates for statewide and county offices must designate a bank or trust company as their depository upon becoming a candidate. G.L. c. 55, §19. Only candidates for statewide office are eligible to receive funds from the SECF. See G.L. c.10, §42; c. 55A, §54, 6.

2 The primary election account, state election account, and primary and state election candidate accounts are established by G.L. c. 10, §43 (added by St. 1975, c. 774).

3 With respect to these candidates’ accounts, the post-audit functions you normally perform are committed to the Comptroller. I express no view as to whether his authority to audit “the accounts and transactions of any candidate for state auditor” extends to an audit of depository accounts. See 10-11 N 12 infra.

4 See G.L. c. 55, §3, for a description of the Director’s position and of the duties which he performs.

5 As mentioned above, the SECF itself is made up of taxpayer contributions. See n. 1 supra.
Your question relates to your authority to audit the various accounts that are established pursuant to the statutory scheme described above. In answering it I have considered in turn (1) the statutes and case law which define the general authority and responsibilities of the State Auditor, and (2) the specific statute describing the Auditor’s duties with respect to the new public campaign financing system.

The State Auditor’s basic functions and authority are defined in G.L. c. 11, §12, which reads in relevant part:

The department of the state auditor should make an audit as often as the state auditor determines it necessary, but in no event less than once in every two years of the accounts of all departments, offices, commissions, institutions, and activities of the commonwealth, including those of districts and authorities created by the general court . . . [Emphasis supplied.]

Judicial and Attorney General opinions considering the Auditor’s powers in light of this section have established that in general the Auditor is responsible only for auditing funds held in accounts of the Commonwealth, its agencies and departments, and of political entities established by the Legislature; accounts of private persons or organizations, even though the organizations may perform public functions or in certain circumstances may come under control of the state, are not, without more, subject to state audit. See Auditor of the Commonwealth v. Trustees of Boston Elev. Ry., 312 Mass. 74 82 (1942); 1940 Op. Atty. Gen. at 64; 1939 Op. Atty. Gen. at 117, 118; 1931 Op. Atty. Gen. at 94,95. Rather, as some of the cited opinions and other statutory provisions suggest, specific authority must be vested by the Legislature in the Auditor to permit his unilateral exercise of jurisdiction over private individuals or corporations. See 1931 Op. Atty. Gen. 94, 95; see also G.L. c.11, §12, seventh sentence (expressly authorizing Auditor to examine records of Department of Public Welfare vendors); cf. 1976/77 Op. Atty. Gen. No. 13 (consent of private educational entity to be audited by State Auditor).

Under the interpretation of G.L. c. 11, §12 which these opinions have established, I believe it clear that the State Auditor is responsible for auditing the SECF itself, since it is specifically defined as a fund on the books of the Commonwealth. G.L. c. 10, §42. He is also required to audit the primary and state election accounts as well as the primary and state election candidate accounts; all these accounts are created and controlled by the Comptroller and Treasurer of the Commonwealth respectively, and thus qualify as accounts “of offices . . . of the Commonwealth.” G.L. c.11, §12.

The depository accounts of the individual candidates who receive public campaign financing, however, do not fall into the same category. Every candidate for statewide or county elective office is required to set up such an account in order to receive and hold campaign contributions made to them by private individuals or organizations, see G.L. c. 55, §19. The depository accounts may also hold funds distributed by the State Treasurer from the primary and state election candidate accounts, see G.L. c. 10, §44, and are subject to inspection and regulation by the Commonwealth’s Director of
Campaign and Political Finance. Nevertheless, these facts alone do not bring the accounts within the scope of G.L. c.11, §12, since they do not appear to be accounts of the Commonwealth or of its departments, commissions, districts or authorities. Cf. Auditor of the Commonwealth v. Boston Elev. Ry., supra, 312 Mass. at 77, 82-83.

The question that remains is whether G.L. c. 10, §45, which defines the State Auditor’s role in the public campaign financing scheme, serves to enlarge the Auditor’s authority in that specific area. Section 45 provides as follows:

The state auditor shall conduct a post-audit of all accounts and transactions involving the state election campaign fund for any year in which elections are held for statewide elective office and shall conduct such other special audits and post-audits as he may deem necessary. The state auditor shall publish a report of any post-audit required by this section on or before April first of the year following any year in which elections are held for statewide elective office. The comptroller shall conduct a post-audit of the accounts and transactions of any candidate for state auditor. [Emphasis supplied.]

In my view, the critical language of §45 is the phrase, “accounts and transactions involving the state election campaign fund . . .” Unfortunately, its scope is ambiguous. Place in context, however, its meaning emerges. First, the quoted phrase shows an intent that the state Auditor audit the SECF and the accounts into which it is divided by the Comptroller, namely, the primary and state election accounts and the primary and state election candidate accounts. What remains unsettled is whether the phrase should also be read to include the depository accounts of candidates who receive limited public financing, since such public funds originally derive from the SECF. I have concluded that such an expansive construction of §45 would not be appropriate; when §45 is read in conjunction with the statutory provision defining the duties of the Director of Campaign and Political Finance (Director) in the area of public campaign financing, it becomes evident that the Director and not the State Auditor is the proper official to audit these depository accounts.

The Director plays a central role in the administration of the public campaign financing system created by St. 1975, c. 774. He determines and certifies to the Treasurer the candidates eligible for public financing as well as the specific amounts of public financing to which each is entitled. G.L. c. 55A, §§3-7; c. 10, §44. More pertinent to your question, every candidate must file a statement with the Director within two weeks of a primary or state election “showing the balance remaining in the candidate’s depository account as of the primary or state election less any reserve necessary to cover

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1. The Director’s regulatory responsibilities concerning public campaign financing are treated below at 8-9, infra.
3. Finally, the statute requires the Director to promulgate “such rules and regulations as are necessary to effectuate the purpose of [G.L. c. 55A] .” G.L. c. 55A, §11.
[certain defined debts],” and must return a portion of the surplus balance, if any, to the SECF. G.L. c. 55A, §8. The Director is expressly empowered “to investigate the legality, validity, completeness and accuracy” of these depository account balance statements or reports, G.L. c. 55A, §11, and he is also authorized to compel candidates to repay surplus or improperly used public campaign funds to the SECF. Id., §§3, 8, 9.9

The broad powers which the Legislature has granted to the Director to monitor and investigate individual candidates’ use of public campaign funds in G.L. c. 55A must be read to include implicitly the power to audit each candidate’s depository account, since it appears that an audit would be a necessary step for the Director to take in the course of determining whether the candidate has received excess public financing or has used the public funds for improper purposes. See G.L. c. 55A, §9.10 To construe G.L. c. 10, §45 as requiring that the State Auditor also audit all individual depository accounts of candidates receiving public financing, would create an unnecessary overlap in jurisdiction between the two officers and prevent the effective administration of the public campaign financing scheme. Such a construction, therefore, should be avoided. See, e.g., Hein-Werner Corp. v. Jackson Industries, Inc., 364 Mass. 523, 528 (1974).

Moreover, given the close identity in subject matter, the public campaign financing system set forth in St. 1975, c. 774 should be read in relation to and harmony with G.L. c. 55, the Commonwealth’s campaign and political finance law. See n. 8 supra, and cases cited.11 Under G.L. c. 55, the Director is responsible for investigating all financial reports of political candidates, see id., §3; cf. 1977/1978 Op. Atty. Gen. No. 27; cf. also 1976/1977 Op. Atty. Gen. No. 38. The State Auditor does not play a role in the process. A more harmonious and sensible administrative system results from interpreting the relevant portions of St. 1975, c. 774, in a similar fashion, entrusting the Director with the responsibility to audit individual candidates’ receipt and use of the public campaign monies distributed from the SECF, and the Auditor with the duty to audit all accounts which hold SECF funds and are in the control of state officials. cf., e.g., Dedham v. Labor Relations Comm’n, 365 Mass. 392, 402 (1974); School Comm. of Gloucester v. Gloucester, 324 Mass. 209, 212 (1949); cf. also Thacher v. Secretary of the Commonwealth, 250 Mass. 188, 190 (1924).12

In summary, both the general provisions of G.L. c. 11, §12, and the specific terms of G.L. c. 10, §45, indicate that under the public campaign

*Finally, the statute requires the Director to promulgate "such rules and regulations as are necessary to effectuate the purposes of [G.L. c. 55A]." G.L. c. 55A, §11.

This conclusion is reinforced by the position taken by your Department on the function and purpose of an audit of a public fund such as the SECF. As explained in the memorandum you submitted to me with your opinion request, the Department of the State Auditor views such an audit as encompassing at least (a) a financial accounting of the monies in the fund, and (b) a compliance accounting of those monies. In order to fulfill the mandate defined in G.L. c. 55A, §9, the Director would clearly be required to perform these two tasks.

*Indeed, G.L. c. 55A, §11, appears to call directly for a parallel reading of the two statutes insofar as the Director is concerned, by stating that the Director's investigatory powers under the public campaign financing statute, G.L. c. 55A, are to be the same as under the campaign and political contribution statute, G.L. c. 55A, §3.

*One additional observation about G.L. c. 10, §45 is called for. As indicated above, I believe the language of this section is ambiguous. The ambiguity is exacerbated by the last sentence of §45, which directs the Comptroller to conduct "a post-audit of the accounts transactions of any candidate for state auditor." This sentence could be read to mean that the Comptroller is not conduct audits of all accounts of every candidate for State Auditor, including depository accounts. I need not and do not resolve this question of statutory interpretation at the present time, however. The different language used by the Legislature in §45 to describe the Auditor's and Comptroller's respective post-audit duties suggests, if anything, that the scope of the Auditor's review is narrower than the Comptroller's and is not intended to encompass individual candidates' accounts. Cf. Nealon v. Gordon, Mass. Adv. Sh. (1977) 1701, 1706; Wood v. Commissioner of Correction, supra, 363 Mass. at 83.
finance system established by St. 1975, c. 774, the State Auditor is responsible for auditing the SECF and the various accounts into which it is divided by the Comptroller and held by the State Treasurer. The Auditor does not have the duty or authority to audit the depository accounts of political candidates into which the SECF monies are ultimately placed. The duty to regulate these depository accounts, which includes the power of audit, lies with the Director of Campaign and Political Finance.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 20
John Larkin, Chairman
Alcoholic Beverages Control Commission
100 Cambridge Street
Boston, MA 02202

Dear Mr. Larkin:

You have requested my opinion whether the holder of a liquor license may, under the provisions of G.L. c. 138, § 23, pledge that license to the Commonwealth’s Department or Commissioner of Revenue to secure the payment of Massachusetts taxes owed by the licensee to the Commonwealth. ¹ General Laws, c. 138, § 23 provides in relevant part:

Any license granted under the provisions of this chapter may be pledged by the licensee for a loan, provided approval of such loan and pledge is given by the local licensing authority and the [Alcoholic Beverages Control] commission. Such pledge shall not be construed so as to affect the right of such local licensing authority or the commission to suspend, revoke, or otherwise regulate such license, as provided by this chapter.

For the reasons which follow, it is my opinion that § 23 does not authorize the pledge of a liquor license to the Department or Commissioner of Revenue to secure the payment of taxes owed to the Commonwealth.²

General principles of statutory interpretation dictate that when words or phrases used in a statute are not specifically defined, they are to be given their ordinary meaning and construed according to their natural import and approved usage. E.g., Burke v. Chief of Police of Newton, Mass. Adv. Sh. (1978) 425, 427; Commonwealth v. Zone Book, Inc., Mass. Adv. Sh. (1977) 743, 746; Board of Education v. Assessor of Worcester, 368 Mass. 511, 513 (1975); Randall’s Case, 331 Mass 383, 385 (1954). The relevant provision of

¹ You have provided this Department with a legal memorandum addressing the question you raise. The Department of Revenue was also given the opportunity to file a memorandum, but has not done so.
² In a January 4, 1978 report to the Governor, I suggested the implementation of a program coordinating the collection efforts of what was then the Department of Corporations and Taxation and the licensing activities of the Alcoholic Beverages Control Commission. The conclusion I reach in this opinion concerning the pledge of a license to secure the payment of taxes does not signal that I am no longer interested in the development of such a program. On the contrary, I remain convinced that a cooperative effort between the two agencies is essential to effective tax collection and merely conclude that the particular mechanism described in your opinion request is not authorized by G.L. c. 138, § 23.
G.L. c. 138, § 23 in terms permits the pledging of a license for a "loan." As commonly defined and construed by the courts, a loan in substance constitutes the delivery of sum of money to another under a contract to return the equivalent amount, with or without an additional sum agreed upon for its use, at some future time. E.g., Rochester Capitol Leasing Corp. v. V. & L. Litho Corp., 13 C.A. 3d 697, 91 Cal Rptr. 827, 830 (Ct. App. 1970); Kline v. Robinson, 83 Nev. 244, 428 P.2d 190, 194 (1976); See Liberty Nat'l Bank & Trust Co. v. Travelers Indem. Co., 58 Misc. 2d 443, 295 N.Y.S.2d 983, 986 (1968). The dictionary defines a loan as "something lent for the borrower's temporary use on the condition that it or its equivalent be returned." Webster's Third New International Dictionary (1964).

Thus, a salient characteristic of the loan is the transfer of funds or other items of value to the borrower under a promise to return them at some future time. In my opinion, neither the creation of a tax liability to the Commonwealth nor the Commonwealth's forebearance from collecting taxes constitutes a loan to a liquor licensee. No funds are transferred or otherwise extended to the licensee. The initial tax liability does not arise because the licensee has borrowed anything from the state, but is instead a liability which arises by operation of law.

The language of G.L. c. 138, §23 itself supports the conclusion the pledge of a liquor license to secure the payment of taxes was not contemplated. Section 23 requires approval of both the loan and the pledge of the license by the local licensing authority and the Alcoholic Beverages Control Commission. However, since a person's tax liability arises as matter of law, neither the local licensing authority nor the Commission can have a role in approving the creation, existence or any modification of that liability. The portion of the statute requiring approval of the loan would thus have no meaning if tax liability were considered a loan. A construction which renders meaningless any part of a statute is to be avoided. See, e.g., Commonwealth v. Mercy Hospital, 364 Mass. 515, 521 (1974); Insurance Rating Board v. Commissioner of Ins., 356 Mass. 184, 189 (1969); cf. Board of Appeals of Hanover v. Housing Appeals Committee in the Dept. of Comm'y Affairs, 363 Mass. 339, 355 (1973).

Nothing suggests an intent by the Legislature to give the "loan" language of § 23 so expansive a construction as to encompass security for the payment of taxes. The limited statutory authorization to pledge a liquor license to secure a loan is an exception to the general policy, as enunciated in other paragraphs of G.L. c. 138 § 23, that a licensee does not have a property right in the document or paper which evidences the granting of the license. G.L. c. 138, § 23 ¶ 1, 2. See Opinion of the Justices, 349 Mass. 794, 797 (1965); Jubinville v. Jubinville, 313 Mass., 103, 106 (1943).

Moreover, I note that the Legislature has elsewhere provided the Department of Revenue with a broad set of administrative and judicial powers for the enforcement of tax liabilities. See G.L. c. 62C, §46 (incorporating tax collection remedies of lien, levy, imprisonment, and suit). The incongruity of permitting the pledge of a liquor license to deal with tax liabilities, in light of this extensive scheme, further negates an expansive construction of § 23.

For the foregoing reasons, it is my opinion that the language of G.L. c.
138, § 23 does not authorize the pledge of a liquor license to secure the payment of taxes owed to the Commonwealth by the licensee. It is thus unnecessary to consider whether independent considerations, such as a lack of authority of the Department of Revenue to hold a liquor license, would otherwise preclude such a pledge.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 21
Frank T. Keefe
Director of State Planning
One Ashburton Place
Boston, Massachusetts 02180

Dear Mr. Keefe:

You have requested my opinion as to whether a city or town may remove itself from a regional planning district established pursuant to G.L. c. 40B, § 3, without specific authorization for the Legislature. As your letter indicates, this question was the subject of a previous opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 305 (1966), and was answered in the negative. You ask whether the Home Rule Amendment, with its broad delegation of power to municipalities, now requires that the question be answered differently.

For the reasons outlined below, I follow and adopt the opinion of my predecessor as continuing to reflect the correct reading of the relevant statutes. In my view, a municipality which has joined a regional planning district pursuant to G.L. c. 40B, § 3, may not remove itself from the district at will and in the absence of legislative permission.

It is useful to begin by considering the function and duties of regional planning districts and the relationship of your office to them. Regional planning districts are primarily established pursuant to G.L. c. 40B § 3 or special act of the Legislature. They are composed of groups of cities and towns which vote to form a planning district, G.L. c. 40B, § 3. Each is governed by a regional planning commission consisting of one member of the planning board of each city and town in the district, id., § 4. The responsibilities of these districts and commissions include: (1) to study and develop "a comprehensive plan of development" for the district; id., § 5; and (2) to review all proposals for federal grants pertaining to the district and all federal environmental impact statements for projects within it. See e.g., id., § 4A. These functions are, you state, vital to the continuation of

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1 The Home Rule Amendment was adopted in 1966 as art. 89 of the Amendments to the Massachusetts Constitution, amending art. 2 of the Amendments.

2 The factual background of your question relates to a dispute between the Town of Granville and the Lower Pioneer Valley Regional Planning District. This district was formed under G.L. c. 40B, § 3. In March of 1970, Granville voted to become a member; on June 6, 1977 the town voted to withdraw its membership. At issue is whether Granville had the power to withdraw from the district on its own motion.

3 General Laws, c. 40B, §§ 9 and 10 provide for the formation of the Southeastern Regional Planning and Economic Development District. As discussed below, the Southeastern Planning District is distinct in several respects from the regional planning districts established under c. 40B, § 3. The description of planning districts in the text refers to the section 3 districts.

4 The districts perform many of these federal review functions as federally designated regional review clearinghouses.
certain federal aid to the Commonwealth. The Office of State Planning serves as the Commonwealth's liaison with all regional planning agencies established under G.L. c. 40B. You have thus requested this opinion in your capacity as director of the supervisory state agency for the regional planning districts.

General Laws, c. 40B, § 3 provides:

Any group of cities, towns, or cities and towns may, by vote of their respective city councils or town meetings, vote to become members of and thus establish a planning district, which shall constitute a public body corporate. After a planning district has been thus established, any other city or town within the district area as hereinafter defined may by vote of its city council or town meeting apply for admission. Upon the affirmative vote of two thirds of the representatives of the cities and towns comprising the district, said city or town shall become a member thereof. The area of jurisdiction of said district shall be an area defined or redefined as an effective regional planning region by the division of planning of the department of commerce and development. All rights, privileges and obligations applicable to the original members of the district shall be applicable to the new members.

The statute thus speaks in detail about the ability of a city or town to join a regional planning district and the process it is to follow in joining, but does not address the issue of removal from a district.

As indicated above, in 1966 the Attorney General issued an opinion concluding that in the absence of any provision in G.L. c. 40B, § 3 (or any other statute) for the withdrawal from or dissolution of a regional planning district, a city or town could only remove itself through legislative action. Rep. A.G., Pub. Doc. No. 12, at 305, 306 (1966). As a general matter, I adhere to my previously stated view that it is inappropriate to reconsider and reverse a prior opinion of the Attorney General unless there are compelling reasons for doing so. See 1975/76 Op. Atty. Gen. No. 77, Rep. A.G., Pub. Doc. No. 12, at 198, 199 (1976). I can find no compelling reason to conclude that the subsequently enacted Home Rule Amendment requires modification of the prior opinion issued on the question you have raised.


It is apparent that the legislative intent underlying c. 40B could be frustrated if the Home Rule Amendment were construed to allow municipalities the right to withdraw from regional districts at will. The
General Court created regional planning districts in part for the purpose of effectively coordinating economic, environmental, social and governmental planning in cohesive units throughout the state. See G.L. c. 40B, §§3, 5A, 5B, 6. In addition, the planning districts are intended to serve in an organized fashion as regional clearinghouses for various federal grant-in-aid proposals, see, e.g., G.L. c. 40B, §4A. A sense of continuity and unity of purpose is essential to the success of these legislative goals. Termination at will of membership in established districts might well undermine the orderly operation of the districts and defeat the important planning and reviewing functions which they perform.


Notably, the critical provision analyzed in the 1977 opinion, G.L. c. 40B, §10, is part of a specific law concerning a single district and was enacted subsequent to the Home Rule Amendment. Since “[n]one of the words of a statute is to be regarded as superfluous,” “see Commonwealth v. Woods Hole, Martha’s Vineyard & Nantucket S.S. Authy., 352 Mass. 617, 618 (1967), the fact that the Legislature made express provision for withdrawal in §10 indicates an understanding that the already-established statutory scheme of c. 40B did not bestow withdrawal power as a general matter.

“Subsequent legislation may be considered in the interpretation of prior legislation on the same subject.” Boston v. Commonwealth, 322 Mass. 177, 180 (1947). See Pereira v. New England LNG Co., Inc., 364 Mass. 109, 115 (1973). Moreover, established principles of statutory construction indicate that when a legislature uses different language in tow related and similar statutes, a different meaning was intended. See Negron v. Gordon, Mass. Adv. Sh. (1977) 1701, 1706-1707; C. Sands, Sutherland Statutes and Statutory Construction, §51.02 (4th ed. 1973). Application of these principles to the instant case indicates that the Legislature did not intend to allow municipalities organized pursuant to c. 40 B, §3, to terminate their

\[This statute and the cited opinions which relate to it are discussed immediately below.\]
member from regional planning districts at will. Accordingly, in answer to your specific concern, the Town of Granville has not effectively withdrawn itself from membership in the Lower Pioneer Valley Regional Planning Commission.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 22
December 19, 1978
Richard F. Hodgkins
Director of Aeronautics
Massachusetts Aeronautics Commission
General Edward Lawrence
Logan Airport
East Boston, Massachusetts 02128

Dear Mr. Hodkins:

You have requested my opinion on behalf of the Massachusetts Aeronautics Commission (Commission) concerning whether the Westover Metropolitan Development Corporation (WMDC) has the legal authority to operate and maintain a public airport. You state that your request is prompted by the fact that WMDC is anxious to acquire the "aviation assets" (i.e., runway, ramp, tower, etc.) of Westover Air Force Base if the corporation may legally operate and maintain a public commercial airport. You further state that the United States Air Force will not transfer the aviation assets of Westover Air Force Base to WDMC unless it is assured that WMDC has the requisite legal authority. For the reasons discussed below I conclude that WMDC is empowered to operate a public commercial airport using former property of the Westover Air Force Base, provided it first amends its operative economic development plan to include such an activity.

WMDC was created by St. 1974, c. 672 (c. 672). It is a "body politic and corporate" governed by a board of nine directors who are chosen directly or indirectly by the City of Chicopee and Town of Ludlow, c. 672, § 3. The stated purpose of WMDC is "... to aid private enterprise in the speedy and orderly conversion and redevelopment of lands formerly used for certain activities at (Westover Air Force Base) to nonmilitary uses ... in order to prevent blight, economic dislocation, and additional unemployment and to aid private enterprise fully to utilize opportunities to alleviate unemployment." C. 672, § 1 ("Findings and Purpose"). In order to accomplish this purpose, WMDC has been given broad powers to develop,

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1 The Secretary of Transportation and Construction has joined in your request. The commission is an agency under the jurisdiction of the Executive Office of Transportation and Construction, G.L. c. 6A, § 19.

2 The issue of WMDC's authority is of direct concern to the Commission because it is the state agency charged with "general supervision and control over aeronautics" in the Commonwealth, G.L. c. 90, § 39. It must prepare and adopt a comprehensive state plan for the development of airports in Massachusetts, id., § 39A, and an airport potentially to be operated by WMDC obviously implicates the Commission's planning duties. Moreover, were WMDC to acquire the aviation assets of Westover Air Force Base and use them to operate a commercial airport, it would first be required to obtain a certificate of approval from the Commission and would be subject to the Commission's regulation. G.L. c. 90, § 39B; see Building Inspector of Lancaster vSEND seder, Mass. Adv. Sh. (1977) 479, 480, 490; compare St. 1974, c. 672, § 7.
construct and manage "economic development projects" on land owned and used formerly by the United States as part of Westover Air Force Base, including authority to acquire and hold real and personal property, enter into necessary contracts, borrow and invest money, issue bonds, etc. See c. 672, §§ 5, 10, 12, 13.

The expansive scope of authority vested in WMDC to effectuate its purposes clearly includes the power to acquire the Westover Air Force Base aviation assets in order to operate and maintain an airport: a civilian commercial airport at Westover qualifies as an "economic development project" within the meaning of c. 672; and WMDC's power to "manage" any such project, c. 672, § 6(s), encompasses the authority to take control of and operate the airport. See Fluet v. McCabe, 299 Mass. 173, 179 (1938).

While c. 672 does provide WMDC with the substantive power to acquire and operate an airport, the statute imposes a procedural limitation on the corporation's exercise of that power. In particular, c. 672, § 6, requires that before WMDC undertakes any economic development project, the project must be included within "an economic development plan" that has been the subject of a public hearing and approved by Ludlow and Chicopee. I have been informed that WMDC's economic development plan currently in effect assumes the continued existence of a commercial airport for civilian use, but does not expressly provide that WMDC itself (or some entity with which it contracts) will operate the airport. Thus before WMDC undertakes the job of operating the Westover Air Force Base aviation assets as a commercial airport, it must secure municipal approval of an amendment to its economic development plan pursuant to c. 672, § 6.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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3 An "economic development project" is defined by c. 672, § 2, as follows: 
   . . . [A] project to be undertaken in accordance with an economic development plan (discussed below) for acquisition by the corporation of land and the improvements thereon, if any, within an economic development area (defined as "any part of the area formerly used by the United States for the Westover Air Force Base") and for clearance, if necessary, rehabilitation, improvement, and redevelopment for industrial, manufacturing, or commercial uses. An economic development project may include improvements necessary for carrying out the objectives of the economic development project . . . An economic development project may also include the construction by the corporation of any of the buildings, structures or other facilities for industrial, manufacturing, or commercial uses contemplated by the economic development plan.

4 WMDC has specific and express authority to: designate portions of land formerly used for Westover Air Force Base as "economic development areas," § 5(k); acquire any such lands from the United States, §§ 50, (m); prepare or have prepared plans, specifications and cost estimates for the construction, development, redevelopment, rehabilitation, etc., of all "economic development projects," § 5(o); improve, construct, develop, etc., all property which it buys, §§ 50, (p); and "manage" any project owned or leased by WMDC, or enter into agreements with public or private entities for managing the project, § 5(s).

5 See n. 3 supra, setting forth this term's definition.

6 In so concluding, I note that the final section of c. 672 reads: "This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed to effect the purpose thereof." C. 672, § 18.

"Economic development plan" is defined in c. 672, § 2, as "... a detailed plan, as it may be approved from time to time by the municipality (Ludlow or Chicopee or both) as herein provided, for one or more economic development projects within an economic development area . . . ."
Dear Commissioner Condon:

You have requested an opinion concerning the proper interpretation of St. 1977, c. 797 (c. 797), entitled "An Act Relative to Appointments to the Position of State Police Detective Lieutenant-Inspector." You raise three questions:

1. Is the position of state police detective lieutenant-inspector effectively exempted from the scope of the civil service law, G.L. c 31, by the enactment of c. 797?

2. Does G.L. c. 31 continue to govern promotions from the position of detective lieutenant-inspector to higher ranks within the Office of Investigation and Intelligence?

3. Under which statute and, thus, at what age, must state police detective lieutenant-inspectors promoted to that position from the uniformed branch of the Division of State Police retire?

For the reasons state below, I answer your questions as follows. (1) The position of state police detective is exempt from the operation of G.L. c. 31, except that detectives who are currently covered by the civil service law retain their entitlement to its protection. (2) General Laws, c. 31 does not govern promotions to higher ranks in the state police detective force. Such promotions are provided for, to a limited extent, in G.L. c. 22, § 9P, but no statute currently prescribes examination procedures or standards to govern such appointments. (3) Members of the uniformed branch in the Division of State Police promoted to the position of state police detective must retire at age 50 under the provisions of G.L. c. 32, § 26(3)(a).

Your opinion request requires an initial understanding of the organizational structure of the Department of Public Safety (Department) and the classification of the Department's personnel which the enactment of c. 797 sought to alter. The Department consists of three divisions, each operating under the general supervision and control of the Commissioner: a Division

*Chapter 797 has three sections which may be summarized as follows:
Section 1 adds § 95 to G.L. c. 22. Section 95 in turn (1) established the position of state police detective lieutenant-inspector within the Office of Investigation and Intelligence of the Department of Public Safety's Division of State Police; (2) authorizes the Commissioner of Public Safety to promote eligible members of the uniformed branch of the state police to the detective position; and (3) provides substantive and procedural requirements which are to control such promotions and the accompanying examinations.
Section 2 amends G.L. c. 31, § 20, ¶ 1, a statute governing competitive civil service examinations for several state and local public safety positions, to delete a reference to competitive examinations for the "detective force" of the Department of Public Safety.
Section 3 transfers detective lieutenant-inspectors in the Department of Public Safety who currently hold positions classified under G.L. c. 31, or have tenure by reason of G.L. c. 30, § 9A, to the position of state police detective lieutenant-inspectors in the Office of Investigation and Intelligence without impairment of civil service status, seniority, retirement or other rights and without reduction in compensation or salary grade.

Throughout the balance of this opinion I use the phrase "state police detective" to denote the position of state police detective lieutenant-inspector. Similarly, I use the terms "detective branch" and "detective force" throughout to preserve the historical differentiation between members of the uniformed branch and detective lieutenant-inspectors. See 1973-1974 Op. Att'y Gen. No. 43, Rep. A.G., Pub. Doc. No. 12 at 155 (1974). I do so for purposes of continuity and clarity, even though, as this opinion concludes, the distinctions between the uniformed and detective branches in terms of original appointment and civil service status have largely been eliminated*
of State Police under the immediate charge of the Commissioner; a Division of Inspection under the immediate charge of the Chief of Inspections; and a Division of Fire Prevention under the direct charge of State Fire Marshal. G.L. c. 22, §§ 3, 4A. The Office of Investigation and Intelligence, in which all state police detectives are now to serve by virtue of c. 797, is an office within the Division of State Police. G.L. c. 22, § 9P.

The Commissioner is authorized to appoint employees and officers to serve in the three divisions of the Department pursuant to two distinct sections of G.L. c. 22. Members of the uniformed branch of the Division of State Police are appointed under § 9A, which both prescribes the manner of appointment and implicitly exempts the officers from the requirements of the civil service law, G.L. c. 31. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 308, n.1 (1976). All other officers and employees of the Division of State Police, and of the other two divisions within the Department, are originally appointed under § 6. These appointments are subject to the civil service law and rules. See Walsh v. Commissioners of Civil Service, 300 Mass. 244, 247 (1938).

The impact of this bifurcated personnel system was particularly apparent in the detective branch of the Division of State Police. Until the enactment of c. 797, state police detectives were appointed under G.L. c. 22, § 6. They were, therefore, covered by the civil service statute, and all appointments and promotions were specifically required to be made on the basis of competitive civil service examinations. See G.L. c. 31, § 20, as amended by St. 1945, c. 704, § 6; see also 1973/74 Op. Atty. Gen. No. 43, Rep. A.G., Pub. Doc. No. 12 at 135 (1974). As a result, if a member of the uniformed branch sought appointment to a detective position, he was required to take a leave of absence from the uniformed branch and to suffer the impairment of his seniority rights in that branch. See 1970/71 Op. Atty. Gen. No. 21, Rep. A.G., Pub. Doc. No. 12 at 66 (1971).

With this background in place, I now address each of your inquiries in turn. Your first question asks whether the position of state police detective is now covered by the civil service law. The clear intent of c. 797 is to remove that position from the scope of c. 31, to eliminate the bifurcated system described in the preceeding paragraph and to permit a more integrated personnel structure for law enforcement officers within the Division of the State Police. Thus c. 797, § 1, enacting G.L. c. 22, § 9S, explicitly authorizes the promotion to state police detective of members of the uniformed branch, whose original appointments are excepted from the requirements of the civil service law by G.L. c. 22, § 9A. In addition, c. 797, § 2, amends G.L. c. 31, § 20, specifically to delete the requirement that “[a]ppointments and promotions . . . in the detective force of the state department of public safety . . . shall be made only by competitive (civil service) examination . . . .” Finally, c. 797, § 3, permits the currently employed detectives who were appointed under G.L. c. 22, § 6, and its civil service concomitant, G.L. c. 31, § 20, to retain all civil service rights. If future appointments to the detective position were intended to remain subject to civil service, the protection accorded by this “grandfather” provision would be unnecessary.

With c. 797’s deletion of the reference to state police detectives in the civil
With c. 797's deletion of the reference to state police detectives in the civil service appointment and promotion provisions of G.L. c. 31, § 20, further appointments or promotions to the position of detective are to be governed exclusively by G.L. c. 22, § 9S. This conclusion is not altered by the reference to the Department’s “detective force” which remains in c. 31, § 20.3 In light of c. 797’s specific deletion of the detective force from the scope of all civil service examinations in the first sentence of § 20, the remaining language, relating to eligibility criteria for entrance to promotional civil service examinations, must be deemed superfluous and of no effect.

Ordinarily, no portion of statutory language may be treated as superfluous. Commonwealth v. Gove, 366 Mass. 351, 354 (1974); Commonwealth v. Woods Hole, Martha’s Vineyard and Nantucket S.S. Auth’y, 352 Mass. 617, 618 (1967); see George S. Carrington Co. v. State Tax Comm’n, Mass. Adv. Sh. (1978) 1752, 1758. However, that maxim of statutory construction must yield when no other course is open and the object and plain meaning of the statute require it. Johnson’s Case, 318 Mass. 741, 747 (1945); see Massachusetts Comm’n Against Discrimination v. Liberty Mut. Ins. Co., Mass. Adv. Sh. (1976) 2403, 2407-2408. Since the one reference to state police detectives which is retained in c. 31, § 20, is inconsistent with, and in my judgment repugnant to, the legislative intent to remove the detective force from the civil service system as reflected in c. 797, § 2, the more recent and specific provision must govern. See Rennert v. Board of Trustees of State Colleges, 363 Mass. 740, 743 (1973); Doherty v. Commissioner of Administration, 349 Mass. 687, 690 (1965) (repeal by implication of inconsistent statutory provisions). Accordingly, I answer your first question in the affirmative, concluding that the position of state police detective is removed from the scope of the civil service system by c. 797.

Your second question asks whether G.L. c. 31 will continue to govern promotions to higher ranks in the detective branch, such as the positions of captain and major of state police detectives. As my discussion of your first question indicates, I do not believe that the further promotion of state police detectives is to be governed by G.L. c. 31, notwithstanding the remaining reference to such police detectives in G.L. c. 31, § 20, third sentence. However, this conclusion does not end the inquiry since it is apparent that subsequent promotions in the detective branch are not otherwise covered by c. 797, or fully by any other statute.

The issue presented by your second question stems from the fact that the promotional examination authorized by G.L. c. 22, § 9S (as inserted by c. 797, § 1), relates only to the position of state police detective, the entry level

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3As mentioned above, c. 797, § 2, removed the reference to the state police detectives in the first sentence of G.L. c. 31, § 20, mandating the appointment and promotion of certain positions by competitive civil service examination. However, c. 797 did not delete a reference to state police detectives in the third sentence of § 20, defining general eligibility standards for promotional examinations for civil service positions:

Eligibility for entrance to a promotional examination for any grade of service shall be limited to permanent employees in the next lower grade . . . [with certain exceptions], provided, that . . . [no] persons shall . . . be eligible to take any such examination for the first grade above the lowest grade in police and fire departments in cities and towns with a population in the excess of fifty thousand, in the detective force of the state department of public safety, in the capital police force and in the police force of the metropolitan district commission unless . . . [specified length of service requirements are met]. (Emphasis supplied.)
position in the detective branch. At the same time, G.L. c. 22, § 9P, implicitly assumes that additional positions of major and captain of detectives must exist: it places the Office of Investigation and Intelligence under the direction of a lieutenant colonel who has been selected from the grade of "major or captain of detectives"; and it provides for the selection of major of the Bureau of Investigative Services (within the Office of Investigation and Intelligence) from the grades of "captain of detectives or detective lieutenant inspectors . . . . ." However, § 9P expressly states that these promotions must be made from officers appointed under G.L. c. 22, § 6; officers appointed under § 9A are not mentioned.4 In addition, no statutory provision delineates procedures for the promotion of state police detectives to the grade of captain. As a result, the rank of captain of detectives currently can be staffed only with individuals now holding that title, and the ranks of major and lieutenant colonel within the detective branch must be filled solely by officers originally appointed under G.L. c. 22, § 6. Additional legislation will be necessary to establish a system for the promotion to captain of any state police detectives, and for all promotions of state police detectives originally appointed to positions in the Division of State Police under G.L. c. 22, § 9A.5

In response to your final question, it is my opinion that members of the uniformed branch promoted to the position of state police detective under G.L. c. 22, § 9S, would retire under the provisions of G.L. c. 32, § 26(3)(a), at age 50 or upon the expiration of 20 years of service, whichever last occurs. Notwithstanding such a person's promotion to the detective position, he would continue to qualify as a "member in service classified in Group 3 who is an officer appointed under (c. 22, § 9A) and who has performed service in the division of state police . . . . ." G.L. c. 32, § 26(3)(a). See Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 308, n.1. In other words, the promotion under § 9S would not alter the status of the person's original appointment and the retirement rights established thereby. See Opinion of the Justices, 364 Mass. 847, 860 (1973).6

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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4A separate system for the promotion of members of the uniformed branch does exist, see G.L. c. 22, §§ 90-9Q, but there is no reference in that promotional ladder to the position of state police detective.

5I understand that you or members of the Department may wish to propose legislation responding to this statutory gap. In doing so, it might be appropriate to direct the Legislature's attention to the current requirement in G.L. c. 22, § 9P, that officers holding the positions of lieutenant colonel in the Office of Investigation and Intelligence and major of the Bureau of Investigative Services be appointed under G.L. c. 22, § 6. As indicated above, unless these references to § 6 are deleted or changed, uniformed branch members — by definition appointed under § 9A — who subsequently became state police detectives would have their promotional opportunities in the detective branch severely limited, and the supply of individuals eligible for subsequent promotion may eventually be exhausted.

6Because of the savings provisions of c. 797, § 3, state police detectives originally appointed under G.L. c. 22, § 6, and transferred to the Office of Investigation and Intelligence, would continue to be subject to the mandatory retirement provisions governing employees classified in Group 4. See G.L. c. 32, §§ 3(2)(g) ("Group 4"), (1 ("Maximum Age"). They would therefore retire at age 65.
January 2, 1979

Number 24
John R. Buckley
Secretary of Administration and Finance
State House
Boston, MA 02133

Dear Commissioner Buckley:

You have requested my opinion as to whether you can, with the Governor's approval, appoint a person to fill a vacancy in the position of Personnel Administrator of the Massachusetts Division of Personnel Administration. A vacancy now exists in that position, occasioned by the resignation of the former Personnel Administrator on December 22, 1978.

It is my opinion that under G.L. c. 7, § 4A, your selection of a successor Personnel Administrator to fill that vacancy must be made from among the names of three persons submitted to you by a majority vote of the Civil Service Commission, and must be approved by the Governor. Nevertheless, you do have authority to designate, on a temporary or acting basis, an individual to perform the duties of Personnel Administrator until the vacancy is filled in accordance with G.L. c. 7, § 4A. My reasons are set forth below. General Laws, c. 7, § 4A1 provides that the Personnel Administrator is to be appointed by the Commissioner of Administration (Secretary of Administration and Finance) "from the names of three persons submitted by the majority vote of all the members of the civil service commission" and with the prior written approval of the Governor. It further states that the Personnel Administrator is to serve a four year term, ending "on June thirtieth of the first year of the term of the governor, except that he may be removed by the commissioner, with the approval of four fifths of the members of the civil service commission." However, although the section authorizes the appointment of a person to fill a vacancy created in the position of Personnel Administrator, it does not prescribe any procedure for such an appointment. Despite this absence of express statutory direction, in my opinion the procedural requirements of G.L. c. 7, § 4A, governing original appointments of a Personnel Administrator must be construed to govern as well appointments made to fill mid-term vacancies in the position.

Controlling rules of statutory interpretation dictate that where the meaning of a particular portion of a statute is in doubt, other provisions of the statute should be considered to ascertain its meaning, in order to give the Legislature's intended effect to the statute as a whole. E.g., Boston v. Massachusetts Bay Transp. Authy., Mass. Adv. Sh. (1977) 2588, 2593; see School Committee of Springfield v. Board of Educ., 362 Mass. 417, 438

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1G.L. c. 7, § 4A, provides in relevant part that:
The personnel administrator shall be appointed by the commissioner, with the prior written approval of the governor, from the names of three persons submitted by the majority vote of all the members of the civil service commission. The said personnel administrator shall be a person familiar with the principles and experienced in the method and practice of personnel administration. The personnel administrator shall serve for a term of four years, which term shall end on June thirtieth of the first year of the term of the governor, except that he may be removed by the commissioner, with the approval of four fifths of the members of the civil service commission. Any person so appointed shall serve until the qualification of his successor; provided, however, that in such case, or in the case of a person appointed to fill a vacancy occurring during the prescribed term by reason of death, resignation or otherwise, the term of the successor in said office shall end on the year succeeding June thirtieth of the first year of the term of the governor. No person while holding such appointment shall be subject to section 9A of chapter thirty.
(1972); see also Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975). In requiring the Civil Service Commission's participation in the original appointment and removal of the Personnel Administrator, the Legislature in G.L. c. 7, § 4A, clearly intended that the Commission would play a significant role in his selection. Under the provisions of § 4A, an interim appointment made to fill a vacancy in the Administrator's position can potentially last even longer than an original appointment under that section. Given these time frames, the appointment procedures set forth in c. 7, § 4A, might well be undermined if a different method of selection were held to govern the appointment of an interim Personnel Administrator than that which controls original appointments to the position. See United States Trust Co. v. Commonwealth, 348 Mass. 378, 383 (1965).

You have suggested that the broad appointment authority vested in you by G.L. c. 7, § 4D, implicitly allows you to appoint a person to fill the Personnel Administrator position vacancy without input from the Civil Service Commission. I do not believe that the provisions of § 4D can be read to apply to interim appointments of a Personnel Administrator. An introductory caveat to c. 7, § 4D, states that its provisions apply "except as otherwise provided by law." In my judgment the appointment provisions of c. 7, § 4A, constitute such an alternative provision and, thus, supersede § 4D.

Finally, I draw support from G.L. c. 30, § 10, for my determination that vacancies in the position of Personnel Administrator must be filled in accordance with the original appointment provisions of G.L. c. 7, § 4A. Section 10 deals with the problem of filling interim vacancies in positions appointed by the Governor where no method of filling such vacancies is explicitly provided for. It states that under such circumstances, vacancies are to be filled for the unexpired term in the same manner provided for the original appointment. Although G.L. c. 30, § 10, does not directly apply to the Personnel Administrator, since the Governor approves rather than directly appoints an individual to fill that position, the section reinforces, by analogy, the conclusion that I have reached above.

Although you lack the power to appoint a person to fill the current vacancy in the position of Personnel Administrator without input from the Civil Service Commission, you may nevertheless designate a person to

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1While the term of an original appointee lasts four years, expiring on June 30 of the first year of the term of the Governor, the term of an interim appointee does not expire until the year succeeding June 30 of the first year of the term of the governor. Accordingly, if a Personnel Administrator resigned during the first year of his term, the person appointed to fill the vacancy might remain in office more than four years. G.L. c. 7, § 4A.

2It also note that the Legislature in G.L. c. 7, § 4A, refers to both original and interim selections of Personnel Administrators as "appointments." Had the Legislature intended fewer steps to accompany interim selections, it would not have used the same term to refer to interim selections as it used to refer to original appointments. See Webster v. Board of Appeals of Reading, 349 Mass. 17, 19 (1965); G.L. c. 14, § 1.

3General Laws, c. 7, § 4D, provides in relevant part that: except as otherwise provided by law, the commissioner [of Administration Finance] shall appoint all employees of the executive office for administration and finance . . . [including] staffing at any time said office, the commissioner may, without regard to [G.L. c. 31] but subject to the approval of the governor, appoint such experts and other assistants in said office as he shall deem necessary.

4Even if G.L. c. 7, § 4D, contained no explicit language concerning its relationship to other appointment provisions, its terms would still have no applicable to interim appointments of a Personnel Administrator. Section 4D relates to appointments of a general category of Administration and Finance employees, not specifically to the Personnel Administrator; further, § 4D contains no explicit instructions for making interim appointments to any position. In contrast, G.L. c. 7, § 4A, focuses specifically on the Personnel Administrator and therefore is the more appropriate section from which to seek guidance. See Pereira v. New England LNG Company, Inc., 364 Mass. 109, 118 (1973) (if general statute and a specific statute cannot be reconciled, the general must yield to the specific).

5That section reads in pertinent part: Any vacancy in any office, the original appointment to which is required by law to be made by the governor . . . and for which no other method of filling vacancies is expressly provided by law, shall be filled for the unexpired term in the manner provided for an original appointment . . .
perform the Personnel Administrator's duties until that vacancy is filled. As Secretary of Administration and Finance you are "responsible for the exercise of all powers and the performance of all duties assigned by law to the executive office for administration and finance or to any division . . . under said office." G.L. c. 7, § 4. The Division of Personnel Administration is "under" your office, and, as discussed above, you are the official ultimately charged with appointing the Personnel Administrator (subject to certain procedural requirements). G.L. c. 7, § 4A.


Moreover, the importance of the Personnel Administrator's functions and duties to the operation of Commonwealth's personnel system is obvious. See generally G.L. c. 31. Necessity would seem to require that a vacancy in the position of Personnel Administrator be filled on at least a temporary basis until the procedural requirements of G.L. c. 7, § 4A, can be fulfilled. Since you alone possess the actual appointing authority, although subject to restrictions, it appears that you alone have the power to make the needed temporary selection. Cf. Mayor of Everett v. Superior Court, 324 Mass. 144, 150-151 (1949); Moran v. School Committee of Littleton, 317 Mass. 591, 593-594 (rule of necessity applicable to conduct of administrative adjudicatory hearings).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 25
John F. Hagerty, Commissioner
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

January 11, 1979

Dear Commissioner Hagerty:

Since 1966 the Massachusetts Port Authority (the Authority) has owned land in East Boston known as the Belle Isle Marsh property (the property). The Authority wishes to transfer the property to the Metropolitan District Commission (the MDC), subject to the Authority's retention of certain

*The court there observed:
Where a grant of power is expressly conferred by statute upon an administrative officer or board or where a specific duty is imposed on them, they in the absence of some statutory limitation have authority to employ all ordinary means reasonably necessary for the full exercise of the power and for the faithful performance of the duty.*
easement and related rights. Your predecessor in office has requested my opinion whether the proposed transfer, if accomplished in the manner described in his letter of request, would require specific legislative authorization. Should the MDC acquire the property, he also asked me to determine the effect of Article 97 of the Amendments to the Massachusetts Constitution (art. 97) on any subsequent transfer of the property by the MDC.

In an opinion issued in 1976 to the former Commissioner of the MDC, I considered the same legal questions concerning a less completely developed or detailed proposed transfer of the property from the Authority to the MDC. The principal focus of that opinion, however, was the effect of art. 97 on the transfer. On this issue, I ruled that (1) the Authority's transfer to the MDC of the property was not covered by art. 97, but (2) any subsequent transfer by the MDC of the property would fall under the Amendment's terms. On the separate question of legislative authorization for the transfer, I concluded that such authorization was necessary under the common law doctrine of "prior public use."

Since the issuance of my prior opinion, it appears that the terms and conditions of the Authority's proposed transfer of the property have been further refined and spelled out in concrete terms. Based on the information presented to me and for the reasons discussed below, I conclude that the Authority may transfer the property to the MDC under the terms now proposed consistently with the doctrine of prior public use and without specific, additional legislative approval. On the application of art. 97 to future transfers of the property by the MDC, I adhere to the conclusions stated in my earlier opinion.

I first consider the proposed transfer of the property in light of the doctrine of prior public use. That doctrine provides in essence that:


The doctrine requires explicit legislative approval for transfers of public lands between government agencies if the respective existing and proposed uses are inconsistent or would materially interfere with each other. See, e.g., Robbins v. Department of Pub. Works, supra, 355 Mass. at 330-332 (transfer of wetlands property held by MDC to the Department of Public Works for highway purposes); Gould v. Greylock Reservation Comm'n., 350 Mass. 410, 419, 421-423 (1966) (lease of mountain reservation land to public authority for construction of ski facilities and resort); Common-wealth v. Massachusetts Turnpike Auth'y, 346 Mass. 250, 254-255 (1963) (taking of MDC reservation land in and adjacent to Charles River to build turnpike extension); see also Trustees of Reservations v. Stockbridge, 348 Mass. 511, 513-514 (1965) (taking of reservation land to build school;

1The former Executive Secretaries of Transportation and Construction and Environmental Affairs, respectfully, joined in his request.


3I have not been asked anew whether the Authority's transfer to the property to the MDC comes within the scope of art. 97, and I see no reason to reconsider my previous ruling on that issue. See 1975/76 Op. Atty. Gen. No. 61 at 2-3, Rep. A.G., Pub. Doc. No. 12 at 157, 158 (1976).
taking specifically authorized by legislation). 4

In each of the cited cases, the parties conceded or the court found that the proposed use of the land at issue was inconsistent with the existing use; what required resolution was whether the Legislature had authorized the transfer and new use in legislation that was sufficiently specific. A different situation presents itself here. It appears that there is no legislation which specifically authorizes the Authority's transfer of the property to the MDC. 5

The MDC's authority to acquire the property derives from G.L. c. 92, § 33, a generally phrased statute which provides that the MDC "... may acquire, maintain and make available to the inhabitants of ... Boston ... Revere ... [and] Winthrop ... open spaces for exercise and recreation ... called reservations ..." The Authority is empowered to convey the property under the even more general provisions of St. 1956, c. 465, § 3(j), G.L. c. 91 App., § 1-3(j). Neither cited statute mentions the Belle Isle Marsh property. The single question thus posed is whether the MDC's proposed and the Authority's continuing use of the property after its transfer is consistent with the use to which it has been put by the Authority since ownership was acquired in 1966. See Boston v. Inhabitants of Brookline, 156 Mass. 172, 175-176 (1892). 6

Since this question turns on factual considerations regarding the present and proposed uses of the property, I will review in detail the information which your predecessor and representatives of the Authority furnished me about those uses. The property is part of a salt marsh located between the communities of Winthrop, East Boston and the Beachmont section of Revere. It is adjacent to the General Edward Lawrence Logan International Airport (Logan). The Authority acquired the property in 1966 under its eminent domain powers in pertinent part to provide for airport expansion and improvement, protect aerial approaches to Logan runways in accordance with federal standards, and meet federal runway clear zone and other aviation safety requirements. The Federal Aviation Agency (FAA) reimbursed the Authority for 50 per cent of the taking price of a portion of the property under a grant conditioned on the property's use for aerial approaches and runway clear zones. Since its acquisition, the property has been used by the Authority solely as a runway clear zone, and the salt marsh has been left in its undisturbed state.

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5 There is some confusion on this issue. By St. 1976, c. 481, § 19, effective July 1, 1976, the Legislature authorized and directed the MDC to spend certain bond proceeds "... for the acquisition of land in the Belle Isle section of East Boston and the construction of park and recreational facilities thereon and on the recently acquired Suffolk Downs drive-in theatre site." Your predecessor's staff, however, did not understand this legislation to apply specifically to the property transfer under consideration here. They pointed out that in the past legislative actions authorizing the transfer of land from a public agency to the MDC has described that land in more detailed terms and, more significant, has specifically mentioned the transferring agency. See, e.g., St. 1967, c. 518, cited in Robbins v. Department of Pub. Works, supra, 355 Mass. at 331, n. 4; see also St. 1963, c. 824, cited in Trustees of Reservations v. Stockbridge, supra, 348 Mass. at 513-514 and nn. 1, 2; St. 1969, c. 648, discussed in 1977/78 Op. Atty. Gen. No. 33, Rep. A.G., Pub. Doc. No. 12 at 12 (1978). Staff of the Authority concurred in the MDC's opinion about the import of St. 1976, c. 481, § 19.

6 Unfortunately there is no formal legislative history to clarify the meaning of c. 481. However, I find the legal considerations raised by your predecessor's and the Authority's staff persuasive. For purposes of this opinion, therefore, I assume that St. 1976, c. 481, § 19, should not be treated as a specific legislative authorization of the property's proposed transfer sufficient to satisfy the standards of Robbins v. Department of Pub. Works, supra. (It should also be mentioned that the MDC does not now rely on St. 1971, c. 276, § 2C, cited in my earlier opinion, to authorize its purchase of the property.)

7 In stating the question, I assume that the Authority has been using the property during its period of ownership in an authorized manner. The Authority's orders of taking relating to the property — copies of which have been furnished to me — support my assumption.
It appears that the use of the property would not materially change as a result of the transfer. The proposed deed of conveyance is to contain a covenant that the MDC shall use the property solely for conservation and passive recreation purposes, on a non-commercial basis; this covenant is to run with the land.7 Furthermore, the MDC’s plan for the property calls for it to be maintained as a “public open space” for such activities as walking, biking, educational field trips, nature studies, and the preservation of wetlands and the ocean shore line.8

The Authority, in turn, intends permanently to reserve to itself a number of rights in the property as a condition of the transfer. Specifically, the deed of transfer will grant to the Authority a perpetual easement and right of way over the property — in essence air rights — for the unobstructed flight of aircraft. The easement would give the Authority continuing rights to (1) effectively maintain the property as a runway clear zone by preventing the erection of structures that would interfere with flights or cause safety hazards, (2) erect markings, lights and navigation aids on the property, pursuant to FAA requirements, and (3) enter upon the property and take any necessary action with respect to it to insure the safe operation of aircraft.9

Finally, I have been informed that regardless of who owns the property, its future use for any projects involving the filling or other alteration of the salt marsh (e.g., projects for airport, commercial or industrial development or expansion) would be severely limited if not prohibited by the state’s environmental protection statutes.10 Indeed, when the Authority recently had the property appraised, the appraiser determined that its commercial value was zero, primarily because of these statutorily-imposed environmental restrictions.

“Inconsistent” is defined as “[m]utually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of one implies the abrogation or abandonment of the other . . . .” Black’s Law Dictionary at 907 (4th rev. ed., 1967). The question whether a proposed future use of public land is inconsistent with its existing use . . . is not to be settled with reverence to every possible manner in which the land might be used for the purpose for which it had been acquired, but with a reasonable regard to the way in which it would naturally and reasonably be used in putting it to that purpose. Boston v. Inhabitants of Brookline, supra. 156 Mass. at 176.

On the facts presented, it is clear that (1) for 13 years the Authority has used the land in question for aerial approaches and a runway clear zone

7The proposed covenant is to be binding on all persons for 30 years initially, and may be extended for successive periods of 20 years pursuant to G.L. c. 184, § 27.
8Members of your predecessor’s staff further stated that the property will not be used for any “active” recreational purposes.
9In particular, the property will have no functional relationship to the skating rink, referred to in the MDC’s prior opinion request and my prior opinion, that the MDC is planning to build on adjacent land. See 1975/76 Op. Att’y. Gen. No. 61 at 1, 3-4, Rep. A.G., Pub. Doc. No. 12 at 157, 158-159 (1976).
10Staff of the Authority informed me that under the terms of its 1966 grant from the FAA for the property’s purchase, the Authority must restrict the use of land adjacent to the airport for purposes consistent with airport operations, including aircraft landings and takeoffs and clear zones. They indicated that regional officials of the FAA responsible for grant administration are satisfied that the proposed transfer of the property adheres to the terms upon which the FAA’s 1966 grant was awarded.
11See pp. 8-9, n. 11 infra.
compatibly and consistently with the property’s continued existence and use as a salt marsh, and (2) under the terms of the proposed transfer both of these two heretofore compatible uses would continue. In sum, the restrictions which the MDC has covenanted to place on the property, the regulatory restrictions separately imposed by the Wetlands Acts, and the Authority’s perpetual retention of necessary aviation rights, make clear that the property’s future use will be harmonious and consistent with its existing use.\footnote{In my prior opinion I concluded that the recreational uses to which the MDC intended to put the property represented a diversion from the existing “airport-connected” uses. 1975/76 Op. Atty. Gen. No. 61 at 4, Rep. A.G., Pub. Doc. No. 12 at 158-159 (1976). As stated above, however, the primary focus of the earlier opinion was the application of art. 97 to the proposed transfer of the property, and not the doctrine of prior public use. Here, of course, the central question presented relates to that doctrine. In light of this shift in emphasis, I have examined very carefully the further details presented in the opinion concerning the MDC’s proposed use of the property, the Authority’s current use, and the rights pertaining to the property which the Authority will perpetually retain as a condition of transfer. In addition, as noted above, I have considered the fact that the property is subject to the Wetlands Protection Act, G.L. c. 131, § 40; the Coastal Wetlands Restriction Act, G.L. c. 130, § 105; and applicable regulations promulgated under these statutes, see e.g., Department of Environmental Quality Engineering, “Additional Regulations for Coastal Wetlands,” § 32, reprinted in Mass. Register, Issue No. 115, at 64, 87-89 (1978). These statutory and regulatory provisions would operate independently to restrict almost any use of the property by the MDC (or the Authority) that might interfere with its existence as a natural salt marsh. Based on these factors, I conclude in these circumstances that the MDC’s intended passive recreational uses would not disturb the property’s existence as a salt marsh and runway clear zone or materially divert the property from its current use. To the extent that my prior opinion is inconsistent with this conclusion I must decline to follow it.} Accordin\textsuperscript{g}, compliance with the prior public use doctrine does not require additional, specific legislative authorization to effectuate the proposed transfer between the two agencies. \textit{See Eldredge v. County Comm'rs of Norfolk, 185 Mass. 186, 188 (1904); Boston v. Inhabitants of Brookline, supra, 156 Mass. at 176; Inhabitants of Easthampton v. County Comm'rs of Berkshire, 154 Mass. 424, 425-426 (1891); see also Needham v. County Comm'rs of Norfolk, 324 Mass. 293, 296-297 (1949); compare Boston & Albany R. Co. v. City Council of Cambridge, 166 Mass. 224, 225-226 (1896).}

In reaching this conclusion I recognize that at some undefined time in the future the Authority, were it to retain ownership of the property, might seek to develop it for a more active airport use than a runway clear zone; and that the transfer to the MDC would preclude this possibility. On the facts presented, however, I do not believe such speculation about the future is relevant to whether the doctrine of prior public use requires legislation beyond G.L. c. 92, § 33, and G.L. c. 91 App., § 1-3(j), to authorize the proposed transfer. As a general matter, the case law indicates that current and currently contemplated uses of public lands are the important considerations, and not uses that might in theory be implemented in the future. \textit{See Boston v. Inhabitants of Brookline, supra, 156 Mass. at 176, 177 (taking and use by Brookline of land as public way held not presently inconsistent with Boston’s existing use of same land for laying water pipes, and no present indication that uses would be inconsistent in future); see also Old Colony R. Co. v. Framingham Water Co., 153 Mass. 561, 564-565 (1891) (in determining whether general statute in question authorized defendants’ taking and use of railroad’s “public land,” court focused on actual, current use of land, not its potential future use). Turning to the specific case at hand, there is no current suggestion that the authority intends at any time to use the property for something other than a runway clear zone; and no indication that even assuming such an intention, the limitations and prohibitions imposed on development by the Wetlands Acts will be removed or modified. In other words, looking at the situation as now presented, I...}
believe the property's current use represents "the way in which it would naturally and reasonably be used..." to effectuate the purposes for which the Authority took it in 1966. *Boston v. Inhabitants of Brookline, supra*, 156 Mass. at 176.

Finally, it deserves mention that the doctrine of prior public use appears to have developed in significant part as a judicial means to further the Commonwealth's policy of protecting public parkland. See *Higginson v. Treasurer and School House Comm'r's of Boston*, 212 Mass. 583, 591-592 (1912); accord, *Brookline v. Metropolitan Dist. Comm'n*, 357 Mass. 435, 439-440 (1970); *Robbins v. Department of Pub. Works, supra*, 355 Mass. at 330; *Gould v. Greylock Reservations Comm'n, supra*, 350 Mass. at 419; *see also Sacco v. Department of Pub. Works*, 352 Mass. 670, 673 (1967). Here, in contrast to the cited cases, the proposed transfer of the property to the MDC is intended specifically to preserve and indeed enhance the property's ecological, aesthetic and "open space" or parkland values. Thus there is not the same need for "stringent" application of the prior public use doctrine, *see Robbins, supra* at 330, in this situation.

You have also asked whether art. 97 would apply to any subsequent transfer of the parcel by the MDC. As indicated above, I have previously concluded that art. 97 would govern such transfers. 1975/76 Op. Atty. Gen. No. 61 at 4, Rep. A.G., Pub. Doc. No. 12 at 157, 159 (1976). No new or different facts or legal considerations have been presented that would warrant a reconsideration of my prior answer at this time, and I respectfully decline to undertake the task.

Very truly yours,

FRANCIS X. BELLOTTI

*Attorney General*

Number 26
William A. Burke
*Executive Secretary*
Group Insurance Commission
One Ashburton Place
Boston, Massachusetts 02108

January 30, 1979

Dear Mr. Burke:

You have requested my opinion on behalf of the Group Insurance Commission (Commission)\(^1\) with respect to four questions concerning the Commission's responsibility to implement certain provisions of St. 1978, c. 367 (c. 367), the appropriations act for fiscal year 1979. The provisions at issue, Items 1120-2000, 1120-3000 and 1120-4000 of c. 367, § 2, appropriate funds to pay the Commonwealth's share of group life and group health

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\(^1\)The Commission is a state agency within but not under the jurisdiction of the Executive Office for Administration and Finance. G.L. c. 32A, § 3. Its members are the Commissioner of Administration, the Commissioner of Insurance and seven members appointed by the Governor. *Id.* The Commission is responsible for negotiating and purchasing, *inter alia*, group general or blanket insurance providing hospital, surgical, medical, dental and other health insurance benefits covering persons in the service of the Commonwealth and their dependents...* G.L. c. 32A, § 4.
insurance premiums for certain insured state and retired municipal employees. Each item, however, contains the following proviso prohibiting the use of the funds to pay for most abortions:

... and further provided that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident.

Your questions relate to the quoted proviso (referred to hereafter to as the “abortion proviso”). You state that the Commission, in accordance with the provisions of G.L. c. 32A, §§ 4 and 14, has entered into a number of contracts for group health insurance for the period October 1, 1977, through June 30, 1981. Although the length and terms of the contracts vary, each establishes rates and coverages through July 1, 1979, with provision for renegotiation of renewal rates and coverages annually thereafter, and at the present time each contract specifically provides health insurance coverage for abortions.

Based on these facts, you ask the following:

1. Effective July 1, 1979, or at some future date, is the Commission required by c. 367 to reduce the coverage for abortions under contracts which it has entered into in accordance with G.L. c. 32A?
2. Once the Commission and its contracting parties have executed health insurance contracts pursuant to G.L. c. 32A and its supporting appropriation act, does the Commission possess the power unilaterally or by mutual agreement to change the provisions of those contracts by reducing benefits, i.e. the level of the coverage they provide for?

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2One of the items containing the quoted abortion proviso, Item 1120-2000, also contains a separate proviso stating that “the present level of insurance coverage shall be maintained but shall not constitute payment in full of charges for health care services.” The provision also appeared in the previous year’s appropriations act, St. 1977, c. 363A, § 2, Item 1120-2000. I do not view the quoted general language as inconsistent with the item's separate proviso restricting coverage for abortions. In any event, doubts about the harmonious construction of the two provisions must be resolved by giving weight and precedence to the later and more specific provision relating to abortions. Cf. Pereira v. New England LNG Co., Inc., 364 Mass. 109, 118-119 (1973).

3An identically phrased proviso was also attached to the fiscal year 1979 Medicaid appropriation, set forth in c. 307, § 2, Item 4402-5000 (“Medicaid abortion proviso”). Two lawsuits were brought challenging the Medicaid abortion proviso as violating Title XIX of the “Medicaid Act,” 42 U.S.C. §§ 1396 et seq., and certain constitutional guarantees. Preterm, Inc. v. Dukeakis, No. 78-1324 (1st Cir. 1979); Parent’s Legal Society, Inc. v. Sharp, Nos. 78-1325, 78-1326 (1st Cir. 1979). Without reaching the constitutional questions, the United States Court of Appeals for the First Circuit entered judgments in these cases on January 15, 1979, affirming the District Court’s injunctions against the full implementation of the Medicaid abortion proviso. Because these cases turned on the interpretation of the Medicaid Act (Title XIX), which has no bearing on the abortion proviso applicable to the Commission’s appropriations, the cases are not relevant to my resolution of the questions you have raised. In 1978/79 Op. Atty., Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at 14 (1979). I also considered certain questions relating to the Medicaid abortion proviso, but again, those questions are not pertinent to the ones you pose.

4At least three contracts are with Blue Cross of Massachusetts Inc. (Blue Cross) and Blue Shield of Massachusetts, Inc. (Blue Shield), and run from October 1, 1977, to June 30, 1981. In addition, the Commission has entered into contracts with three health maintenance organizations (HMOs): the Harvard Community Health Plan, Inc., Valley Health Plan and the Rhode Island Health Association, Inc. Each of these contracts with HMOs runs from July 1, 1978, through June 30, 1979, but provides for annual renewal.

5You explain that the coverage provisions relating to abortions in the Commission’s existing contracts are not identical: the Blue Cross-Blue Shield contracts cover fewer types of abortions for a smaller classification of employees than do the HMO contracts. For purposes of this opinion, however, these differences are not pertinent. The important fact is that all existing contracts cover more categories of abortions than are included in the abortion proviso of c. 367. (The terms of the existing contracts, including those relating to abortion coverage, were negotiated and set before c. 367 was enacted.) The issue which arises is whether, and how, the abortion proviso can be implemented in light of the contracts’ current terms.

6I understand your mention of the “supporting appropriations act” to refer to G.L. c. 32A, § 8, which (1) defines the portion of the group health insurance premium to be paid by the Commonwealth and by employees, respectively, and (2) provides that the ratio or relative portions of the premiums to be paid by each may be varied by annual appropriations acts.
(3) Is the Commission required, by the provisions of G.L. c. 32A or any other law, to provide equitable treatment and uniformity of coverage between employees who elect to participate in the conventional health insurance plans and those who elect to participate in the HMO plans?

(4) If it is determined that the abortion proviso of c. 367 requires health insurance coverage provided under the Commission’s existing contracts to be reduced to exclude abortions, do the provisions of the state’s collective bargaining agreement with the Alliance supersede or otherwise negate such a requirement?

I discuss each of these questions separately below. In summary, however, I answer them as follows. (1) The abortion proviso of c. 367 governs appropriations for the current fiscal year only, which ends on June 30, 1979. Thus, if the fiscal year 1980 budget is enacted before July 1, 1979, the abortion proviso does not impose any requirements on the Commission effective July 1, 1979, or thereafter. However, the Commission does have a present, ongoing duty to implement the proviso’s mandate during this fiscal year. Further, if the fiscal year 1980 budget is not passed by July 1, the abortion proviso will continue to apply to the Commission’s expenditure of funds under c. 367. (2) Under the terms of its group health insurance contracts, the Commission is empowered to amend existing contracts with the consent of the contracting insurers in order to reduce coverage for abortions. If any contracting party is unwilling to agree to such an amendment, the Commission should explore and exercise other contractual options available which would enable it to carry out the restrictions in c. 367’s abortion proviso. (3) The Commission is not required to provide the same coverage in HMO plans as it does in conventional insurance plans. (4) The Commonwealth’s collective bargaining agreement does not negate or supersede the Commission’s duty to implement the abortion proviso.

Question One:

Your first question asks whether the abortion proviso in c. 367, § 2, Items 1120-2000, 1120-3000 and 1120-4000, obligates the Commission to reduce group insurance coverage for abortions “effective July 1, 1979, or at some future date.” The direct answer to this question is “no.”

Chapter 367 is the Commonwealth’s General Appropriations Bill, see Massachusetts Constitution, Amendments, art. 63, § 3. Each item described in c. 367, including the three at issue here, sets apart from the general public revenues, “a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money, and no more, for that object and no others.” Opinion of the Justices, 323 Mass. 764, 766 (1948) (citations omitted). Accord, Opinion of the Justices, Mass. Adv. Sh. (1978) 1412, 1419-1420; Opinion of the Justices, Mass. Adv. Sh. (1977) 2339, 2342. Items 1120-2000, 1120-3000 and 1120-4000 appropriated funds for the 1979 fiscal year and the abortion proviso attached to each of those items only pertains to and restricts funds so appropriated. The 1979 fiscal year ends June 30, 1979. Accordingly, and assuming that the fiscal year 1980 appropriations act is passed before the fiscal year begins on July 1, 1979, the abortion proviso in c. 367 does not govern the Commission’s
expenditure of funds during any time period beginning July 1, 1979, or thereafter.7 At this point in time (the middle of fiscal year 1979), the question whether subsequent appropriations acts will contain a similar proviso is a matter of speculation. Therefore, insofar as you seek guidance as to the Commission's legal obligations beyond June 30, 1979, you must await the action of the Legislature.8

Nevertheless, the Commission must recognize that the abortion proviso in c. 367 does apply to funds expended during the current, 1979 fiscal year. The proviso expresses a clear and affirmative legislative mandate, and absent a determination by a court or other competent authority that the proviso is constitutionally invalid or otherwise not enforceable, the Commission is charged with the duty to implement the proviso to the fullest extent possible. See Opinion of the Justices, supra, Mass. Adv. Sh. (1978) 1412, 1419-1420.9 Since there has been no judicial or other decision holding that certain constitutional or statutory provisions supersede the Commission's obligation to implement the abortion proviso at the present time, it should proceed expeditiously to exercise all available options to fulfill this duty. I consider those options in my answer to the second question, immediately below.

**Question Two:**

The second question concerns the Commission's power, unilaterally or by agreement, to change the provisions of the existing group health insurance contracts in order to exclude coverage of abortion services which do not fit within the scope of the abortion proviso.10 Treating first the issue of mutuality, the contracts expressly contemplate amendments by agreement, in order to conform to newly enacted legislation, among other reasons.11 I also understand that in fact Blue Cross-Blue Shield is presently willing to execute such an amendment limiting the abortion services covered under its contracts; as amended, the contracts would conform to the restrictions of the abortion proviso. In my view, the Commission should accept the offer

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7There have been instances when the Legislature has not enacted a budget or appropriations act before the start of a fiscal year; fiscal year 1979 is the most recent example. If such a situation should occur with respect to the 1980 budget, the abortion proviso in c. 367 would apply to the Commission so long as the Commission continues to expend funds appropriated by c. 367. I discuss the Commission's current obligations concerning the implementation of c. 367's abortion proviso in the remainder of my answer to the first question and in my answer to the second question.

8Since the matter is one of legislative determination, it would be inappropriate for me to conjecture whether future appropriations acts will contain identical or related abortion spending restrictions, and to consider your first question accordingly. Presumably, the Commission in the course of its negotiations on insurance coverage applicable to periods on and after July 1, 1979, might provide for a mechanism to adjust rates and coverages depending upon whether such restrictions are attached to future Commission appropriations.


10Independent of court action, I have on occasion answered questions about the constitutionality of specified statutes or provisions rendered to state officials, see, e.g. 1974/75 Op. Att'y Gen. No. 65, Rep. A.G., Pub. Doc. No. 12 at 351 (1975), and have even advised officials not to enforce statutes which I found directly to offend the Constitution. See 1974/75 Op. Att'y Gen. No. 12 at 151 (1975). Your first question, however, does not ask any question about the constitutionality of the abortion proviso, and insofar as your second and fourth questions raise constitutional issues, my answers show that I have not found it necessary to resolve them. I decline to opine generally on the possible constitutional impediments to the abortion proviso.

11I assume your question refers only to the contracts with Blue Cross-Blue Shield and HMOs, and not to the Commission's obligations (if any) relating to the collective bargaining agreement between the Commonwealth and the "Alliance" (i.e., the alliance of the American Federation of State, County and Municipal Employees Union [AFSCME], AFL-CIO, and its affiliate councils, and the Service Employees International Union [SEIU], and its affiliate locals).

12You have given me copies of relevant portions of the Commission's contracts with Blue Cross-Blue Shield and with the HMOs. Each contains a provision explicitly authorizing changes by written agreement between the insurer and the Commission without the consent of any covered employee, dependent, or other person.
of Blue Cross-Blue Shield and proceed to execute the necessary contract amendments.\(^{12}\)

The HMOs pose a different problem. You have stated that none of them is willing to amend its group insurance contract until July 1, 1979, after the end of fiscal year 1979. Thus a mutually agreed-upon change designed to implement the abortion proviso is not an option. The question whether the Commission has the authority to require an amendment of each HMO contract so as to comply with the abortion proviso's mandate is not an easy one, compare e.g., American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., Mass. Adv. Sh. (1978) 58, with Wasser v. Congregation Agudath Sholom of Chelsea, 262 Mass. 235, 236-237 (1928). However, I do not believe it necessary to answer the question here, because the Commission has other remedies available under its existing contracts.\(^{13}\) If the HMOs persist in their unwillingness to amend their group insurance contracts before July 1, 1979, the Commission may be required to proceed under the contractual provision described in n. 13 above or some other pertinent provision, in order to comply with the mandate of the abortion proviso.

**Question Three:**

The third question asks whether G.L. c. 32A "or any other law" requires the Commission to provide uniform insurance coverage to employees who elect to participate in the different group health plans for which you have entered into contracts. As framed, the question is extremely general in nature, making its answer difficult. Cf. 1977/78 op. Atty. Gen. No. 18, Rep. A.G., Pub. Doc. No. 12 at __________ (1978). It appears, however, that the Commission is concerned because the coverage provided to employees who elect to participate in an HMO insurance plan differs quite substantially from that given employees who choose the more conventional insurance plan offered by Blue Cross-Blue Shield.

General Laws, c. 32A does not prohibit differences between the coverage provided by HMO contracts and conventional contracts.\(^{14}\) Pursuant to G.L. c. 32A, § 14, and c. 176G, § 11, the Commission is authorized to enter into group health insurance contracts with HMOs, and the scope of its authority to set the terms of such contracts is very broad:

> The Commission may enter into a contract . . . to make available the services of a health care organization [or HMO] to certain eligible active and retired employees and dependents . . . on a voluntary and optional basis, as it deems in the best interest of the Commonwealth and such eligible persons as aforesaid . . . (emphasis supplied). G.L. c. 32A, § 14\(^{15}\)

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12 Given the position of Blue Cross-Blue Shield, it is therefore not necessary to consider whether the Commission unilaterally could implement such amendments to its Blue Cross-Blue Shield contracts.

13 Each of the HMO contracts forwarded to me contains a provision stating:

> The Commission may discontinue this contract at any time by giving [to the HMO] written notice stating when, after the date of such notice, such discontinuance shall become effective, but in no event shall such discontinuance be less than thirty (30) days from said notice.

In addition, there may be provisions of the contracts in the portions I have not seen which offer alternative (and less drastic) options that might be pursued to effectuate c. 367’s requirements. “Nor am I aware of ‘any other law’ that might independently prohibit such differences. However, I should point out that this portion of your inquiry is too broad and too general to answer; under the circumstances it would be inappropriate to undertake an exhaustive review of every statute to determine its application to the issue you raise.

14 The section attaches two conditions to the Commission’s contracting power, neither of which relates to coverage terms.
No other provision in § 14, or in any other section of c. 32A, limits the Commission’s power to contract with HMOs for such insurance coverage as it deems appropriate. The broad discretion vested in the Commission by the quoted language of § 14 is to be given effect. Cf. Multi-Line Ins. Rating Bureau v. Commissioner of Ins., 357 Mass. 19, 21-22 (1970); cf. also First Nat’l Bank of Cape Cod v. Board of Bank Incorporation, 361 Mass. 381, 382 (1972).

Question Four:

Your fourth question asks whether the Commonwealth’s collective bargaining agreement with the Alliance, the primary collective bargaining representative of state employees, supersedes the Commission’s obligation to reduce the coverage for abortion services now provided in its health insurance plans in order to comply with c. 367’s abortion proviso.

Two independent factors restrict my ability to respond. The first concerns pending litigation. The Commission is not a party to the Commonwealth’s collective bargaining contract. Nevertheless, a question was raised in a proceeding before the Labor Relations Commission whether the Group Insurance Commission, as a state agency, is subject to some of the bargaining duties and obligations imposed by the public employees’ collective bargaining statute (G.L. c. 150E) on the Commonwealth as the “employer” (see G.L. c. 150E, § 1). This question is one of the issues presented in a case now before the Massachusetts Appeals Court, Group Insurance Commission v. Labor Relations Commission, No. 78-630 (1978), in which I represent the Commission. To the extent that your fourth question raises the same legal issue, the pendency of the litigation precludes my answering it. See, e.g., 1977/78 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at

Apart from the litigation, in large measure your question calls for a reading and interpretation of the existing collective bargaining agreement between the Commonwealth and the Alliance. The duty to interpret the terms of the agreement, however, lies with others, for example an arbitrator or the Labor Relations Commission. See School Comm. of Danvers v. Tyman, Mass. Adv. Sh. (1977) 415, 427; see also 1977/78 Op. Atty. Gen. No. 14 at 3, n. 4., Rep. A.G., Pub. Doc. No. 12 at n. 4 (1978). Nevertheless, since the Commission is not a party to the collective bargaining agreement, it is not in a position to seek an answer in the collective bargaining forum to the question you pose. As its lawyer I am responsible for advising the Commission of questions relating to its official duties. To that end I respond to your question insofar as I am able, taking into account the pending lawsuit just mentioned.

The current collective bargaining agreement between the Commonwealth and the Alliance runs from July 1, 1977, through June 30, 1980. Article 13 of the agreement relates to group insurance, setting forth the portions of the group insurance premium which the Commonwealth and each insured state

*The other pertinent sections in G.L. c. 32A which concern the Commission’s authority to contract for group insurance and the amount of coverage to which each insured employee is entitled, e.g., c. 32A, §§ 4, 5 and 6, do not require, expressly or implicitly, uniform coverage for every employee.
employee respectfully agree to pay during the contract period.\textsuperscript{17} Neither Article 13 nor any other provision of the agreement describes the coverage offered by any group insurance policy. The agreement thus appears to indicate on its face (see n. 17 \textit{supra}) that specific types of benefits provided — for example abortion services — are not considered in or treated by it. \textit{Cf. Watertown Firefighters, Local 1343, I.A.F.F., AFL-CIO v. Watertown}, Mass. Adv. Sh. (1978) 2956.\textsuperscript{18}

Further, as the cited case shows, provisions in a public employee collective bargaining agreement which contavene a declared legislative policy with respect to group insurance cannot be enforced. \textit{Id.} at 2963, 2964-2967.\textsuperscript{19}

It is therefore my opinion that the current collective bargaining agreement with the Alliance does not override or negate the Commission's duty to comply with the abortion proviso in c. 367.

In summary, then, I conclude that neither the terms of the Commission's existing group health insurance contracts nor the provisions of the Commonwealth's collective bargaining agreement with the Alliance removes the Commission's obligation to implement c. 367's abortion proviso. The Commission should take the necessary steps to ensure that its expenditure of funds appropriated by c. 367 complies with that proviso. The abortion proviso, however, does not itself govern the Commission's expenditure of funds appropriated for fiscal year 1980, beginning July 1, 1979.

Very truly yours,

FRANCIS X. BELLOTTI
Attorney General

Number 27
Robert Q. Crane
Treasurer and Receiver-General
Chairman, State Board of Retirement
One Ashburton Place
Boston, MA 02108

Dear Mr. Crane:

As Chairman of the State Board of Retirement (Board), you have requested my opinion on the proper construction of G.L. c. 32, § 91 (§ 91), which concerns in relevant part the relation between retirement benefits and

\textsuperscript{17}For example, Article 13 § 1, reads:

[until January 1, 1978] [the Commonwealth shall pay eighty percent of the monthly premium rate for the Group Health Insurance Plan and each employee covered shall pay twenty percent of this premium rate for the type of coverage that is provided for him/her and his/her dependents under the plan.]

This language by its terms concerns only the allocation of responsibility between the Commonwealth and its employees for payment of contract premiums during the life of the agreement. The subsequent pertinent sections of Article 13 vary the relative portions on the premium to be paid by the Commonwealth and the employee at specified points in time, but are otherwise identical to § 1 (quoted here).

\textsuperscript{18}That case concerned the relationship between municipal employees' collective bargaining agreements and group insurance contracts which certain local governments enter into for such employees pursuant to G.L. c. 32B. In the course of its opinion the court indicated that the Legislature did not intend municipal bargaining agreements to reach specific types of benefits to be covered by employee insurance policies, since such provisions might seriously impair the municipality's ability to contract for health insurance on a group basis. Mass. Adv. Sh. (1978) at 2961. The same rationale applies to the Commission's duty to provide group health insurance for state employees under G.L. c. 32A.

\textsuperscript{19}General Laws, c. 150E, § 7, provides that the terms of a collective bargaining agreement may supersede contrary provisions of certain enumerated statutes; G.L. c. 32A is not one of those listed. \textit{Cf. Watertown Firefighters, supra at 2964 and n. 16.}
compensation paid to retired public employees who return to active public service. Your present request arises out of an informal opinion which a member of my staff gave to the Executive Secretary of the Board on February 15, 1978, and which also involved an interpretation of § 91. Because of the informal nature of the previous opinion and the close relationship between it and your present opinion request, I have addressed in this opinion both requests in order that an integrated and comprehensive response can be made. Accordingly, the questions which I consider here are the following:

1. Whether a retired state employee who waives his retirement benefits and then accepts a full-time, paid position with a municipal or county government may have his state retirement allowance reinstated for 90 days, or 720 hours, during any calendar year.

2. Whether, assuming the answer to the first question is no, the Board may: (a) require an individual to return retirement benefits received in violation of § 91, as construed by this opinion and by the February 15, 1978 informal opinion; (b) alternatively, require that the amount of retirement benefits received in violation of § 91 be recovered by setting off such amounts from subsequent valid retirement benefits made to the individual; or (c) give only prospective effect to the informal opinion of February 15, 1978.

In summary, my answer to the first question is that § 91 does not permit a retired state employee who waives his retirement benefits and then accepts employment with a municipal or county government to supplement his income by the device of reinstating his retirement allowance for 90 days, or 720 hours, during any calendar year. The answer to the second question is that the Board may exercise either alternative (a) (retroactive reimbursement), alternative (b) (set-off), or some other reasonable method to recover benefits to which a retired state employee is not entitled; the Board is not limited to a prospective enforcement of § 91’s provisions from the date of the informal opinion. My reasons for these conclusions are discussed below.

**Question 1:**
Two portions of § 91 are particularly relevant to the first question: § 91(a) and (b). Section 91(a) provides in part:

No person while receiving a pension or retirement allowance from the commonwealth, or from any county, city, town or district, shall, after the date of his retirement be paid for any service rendered to the commonwealth or any county, city, town or district [except in certain situations].

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1. This opinion therefore supersedes the earlier informal opinion. As a general matter, I wish to discourage requests for informal opinions. Since informal opinions are rarely prepared with the same amount of research and consultation as formal opinions of the Attorney General, I believe that in many instances they are not an appropriate way for my Department to advise state agencies and state officials on important legal questions.

2. This issue was the subject of the previous informal opinion and arose out of two factual situations. The first involved an individual who retired from state employment on August 9, 1974. Effective the same day, he waived and renounced his retirement allowance pursuant to G.L. c. 32, § 90B. On September 2, 1976, he requested that his retirement allowance be reinstated; he again waived the allowance on May 31, 1977. The individual had been appointed chief of police of a municipality on June 2, 1974, and was employed in that capacity at least through 1977. The second situation concerned an individual who retired from state employment on July 31, 1976. He received a retirement allowance from August 1, 1976 through March 31, 1977, when he waived and renounced the allowance. The individual had been appointed by the Governor to be a county sheriff on August 1, 1976, and served in that capacity until 1978.

3. This second group of questions represents those which you have posed in your formal opinion request.

4. The same conclusion was reached in the informal opinion of February 15, 1978, although by a somewhat different interpretation and application of § 91 than are employed in the present opinion.
circumstances]. . . . Notwithstanding the foregoing provisions of this section . . . a person who, while receiving . . . a pension or retirement allowance [from the commonwealth or any county, city, town or district], is appointed . . . to a position by . . . [the Governor, a mayor or a city council, or the Legislature], shall be paid the compensation attached to such position; provided that he files with the treasurer of the governmental unit paying such pension or allowance, a written statement wherein he waives the same for the period during which such compensation is payable.

The plain import of § 91(a) is that retired state employees are generally prohibited from receiving retirement benefits during any period in which they are receiving compensation for services to the Commonwealth or to a county, city, town or district. See 1971/72 Op. Atty. Gen. No. 15, Rep. A.G., Pub. Doc. No. 12 at 76 (1972). 5

Section 91(b) 6 offers a specific and narrow exception to § 91(a)'s prohibition, permitting, under certain conditions, retired public employees to be reemployed in public service for not more than 90 days in any calendar year. It presently reads 7 in relevant part:

In addition to and notwithstanding the foregoing provisions of this section or similar provisions of any special law, any person who has been retired and who is receiving a pension or retirement allowance . . . may . . . be employed in the service of the commonwealth, county, city, town, district or authority for not more than [90] days or [720] hours in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated. (Emphasis supplied.)

Section 91(b) thus explicitly limits its exception to a person "who has been retired and who is receiving a pension or retirement allowance" (emphasis supplied). The exception does not extend to persons who have retired but have waived their retirement benefits (pursuant to § 91(a) or G.L. c. 32, § 90B) in order to accept public employment: clearly such persons are not "receiving a pension or retirement allowance." The plain language of the § 91(b) exception must be given effect. See, e.g., Burke v. Chief of Police of Newton, Mass. Adv. Sh. (1978) 425, 427; Moynihan v. Arlington, Mass. App. Ct. Adv. Sh. (1978) 1225.

Moreover, it would be anomalous to read § 91(b) as a device for allowing employed persons to supplement their incomes with retirement benefits for up to 90 days or 720 hours each year. Such a reading would turn the statutory

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6 Section 91(b) was added by St. 1968, c. 676, a statute which rewrote § 91 and subdivided it into subsections (a) through (d). Before the enactment of c. 676, the language of general prohibition now contained in § 91(a) and quoted in the text at 3, supra, appeared in § 91, ¶ 1.

7 Section 91(b) was amended by St. 1973, c. 587, to change the term "[90] days" to "[90] days or [720] hours." Otherwise it has remained in the form originally enacted in 1968.

Reference to the two factual situations described in n. 2, supra, may help clarify the relation between subsections (a) and (b) of § 91. Prior to September 2, 1976, the first individual described had been employed as chief of police for a municipality and had waived and renounced his retirement benefits. On September 2, 1976, he requested that his retirement allowance be reinstated. The general prohibition of § 91(a), considered alone, dictates the conclusion that the individual was not entitled to collect both retirement benefits relating to his former state employment and compensation for his ongoing services as police chief on and after September 2. Further, in the situation described the limited exception of § 91(b) does not aid the individual since, on September 2, he was not a retired person "who is receiving a pension or retirement allowance . . . ." Id.

Different considerations apply, however, to the case of the second person mentioned in n. 2. On August 1, 1976, the date of his appointment as sheriff, he was a retired person receiving a retirement allowance. Under the provisions of § 91(b), he was therefore entitled to collect, in addition to his retirement benefits and within the limits specified in § 91(b), compensation for his services as sheriff for an aggregate period of up to 90 days or 720 hours in the calendar year 1976. Depending on the facts, he also may have been entitled to collect both retirement benefits and compensation for services during a period of 90 days or 720 hours in the calendar year 1977. Subsequent to March 31, 1977 — the date on which he waived and renounced his retirement benefits — he was no longer a retired person receiving retirement benefits and therefore was not entitled to claim the limited exception of § 91(b).

Question 2:

The second question also involves an interpretation of § 91. You ask whether the Board (a) may require an individual to return retirement benefits received in violation of § 91 prior to February 15, 1978, (b) alternatively, may offset the amount of such benefits against future valid allowances, or (c) is required to give only prospective effect to this opinion and the informal opinion of February 15, 1978.

It is a well-established principle of statutory construction that statutes

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*Whether the individual qualified for retirement benefits in 1977 depends on the calculation of days or hours he served as sheriff in 1976. That calculation is necessarily a factual determination for the Board to make, and I cannot advise you on it.

*Nothing stated here is intended to suggest that a retired employee who waives his retirement benefits is then forever precluded from receiving them; G.L. c. 32, § 90B makes clear that a waiver may be restricted in time and also rescinded. Rather, the benefits preclusion I discuss lasts only so long as the retired employee continues to hold a job with a governmental unit after his retirement.

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affecting substantive rights are presumed to be prospective in their operation unless a contrary intent is clearly expressed. In contrast, statutes relating to remedies and not affecting substantive rights are commonly treated as operating retroactively. See, e.g., Welch v. Mayor of Taunton, 343 Mass. 485, 487-488 (1962). However, these principles primarily have application to the question whether an act or occurrence prior to the effective date of the statute in question should be subjected to the mandates of the statute. Cf. Elmer v. Board of Zoning Adjustment of Boston, 343 Mass. 24, 25 (1961). Entirely different considerations apply where, as here, the acts in question occurred after the effective date of the statute.

As I previously noted, § 91 was substantially rewritten and reorganized by St. 1968, c. 676, which added subsection (b) to § 91 in essentially its present form. Chapter 676 was approved on July 19, 1968, and became effective 90 days thereafter, see Opinion of the Justices, 368 Mass. 998, 891, n. 4 (1975). The informal opinion of February 15, 1978, as well as this opinion, merely apply the clear language of § 91(a) and (b) in the context of factual situations arising subsequent to the effective date of c. 676.10 The Board therefore is not limited by the dates of the informal opinion or of this opinion in seeking to enforce the provisions of these two subsections.

The powers and duties of the Board are delineated in G.L. c. 32, § 20(5); see id., § 20(1)(b). Under the explicit terms of § 20(5)(b), the Board is to have such powers and duties as are necessary to satisfy the requirements of the statutory retirement scheme of c. 32. This general regulatory and administrative mandate carries with it the authority to take all necessary steps to fulfill the Board's responsibilities. Multi-Line Ins. Rating Bureau v. Commissioner of Ins., 357 Mass. 19, 22 (1970); Massachusetts Bay Trans. Auth'y v. Boston Safe Deposit & Trust Co., 348 Mass. 538, 544 (1965). In cases in which retirement benefits have been received in violation of any provision of c. 32, it is therefore the duty of the Board to take remedial action. As you have suggested, one remedial step might be to require that an individual who has violated § 91(b) repay the Commonwealth the excess of otherwise improper retirement benefits he has received.11 Cf. G.L. c. 32, §§ 24, 91(c). Alternatively, again as you have suggested, in an appropriate situation the Board might choose to offset the excessive amount against future valid payments. See G.L. c. 32, § 20(5)(c). It is my opinion that, as a general matter, both methods of collecting past invalid payments are available to the Board, and that the Board has the duty to enforce the statute by actively employing these or similar methods.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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10Neither § 91(a) nor (b) falls in the category of statutes which are arguably so vague and unclear that serious questions of due process would arise if they were construed to apply to conduct undertaken before a formal judicial or Attorney General's interpretation of the statute had been given. Compare Commonwealth v. Templeman, Mass. Adv. Sh. (1978) 2738, 2743-2744 (due process might prohibit application of vague criminal statute to defendant's conduct before court clarified statute's meaning and cured its defect of vagueness), with Commonwealth v. Gallant, Mass. Adv. Sh. (1977) 2254, 2270-2272 (rejecting vagueness attack on another criminal statute and upholding defendant's conviction under it); see generally Grey v. City of Rockford, 408 U.S. 104, 108 and n. 3 (1972); Commonwealth v. Gallant, supra, Mass. Adv. Sh. (1977) at 2256-2258 (discussion of vagueness doctrine). Nor is this a situation where a long established rule or interpretation of a statute, on which parties have relied, is suddenly altered. Cf. Tucker v. Badoian, Mass. Adv. Sh. (1978) 3207, 3220 (Kaplan J., et al., concurring in result).
11In this regard, I understand that pursuant to the informal opinion of February 15, 1978, the Board sought and received the excessive retirement allowance paid to the first individual described in n. 2, supra.
Number 28
Richard E. McLaughlin
Registrar
Registry of Motor Vehicles
100 Nashua Street
Boston, MA 02114

Dear Mr. McLaughlin:

You have requested an opinion concerning the present status of the arrest provisions set forth in G.L. c. 90, § 21, in view of § 41 of St. 1978, c. 478 (c. 478), the comprehensive court reform act passed by the Legislature on July 18, 1978. For the reasons discussed below, I conclude that c. 90, § 21, is unaffected by the court reform legislation. Accordingly, officers authorized under c. 90, § 21, to make arrests may continue to arrest motor vehicle operators pursuant to the provisions of that section.

Since your question involves the interrelationship of c. 478, § 41, and G.L. c. 90, § 21, I begin with a description of these statutory provisions. Chapter 478 is a comprehensive statute which substantially reorganizes the Commonwealth’s trial court system in order “to promote the orderly and effective administration of the judicial system of the Commonwealth.” Chapter 478, § 1. Section 41 of c. 478 adds § 20F to G.L. c. 90, one of the principal chapters of the General Laws concerned with the regulation and operation of motor vehicles.

Section 20F seeks to provide alternative procedures for handling “minor motor vehicle violations.” These alternative procedures operate at the option of the offender, and, if followed, result in an administrative and non-criminal disposition of the minor motor vehicle violation. The purpose of the new administrative procedures is presumably to reduce some of the burdensome caseload of the district courts and probation offices, in order to free them to deal with more serious criminal (as well as civil) cases. Cf. Pinnick v. Cleary, 360 Mass. 1, 16-19 (1971) (reducing court congestion found to be one of purposes of no-fault insurance legislation).

General Laws, c. 90, § 21, was enacted long before § 20F, and was not amended in any way by the court reform act’s provisions. Section 21

1You raise this question in relation to the duties of “enforcement personnel” of the Registry of Motor Vehicles, a term I understand to refer to persons appointed by the Registrar who are entitled to exercise all the powers of police officers and constables pursuant to G.L. c. 90, § 29. The first sentence of G.L. c. 90, § 21, the portion of the section relevant to this opinion, applies to “any officer authorized to make arrests . . . .” which includes police officers and therefore Registry “enforcement personnel.” Cf. Commonwealth v. Sullivan, 311 Mass. 177, 179-180 (1942).

2I use the term “minor motor vehicle violations” as a shorthand expression to refer to the following language in § 20F:

[A] violation of chapters eighty-five to ninety D, inclusive, involving the operation of a motor vehicle, other than a violation involving the parking of motor vehicles, where the maximum statutory penalty does not exceed one hundred dollars for the first offense and which does not provide for a penalty of imprisonment . . . .

In summary, the procedures offered under § 20F are the following. (1) A police officer who “takes cognizance” of a minor motor vehicle offense gives the offender a citation, called a “uniform traffic citation.” (2) This citation notifies the offender that (a) he may request a hearing on the alleged violation within four days before any process shall issue, and (b) he may waive his right to trial and pay the maximum statutory penalty within ten days of the alleged violation; it also “contain[s] a space for the name and address of the offender, the number of his license to operate motor vehicles, the registration number of the vehicle involved, the time and place of the violation, the specific offense charged” (emphasis supplied), and certain other information; finally, “[s]uch citation shall be signed by the officer and by the offender to acknowledge that the citation has been received” (emphasis supplied). (3) A person who receives such a citation may appear before the magistrate of the district court with jurisdiction and confess the offense charged or may mail to the magistrate the maximum statutory fine for that offense. (4) “The payment to the magistrate of such penalty shall operate as a final disposition of the case. If the citation is so returned by the offender, such an appearance shall not be deemed a criminal proceeding for the purposes of [G.L. c. 90]. The offender shall not be required to report to any probation officer and no record of the case shall be entered in any probation records.”

Section 20F proceeds to make clear, however, that if an alleged offender fails to appear before the magistrate or “desire[s] not to avail himself of the benefits of the procedure established by this section, the clerk shall as soon as may be notify the officer concerned, who shall forthwith make a complaint and follow the procedure established for criminal cases.”
provides in relevant part that an officer empowered to make arrests may arrest without warrant any person driving an automobile who commits one or more of the motor vehicle offenses enumerated in the section. It goes on to provide that any person arrested under the section’s terms is to be brought within 24 hours of his arrest “before a magistrate and [to be] proceeded against according to law.”

There is no express language in the new G.L. c. 90, § 20F, which repeals, modifies, or even refers to the arrest provisions of the older § 21. Section 20F begins, however, with the phrase: “Notwithstanding any provisions of the General Laws to the contrary . . . .” As you have indicated, this phrase, and the new section in general, have caused a great deal of confusion and concern among law enforcement and other officials over the operation of the two statutes together. It seems that some officials believe an irreconcilable conflict arises between §§ 20F and 21 in that § 21 permits police officers to arrest and hold in custody alleged offenders for a number of minor motor vehicle violations which may be administratively processed on a non-criminal basis under § 20F. In their view, it is wholly inconsistent with the concept of non-criminal dispositions of motor vehicle offenses to permit arrests for them. Accordingly, the assertion is made that § 20F impliedly repeals the conflicting provisions of § 21, and that officers may no longer arrest persons for those offenses listed in § 21 which also qualify as minor motor vehicle violations under § 20F.

In my opinion, G.L. c. 90, § 20F, does not operate as an implied repeal of any portion of c. 90, § 21. Rather, a careful reading of the two statutes in light of the governing rules of statutory construction demonstrates that the statutes may operate consistently and harmoniously together.

“The principle of interpretation is well established, that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them.” Brooks v. Fitchburg & Leominster St. Ry., 200 Mass. 8, 17 (1908); accord, Goldsmith v. Reliance Ins. Co., 353 Mass. 99, 102 (1967); Everett v. Revere, 344 Mass. 585, 589 (1962). In a similar vein, where possible, a statute is to be construed in harmony with earlier

*These offenses, designated in the first sentence of § 21, are: (1) operation of a motor vehicle without having in possession an operator’s license, when combined with the violation of “any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles”; (2) operation of a motor vehicle on a public way after the motorist’s operator’s license has been suspended or revoked by the Registrar of Motor Vehicles; (3) operation on a public way of a motor vehicle while under the influence of alcohol, marijuana or narcotic drugs, or other described substances; (4) unauthorized use of a motor vehicle; (5) refusal of a motorist, when requested by a police (or other authorized) officer, to give his name and address or the name and address of the vehicle’s owner; (6) refusal of a motorist, on the demand of an officer, to produce for examination his operator’s license or the registration certificate for the vehicle; (7) operation of a motor vehicle on a public way without stopping to give one’s name, residence and vehicle registration number after knowingly colliding with or causing injury to any person.

The following is an example of the purported conflict: the failure of a motorist to produce his operator’s license upon the demand of a police officer is an arrestable offense under § 21; however, since that offense is punishable by a maximum fine of $100, see G.L. c. 90, § 25, it constitutes one of the minor motor vehicle violations described in § 20F, and the alleged offending motorist has the option of selecting the non-criminal administrative procedures set forth in § 20F.

It bears emphasis that the implied repeal of § 21, if any, would only operate with respect to those § 20F minor motor vehicle violations for which warrantless arrests may normally be made under § 21. Such violations are: (1) refusal of a motorist to give the name and address of the vehicle’s owner; (2) a motorist’s refusal to produce his license and registration certificate (similarly punishable under c. 90, § 25); and (3) depending on the additional violations committed, operating without a license (punishable in certain instances by a maximum fine of $25 for the first offense under c. 90, § 20). The other violations listed in § 21, e.g., operating under the influence of alcohol, unauthorized use, etc., are all punishable by terms of imprisonment for the first offense, and thus do not qualify as minor motor vehicle offenses for which non-criminal procedures and dispositions are available under § 20F. By definition, therefore, arrests for such offenses do not contravene any provisions of § 20F.

See also Doherty v. Commissioner of Administration, 349 Mass. 687, 690 (1965): “The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand” (citation omitted).

I consider first the operation of the two statutes with respect to the minor motor vehicle violations covered by both. Section 20F makes clear that a non-criminal, administrative disposition of a case involving a minor motor vehicle violation is not automatic; the alleged offender may choose to proceed criminally or may be required to do so because of his failure to follow the prescribed administrative procedures. The section also indicates in plain terms that the initial procedural step which ultimately leads to a non-criminal, administrative disposition — the issuance and receipt of a "uniform traffic citation" — requires the offender to provide the issuing police officer with (1) the offender's name and address, (2) the number of his operator's license, (3) the registration of the vehicle involved, and (4) his signature. (See n. 3 supra). Unless this information is furnished by the offender and filled out on the uniform traffic citation, the citation will be incomplete and could not serve as the basis of a non-criminal disposition of the case in conformance with the explicit provisions of § 20 F. Cf. Commonwealth v. Schiller, Mass. Adv. Sh. (1979) 13, 15-16; Commonwealth v. Sullivan supra, 311 Mass. at 178. In short, the driver's refusal to provide information would preclude the operation of the non-criminal options which are asserted as justification for the refusal. In these circumstances there is no inconsistency between §§ 20F and 21: an alleged offender who has failed to provide this information by definition would not be entitled to choose to have his case terminated on a non-criminal basis under § 20F. 8

It thus appears that for virtually every § 20F minor motor vehicle violation which is also covered in § 21 (see n. 6, supra), a person committing the substantive offense would not be entitled in any event to have his case disposed of non-criminally under § 20F. 8 But even if one assumes there are circumstances in which a person might be arrested pursuant to § 21 and at the same time entitled to an administrative, non-criminal disposition of his case, I perceive no inconsistency between the operation of the two sections. I reach this conclusion because I do not agree with the underlying assumption that an arrest and a non-criminal disposition of a case are per se incompatible.

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8 As a practical matter, the same conclusion would apply to the offenses of refusal to produce one's license and registration certificate or the registration certificate of the vehicle involved. While the uniform traffic citation specifically calls for only the motorist's license number and the registration number of the vehicle involved, § 20F, 11, it is doubtful that an alleged offender could furnish both these items of information from memory and without producing the actual license and registration. Thus if the offender refused to produce these documents on the demand of an officer — an arrestable offense under § 21 — the chances are very good that he would also be unable to provide the information necessary to complete the uniform traffic citation.

8 Operation of a motor vehicle without having one's license available may be an exception in certain instances. However, since under § 21 this offense must be coupled with another motor vehicle violation to constitute an arrestable offense (see nn. 4 and 6, supra), the frequency of this exception is not at all clear.
"[A]n arrest is not a conviction of a crime. It is not even a final formal charge of a crime. It is merely an order holding a person in custody until he answers a complaining." United States v. cooperstein, 221 F. Supp. 522, 526 (D. Mass. 1963); see K. Smith, Criminal Practice and Procedure, § 74, n. 14 (30 Massachusetts Practice Series [1970]). Section 21 specifically requires a person who has been arrested and held in custody under its terms to be brought before a magistrate "and proceeded against according to law." There is no reason that such a person, if otherwise entitled to have his case treated on a non-criminal basis under § 20F, could not pay (or arrange to pay) to the magistrate the maximum statutory penalty for the offense and thereby finally dispose of the matter. Section 20F states only that if the payment is made by the offender, his "appearance shall not be deemed a criminal proceeding for purposes of [c. 90] . . . [and] [t]he offender shall not be required to report to any probation officer and no record of the case shall be entered in any probation records." An arrest under § 21 is in no way inconsistent with this language, for an arrest in and of itself does not trigger the entry of a criminal action on any judicial or probation records.

Common sense lends strong support to this result. See Massachusetts Mut. Life Inc. Co. v. Commissioner of Corporations & Taxation, 363 Mass. 685, 690-691 (1973). If, for instance, a motor vehicle operator cannot be arrested for failure to produce an operator's license and the motor vehicle registration on the demand of a police officer, then the officer has no effective means accurately to identify the operator or the owner of the vehicle. Not only will the operator's identity perhaps never be known but far more serious violations of law — for example, larceny of a motor vehicle; operation of an uninsured motor vehicle; unauthorized use of a motor vehicle — will not be detected.

The effective enforcement of most motor vehicle laws requires and depends on the ability of police officers to identify motor vehicle operators and their vehicles correctly at the time of the incident being investigated. The system of licensing operators and registering motor vehicles correctly at the time of the incident being investigated. The system of licensing operators and registering motor vehicles in part fulfills that requirement. However, there must be the additional factor of immediate sanctions for failure to produce a license or registration if the requirement is to be completely satisfied. Therefore the arrest sanctions set out in G.L. c. 90. § 21, are necessary for the effective administration of motor vehicle laws in Massachusetts.

It is useful to remember that G.L. c. 90. § 20F, originated as part of the court reorganization act, c. 478; its provisions must be read in that context. As mentioned,10 c. 478 was designed to improve the administration of the Commonwealth's court system, with emphasis on the trial courts. Before c. 478, minor motor vehicle offenses were handled by the district courts and probation offices in the same manner as all other criminal offenses of the same seriousness. Chapter 478 created an avenue for disposing of these cases that rendered court (and probation office) involvement unnecessary. At the same time the Legislature appears to have determined that a person

10See p. 2 supra.
who allegedly commits a minor motor vehicle violation should not (or perhaps constitutionally could not) be cut off from the judicial process. Thus the choice of an administrative or judicial disposition of such cases was left to the offender. However, the focus of § 20F is not on the offender and his rights, but rather on the administration of the courts and what was viewed as a more efficient and sensible approach to processing slight violations of motor vehicle law.

Viewing G.L. c. 90. § 21, against this background, it is reasonable to assume that the Legislature did not intend the new § 20F to alter any existing statutes governing the authority to arrest for violations of motor vehicle law. The Commonwealth's motor vehicle laws in themselves constitute a comprehensive regulatory scheme of which the arrest provisions established in § 21 are an integral part. Since the removal of these traditional arrest powers is not necessary to the effective administration of the new § 20F, such a radical change in public policy should not be imputed to the Legislature. See Ferullo's Case, 331 Mass. 635,637 (1954); Commissioner of Corporations & Taxation v. Dalton, 304 Mass 147, 150 (1939); Commonwealth v. Welosky, 276 Mass. 398, 401-402 (1931).

In summary, I conclude that the alternative, administrative procedures set forth in G.L. c. 90. § 20F, for resolving cases involving minor motor vehicle violations do not conflict with or impliedly repeal any of the provisions of G.L. c. 90, § 21. Enforcement personnel of the Registry of Motor Vehicles as well as other officers with the requisite authority may therefore continue to make arrests for motor vehicle violations pursuant to provisions of § 21.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 29
John E. Kearney, Chairman
Teachers' Retirement Board
One Ashburton Place
Boston, MA 02108

February 22, 1979

Dear Mr. Kearney:

You have requested an opinion whether the Teachers' Retirement Board (Board) is the appointing authority for its own staff. For the reasons set forth below, I conclude that the Board is the appointing authority for the Board's staff.¹

The substance of your question arises as a result of the following statutory changes effected by the 1969 legislation establishing a Governor's cabinet,

¹Note that in 1971 an informal opinion on the same question was rendered by an Assistant Attorney General to the then Commissioner of Education. This opinion supersedes in all respects the 1971 opinion. I also reiterate that I discourage requests for and the issuance of informal opinions. Such requests do not receive the same degree of research and deliberation as formal requests, but regrettably the answers are often relied upon, mistakenly, to the same degree as formal opinions of the Attorney General. See 1978/79 Op. Atty. Gen. No. 27, Rep. A.G., Pub. Doc. No. 12 at ______ (1979).
St. 1969, c. 704. The so-called Governor's Cabinet Act removed the Board from the Department of Administration and Finance. St. 1969, c. 704, §§ 8, 19. However, c. 704 made no changes in G.L. c. 15, § 18. Section 18 expressly authorizes the Board to "employ a secretary . . . [and] such other necessary clerical and other assistants as it may require."

Despite the language contained in G.L. c. 15, § 18, the previous Attorney General (through one of his assistants) informally took the view in 1971 that the power to appoint its staff did not rest in the Board itself, apparently because (1) appropriations for the maintenance of the Board continued to be allocated as part of the budget for the Department of Education; 2 (2) he read G.L. c. 29, § 27, to prohibit the appointment of staff by any state agency which does not directly receive an appropriation to cover the costs of such appointments; and (3) he interpreted the word "employ," as it appears in G.L. c. 15, § 18, as having a meaning different from the word "appoint." My own consideration of the matter, however, leads me to conclude that the earlier informal opinion is incorrect and that the Board does have the power to appoint its own staff. 4

I consider first whether the Board is the "appointing authority" for its own staff as that term is used in the civil service law, G.L. c. 31. I understand that with the exception of the Board's executive secretary, the staff of the Board is within the civil service system. "Appointing authority," at least for civil service purposes, is defined in G.L. c. 31, § 1, as follows:

"[A]ny person, board or commission with the power to appoint or employ personnel in civil service positions (emphasis added)."

Thus the Board, having the express power to "employ" personnel by virtue of G.L. c. 15, § 18, clearly qualifies as an appointing authority for all purposes relating to the Commonwealth's civil service system. Cf. Johnson v. Mayor of New Bedford, 303 Mass. 381, 383 (1939) (petitioner's "employment" began when he was "appointed").

Insofar as the Board employs personnel not governed by the civil service law, my conclusion is no different. 6 As I have noted, when the Legislature placed the Board within the Executive Office for Administration and Finance (A & F), it expressly exempted the Board from A & F's "direction, control and supervision." St. 1969, c. 704, § 4. It would be anomalous for

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2Section 8 of St. 1969, c. 704, amended G.L. c. 7 by inserting, inter alia, § 4G. Section 4G declares the Board and certain other agencies to be within the Executive Office for Administration and Finance. It also provides, however: "Nothing in this section shall be construed as conferring any powers or imposing any duties upon the commissioner [of administration] with respect to the foregoing agencies except as expressly provided by law." Moreover, St. 1969, c. 704, § 4, amended G.L. c. 7, § 4, to provide: "[The Commissioner of Administration] shall be the executive and administrative head of said office [for Administration and Finance], and every division, bureau, section and other administrative unit and agency within said office, other than the agencies named in section four G, shall be under his direction, control and supervision" (emphasis added).

3To complete the Board's transfer to the Executive Office for Administration and Finance, St. 1969, c. 704, § 19, deleted language from G.L. c. 15, § 16, which had placed the Board within the Department of Education.

4See, e.g., St. 1970, c. 480, Item 7025-0000.


6Prior to January 1, 1979, the definition appeared in G.L. c. 31 as follows: "... any person, board or commission having the power of appointment or employment . . . " (emphasis added).

7While the scope of the words "employ" and "appoint" may not be identical in all contexts, it may be noted that courts in other jurisdictions have held the terms to have congruent meanings in the context raised by your request. See, e.g., Burnap v. United States, 252 U.S. 512, 515 (1920); Morris v. Parks, 145 Or. 481, 28 P. 2d 215, 216 (1934); Board of Commissioners v. Department of Public Health, 44 N.M. 189, 100 P. 2d 222, 223 (1940).
the Legislature to have ordained that the Board's executive secretary — the person who heads the Board's staff and bears responsibility for the Board's day-to-day operations — be appointed by precisely the same agency from whose direction and control the Board is exempted. Such a suggestion contradicts the clear legislative intent to preserve the Board's autonomy and cannot be accepted.7

The provisions of G.L. c. 29, § 27, do not indicate a different result.8 Section 27 prohibits the employment of personnel by a state agency "unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made." This language does not imply that the department or executive office in whose budget an appropriation may have been placed for the maintenance of a state agency thereby necessarily becomes the appointing authority for that agency's staff. As the limited case law under the statute suggests, § 27 was designed to limit the amount of money expended for the employment of personnel, not to allocate the authority to make appointments. See Baker v. Commonwealth, 312 Mass. 490, 493 (1942).9

Accordingly, in the context of your question, I view G.L. c. 29, § 27, as a fiscal control statute whose impact on the Board is to prohibit the hiring of personnel beyond the amount annually appropriated for their salaries. Section 27 should not be applied as a personnel statute to render ineffectual the clear language of G.L. c. 15, § 18, and the manifest intent of St. 1969, c. 704, § 4. Statutes relating to a common issue should be read harmoniously together so as to preserve the meaning and practical effect of all. School Committee of Gloucester v. Gloucester, 324 Mass. 209, 212 (1949); see Morse v. Boston, 253 Mass. 247, 252 (1925); see also Labor Relations Comm'n v. Board of Selectmen of Dracut, Mass. Adv. Sh. (1978) 657, 662.

In summary, the provisions of G.L. c. 15, § 18, read in the context of G.L. c. 7, §§ 4 and 4G, clearly indicate that the Board has the authority to appoint its own executive secretary and its other staff.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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7 Since 1975, appropriations for the maintenance of the Board have appeared as line items in the budgets of A & F. Moreover, within the A & F budget the Board's appropriation is listed under the heading of "Division of Personnel Administration" (the Division). See St. 1978, c. 367, § 2, Item 1111-0010. Because the Division is both statutorily distinct and functionally unrelated to the Board, it cannot reasonably be inferred from their respective positions in the budget act that the Division is the appointing authority for the Board's staff. Yet, applying the logic of the 1971 informal opinion, A & F or the Division would now be responsible for appointing all personnel employed by the Board.

8 General Laws, c. 29, § 27, provides in relevant part as follows:

Notwithstanding any provision of general law, no department, office, commission and institution shall incur an expense, increase a salary, or employ a new clerk, assistant or other subordinate, unless an appropriation by the general court and an allotment by the governor, sufficient to cover the expense thereof, shall have been made. Appropriations by the General Court, and any allotments by the governor, shall be expended only in the amounts prescribed in the subsidiary accounts, if any, established for the several appropriation accounts in schedules established by, and on file with, the joint committee on ways and means.

9 To the extent that G.L. c. 29, § 27, has been held to touch upon the question of who has authority to make an expenditure, the Supreme Judicial Court has said that an appropriation to one agency cannot be construed to authorize expenditures by a second agency where the agencies are statutorily and functionally distinct and the legislative authorization neither states nor implies that the appropriation is made for the advancement of a function of the second agency. Shells v. Commonwealth, 306 Mass. 535, 539 (1940). The circumstances presented by your request differ markedly from those presented in Shells. An express appropriation for the administration of the Teachers' Retirement Bureau is made annually.
April 13, 1979

Dennis Condon, Commissioner
Department of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02110

Dear Commissioner Condon:

You have requested my opinion whether responsibility for inspecting buildings owned by the Massachusetts Bay Transportation Authority (MBTA), other state authorities1 and the various counties in the Commonwealth vests in local building inspectors or inspectors of the Department of Public Safety (state inspectors).2 Specifically, your inquiry seeks an interpretation of G.L. c. 143, § 3A (§ 3A), and a determination whether Section 108.1 of the State Building Code is consistent with that statute.3

For the reasons set forth below, I conclude that § 3A places the responsibility for inspections of buildings owned by the MBTA and other state authorities (see n. 1, supra) on state inspectors, while it reserves the inspection of county-owned buildings for local building inspectors. Accordingly, I believe that Section 108.1 of the State Building Code as presently written in part contravenes the provisions of § 3A, and requires amendment to conform to that statute.

General Laws, c. 143, § 3A, provides in relevant part:

...[T]he local inspector4 shall enforce the state building code as to any building or structure within the city or town from which he is appointed, including any building or structure owned by any authority established by the legislature but not owned by the commonwealth... The [state] inspector shall enforce the state building code as to any building or structure within any city or town that is owned by the commonwealth or any departments, commissions, agencies or authorities of the commonwealth. The [state] inspector shall have all the powers of a local inspector under this chapter and under the state building code as to such buildings or structures that are owned by the commonwealth or any of its departments, agencies, commissions or authorities. (Emphasis supplied.)

The State Building Code Commission (the Commission) was established by St. 1972, c. 802, § 1, and charged with the responsibility to promulgate the State Building Code. The Commission has interpreted § 3A to mean that local building inspectors have the full responsibility for the inspection of buildings owned by the MBTA, other state authorities, and the various counties of the Commonwealth; and that state inspectors are responsible

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1 In the context of your inquiry, the "other state authorities" treated in this opinion are the Massachusetts Port Authority (Massport) and the Massachusetts Turnpike Authority (MTA).
3 I have received memoranda from the Executive Office of Transportation and Construction, the State Building Code Commission and legal counsel to the former Governor addressing the legal issues raised by your request.
4 The term "inspector" is defined in G.L. c. 143, § 1, to refer to "an inspector in the division of inspection of the department [of Public Safety], except when qualified by the word 'local', whereupon it shall mean the inspector of buildings, building commissioner or local inspector of a city, town, or district..."
for buildings owned by the Commonwealth and its agencies, divisions and commissions. The Commission's interpretation is set forth in Sections 108.1 and 108.2 of the State Building Code. You have indicated, however, that the Division of Inspection in the Department of Public Safety construes § 3A to mean that state-owned buildings, as well as buildings and structures owned by the MBTA, Massport, the MTA, and generally by "political subdivisions" of the Commonwealth are to be inspected by state inspectors.

I first consider buildings owned by the MBTA, Massport and the MTA. The question whether those authorities are under the jurisdiction of state or local inspectors is difficult because of the ambiguity in the pertinent language of § 3A. Under that section, local inspectors are to inspect "any building or structure owned by an authority established by the legislature but not owned by the commonwealth" while state inspectors have responsibility over those buildings or structures "owned by the commonwealth or any . . . authorities of the commonwealth."

It is a well settled principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute so that no part will be inoperative or superfluous. Commonwealth v. Gove, 366 Mass. 351, 354 (1974); Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket S.S. Authy., 352 Mass. 617, 618 (1967). The task in this instance, then, is to identify some distinction (if possible) between "authorities established by the legislature" and "authorities of the Commonwealth" as those terms are used in § 3A.

Virtually every authority in Massachusetts can properly be described as being "established by the legislature," either directly by a specific statute or indirectly by the enactment of general enabling legislation that permits another entity — a city or town, for example — to create the authority. If a distinction is to be made, therefore, it must turn on whether certain authorities can be separated out from the entire class and characterized as "authorities of the Commonwealth" for state inspection purposes.

Authorities generally fall into two categories. The first, of which the MBTA, Massport and the MTA are members, is made up of those authorities established to perform vital governmental functions for usually large geographical areas. Thus the MBTA provides transportation services to some 78 or more communities in the Commonwealth, G.L. c. 161A, §§ 1, 2, 16. Massport has control of the state's major commercial airport and other vital transportation facilities located in Boston, Winthrop, Chelsea, Lincoln and Bedford, St. 1956, c. 465. The MTA's jurisdiction spans the Commonwealth from Boston to the New York boundary, St. 1952, c. 354.

§ 3A of the State Building Code reads in relevant part:

108.1 THE BUILDING OFFICIAL: The building commissioner or inspector of buildings and the local inspector shall enforce all the provisions of the Basic Code and any other applicable state statutes, rules and regulations, or ordinances and by-laws . . . [with respect to] all buildings and structures, including any building or structure owned by any authority, established by the legislature but not owned by the Commonwealth, such authorities to include, but not be limited to the Massachusetts Bay Transportation Authority, Massachusetts Turnpike Authority and the Massachusetts Port Authority. Section 108.2 provides:

108.2 THE STATE INSPECTOR: In every city or town the Basic Code shall be enforced by the state inspector as to any structures or buildings or parts thereof that are owned by the Commonwealth or any departments, commissions, agencies, or authorities of the Commonwealth . . . All buildings and structures owned by any authority established by the legislature shall be regulated in accordance with Section 108.1 of the Basic Code.

While these provisions do not expressly mention counties, the Building Code Commission informs me that it considers counties to fall within the general jurisdiction of local inspectors.

*The Executive Office of Transportation and Construction takes the position that buildings owned by the MBTA, Massport and the MTA are subject to state inspections. That office has not addressed the question of county-owned buildings.
Further, each of these authorities is placed by G.L. c. 6A, § 19, within the state's Executive Office of Transportation and Construction (EOTC) and each has a governing board of directors appointed by the Governor, G.L. c. 161A, § 6 (MBTA); St. 1956, c. 465, § 2 (Massport); St. 1952, c. 354, § 3 (MTA).

The second category of authorities consists of those which are directly established by local governing bodies or officers pursuant to enabling legislation enacted by the General Court. Examples are the housing authorities of various cities and towns organized in accordance with G.L. c. 121B, § 3, and local redevelopment authorities organized under G.L. c. 121B, § 4. Each of these authorities operates within the jurisdiction of the city or town which organized it, and its members must be residents in that city or town. G.L. c. 121B, §§ 3, 5, 6. Moreover, every housing project developed or operated by a housing authority is specifically made subject to all building, planning, zoning and health laws and ordinances of the community in which it lies. Id., § 28.

Viewing these two groups of authorities together, distinctions between them emerge which bear on the proper construction of § 3A. Authorities such as the MBTA, Massport and the MTA have by definition expansive geographical jurisdiction or scope of functions, or both. To require that these authorities comply with different and possibly inconsistent determinations of local building inspectors would make little administrative sense and could impede the efficient and effective operation of the authorities. A construction of § 3A to produce a more administratively practical result should be adopted. See Hood Rubber Co. v. Commissioner of Corps. & Tax’n, 268 Mass. 355, 358 (1929); Heine-Werner Corp. v. Jackson Industries, Inc., 364 Mass. 523, 528-529 (1974).

In addition, I hesitate to impute to the Legislature an intent to permit local authorities to interfere with the operations of entities such as the MBTA, Massport and the MTA, whose services and functions are of vital interest to the Commonwealth as a whole. Cf. Pereira v. New England LNG Co., Inc., 364 Mass. 109, 121 (1973); cf. also Boston v. Hospital Transportation Serv. Inc., Mass. App. Ct. Adv. Sh. (1978) 329, 333. For these reasons, I conclude that these three authorities are properly classified as “authorities of the commonwealth” within the meaning of § 3A, and therefore are exclusively subject to inspection by state building inspectors.

The same reasoning does not apply to local housing and redevelopment

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1 Other factors also show the state or in any event non-local orientation of these authorities. For example, the MBTA prepares its capital investment and mass transportation plans under the direction and supervision of EOTC, G.L. c. 161A, § 5(g), and the Commonwealth is obligated to fund the MBTA’s cost of service and operating revenue deficits annually, id., §§ 12, 13 (and see id. § 28). See 1978/79 Op. Atty. Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at (1979). Massport must make annual reports on its activities to the Legislature, St. 1956, c. 465, § 21, and the statute establishing it states: “This act, being necessary for the welfare of the commonwealth and its inhabitants, shall be liberally construed . . . .” Id., § 27. Similarly, the Act creating the MTA contains language about its necessity for the welfare of the Commonwealth, St. 1952, c. 354, § 19. That Act also provides that upon completion of the turnpike and establishment of a trust for repaying bondholders, the turnpike is to be turned over to and operated by the Commonwealth’s Department of Public Works, and the MTA itself dissolved. Id., § 17. See Village on the Hill, Inc. v. Massachusetts Turnpike Authority, 348 Mass. 107, 118 (1964), cert. denied 380 U.S. 955 (1965); Massachusetts Turnpike Authority v. Commonwealth, 347 Mass. 524, 528 (1964) (outlining the nexus between the MTA and the state government).


3 Of course regional housing authorities operate within all the cities and towns joining in the authorities’ creation.

4 See also G.L. c. 121B, § 7, which provides that housing and redevelopment authorities are to be considered municipal agencies for purposes of the Commonwealth’s conflict of interest law, G.L. c. 268A. The MBTA, Massport and the MTA have always been treated as state agencies under the conflict statute. E.g., Conf. Op. Atty. Gen. Nos. 795, 674, 639.

5 Appeals of a local building inspector’s interpretation of the State Building Code may be taken to the State Building Code Commission, G.L. c. 23B, § 23. While the Commission through this appeal process may remove the burden of compliance with inconsistent Building Code rulings, an appeal can be time-consuming and costly.
authorities. Given the local sphere in which these authorities operate, there is not the same need for them to be subject to a single set or source of building code determinations. Indeed, the opposite may be true. It appears highly sensible that authorities with local jurisdiction operate in concert with the Building Code interpretations of local building inspectors. Accordingly, I believe the language of § 3A granting to such local inspectors jurisdiction over buildings owned by authorities “established by the legislature but not owned by the commonwealth” should be considered to include buildings owned and operated by local or regional housing, redevelopment or similar authorities. See Perini Corp. v. Building Inspector of North Andover, supra, Mass. App. Ct. Adv. Sh. (1979) at 215-217.12

I turn now to the question of who has the authority to inspect county-owned buildings. It is undisputed that these buildings are subject to the State Building Code. See G.L. c. 143, § 2A. Nevertheless, a county is not a department, commission, agency or authority of the Commonwealth (see generally G.L. c. 34, 35), and therefore buildings owned by counties do not fall expressly within the jurisdiction of state inspectors as defined by § 3A. The question, then, is whether § 3A should be read implicitly to bring county-owned buildings under the authority of state inspectors. I believe that question should be answered “no.”

The clear thrust of § 3A is to vest in local inspectors the general duty and authority to enforce the State Building Code, except where that authority has been specifically given to the state inspectors either by statute or the Code itself. Cf. 1974/75 Op. Atty. Gen. No. 33, Rep. A.G., Pub. Doc. No. 12 at 74 (1975). Moreover, while counties have been called territorial subdivisions of the Commonwealth, established by the Legislature to carry out public purposes, the case law makes clear that counties are not to be equated directly with the state. Rather, they function essentially as a type of local government. See Opinion of the Justices, 167 Mass. 599, 600 (1897); see also Worcester County v. Mayor and Aldermen of Worcester, 116 Mass. 193, 194 (1874); Goodale v. County Comm’rs of Worcester, 277 Mass. 144, 148-149 (1931); Thompson v. Chelsea, 358 Mass. 1, 9 (1970); cf. Avery v. Midland County, 390 U.S. 474, 485 (1968). Given the nature and functions of county governments, there appears no reason to read into the provisions of § 3A an implicit delegation to the state inspectors of inspection responsibility for county-owned buildings. I conclude, therefore, that under § 3A, the local inspector has jurisdiction as to any county-owned building or structure “within the city or town from which he is appointed . . . .”

In summary, buildings owned by the MBTA and other non-local authorities created by the Legislature are subject to inspection by state inspectors, while local inspectors have the responsibility to inspect county-owned buildings in their respective communities.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

12My construction of § 3A leads to the conclusion that Section 108.1 of the State Building Code (see n. 5, supra) is partially inconsistent with that statute and, to that extent, invalid. See Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare, 326 Mass. 121, 124 (1950). While I recognize that the interpretation of a statute by the agency charged with its administration is entitled to weight, if the agency’s reading is contrary to the statute’s terms it cannot stand. School Comm. of Springfield v. Board of Educ., 362 Mass. 417, 441, n. 22 (1972). This rule applies to the Building Code Commission. The inconsistent portion of Section 108.1 should be corrected by amending the Code in a manner that will bring it into conformity with § 3A.
Number 31

Alfred L. Frechette, M.D.
Acting Commissioner of Public Health
Department of Public Health
600 Washington Street
Boston, Massachusetts 02111

April 23, 1979

Dear Dr. Frechette:

You have asked for my opinion concerning whether or not the design of
the proposed Management Information System developed by the Division
of Alcoholism, within the Department of Public Health, complies with
federally-imposed confidentiality requirements. For the reasons discussed
below, I believe that the system does satisfy such confidentiality
requirements and may be implemented.

The Department’s Division of Alcoholism (Division) administers the
Commonwealth’s program for alcoholism treatment and rehabilitation
which is established by G.L. c. 111B. You have indicated that the Division
has developed the Management Information System in order to collect
information about individuals who are served by organizations, agencies
and other entities with which the Division contracts to provide a variety
of alcohol abuse and alcoholism services. The general purpose of MIS is to
obtain information for program evaluation and monitoring of about 150
service providers.

You stated that all providers who contract with the Division are to fill out
an MIS form for each client they serve. The forms call for a variety of
information relating to, inter alia, the client’s employment, living arrange-
ments, marital history and status, drinking habits and history, drug use,
arrest history, medical history, treatment and treatment evaluation. You
further indicate that in order to fulfill the purposes of MIS, the Division
needs information about individual recipients of alcoholism services, but
does not need to know the identity of any individual. Accordingly, the
Division has created an alpha-numeric client code which consists of the first
and third letters of the client’s first name and surname, plus his or her
middle initial, and a six-digit number derived from the client’s date of
birth. Only alpha-numeric code identifiers are to be used on the individual
client forms which providers are to complete and submit to the Division;
providers will not transmit the client’s name, address, Social Security
number or other information which directly reveals the client’s identity.

The federal confidentiality requirements at issue are contained in 42
U.S.C. § 4582 (1976), and implementing regulations promulgated by the
Secretary of the Department of Health, Education and Welfare (HEW). 42
C.F.R. § 2.1 et seq. (1978). These requirements are pertinent because they
are incorporated into federal grants which were awarded to the Department
for the development of the Management Information System, and more
generally because they apply to all direct and indirect recipients of federal

1 Sometimes referred to hereafter as “MIS.”
2 According to your calculation, there are approximately 40 billion possible combinations of the client code information. Thus
the chance that any two individuals will have the same client code is very remote.
funds for alcoholism programs. The Division and the individual service providers with whom it contracts are all direct or indirect recipients of such funds.

You have asked two related questions:

1. Whether the Management Information System client code number is "patient identifying information" as defined by federal regulation, 42 C.F.R. § 2.11(j) (1978), and

2. If the information is "patient identifying information," whether the existing restrictions on dissemination of information received by the Division conform to federal requirements set forth in 42 C.F.R. § 2.53(c) (1978).

These questions arise because if it is determined that the MIS code and related information are "patient identifying information," a further federal regulation implementing 42 U.S.C. § 4582 requires the Attorney General to issue an opinion that the confidentiality provisions of 42 C.F.R. § 2.53(c) are satisfied before the Division can compel any provider to comply with the MIS reporting requirements. 42 C.F.R. § 2.53(d)(1)(1978).

I begin by considering whether the MIS alpha-numeric client code is "patient identifying information" within the meaning of 42 C.F.R. § 2.11(j). At first glance, the code would appear to disguise identities sufficiently so that it would not come within the regulation's scope. Neither the name of the patient or client nor such commonly used identifiers as address or Social Security number appear anywhere on the MIS forms which providers are to transmit. These are the types of patient identifying information which the regulation specifically mentions.

However, in your letter you suggest that the MIS records and client code which the Division has developed should be regarded as patient identifying information. You indicate that a person would be able to break the code by use of computer technology with relative ease. On the basis of your suggestion, I will assume that the identity of patients "can be determined with reasonable accuracy and speed" and therefore that the MIS records, containing the names of clients scrambled according to the alpha-numeric code are "patient identifying information" as defined in 42 C.F.R. § 2.11(j).

The import of this assumption is that before the Division can require providers to file with it the MIS forms, it must be determined that the
provisions of state law applicable to the Division satisfy federal privacy standards. 42 C.F.R. § 2.53(d)(1).

As indicated above, the pertinent federal privacy requirements are found in 42 C.F.R. § 2.53(c). That regulation prohibits the Division’s collection of patient identifying information unless the Division “[1] is legally required to hold such information in confidence, [2] is prohibited from taking any administrative, investigative, or other action with respect to an individual patient on the basis of such information, and [3] is prohibited from identifying directly any individual in reports . . . or otherwise disclosing patient identities in any manner.” In the case of the Division’s handling of MIS records, I believe the three quoted requirements are satisfied by the prohibitions contained in the Massachusetts Fair Information Practices Act, G.L. c. 66A (FIPA); by certain provisions in the statute defining the Division’s functions, G.L. c. 111B; and by the medical records and privacy exemptions to the Public Records Law, G.L. c. 4, § 7, clause Twenty-sixth (c). 8

1. Holding patient identifying information in confidence: Considering first the Public Records Law in relation to the confidentiality requirement of 42 C.F.R. § 2.53(c), it is reasonable to assume that much of the information contained in MIS forms which relates to alcohol treatment qualifies as “medical files or information” and is thus exempt from mandatory public disclosure as a public record. Cf. Whalen v. Roe, 429 U.S. 589 (1977). Moreover, the general privacy exemption in the definition of public records excepts “any information relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” This section has been interpreted to mean information relating to “‘intimate details’” of a “‘highly personal nature.’” Attorney General v. Collector of Lynn, Mass. Adv. Sh. (1979) 191, 198. It seems obvious that information relating to alcohol abuse and alcoholism falls within the described class. Compare Hastings and Sons Pub. Co. v. City Treasurer of Lynn, Mass. Adv. Sh. (1978) 920, 928 (salary information paid to police not exempted from public disclosure by privacy provisions of clause (c)). Since, the MIS records thus do not qualify as “public records,” the Division would have no obligation to disclose these records to members of the public or other agencies who might request them pursuant to G.L. c.66, §10.

Exemption (c) to the Public Records Law offers essentially a negative form of protection; it does not require the Division to make the MIS forms available generally as public records. However, the MIS patient identifying information is more affirmatively protected from dissemination by the provisions of FIPA. FIPA strictly limits disclosure of and access to “personal data” which is collected, used, or held by any public agency. “Personal data” is defined as:

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1It should be understood that the cited requirements apply to disclosures of patient identifying information without the patient’s or client’s consent. If the client consents to disclosure, other statutory and regulatory provisions come into play. See 42 U.S.C. § 4522(b)(1)(1976); 42 C.F.R. § 2.31 et seq. (1978). The general scope, basis and purpose of the statute and regulations governing non-consensual disclosures for research, audit and evaluation purposes are described in 42 C.F.R. §§ 2.52, 2.52-1 (1978).

2Clause Twenty-sixth (c) exempts from the definition of public record:

[|Personal and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy . . . .]
[A]ny information concerning an individual which, because of name, identifying number, mark, or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in [G.L. c. 4, § 7, clause clause Twenty-sixth]. . . . G.L. c. 66A, § 1.

For the same reasons which indicate that the MIS client code number and forms constitute “patient identifying information,” I believe that they also qualify as “personal data” within the scope of the quoted FIPA definition.

One of the critical sections of FIPA, G.L. c. 66A, § 2(c), forbids the Department (and the Division) from disseminating personal data to any other agency or to any individual not employed by the Department except with the client’s consent. Thus, the first requirement of 42 C.F.R. § 2.53(c) is satisfied because there can be no legal dissemination of patient identifying data contained in MIS forms to anyone outside the Department of Public Health unless the client agrees.

2. Administrative or investigative action: The second part of 42 C.F.R. § 2.53(c) requires that the Division be “prohibited from taking any administrative, investigative, or other action with respect to an individual patient on the basis of such information . . . .” The Division can also meet this requirement. First, it does not appear that the Division itself will have any way to determine the identities of individual patients described in MIS forms. In order to break the alpha-numeric client code used on those forms, the Division would need to have a separate list of names and birthdates of patients against which it could match the client codes. I have not been informed that the Division would have access to such a separate list.

Even if the Division did now the identity of individual patients, however, a prohibition against taking any action with respect to the patients is created by implication in G.L. c. 111B. Sections 6 and 6A of c. 111B permit the Division to require alcoholism programs to furnish “such data, statistics, schedules or information as the Department may reasonably require for the purposes of this section.” The purposes set forth in both §§ 6 and 6A include determining the need for certain types of provider facilities and licensing and evaluation of programs. There is no mention of a power vested in the Division (or indeed the Department) in these sections, in other provisions in G.L. c. 111B, or in separate statutes to take administrative, investigative, or other action relating to individual patients. In addition, G.L. c. 111B, § 11, explicitly requires directors of alcoholism programs to insure the confidentiality of patient treatment records.

The Division and the Department have “only those powers, duties and

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8See p. 5 and n. 6 supra.
9Federal law pertaining to dissemination of alcoholism treatment records of individual patients is substantially similar. 42 U.S.C. § 4582(b).
10The statute enacting G.L. c. 111B provides that the Secretary of HEW and the Comptroller General are to be “afforded reasonable access to any reports, records, or the like, kept by the department of public health pursuant to and in accordance with the provisions of this act.” St. 1971, c. 1076, § 20. While on the surface this language seems to call for disclosure of MIS reports in contravention of 45 C.F.R. § 2.53(c), the language cannot be so interpreted. The federal statute which 45 C.F.R. § 2.53(e) is designed to implement requires the Department of Public Health to make such reports, and make available such records, as the Secretary of HEW may require; and to make the same reports and records available to the Comptroller General for auditing purposes. 42 U.S.C. § 4573(a)(6), (7) (1976). In light of the link between 42 C.F.R. § 2.53 and 42 U.S.C. § 4573, it would be anomalous to read the language in St. 1971, c. 1076, § 20, as violating the federal regulation, particularly when the state statutory provision clearly seems to have been adopted to reflect the federal reporting requirements in 42 U.S.C. § 4573.
11See 105 C.M.R. 160.920 (1978) (regulation prescribing data reporting requirements for detoxification facilities); 105 C.M.R. 165.120 (1978) (similar regulation for halfway houses for alcoholics).
12See 105 C.M.R. 165.560(B) (1978) (individual halfway house treatment and medical records to be kept confidential).
obligations conferred upon [them] by statute and those reasonably necessary for [their] proper functioning . . . .” Massachusetts Comm’n Against Discrimination v. Liberty Mut. Ins. Co., Mass. Adv. Sh. (1976) 2403, 2405; Hathaway Bakeries, Inc. v. Labor Relations Comm’n, 316 Mass. 136, 141 (1944). Given the statutory framework in which the Division and the Department operate, I do not believe that the power to take “administrative, investigative or other” (42 C.F.R. § 2.53(c)) action against individual clients or patients of alcoholism treatment programs can be deemed reasonably necessary to the agencies’ functions. Accordingly, I conclude that neither agency has authority to take such action against patients. Therefore, G.L. c. 111B furnishes the necessary prescription against the Division’s using patient identifying information in MIS in contravention of the second requirement of 42 C.F.R. § 2.53(c).

3. Patient identification in agency reports: The third requirement of 42 C.F.R. § 2.53(c) is that the Division not identify directly or indirectly any individual patient in any evaluation or research report. The prohibitions and limitations imposed by FIPA satisfy this directive. See pp. 8-9 supra.

Finally, it deserves mention that there is no constitutional impediment to the Division’s collection of sensitive patient data where there is a legitimate management function to justify such collection and reasonable confidentiality standards are imposed. You have explained that the client code numbering system will permit the Division to do the following: (1) calculate the exact number of separate individuals being seen each year not only within each provider agency but within the entire provider system; (2) calculate the number of successful referrals from one agency to another as a measure of effective continuity of care; (3) assess more effectively the need for different types of services and facilities by virtue of knowing more precisely the number of individuals in different parts of the treatment system; and (4) conduct long-term research studies.

These intended uses of MIS information indicate that the collection of patient data is a sound management step reasonably necessary to the operation of the Division, and one it may lawfully take consistently with the constitutional rights of its clients. See Whalen v. Roe, supra, 429 U.S. at 596-598, 600-602, 605; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79-81 (1976); cf. Minnesota Medical Ass’n v. State, Minn. 274 N.W. 2d 84, 91 (1978).14

Since the necessary confidentiality protections are provided for in the Management Information System, even if the MIS records do constitute patient identifying information, I need not provide a definitive answer to your first question. Assuming, as suggested in your request, that the data does constitute “patient identifying information”, the existing restrictions on dissemination of that information conform with the requirements set forth in 42 C.F.R. § 2.53(c).

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14In an analogous vein, it has been suggested that the Division does not need all the information contained in the MIS forms to carry out its statutory functions, and that its collection and maintenance of the information may violate G.L. c. 66A, § 2(1), proscribing agencies from collecting more “personal data” than necessary. As I have indicated, however, it appears that several important functions of the Division will be served by the MIS information. In the circumstances, I find no reason to conclude that the information called for on the MIS forms is excessive or superfluous to the Division’s operations.
Accordingly I answer your second question in the affirmative and conclude that the Division can implement its proposed Management Information System by requiring providers to file completed MIS forms.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General
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