HOUSE . . . . . No. 6922

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL
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December 23, 1977

Wallace C. Mills, Clerk
House of Representatives
State House
Boston, Massachusetts 02133

Dear Mr. Mills:

You have transmitted an order of the House of Representatives, designated as House No. 6790, which asks my opinion on the following question:

> Is the expenditure of large sums of money by the Secretary of Manpower Affairs for radio and newspaper ads promoting expansion of industry within the Commonwealth in contravention to the statutory language of item 9091-0400 [,] Chapter 363A of the Acts of 1977? [1/]

Pursuant to the responsibilities conferred by G.L. c. 12, §9, I respectfully submit the following opinion.

House No. 6790 is phrased in broad and general terms. I have been informed, however, that it is intended specifically to address language in the current item 9091-0400 which differs from that used in item 9091-0400 as it appeared in St. 1976, c. 283, the fiscal year 1977 appropriation act. In c. 283,

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1/ Chapter 363A of the Acts of 1977 is the appropriation act for fiscal year 1978. Item 9091-0400 appropriates $750,000 to the Division of Economic Development for

> . . . the promotion of industry <u>into</u> the Commonwealth; provided, that no salaries or expenses of employees shall be chargeable to this item . . . . (emphasis supplied)

item 9091-0400 appropriated $750,000 to the Division of Economic Development "[f]or the promotion of industry within the commonwealth . . ."; St. 1977, c. 363A, item 9091-0400 appropriates the same amount to the same agency, but "[f]or the promotion of industry into the commonwealth . . ." (see n. 1 in the margin, supra). The question posed is whether, in light of the change from "within" to "into", the use of FY 1978 funds for advertisements placed in Massachusetts newspapers and radio stations, as opposed to their out-of-state counterparts, contravenes the language of c. 363A.[2/] For the reasons discussed below, I conclude that such expenditures are not prohibited by or inconsistent with that law.

The underlying principles governing the expenditure of funds by government are familiar and simply stated. Under the Massachusetts Constitution, the power of appropriation is

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2/ House No. 6790 refers to the expenditure of funds by the Secretary of Manpower Affairs. I note, however, that the Division of Economic Development , the agency to which item 9091-0400 specifically appropriates the funds in question, is within the Department of Commerce and Development which in turn is within the Executive Office of Communities and Development. G.L. c. 23A, §§3, 4; c. 6A, §8; see also c. 6A, §17. It is thus clear that the Secretary of Manpower Affairs has no statutory authority to spend the monies appropriated by item 9091-0400 of St. 1977, c. 363A, and I have not received any information to suggest that he has done so.

I understand the House of Representatives' question to focus on the purposes for which the item 9091-0400 monies are spent, rather than on the particular state official authorized to make the expenditures. Accordingly, in this opinion I consider solely the question whether the Division of Economic Development may properly spend the monies appropriated in item 9091-0400 "for radio and newspaper ads promoting the expansion of industry within the Commonwealth . . . ."

lodged exclusively in the Legislature; the Legislature may, by exercising this power, delimit the types of expenditures which agencies in the executive branch of government may make. See Massachusetts Constitution, Amendments, art. 63, §3, and Part 2, c. 1, §3, art. 7. The power of appropriation may not, however, intrude upon the power of expenditure which the Constitution vests in the Governor and through him, in executive and administrative agencies. Massachusetts Constitution, Part 2, c. 2, §1, art. 11. As the Supreme Judicial Court has noted, " . . . however minutely appropriations are itemized, some scope is left for the exercise of judgment and discretion by executive or administrative officers or boards in the expenditure of money . . . ." Opinion of the Justices, 302 Mass. 605, 615 (1939). See also Opinion of the Justices, Mass. Adv. Sh. (1976) 220, 224-225; Opinion of the Justices, Mass. Adv. Sh. (1975) 2745, 2755.

In applying these basic principles to the present context, the pertinent statutes to consider are those relating to the Department of Commerce and Development (Department) and, in particular, the Division of Economic Development (Division). The Division is by statute one of four divisions within the Department. G.L. c. 23A, §§3, 4. The Legislature has vested broad authority and responsibility in the Department for purposes of "[p]romoting, developing and expanding the economy, the commerce, the industry . . . of the commonwealth . . ." and of "[p]reparing and perfecting functional plans for the

economic development of the commonwealth . . . ." G.L. c. 23A, §§2(a), 2(b).[3/]

These statutes evince a legislative intent to improve the economy of the Commonwealth by expanding and attracting business and industry and creating employment for its citizens. More important, the statutes also show that the Legislature has chosen to delegate the implementation of this goal to agencies within the executive branch, as is its prerogative. See Opinion of the Justices, Mass. Adv. Sh. (1975) 2521, 2530-31 (1975); see also Commonwealth v. Racine, Mass. Adv. Sh. (1977) 1101, 1106-1107.

It is my understanding that the Department and other agencies within the executive branch have formulated a comprehensive economic development plan for Massachusetts which has two major facets: (1) the attraction of new business or industry to the state, and (2) the retention and expansion of existing business and industry. The judgment has been made that, in both categories, a critical early step in the successful implementation of the plan is to enlist Massachusetts businessmen in the Commonwealth's efforts to promote Massachusetts in other states and countries. See G.L. c. 23A, §2(b). The Division has allocated a portion of the funds appropriated in item 9091-0400 to advertising within Massachusetts to accomplish

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3/ See also G.L. c. 6A, §17A, which establishes a technical assistance strike force in the executive office of manpower affairs to offer advice and assistance to businesses within the Commonwealth.

this first priority. I have been informed that at the same time funds in item 9091-0400 are also being spent for out-of-state advertising as well as for other purposes.

Against this constitutional and statutory framework and on the basis of the information supplied me, I cannot find any violation of the FY 1978 appropriation act. It appears that the expenditures of item 9091-0400 monies currently being made reasonably advance the promotion of industry into the Commonwealth. The Department and the Division are vested by their enabling statute with wide authority to oversee the area of state economic development and planning, see, e.g., G.L. c. 23A, §2. In these circumstances, I will not strictly construe item 9091-0400 in St. 1977, c. 363A -- or the introduction of the word "into" -- as a limit on the otherwise broad discretionary powers of those agencies, absent a far more explicit indication of legislative purpose. If the General Court had intended to prohibit the Division or the Department from spending any of the funds appropriated under item 9091-0400 on advertisements within the Commonwealth, it could have expressly so stated. See Commonwealth v. Hayes, Mass. Adv. Sh. (1977) 928, 933.[4/]

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

4/ House No. 6790 asks whether the expenditure of "large" sums of money for the advertisements at issue contravenes the language of item 9091-0400. The House order does not further specify the amounts it considers to be "large". It is theoretically possible that the expenditure of item 9091-0400 funds on Massachusetts newspaper and radio advertisements could represent such a great percentage of the total amount appropriated as to constitute arbitrary and unreasonable action or an abuse of discretion on the part of the Division; such expenditures would be subject to legal challenge. See, e.g., West Broadway Task Force, Inc. v. Commissioner of the Department of Community Affairs, 363 Mass. 745, 750-751 (1973). However, none of the information supplied to me suggests that the Division has in fact acted unreasonably in its spending of item 9091-0400 funds.