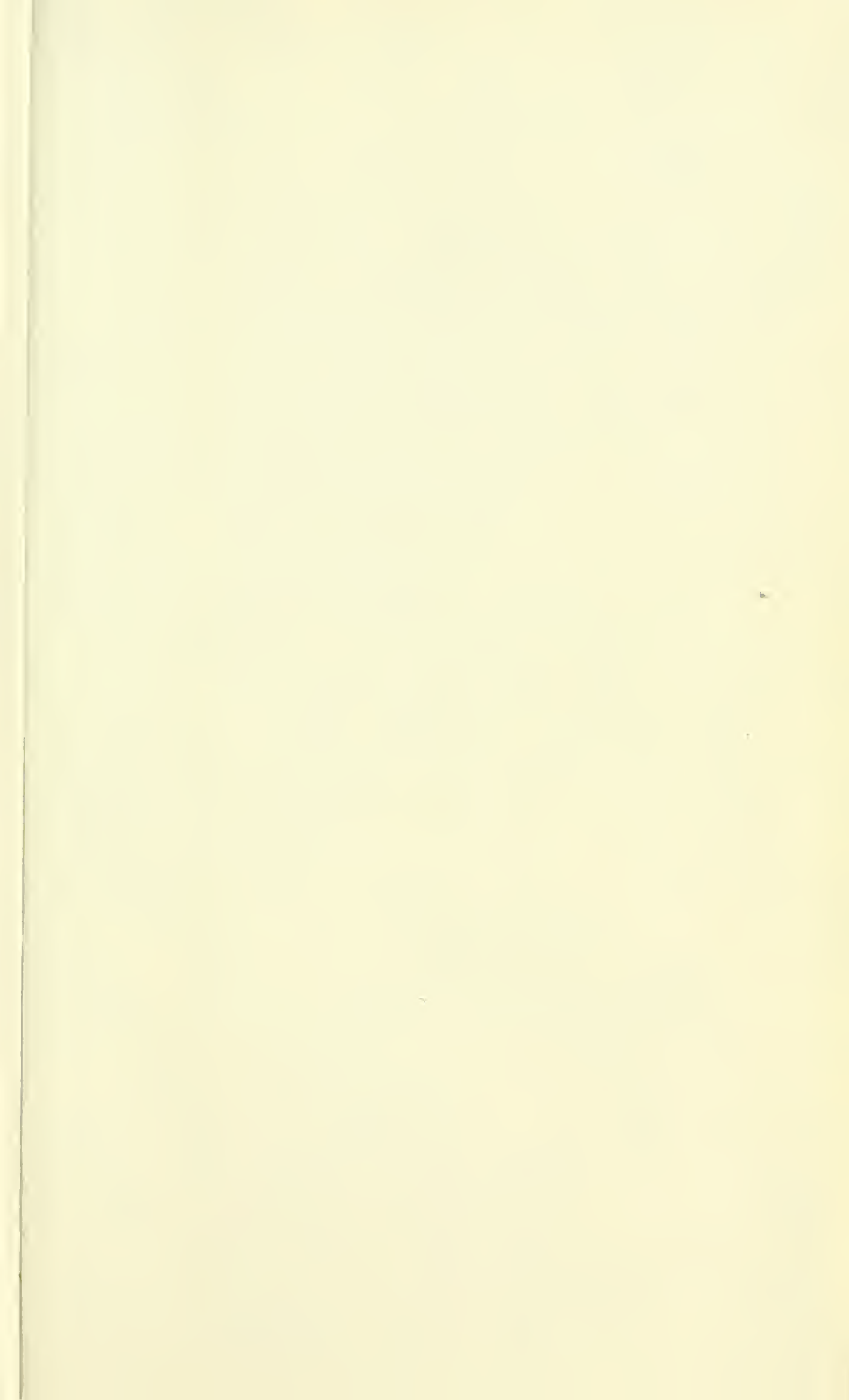




The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1974



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The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1974



The Commonwealth of Massachusetts

Boston, December 4, 1974

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, 1974.

Respectfully submitted,

ROBERT H. QUINN
Attorney General

The Commonwealth of Massachusetts

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²Appointed January 1974

³Appointed March 1974

⁴Appointed April 1974

⁵Terminated November 1973

⁶Terminated November 1973

⁷Terminated December 1973

⁸Terminated January 1974

⁹Terminated February 1974

¹⁰Leave w/o pay October 1974

**STATEMENT OF APPROPRIATIONS AND EXPENDITURES
FOR THE PERIOD
JULY 1, 1973 - JUNE 30, 1974**

EXPENDITURES

0810-0000	Administration	\$2,981,383.43
0810-6610	Anti-Trust Settlement — Concrete Pipe Case	51,756.90
0810-6613	Consumer Protection — Research and Pilot Program	99,042.87
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center...	—
0810-6616	Drug Training, Manual and Technical Assistance.	9,731.99
0810-6618	Training and Reference Materials	9,950.00
0810-6619	Organized Crime Unit	57,771.44
0810-6620	Drug Intelligence Information	64,424.67
0810-6621	Criminal Appellate Program	53,851.71
0810-6622	Prosecution Management Study	21,000.00
0810-6623	WIN — Public Service Employment Program	6,966.67
0810-6624	Organized Crime Unit	29,366.73
0810-6625	Drug Intelligence Information System	238.05
0811-6614	Attorney General Trust Fund	—
0821-0100	Settlement of Claims	198,328.42
		<u>\$3,583,812.88</u>

APPROPRIATIONS

0810-0000	Administration	\$3,667,175.61
0810-6610	Anti-Trust Settlement Concrete Pipe Case	51,756.90
0810-6613	Consumer Protection Research and Pilot Program	
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center...	103,234.79
		575.20
0810-6616	Drug Training, Manual and Technical Assistance.	12,189.88
0810-6618	Training and Reference Materials	29,365.08
0810-6619	Organized Crime Unit	67,094.24
0810-6620	Drug Intelligence Information	65,078.83
0810-6621	Criminal Appellate Program	58,283.54
0810-6622	Prosecution Management Study	25,000.00
0810-6623	WIN — Public Service Employment Program	6,966.67
0810-6624	Organized Crime Unit	36,000.00
0810-6625	Drug Intelligence Information System	238.05
0811-6614	Attorney General Trust Fund	219.30
0821-0100	Settlement of Claims	200,000.00
		<u>\$4,323,178.09</u>

INCOME

0801-40-01-40	Fees — Filing Reports Charitable Organizations..	\$17,451.00
0801-40-02-40	Fees — Registration Charitable Organizations	5,077.00
0801-40-03-40	Fees — Professional Fund Raising Council or Solicitor	110.00
0801-62-02-40	Reimbursement for Services Cost of Investigations.....	19,009.50
0801-69-99-40	Miscellaneous	4,483.44
		<u>\$46,130.94</u>

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, December 4, 1974

To the Honorable Senate and House of Representatives:

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

INTRODUCTION

My sixth Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by G.L. c.30 and 32, encompasses the fiscal year from July 1, 1973 to June 30, 1974.

The work of the Department during the past year has increased in all phases, particularly in the area of litigation. An overall increase of ten percent in court cases has been brought about as a result of constitutional law decisions which have affected every phase of our society.

The development of environmental protection legislation and regulations has increased the case load of our Environmental Protection Division. We have intervened in several Atomic Energy Commission hearings and will continue to intervene, when necessary, to protect the public interest.

Fiscal 1974 has brought additional important litigation involving school desegregation. Our Administrative Division continues to provide excellent representation in this area.

Our Contract Division successfully defended new requirements for the employment of minorities in public contracts, in the case of *Associated General Contractors v. Altshuler*, decided favorably in the Court of Appeals for the First Circuit.

The coming term of the United States Supreme Court should provide a decision in *United States v. Maine*, a case which will determine the ocean territory of coastal states.

The emphasis on civil rights has brought on a new wave of prisoners' rights suits of all descriptions. These matters are being handled by our Criminal Division.

Fiscal 1974 has shown a marked increase in consumer complaints which are being processed by our main and branch offices.

The test of residence preference for police officers and its blending into the decree in *Castro v. Beecher* should be settled with finality within the next months.

Each year in service as your Attorney General has brought new challenges. We have met them through negotiation, through litigation, and through a series of legislative proposals which have resulted in benefits to the general public in the areas of consumer protection, environmental protection, civil rights and criminal justice.

We will continue to serve the people of the Commonwealth in our every official act in order to achieve "Liberty and Justice for All."

ADMINISTRATIVE DIVISION

During the Fiscal Year, the staff of the Division prepared forty-six formal opinions for the signature of the Attorney General. In addition, eighty informal opinions were issued, signed by the Chief of the Division or various Assistant Attorneys General assigned to the Division. Six requests for legal opinions were withdrawn for mootness, the Division processed eight initiative petitions under the provisions of Article 48 of the Articles of Amendment to the Constitution of the Commonwealth, and one hundred and eight opinions were issued under the provisions of the conflict of interest statute, G.L. c. 268A. Numerous other requests for legal advice were settled through oral conversations or in conference.

Several of the opinions deserve separate comment. In an opinion to the Registrar of Vital Statistics (No. 4, July 26, 1973), the Attorney General determined that a person between the ages of 18 and 21, whose parents resided in another state, could establish domicile in Massachusetts for the purpose of obtaining a marriage license within the Commonwealth. In an opinion to the Criminal History Systems Board (No. 23, November 30, 1973), the Attorney General delineated the requirements for dissemination of court records under the new criminal history records act. In a landmark opinion to the Secretary of State (No. 29, January 24, 1974), the Attorney General held that the birth of a child could be recorded using the mother's maiden name. In an opinion to the Commissioner of Banks (No. 44, May 28, 1974), the Attorney General approved the use of a revolving credit plan for savings banks. Finally, in an opinion to the Board of Public Accountancy (No. 46, June 10, 1974), the Attorney General stated that the requirement that a public accountant be a United States citizen prior to registration was unconstitutional and cannot be enforced.

The staff of the Administrative Division continued its practice of providing advisory services to all constitutional officers and state agencies on an as needed basis, thereby obviating formal resolution of many questions and avoiding litigation where possible.

Litigation continued to occupy the principal attention of the members of the Division's staff. Files on three hundred fifty-five new cases of a general nature were opened during the Fiscal Year, approximately a ten percent increase over the previous Fiscal Year. The increased caseload was handled by a smaller staff than in Fiscal Year 1973. An equal number of cases devoted solely to issues arising under the state welfare statutes were handled by Division personnel. At present, such matters require the full time services of four attorneys, with a fifth attorney available on a part time basis.

Significant litigation handled by the staff of the Division during the Fiscal Year included the constitutional challenge to the mandatory retirement age for state police officers (*Murgia v. Commonwealth*, United States District Court), the state and federal litigation involving racial balance and desegregation of the public schools in the cities of Boston and Springfield (*School Committee of Boston v. Board of Education*, Supreme Judicial Court; *Morgan v. Hennigan*, United States District Court; *School Committee of Springfield v. Board of Education*, Supreme Judicial Court), the constitutional challenge to the Commonwealth's divorce statutes (*Tumposky v. Judges of Probate*, United States District Court), the Reorganization proceedings involving the Boston and Maine Railroad (*In re Boston and Maine Railroad, Debtor*, United States District Court), and the litigation involving constitutionality of the residency preference for policemen (*Town of Milton v. Civil Service Commission*, Supreme Judicial Court).

During the Fiscal Year, the staff of the Division appeared in all of the courts of the Commonwealth. The Division is responsible not only for initiating actions in the name of the Attorney General and at the request of various constitutional officers and state agencies, but it is also charged with the defense of petitions for judicial review under the state administrative procedure act and the civil service review act, appeals from the Appellate Tax Board which involve either the State Tax Commission or the Commissioner of Corporations and Taxation, appeals from the orders of the Commissioners of Insurance and Banking, and appeals from orders of the Department of Public Utilities, to name only a few. The litigation is varied in scope and complexity, and the staff of the Division performed their tasks well.

CITIZENS' AID BUREAU

Individuals with a variety of problems continue to call upon the Citizens' Aid Bureau daily. This division attempts to cut governmental red tape, thereby eliminating the frustrations citizens feel when shuffled through governmental departments. It is an information center while at the same time trying to assist individuals with their particular problems and make them aware of their rights. It is gratifying to many to know that a Bureau exists in state government which is not only effective in handling the technical aspects of a problem, but also one which is responsive in listening to matters of a more personal nature.

It is often an individual's misconception that the Attorney General or one of his assistants should serve as his private attorney. Since the Attorney General is prohibited by statute from doing this, the Bureau must often refer individuals to a private attorney, the referral service of the Bar Association or their local legal aid society. Copies of particular laws are furnished upon request. Complaints or inquiries range from welfare rights to rights of minors to erroneous parking tickets to landlord tenant situations, to handicapped individuals. In short, they range across the board.

The Bureau continues to maintain an excellent working rapport with other state agencies in an effort to deliver the best services to the people of the Commonwealth. An added emphasis this year has been on helping senior citizens. In addition to answering their every day questions, the office scheduled a series of seminars or workshops in an effort to enlighten citizens of their rights and benefits as well as to explain the changing laws.

Two pamphlets were written and distributed expressly for senior citizens. An 11 page pamphlet *What To Do Now . . .* details for widows and widowers all the benefits to which they are entitled. The second publication, *Help for Senior Citizens . . . Getting it All Together*, is a wallet size, fold out listing information of vital importance to the elderly.

The work of our Spanish speaking liaison remains an important part of the office especially since the self awareness of the Spanish speaking community is daily increasing. Two publications distributed in the office, *The Citizen and His Policeman* and *Innocent Victims of Violent Crimes* have been translated into Spanish. Additionally, the office participated in various programs and cultural festivities sponsored by the Spanish community.

The student volunteer program with several colleges and high schools in the greater Boston area remains an integral part of the Bureau. Many of our students from past years have gone on to social service careers.

Making government more responsive to the needs of the citizens of the Commonwealth remains the key to the Bureau.

CIVIL RIGHTS AND LIBERTIES DIVISION

The Division continues to have as one of its major responsibilities the legal representation of the Massachusetts Commission Against Discrimination (MCAD), the state agency which has primary responsibility for the enforcement of the state's anti-discrimination laws.

In representing the MCAD in court in the case of *Peabody Little League, et al v. MCAD* the Division was able to secure injunctive relief against two little league teams which paved the way for girls' participation on previously all male little league teams for the first time in this state.

The important case of *East Chop Tennis Club, et al v. Massachusetts Commission Against Discrimination* was decided favorably to MCAD. The Supreme Judicial Court in that case held that the MCAD must be permitted in the first instance to make its own findings of fact essential to its determination of jurisdiction before resort may be had to the courts.

In *Raanan Katz, et al v. Massachusetts Commission Against Discrimination* our Supreme Judicial Court upheld the authority of the MCAD to include as part of its order the requirement that a Respondent place certain equal opportunity advertising in the newspapers.

The popular pamphlet "The Citizen And His Policeman" which was revised to conform to recent changes in the law continues to be distributed by the Division. More than 109,000 were distributed during the year. Recently, the pamphlet has been printed in Spanish which, hopefully, will insure that our Spanish citizens will be apprised of their reciprocal rights and duties at time of arrest.

The number of citizen complaints directed against police officers showed a marked increase during the year. Our investigation of some of those complaints indicates the need on the part of responsible public officials to provide a meaningful way in which such complaints may be handled with equity and justice to all concerned. It does not appear that our present system for handling such complaints meets those standards.

The Division handles countless numbers of complaints alleging violation of civil rights and liberties. These complaints emanate from the affluent as well as the poor. Of major concern is the invasion of individual privacy. The Division in this connection has been able to secure assurances from certain employers that they will no longer subject employees or applicants for employment to lie detector tests in violation of state law prohibiting such tests. Of equal concern is the practice of some employers to pass on to others, without receiving the involved individual's consent, certain information, whether founded or not, from employee personnel records. This problem seems of sufficient magnitude to invite detailed study in the upcoming year.

CONSUMER PROTECTION DIVISION

The Consumer Protection Division continues to broaden its scope of operations and activity. This service to the public has provided a great relief to consumers who have been unable to resolve their problems in the areas of investment and spending.

In the Consumer Protection Division, State House, Boston, which includes the Volunteer Division, complaints totaled 9,898 between the period of July 1, 1973 through June 30, 1974. During this same period, 10,935 complaints were investigated by the eight Consumer Protection Division branch offices throughout the state. The total amount of savings and refunds attributed to the efforts of the Consumer Protection Division, including the Volunteer Division, was \$321,149. Branch office savings totaled \$595,030, bringing the grand total of monies saved for fiscal '73-'74 to \$916,179. Coupled with the actual savings and refunds to consumers during this period, thousands of cases were closed on the basis of resolutions satisfactory and agreeable to both complainants and respondents. This would ordinarily not have resulted had the Department of the Attorney General not been contacted.

On the basis of complaints reported but which did not come under the jurisdiction of the Consumer Protection Division and branch offices, remedies were suggested, guidance provided, and referrals were made to other official consumer agencies and regulatory boards.

In the Consumer Protection Division office in the State House, doors are open to the public from 9:00 a.m. to 5:00 p.m. daily. There is a continuous flow of consumers seeking advice for their problems and requesting legal consultation. A conservative estimate would be in the area of 150-200 per week.

Incoming telephone calls to the Consumer Protection Division, State House, have averaged between 600-700 per day, an increase over the previous year. As a result of the vast number of incoming calls, a special section was established to screen calls, thus providing the capacity to assist the consumer in a more expeditious and efficient manner with regard to information requests and instructions for filing complaints.

A target area for helping the consumer continues to be the field of consumer education. It is vital that the public be made aware of new laws and the proper approach to wise buying. Staff members are constantly called upon for speaking engagements. Consumer literature is in constant distribution throughout the state, coupled with press releases and news columns which play an important part in getting our message across. Radio and TV spots add to the process of public education and exposure. High school and college students have grasped the significance of consumer education. They realize the importance of being knowledgeable about this mushrooming field which touches their everyday lives through their pocketbooks. They have grasped the theory that "A wise buyer is an informed buyer."

The complaint volume has been building steadily at the Consumer Protection Division branch offices throughout the state. Consumers are becoming more aware that they now have these services at their disposal. The branch offices provide on-the-scene operations and investigations and can often be more effective and better informed on complaints and patterns of activity for this reason. The Attorney General's expansion plan for branch offices has received national recognition and Massachusetts is considered a leader in Consumer Protection and the Consumer Movement.

Contracts Division

The Contracts Division has Department responsibility in the following areas:

1. *Litigation.* To represent the Commonwealth in all civil actions brought by it or against it involving contractual claims. This also includes litigation responsibility in all types of actions involving state public works construction and competitive bidding matters.

2. *Public Contracts Review.* To review, on a consistent basis, all state contracts, leases, and bonds for correctness of legal form.

3. *Advice.* To render continuous advice and guidance to state officials concerning competitive bidding procedures, public construction matters, and preparation, drafting, and proper execution of contracts and leases affecting their departments.

4. *Investigation.* To investigate complaints brought by individual citizens and public officials concerning alleged competitive bidding violations and public construction irregularities.

5. *Legislation.* To develop legislation in areas dealing with public construction and competitive bidding.

6. *Opinions.* To research and draft formal opinions of the Attorney General dealing with public construction and competitive bidding procedures.

7. *Municipal Assistance.* To render informal advice and assistance to municipal officials in furtherance of its role in monitoring public competitive bidding practices and procedures statewide.

The Division was faced with a heavy load of litigation. Four of the six attorneys in the Division devoted most of their time to trial work. More than 300 cases were handled by the Division during this fiscal year.

The bulk of litigation regularly handled by this Division, and generally the most complex and time consuming, involved state highway, building, and public works construction claims. These claims are generally for considerable sums of money and require extensive trial preparation and attention.

One of the more significant cases handled by this Division, attracting national interest for furthering equal employment opportunity for qualified minority construction trade workers, was *Associated General Contractors of Massachusetts v. Alan Altshuler*. The contractors' association and thirteen individual construction companies brought suit in the Federal District Court against the Commonwealth's Executive Office of Transportation and Construction and the Bureau of Building Construction for an injunction against the Commonwealth's contract requirement that the contractor take "every possible measure" to maintain 20 percent minority employment in each job category on the \$16 million Boston State College construction project. The Federal District Court held that the challenged provisions did not constitute an impermissible "quota" but are a proper attempt to remedy the present effects of past discrimination in Boston's construction trades. This decision was affirmed on appeal by the Court of Appeals for the First Circuit, and the United States Supreme Court denied the plaintiffs' petition for a writ of certiorari. This case marked the first time that a court has been asked to sanction a plan for hiring a specific percentage of minority workers that requires an employer to take every possible measure to reach the goal on each job site, and placed upon him the burden of proving compliance under threat of sanctions.

The Division successfully defended the Group Insurance Commission, in the Superior Court, from legal challenge of its bidding procedures by Massachusetts Blue Cross and Blue Shield, in connection with the awarding of a new \$36 million group health and life insurance contract covering approximately 60,000 state employees. The plaintiffs' appeal to the Supreme Judicial Court was withdrawn.

In another important case, *Vappi & Company, Inc. v. Walter Poitras*, the Superior Court rejected the contractor's claim for approx-

imately \$400,000 for furnishing precast concrete piles for the state Treatment Training and Research Center in Boston. A final decree was entered requiring the contractor to furnish and install the concrete piles in accordance with the contract specifications, at no additional cost to the Commonwealth.

The Division has reviewed approximately 3,500 contracts and leases for the Commonwealth during this fiscal year. Each document must be thoroughly considered and expeditiously handled to permit the Commonwealth's business to proceed without interruption. In addition, the form of all documents prepared in connection with note issues and notice of sale bonds under financial assistance housing programs for the elderly and veterans of low income is reviewed and approved by this Division.

With a view to establishing early guidance procedures to prevent later litigation from developing, the Division has continuously given advice and assistance to officials from over 80 state agencies. Members of the Division have attended, moderated, and directed numerous conferences with public officials involving public construction, competitive bidding, and contract matters.

The Division has undertaken an active role in the investigation of numerous complaints brought by individual citizens and public officials concerning alleged violations of competitive bidding and public construction laws. Most of the complaints involved municipal bidding matters and were satisfactorily adjusted in cooperation with local officials. Several investigations of alleged bidding and construction irregularities are currently being conducted by Division personnel.

The Contracts Division was instrumental in drafting legislation on collective purchasing (G. L., c. 7, §§ 22A, 22B), authorizing two or more political subdivisions, including the Commonwealth, to join together or with the State Purchasing Agent for the purpose of obtaining and accepting competitive bids on similar items of materials, supplies or equipment. The Division also rendered advisory assistance to numerous state officials in legislative drafting. In addition, this Division is currently actively involved in discussions with the New England Region of the Public Contract Law Section, American Bar Association, concerning a proposed model state procurement code.

Members of the Division have been called upon from time to time to research and draft numerous informal opinions and memoranda to numerous state agencies concerning a variety of contract matters. The Division also researches and drafts formal opinions of the Attorney General in the area of competitive bidding procedures.

In addition, the Division has readily responded to inquiries of municipal officials seeking advice and guidance in competitive bidding and public construction matters, a service we believe complementary to the Department's efforts to foster consistency in the proper application of procedures and practices in these areas throughout the Commonwealth.

Finally, the Division continues to make a special effort to encourage closer cooperation between it and the agencies it serves. Because the ac-

tivities of the Division bring it in close touch with the varied operations of state government, this Division is in an excellent position to provide assistance in the earliest stages of potentially troublesome situations and to give essential leadership in the area of public contract law. We take pride in the results of our efforts.

Criminal Division

The Criminal Division continued to function within the framework of three sections: Organized Crime, Appellate, and Trial, although it should be noted that increased interaction of personnel and supportive services effected extraordinary productivity within the division.

1. THE ORGANIZED CRIME SECTION

The Organized Crime Section is a specialized unit involved in the collection of organized crime intelligence information, the investigation of criminal offenses, and the prosecution of these cases. Intelligence information is disseminated to interested agencies. This section cooperates with all levels of law enforcement personnel, providing background material and intelligence information concerning organized crime figures and others. The following are some of the significant accomplishments of this Section for fiscal year 1974:

On October 27, 1973, State Police Officers from this unit led a series of gaming raids on twenty-six locations throughout the Commonwealth resulting in the arrest of seventeen individuals. These raids were the culmination of an investigation which was conducted for approximately eighteen months and centered in the New Bedford-Fall River areas. This investigation employed the use of court-authorized electronic surveillance.

On March 29, 1974, State Police Officers from this unit and the Criminal Information Bureau of the Massachusetts State Police conducted a series of raids throughout the Commonwealth and arrested seven people on narcotics and firearms violations.

The evidence seized in these raids, together with evidence obtained from the use of court-authorized electronic surveillance, led to the indictment in April of 1974 of twelve persons for conspiracy to violate the state narcotics law.

On March 30, 1974, State Police Officers from this unit led a series of gaming raids on twenty-five locations in the Springfield area. These raids resulted in the arrest of twenty-two individuals and the seizure of gaming apparatus. These raids were the culmination of a six-month investigation during which court-authorized electronic surveillance was utilized.

In this fiscal period, the Organized Crime Section conducted two extensive investigations into alleged irregularities at the Brighton Five Cent Savings Bank and the Hellenic Credit Union of Peabody. The Brighton Five Cent Savings Bank investigation resulted in the indictment of thirteen corporations for the misapplication of bank funds and

larceny by bank officers. The investigation of the Hellenic Credit Union resulted in the indictment of five individuals for the misappropriations of the credit union's funds and larceny by the president of the credit union.

The Organized Crime Section has been an active member of the Law Enforcement Intelligence Unit since 1968. The purpose of the Law Enforcement Intelligence Unit is to establish a communication system for the exchange of organized crime data between member agencies throughout the United States and Canada. In fiscal year 1974, the Organized Crime Section conducted 135 special investigations at the request of out-of-state law enforcement agencies. These requests were from member agencies of the Law Enforcement Intelligence Unit.

II. *THE TRIAL SECTION*

The Trial Section is responsible for a broad range of matters falling within the division's jurisdiction. Its investigative personnel (State Police Detective Lieutenants) receive complaints of alleged criminal activity from a variety of sources and initiate preliminary investigations. Complaint sources include citizen referrals, complaints from governmental department heads, and matters initiated internally.

The Trial Section assigns attorneys to prosecute those matters referred from the Organized Crime Section and cited in the summary above.

In the continuing effort to combat welfare frauds this section vigorously pursued both recipient and vendor frauds which resulted in a large number of convictions, effecting the return of hundreds of thousands of dollars to the Commonwealth. A special note of credit and appreciation is extended to the several District Attorneys who, at the request of the Attorney General, successfully prosecuted many cases involving welfare fraud.

This section continued to assist various department heads in prosecuting offenses discovered by their agencies; for example, the section assisted law enforcement officers of the Department of Natural Resources in the successful prosecution of numerous criminal violations which threatened the valuable natural resources of the Commonwealth.

As part of a continuing effort to assist the District Attorneys, experienced prosecutors from the Criminal Division were sent into the counties to aid in the fight against crime at the local level. This interchange of manpower and supportive personnel has, it is suggested, been of considerable mutual advantage.

III. *CRIMINAL APPELLATE SECTION*

During this fiscal year it has been apparent that there is no longer a clearly definable "Criminal Appellate Section" within the Criminal Division. A distinction in definition of functions within the Criminal Division did exist from the early sixties through the early seventies. During that period the Criminal Appellate Section was a distinct sub-division of the Criminal Division, and the parameters of responsibility within the Criminal Appellate Section were relatively clear: the section was responsible for the defense of appeals which were taken from convictions in the state courts in cases where the Attorney General (rather than a District Attorney) had been the prosecuting authority in the state court

of a criminal matter. Additionally, the Criminal Appellate Section was responsible for briefing and arguing cases in the United States Supreme Court whenever a case involved a question of Massachusetts criminal substantive law or the administration of criminal justice in Massachusetts. This Section handled such cases before the United States Supreme Court regardless of whether the question of law arose in a Criminal Division criminal case, or in a criminal case initially prosecuted by one of the several District Attorneys within the Commonwealth.

There is little historical data (or significance, for that matter) as to when the change began in the Criminal Appellate Section, although it is clear that the change was the result of the series of United States Supreme Court decisions of the sixties with respect to the criminal law. As the rights of criminal defendants were enlarged, correlatively the questions that could be raised by criminal defendants on appeal, or after they had been convicted or incarcerated ("post-conviction"), expanded as never before.

During the same period access by state prisoners to the federal court by the vehicles of the habeas corpus statute (28 U.S.C., § 2254) and the civil rights act (42 U.S.C., §1983) were broadened by court decisions, and the spectrum of relief available in *federal* courts to persons who had been convicted in *state* courts seemed to be constantly enlarging.

By developing tradition, and to some extent, by practical necessity, the matters of prisoners' rights and post-conviction relief were routed to the Criminal Division within the Department. Traditionally, habeas corpus matters were routed to this division because such matters derived from *criminal* convictions in Massachusetts courts. And, as a practical matter, prisoners' rights complaints were similarly routed because of the developing expertise at the Criminal Division in dealing with the Department of Correction and with plaintiff-petitioners who were incarcerated persons.

In the meantime, post-conviction and extraordinary matters in the state courts involving prisoners or questions of Massachusetts criminal law continued to be routed to the Criminal Division. As a result, the Criminal Division seemed to become a "catch-all" for various types of actions, representing various state officers and agencies, and being variously responsible for criminal matters that were either explicitly delegated to the Attorney General by statute, or implicitly delegated by practical necessity.

Within the Criminal Division, for reasons primarily of orderly use of professional manpower and record-keeping, these various matters and responsibilities came to be known as "criminal appellate" matters. This distinction and definition of scope of responsibility has continued.

During the past fiscal year, the work which has been described as "criminal appellate" within the Criminal Division can fairly be further described as "extraordinary," and the following enumeration represents the general categories of cases and matters within this definition:

1. The defense of criminal appeals in the state courts (Supreme Judicial Court and new Intermediate Appeals

Court) which are taken by criminal defendants who are convicted in the state courts in cases prosecuted by the Attorney General.

2. The defense of various forms of post-conviction petitions filed by state prisoners who have been convicted in Massachusetts courts under the prosecutorial jurisdiction of the District Attorneys of the Commonwealth. These petitions are primarily writs of error, writs of habeas corpus, writs of mandamus and writs of certiorari, and the cases have generally been concentrated in the Single Justice Session of the Supreme Judicial Court.
3. The response to interlocutory petitions in the Supreme Judicial Court under G. L., c. 211, §3, seeking relief in pending criminal matters, usually during the course of proceedings in the Massachusetts District Courts.
4. The defense of and response to federal habeas corpus petitions in the federal court by which convicted prisoners in Massachusetts seek their release by order of the federal court reviewing the state criminal process under 28 U.S.C. §2254.
5. The defense of requests in the federal district court for three-judge courts under 28 U.S.C. §§2281, *et. seq.*, seeking injunctions against the enforcement of state criminal statutes.
6. The defense of federal civil rights actions in the federal court brought by state prisoners raising the entire spectrum of the developing law of prisoners' rights.
7. Matters on appeal to the Circuit Court of Appeals on questions of Massachusetts criminal substantive law and Massachusetts criminal procedure which are decided in criminal division cases in the federal district court and involve questions of interest and importance to the Commonwealth, its officers and agents.
8. Cases on appeal or certiorari to the United States Supreme Court which involve questions of law concerning Massachusetts criminal law or procedure. The criminal division has traditionally represented the Commonwealth in these matters even though some of the cases and questions may have originated in cases initiated under the jurisdiction of one of the several District Attorneys.
9. The review and processing of interstate rendition matters referred to the Attorney General by the Governor pursuant to G.L., c. 276, §15.
10. Compilation of the annual "Notice of Law" as provided by G.L., c. 12, §6A.
11. Miscellaneous matters such as review of proposed legislation, review of correspondence from other states' at-

torneys general with respect to the criminal law, attendance to criminal law committee assignments, etc.

During the past fiscal year the following state agencies and officers have been represented by the Attorney General in matters referred to as "criminal appellate matters":

1. The "Commonwealth" as party to criminal appeals and criminal writs of error.
2. Justices of the several courts, sometimes collectively, in petitions under G.L., c. 211, §3, some miscellaneous civil complaints in the state courts, and infrequently as defendants in federal civil rights actions.
3. Executive officers of the Department of Correction (Commissioner, Deputy Commissioner, etc.) and employees of that Department in a variety of cases in both state and federal courts.
4. Superintendents of the various correctional institutions as they are nominal parties respondent in habeas corpus proceedings in state and federal courts.
5. Department of Public Safety personnel as they are nominal parties respondent in habeas corpus proceedings resulting from the execution of executive warrants under the interstate rendition statute.
6. Employees of the Departments of Mental Health, Public Health and Corrections, in both individual and official capacities, as defendants in civil rights actions when the plaintiff in such proceedings is a resident of a Massachusetts correctional facility.
7. Such other state departments, officers and agents as may be parties defendant or respondent in actions which involve questions of Massachusetts criminal law or procedure *and* when request for such representation has been made in accordance with prescribed statutory and/or departmental formulae.

During the fiscal year, five of the sixteen Criminal Division attorneys received federal funding from the "Criminal Appellate and Post-Conviction Legal Services" project. These funds totalled \$72,000 and were administered through the Committee on Criminal Justice. This federal funding experiment was initiated in November of 1972 and has produced a work product of the highest standard. Under this same program, student interns from the Boston area law schools furnished legal assistance of commendable quality to the attorneys of the Criminal Division. Working under the direction of attorneys engaged in the criminal appellate funding experiment, students from the following Boston area law schools enjoyed some measure of experience in the work of the Department: Boston College, Boston University, Harvard, New England, Northeastern and Suffolk.

Although traditional writs of error in the state courts and petitions for habeas corpus in the federal courts continued to make up the "bulk" of "criminal appellate" work (during the fiscal year the case of *Donnelly v. DeChristoforo*, which arose from a petition for habeas corpus in the federal district court, was successfully briefed and argued in the United States Supreme Court), considerable attention during the year has been devoted to the defense of civil rights actions in the federal court seeking, *inter alia*, damages against Massachusetts officers and employees. Examination was made with respect to certain policy/statutory interpretation matters concerning the defense of such cases. In this regard, the following matters seem representative of the problems which receive continuing review:

1. Do the statutory responsibilities/authority of the Attorney General include the defense of these actions when there seems to be no unconditional jurisdiction of the Attorney General to appear in the federal court? See G.L., c. 12, §3.
2. If the Attorney General does appear and defend in these types of cases, is his representation restricted to those employees enumerated in G.L., c. 12, §3D?
3. Should the Attorney General re-examine and re-define the circumstances under which he will undertake to defend defendants in these actions, especially when activity on the part of defendants is alleged which, if proven true, would constitute a violation of Massachusetts criminal law?

Finally, within the Criminal Appellate Section, initial consideration was given to the intra-departmental refinement of the "criminal appellate" types of cases with the goal of eliminating from the Criminal Division many of the "civil" matters which, it has been determined, though expeditiously processed in the Criminal Division, might be better supervised in the "civil" context.

Drug Abuse Section

In September, 1969, the Drug Abuse Section was established within the Department of the Attorney General. The purpose of the Drug Abuse Section is to cooperate on a statewide basis with all segments of our Massachusetts society in a united effort against the drug problem.

Since March, 1970, the Drug Abuse Section has conducted Drug Abuse Education Schools for law enforcement officials and other interested individuals. During 1974 a total of ten such schools were conducted with an enrollment of approximately 350 students. The schools were hosted by the following state and community colleges, with each graduate receiving 3 academic credits.

September 10-20: Framingham State College, Framingham; October 15-19, 23-25: Mt. Wachusett Community College, Gardner; November

5-15: Northern Essex Community College, Gardner; December 3-13: Massasoit Community College, Brockton; January 7-17: Greenfield Community College, Greenfield; January 28-Feb. 7: Bunker Hill Community College, Charlestown; March 4-14: Quinsigamond Community College, Worcester; April 1-11: Massachusetts Maritime Academy, Buzzards Bay; May 6-16: Holyoke Community College, Holyoke; June 10-20: Bristol Community College, Fall River.

The two-week course curriculum includes instruction in the following areas: federal and state drug laws; detection methods and procedures; law enforcement techniques; the legal and practical ramifications of search and seizure; the physiological, psychological and sociological aspects of drug abuse; treatment and rehabilitation resources; and methods of promoting cooperation among agencies.

An outgrowth of the police training program has been a program whereby graduates of the course are setting up drug intelligence networks of county agencies that gather information about drugs, drug users, drug supplies and suppliers.

The Drug Intelligence Unit, funded through an LEAA Grant, continued operation in 1974 by assisting local police agencies in gathering, analyzing, and disseminating drug intelligence information. More than 85% of our cities and towns have designated drug liaison officers to work in conjunction with the Drug Intelligence Unit. These liaison officers forward information to the Unit which in turn analyzes the information and disseminates it to appropriate law enforcement departments and officials. The Unit also conducted a series of ten one-day seminars to discuss the following topics: recent changes in the Massachusetts Controlled Substances Act, federal and state search and seizure guidelines, and a review of the drug problems in the area.

A major goal of the Drug Abuse Section has been to overcome the widespread misconceptions and ignorance within which drug abuse flourishes. The staff has already made significant headway in disseminating information regarding the abuse of drugs and the sanctions provided by the law. They have spoken to parents, students, members of civic and professional groups, educators and legislators.

As part of its drug education program, the Drug Abuse Section publishes TRACKS, a bi-monthly newsletter on drugs; and two pamphlets, MASSACHUSETTS DRUG LAWS and DRUG ABUSE REFERENCE CHART. These materials have been disseminated among educators, students, professionals and other citizens throughout the Commonwealth.

Eminent Domain Division

The Eminent Domain Division is responsible for representing the Commonwealth in all litigation involving the acquisition of land. The Division acts as legal counsel to all agencies of the Commonwealth in: (1) the acquisition of land, whether the transfer is voluntary or involuntary, (2) the disposal of land by the Commonwealth, and (3) all matters

before the Land Court to which the Commonwealth is a party. In addition, the Division is responsible for processing and disposing of all land damage actions filed against the Commonwealth under Chapter 79 of the General Laws.

Approximately eighty (80) percent of our litigation consists of Petitions for the Assessment of Damages under Chapter 79. The remaining twenty (20) percent consist of Equity cases, Land Court Petitions, Federal Eminent Domain proceedings against state land, claims for rent or use and occupancy and other miscellaneous special problems. Most of our cases originate in the Superior Court, and 40-50 percent are jury trials, (C. 983 of the Acts of 1973 requires trial by judge without jury in the first instance).

Since November 1971, a steadily increasing percentage of our cases have been referred to Auditors in accordance with the orders of the Chief Justice. Several conferences with the Bureau of Public Roads were held concerning the attitude toward Auditor's findings, employment of stenographers at the Auditor's hearings and the question of federal contribution for both the Auditor's findings and the payment of stenographers and their transcripts. It was agreed that the Bureau would treat Auditor's findings as administrative settlements. In the event that the Auditor's findings are "substantially" above the review appraiser's figure, the Bureau would not participate in funding the award unless satisfied with all of the documentation. This, in effect, puts us in a position of re-trying all of these Auditor's cases, in which the Bureau of Public Roads is involved, "de novo" in the Superior Court whenever the Auditor's figure is "substantially" in excess of the review appraiser's figure. The Bureau of Public Roads is involved in approximately 80% of the Auditor's cases handled by this Division.

The implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) has placed many new aspects on the acquisition of realty with any federal financial assistance. The provisions for additives to place former residential owners and tenants in decent, safe and sanitary housing, has substantially reduced litigation for land damages, inasmuch as the recipient of the additives, as a condition precedent, must sign a waiver of all amounts received in Court over and above the Pro Tanto and up to the amount of the additive. The 1970 Act increased the additive for residential owners to \$15,000.00 which, in most cases, will wipe out any claim they have for damages above the Pro Tanto, should they participate in this program. An increasing number of former landowners are participating.

A member of this Division sits on the Commission on Eminent Domain. We also provide a legal advisor to the Real Estate Review Board to assist in settling damage claims on takings on 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.

The United States Supreme Court case of *United States v. Maine, et al* has required the time and efforts of members of this Division. The

ultimate decision in this case will determine the extent of the ocean territory of coastal states. This landmark case is the thirty-fifth original jurisdiction case in the entire history of the United States Supreme Court. All of the evidentiary proceedings have been completed and briefs have been filed. The Master has indicated that he will not have his final draft ready until mid-1974. Also, we have been researching the question of off-shore drilling and core sampling off the Massachusetts coast, pending the outcome of the trial.

The Commonwealth's motion for a preliminary injunction against underwater exploration off the coast of Massachusetts was denied in June, 1972. The Supreme Court did, however, entertain the motion, indicating that there was merit to the claim. We met with the Department of Natural Resources, Woods Hole, Environmental Protection Division and Senator Bulger's Office on May 1, 1973 to clear the air on the question of new offshore drilling plans. The net result of this meeting and a subsequent application for another preliminary injunction was a decision by the Federal Government to forego offshore drilling this year.

To date there has been no offshore oil exploratory attempts on the part of the federal authorities. This Division organized the Atlantic Seaboard Conference of Attorneys General, of which Attorney General Robert H. Quinn is now President. General Quinn has appointed a litigation committee of the conference to supervise the handling of the federal case and a legislation committee which has filed two major bills in the Congress.

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 advice, help or an opinion.

It is virtually impossible to estimate accurately the amount of time spent on this area. However, a reasonable estimate would be about 75-100 manhours per week.

Investigations are continually undertaken by personnel of this Division regarding appraisers used by the Commonwealth and alleged indiscretions of Commonwealth witnesses. The results of all these investigations to date have not resulted in criminal action, but we feel that they have resulted in our expert witnesses using a great deal more discretion in their activities.

The following projects are also of prime concern:

1. Long-range review and study of the eminent domain statutes with emphasis on basic changes resulting in administrative determination of damages and changes of the rules of evidence.
2. Attempted resolution of the seaward boundaries.
3. Compilation of a complete file for all eminent domain cases decided by the Supreme Judicial Court, anticipating a revision of the Eminent Domain "Blue Book"

where all cases would be annotated and a basis of each decision cited. (DPW refused application for printing costs and indicated no federal funds available as of this writing).

4. Title examinations, drafting of orders of taking and negotiation settlements of claims for parcels throughout the State for Regional Mental Health Clinics, Community Colleges, State Colleges, University of Massachusetts (Amherst, Boston, Worcester), Department of Natural Resources, Water Resources Commission, Registry of Motor Vehicles, Department of Public Safety, Southeastern Massachusetts Technological Institute, Division of Fisheries and Games, Lowell Technological Institute and other state agencies, as requested.
5. With regard to the railroad takings for the Southwest Expressway, which is the extension of I-95 from Route 128 to the Innerbelt in downtown Boston, negotiations are still underway with General Counsel of the Department of Transportation, Federal Highway Administration and Bureau of Public Roads. The Governor's moratorium on the Southwest Expressway places these negotiations in a questionable status.

At this juncture, we have the legal authority to take the railroad property without seeking permission of the Bankruptcy Court. We do, however, have to acquire a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission, pursuant to Title 49, Section 1(18).

We met with officials of the Bureau of Public Roads, and representatives of the General Counsel's Office of the Interstate Commerce Commission to attempt to establish procedural ground rules for the obtaining of the certificate. Nothing definite has been decided at this point, and we are awaiting authority to release an appraisal figure to the railroads involved before taking any action with the I.C.C. (Moratorium has this effort in limbo).

6. A Bill In Equity has been filed, in conjunction with the Environmental Division, against Fields Point Manufacturing Corp., et al to force the respondents to remove illegal fill in Commonwealth tidelands and restore Popponesset Creek to its natural condition. Depositions have been taken and the case is proceeding toward disposition. The Auditor found against the Commonwealth and this case is now on appeal.
7. The Massachusetts Environmental Protection Act, became effective July 1, 1973. This requires all agencies, before they make any land takings for projects that will affect the environment, to perform an Environmental Impact Study. This has greatly affected the Department of Public Works in its road building plans.

The Division handles the matter of collecting rent from tenants on property taken by Eminent Domain and owned by the Commonwealth. Suits have been commenced this past year against forty-three (43) delinquent commercial tenants. Priority continues to be given to commercial tenants. Some three hundred twenty-four (324) delinquent tenants initiated rental payments in this period, and \$99,903.00 has been received this period for past due rent.

The moratorium on road building within the Rt. 128 area has diminished the amount of new petitions. However, a crash program has been commenced by the Department of Public Works for construction and acquisition on other projects outside of the Innerbelt area and we are experiencing an increase in new petitions in this area.

The present workload is based on land takings from 1967 to date, so that we have not experienced any decrease in court work other than when no judge is available for Civil Sessions. Lately, we have had a steady stream of Auditor's Hearings which take up a great deal of the attorneys' time.

The following cases are on appeal to the Supreme Judicial Court:

GENERAL BAKERY SALES &
SERVICE, INC. v. COMMONWEALTH
KELLY REALTY v. COMMONWEALTH
LOUIS GALAVOTTI, ET AL v. COMMONWEALTH
VARNEY BROTHERS v. COMMONWEALTH
ROBERT H. QUINN v. FIELDS POINT
MANUFACTURING CO.

PENDING LAND DAMAGE CASES

County	Pending as of June 30
BARNSTABLE	17
BERKSHIRE	12
BRISTOL	84
ESSEX	162
FRANKLIN	25
HAMPDEN	99
HAMPSHIRE	19
MIDDLESEX	165
NORFOLK	89
PLYMOUTH	61
SUFFOLK	186
WORCESTER	171
	<u>1,090</u>

PENDING LAND COURT CASES

County
SUFFOLK

Pending
as of
June 30
132

Employment Security Division

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

During the fiscal year ending June 30, 1974, 1347 cases were handled by this Division. 1016 cases were on hand at the start of the year and 331 new cases were received during the year, of which 105 were employer tax cases; 213 were fraudulent claims cases, and 13 were court actions brought by or against the Director of the Division of Employment Security.

201 cases were closed during this fiscal year, of which 102 were employer tax cases and 91 were fraudulent claims cases; 1 a Supreme Judicial court case, and 7 court actions brought by or against the Director of the Division of Employment Security, leaving a balance of 1146 cases on hand at the end of the fiscal year ending June 30, 1974. Monies collected totaled \$454,734.79, with \$334,436.29 as amount collected on employer tax cases and \$120,285.50 collected on the fraudulent claims cases.

The Attorney General's Employment Security Division is charged with the duties of pursuing those individuals found not complying with the Employment Security Law, and during this fiscal year the members of this Division, although inadequately staffed with secretarial help, did wage a more energetic and forceful program in handling all cases referred to the Division for criminal prosecution. At the same time, the Attorney General's office has maintained the policy of giving the erring individual, corporation or business entity every opportunity to make settlement of the case out of court. Concentrated office conferences were conducted with the principals involved to determine whether or not criminal proceedings should be initiated. Criminal prosecutions were taken against those failing to show cooperation with the terms of agreement made by this office and only after they have had an opportunity to discuss the matter thoroughly. If this Division had been properly staffed with secretarial help, more criminal prosecutions would have been initiated. However, during this fiscal year we were only able to bring 119 complaints against 84 employers, involving 857 counts of tax evasion totaling \$420,165.87 in monies owed the Commonwealth.

In addition, there is presently pending in the Massachusetts Supreme Court an action brought by the Massachusetts Bar Association which

raises the question as to what constitutes the practice of law, and to what extent persons representing claimants or employers under Chapter 151-A, General Laws should be required to be members of the Bar. There is also pending in the United States District Court a number of cases brought against the Division of Employment Security alleging that certain procedures set forth in our regulations, and approved by the Department of Labor, violate the plaintiffs' rights to due process under the Fourteenth Amendment. This Division represents the Director of the Division of Employment Security in these matters.

Investigations made by this Division have greatly increased. They now include those conducted through the joint effort of this Division and that of the Criminal Division of the Attorney General's Department for the purpose of uncovering matters of collusion and conspiracy to commit larceny involving certain employees of the Division of Employment Security and individuals filing fraudulent claims for the purpose of obtaining unemployment benefits. In addition, searches are continually made into the whereabouts of the defendants who defaulted court appearances in our criminal actions so that the Warrants may be served and the matters expedited through the courts.

It should be noted, that because of the increased programs and prosecutions more convictions resulted and substantial sums of money were collected. Employers and employees have been made aware of the penalties and restrictions imposed by Chapter 151-A, General Laws and as a result a marked decrease in the number of overall violations occurred in the areas where the Attorney General's Division had prosecuted. Employers realized that employment security division taxes must be paid; and more claimants understand and respect the requirements of the Law governing their rights to unemployment benefits.

For Fiscal Year Ending June 30, 1974

Cases on hand July 1, 1973:		1016
Employer tax cases:	595	
Employee overpayment fraud cases:	420	
Supreme Judicial Court Cases —		
(On appeal from Board/Review decision):	1	
Additional Referrals:		331
Employer tax cases:	105	
Employee overpayment fraud cases:	213	
Supreme Judicial Court Cases —		
(On appeal from Board/Review decision):	0	
D.E.S. Director Actions —		
(Brought in Superior Courts and U.S. Dist.		
Courts/by or against the Director):	13	
<i>Total Cases During Fiscal Year:</i>		<i>1347</i>
Cases Closed:		201
Employer tax cases:		
1. Paid in full.	42	
2. Partial payment, balance uncollectible.	60	
		102

Employee overpayment fraud cases:		
1. Paid in full.	90	
2. Returned to Claims Investigation Department for Administrative Action.	1	91
Supreme Judicial Court Cases:		
(On appeal from Board/Review decision)		
Supreme Court overturned District Court Finding, upheld Division's Argument	1	
D.E.S. Director Actions —		
(Brought in Superior Courts and U.S. Dist. Courts/ by or against the Director)		
Dispositions favorable to Director, D.E.S.	7	
Cases Remaining on hand June 30, 1974:		1146
Employer tax cases:	598	
Employee overpayment fraud cases:	542	
Supreme Judicial Court Cases —		
(On appeal from Board/Review decision):		
D.E.S. Director Actions —	0	
(Brought in Superior Courts and U.S. District Courts/by or against the Director):		
	6	
Total Monies Collected:		\$454,734.79
From Employers: \$334,436.29		
From Employees: \$120,285.50		
Criminal Complaints Brought:		
<i>Larceny Cases:</i> No complaints brought.		
<i>Tax Cases:</i> 119 Complaints, involving 857 Counts brought against 84 employers re delinquent taxes totaling \$420,165.87.		

The Environmental Protection Division

In its three and one-half year existence this division has witnessed a burgeoning caseload, formal creation by statute and rising public interest and participation in environmental enforcement. The division now serves the Commonwealth as trial counsel in all environmental matters, whether federal or state, criminal or civil. Together with referrals from client agencies seeking court action against polluters, citizen complaints provide increasing impetus and evidence for court actions.

What might be termed routine court actions, pending or planned, to enforce Massachusetts pollution statutes now number 180, a threefold increase over the number of active files in 1971 when Attorney General Quinn formed this division by administrative order. Air and water pollution actions each account for one-third of this total (57 and 60, respectively), with wetlands (45), solid waste (16) and outdoor advertising (2) litigation the remaining one-third. Suits against corporations and individuals comprise two-thirds of these active enforcement cases, municipalities one-third. More vigorous pursuit of polluters by client agencies also has generated a large caseload, now at 69, calling upon the division to defend the Department of Public Health, Department of Natural Resources, Division of Water Pollution Control and the Outdoor Advertising Board against challenges to the laws they administer or the orders they issue against specific violators. These enforcement and

defense cases, plus other actions brought at the initiative of the Attorney General, total 202. This figure does not include the 65 cases fully resolved during this fiscal year.

Final results in four of many lawsuits stand out. The U.S. Supreme Court, in a case arising in Colorado, agreed with Massachusetts and other intervenor states that government inspectors do not need search warrants or the owner's permission to enter a company's unrestricted premises to check for smoke pollution. This reaffirms the "unannounced inspection" as an important pollution monitoring tool. In another case, a two-year lawsuit against Foxboro Raceway for raw sewage discharges into the Neponset River was resolved by securing full compliance with the Clean Waters Act by construction of an underground waste treatment facility. In an air pollution action begun in 1971 the Attorney General gave ten major airlines a clean bill of health for reducing smoke at Logan Airport by installing the last in a series of "reduced smoke combustor cans" on JT8D engines. Under the Wetlands Protection Act a court order was obtained against a 100-unit motel, restaurant, lounge and 396-unit condominium development on a 33-acre site on the banks of Webster Lake, for failure to secure the requisite approval of the local conservation commission before work in sensitive wetlands.

Litigation was supplemented by special efforts, through legislation, to preserve the environment where not protected by existing law. Examples include bills to close glaring loopholes in the Wetlands Protection Act and to create "civil" forfeitures" for pollution as an adjunct to the present injunctive and criminal remedies. Both illustrate the important function of the Attorney General to sponsor changes in present statutes seen deficient through experience. As this fiscal year ends, Wetland Protection Act reforms near passage to increase the criminal penalty for illegal wetlands work, clarify what land and work is subject to the law, require the state Department of Natural Resources to implement the law with formal regulations, and facilitate resolution of contested issues. Most important, the bill would give any person — developer and citizen alike — the right to obtain a written opinion from the local conservation commission as to whether any specific land or work is covered by the statute. Also on the legislative front, the Attorney General testified strongly in support of reorganizing the state's environmental agencies, now in disarray, and vigorously against efforts to gut the Massachusetts Environmental Policy Act by exempting private projects damaging the environment.

At federal Council on Environmental Quality hearings the Attorney General protested federal efforts to speed up off-shore drilling for oil and gas on the Georges Bank without knowing and avoiding possible environmental consequences and in the face of the still-unresolved controversy in the U.S. Supreme Court over state offshore jurisdiction. Also, suggestions were delivered to the federal Environmental Protection Agency to assist its efforts to curtail auto use in metropolitan Boston. As an adjunct to stiff controls which may eventually prove necessary Attorney General Quinn recommended immediate voluntary meas-

ures to test the public's willingness to divorce the automobile and perhaps make unneeded some of the planned mandatory controls. In addition, the Attorney General approved Public Restriction Tract Index regulations for Barnstable County. Promulgated thus far only by the Barnstable Register of Deeds, these rules govern recording and indexing "conservation restrictions" under Chapter 666 of the Acts of 1969. These restrictions allow real estate tax, estate tax and income tax benefits to private landowners who, while retaining control over their property, agree to keep land and water areas predominantly in their natural, scenic or open condition, or agricultural farming or forest use.

Atomic energy proceedings continued to command much time and attention. No one Massachusetts agency is equipped or authorized to put sponsoring utilities to their proof in construction and operation of nuclear power plants. The task of coordinating research on the ocean impact of the planned Seabrook, New Hampshire nuclear plant, and preparing the Commonwealth's formal position, fell upon this division. The Atomic Energy Commission granted the Attorney General permission to participate in license hearings on behalf of Massachusetts as an "interested state." The Seabrook site is only three miles from our border and operation will affect our coastal waters and salt marshes. As in the case of the Vermont Yankee proceeding concluded last year, full intervention for the Commonwealth also was sought and allowed by the A.E.C. in Boston Edison's request to build additional nuclear generators at Plymouth. A coalition of scientists provides the technical expertise on nuclear safety issues, and state environmental agencies on ecological concerns. Hearings will begin this fall.

Plans are also in progress to intervene for the Commonwealth in A.E.C. proceedings to license construction by Northeast Utilities of \$1.35 billion twin nuclear power plants on the Montaque Plain. Use of Connecticut River water for cooling, location near Quabbin Reservoir — the drinking water supply for metropolitan Boston, and presence of a ground water recharge area all militate for full intervention on safety and environmental grounds to protect the Commonwealth's interests.

Four important enforcement actions are planned as of this writing. Runways under construction at Logan Airport may violate the Massachusetts Environmental Policy Act. If the Secretary of Environmental Affairs rules Massport's environmental analysis inadequate, the Commonwealth will likely join the city of Boston and Boston residents in their efforts to require, by litigation in Superior Court, a full Environmental Impact Report for the runways project, as required by MEPA for any state work, project or activity which may cause damage to the environment. The City of Boston itself also appears vulnerable to suit for violating air quality standards at its South Bay Incinerator in Roxbury, as efforts are running one year behind to build a new facility to meet July 1975 federal air quality deadlines.

As to the City of Lawrence incinerator and city dump, with its long history of "open burning," an onsite inspection is planned to evaluate claims that both facilities have been closed permanently in response to

earlier suits by the Attorney General. Efforts of the division and local officials have resulted in state designation of the Lawrence area as first priority for a landmark regional solid waste program calling for private waste management centers operated on public lands. This will be a welcome solution to a long standing dilemma.

Despite the division's accomplishments, however, difficulties persist in making litigation a viable enforcement weapon against pollution. Except in unique cases it remains difficult to secure prompt enforcement in the courtroom due to the scheduling delays to which all lawsuits are subject. The Commonwealth's pollution abatement program still suffers from low visibility and inadequate staff and funding, all of which impair credibility and effectiveness. At a conference in Boston sponsored by Attorney General Quinn as President of the National Association of Attorneys General 34 assistant attorneys general from 22 states compared experience with these common problems and discussed techniques to bolster existing laws and agencies, increase citizen participation in enforcement, and secure federal funds for environmental enforcement functions of attorneys general.

If our legislative and executive leaders maintain their resolve to combat pollution and if today's public concern does not give way to public apathy, the accomplishments of these last few years will not be lost.

Industrial Accidents Division

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

There were 9490 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 623 over the previous fiscal year. It should be noted at this point that there are more public employees who come under this jurisdiction than ever before as a result of newly funded state projects. Of the lost time disability cases, this Division reviewed and approved 1444 new claims for compensation, and the Division reviewed and approved all claims for resumption of compensation, of these 137 were verified and approved. In addition to the foregoing, the Division worked on and disposed of 120 claims by complete and final settlement by lump sum agreements and by payments without prejudice.

This Division appeared for the Commonwealth on 615 formal assignments at the Industrial Accident Board and in the Courts on Appellate matters. The staff members are frequently requested to appear and participate in a number of informal conferences and discussions relative to

the many issues involved in these industrial personal injury cases at the Industrial Accident Board, including the review of new cases for evaluation and approval by the Attorney General. In addition this Division must continually review the accepted cases, that is those cases which require weekly payments of compensation, and bring them up to date medically for further evaluation and determination before a Member of the Industrial Accident Board.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1973 to June 30, 1974, were as follows:

General Appropriation

(Appropriated to the Division of Industrial Accidents)

Incapacity Compensation	\$2,614,968.40
Medical Expenses	944,994.43
Total Disbursements	\$3,559,962.83

Metropolitan District Commission

(Appropriated to M. D. C.)

Incapacity Compensation	\$281,179.13
Medical Expenses	93,921.17
Total Disbursements	\$375,100.30

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

It is to be noted that the "Quinn Bill Facilitating the Employment or Re-Employment of Disabled Workers" referred to in this Division's Annual Report of Fiscal year ending June 30, 1973, is now effective and law of this Commonwealth. By this amendment Section 65N of said chapter 152 is repealed, and there remains only one fund in accordance with Section 65, as most recently amended.

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

At the end of this fiscal year the General Fund (Section 65 Fund) showed an unencumbered balance \$889,072.93. As a result of the new "second injury" legislation, there was transferred from the Section 65N fund to General Fund \$256,072.90 in cash and \$480,000.00 in securities. There were receipts to this fund in the amount of \$68,342.07, and payments made out of the fund amounted to \$51,569.92. Additional securities in the amount of \$100,000.00 were obtained and the income

from proper investment was \$22,400.97, indicating that the fund is operating on a sound fiscal basis at no expense to the taxpayers.

Many requests are made of this Division for staff members to appear and participate in seminars relative to Workmen's Compensation Act and particularly to discuss the "new second injury law." Staff members have participated in such seminars at all of the District Offices of the Massachusetts Rehabilitation Commission in an effort to encourage the employment of handicapped people, the purpose of the enactment of the "Quinn Bill Facilitating the Employment or Re-Employment of Disabled Workers."

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

Public Charities

During the fiscal year 1974, there were 2722 trustee's accounts reviewed; 490 Executor's accounts; 754 wills; real estate petitions reviewed were 93; trustee appointments 21; conservators and administrators appointed were 65; and the miscellaneous other matters pertaining to probate work were approximately 188.

Escheated to the Commonwealth under Public Administration matters totalled \$306,124.82 for the period.

Also, under Public Administrations, there were 340 new appointments in the period with 555 cases closed out.

Absentees, totalled 35 for the period and there were some 67 miscellaneous matters handled in public administration.

Under General Laws, Chapter 12, section 8F, 4,461 forms 12 were received, posted and filed and 872 accounts were received posted and filed in lieu of the Forms 12 in the fulfilling of the requirements of the said law.

Under General Laws, Chapter 68, there were 448 forms filed of the Forms 11, applications for certificate of registration to solicit funds from the public in the Commonwealth.

The requirements of the Tax Reform Act caused the Trustees to petition for modification of instruments so as to pay out all the income and such amounts of principal as to avoid taxation in the FRANCES KNOWLES WARREN TRUST; in the GEORGE A. WALKER TRUST; in the LUKE and JERUSHA VOSE BLANCHARD SCHOLARSHIP FUND; in the HIRAM F. MILLS TRUST; in the D. BLAKELEY HOAR TRUST; in the HAROLD WHITWORTH PIERCE CHARITABLE TRUST; in the JOHN A. BIRD TRUST; in the MARY A. CAMPBELL TRUST; in the ESTHER L. FORD

TRUST; in the HENRIETTA F. DEXTER TRUST; in the MARGARET BARR TRUST; in the MATILDA L. HEYDT TRUST; in the ALBERT H. STONE TRUST; in the CLARA L. TENNY TRUST and in the FRANK MONROE NOONAN TRUST.

In the following trusts, because of the burdens of the Tax Reform Act, their assets were transferred by decree of Court to the Charity: Trustees under Indenture of TIMOTHY J. MAHONEY turned over the trust estate to EMMANUEL COLLEGE. The trust fund established in 1926 by many citizens to the City of Waltham, the Trustees of the HAROLD L. PRIDE FOUNDATION transferred its assets to WALTHAM ROTARY FUND, INC., a charitable corporation for educational purposes.

During this year the following charitable corporations were dissolved: RALPH K. HUBBARD FOUNDATION, INC.; FRANCES WILLIAM PARK CORPORATION; PEMBROKE FRIENDS MEETING HOUSE ASSOCIATION; ROBINSON GENEALOGICAL SOCIETY, THAYER MUSEUM; CAPE COD MUSEUM OF HISTORY and ART, INC.; HAMPSHIRE COUNTY PUBLIC HEALTH ASSOCIATION, INC.; MASSACHUSETTS CONSERVATION, INCORPORATED and PARKINSON RESEARCH FOUNDATION OF MASSACHUSETTS.

In mid-January Assistant Attorneys General Hanify and O'Keefe participated in the meeting in Atlanta of the Sub-Committee of the NATIONAL ASSOCIATION OF ATTORNEYS GENERAL. Mr. Hanify's talk dealt with State statutes dealing with charitable trusts and solicitations. Mr. O'Keefe discussed the "Setting of Standards for Charitable Solicitations; Campaigns and Professional Fund Raisers."

Some other interesting cases handled by the Division were the CHARLES F. BACON Trust of March 8, 1919, where the question arose as to whether adopted children were entitled to the Trust property on termination as against a charity. The Probate Judge found in favor of the charity and presently the adopted children are appealing his decision.

In another case, the Trustees of the Fellowes Athenaeum filed a petition for dissolution and named the Attorney General and the Trustees of the Boston Public Library respondents. The Attorney General assented to a petition whereby the Fellowes trustees turned over to the Library more than a half-million dollars to be held by the Library "as the Fellowes Athenaeum Fund, income therefrom to be used for literary instructive purposes at its Dudley Street Branch Library." The Charity was organized in 1866, and its income to be used exclusively for literary, scientific and educational purposes. A suitable plaque in honor of CALEB AND SARAH FELLOWES will be placed in the new DUDLEY STREET BRANCH LIBRARY.

In another case the Attorney General assented to a decree modifying Article XXII of the will of FRANCIS AMORY relating to a gift to AMERICAN ACADEMY OF ARTS and SCIENCES so that the prize instead of being awarded every seven years, may be awarded at such intervals as the President and Fellows of the ACADEMY shall from time to time determine. One of the reasons for the change was that the long interval of seven years between the award of prizes results in less awareness of the existence of the prize.

In the JOHN H. HORIGAN TRUST for the benefit of the BURBANK HOSPITAL we assented to a decree so that principal and accrued income may be used by the Hospital up to 1,200,000 to construct and furnish an emergency and out-patient Center on a floor of the new hospital wing to carry JOHN H. HORRIGAN'S name, preference as to services and use of the Center to be given to needy patients, the balance of the Trust property to be retained in Trust to be used for needy patients in the Hospital.

The Division has handed to the State Printing Division an up-dated Directory of all grant-making foundations with tables of contents making the identification of the appropriate foundation easy to locate. This was done under the direction of Attorney General Robert H. Quinn. The painstaking and detailed research was done by Francis L. Jung a research assistant assigned to the Division by Attorney General Quinn and, presently, a graduate student at the Harvard Law School. For this Directory, we should all be grateful. Its continuance and up-dating at regular period in the future has been provided for by a card system in the Division.

Springfield Office

The Springfield office handles matters of concern to the Attorney General in three Western Counties: Hampden, Hampshire and Franklin. The primary function of the office has been to handle all division references, including Eminent Domain, Workmen's Compensation, Tort, Welfare, Contracts, Environmental Control and Welfare Fraud. The office also handles references from the Massachusetts Discrimination Board, Judicial Reviews, Extradition and Criminal proceedings. Only Consumer Protection matters originate in the Springfield office.

The office supplies personnel to the Board of Insurance Cancellation and the License Board of Appeals for monthly sittings which consider approximately forty cases per sitting.

There are presently 58 pending Eminent Domain cases — 37 in Hampden, 11 in Hampshire and 10 in Franklin. From July 1, 1973 to June 30, 1974 18 cases in Hampden County were settled; 2 Pro-forma hearings were held; 4 Trials were conducted and 1 case was dismissed for Want of Prosecution. In Hampshire County there was 1 Non-suit, while there were no cases in Franklin County.

Listed below are other cases which have been worked on in the Springfield office.

HEW CASES

6 cases were completed
1 case dismissed by agreement
14 cases pending

TORT CASES

7 cases completed
1 case dismissed
11 cases pending

PUBLIC CHARITIES

2 cases completed
3 cases pending

VICTIM OF VIOLENT CRIMES CASES

5 cases pending

WELFARE FRAUD CASES

25 cases worked on and completed

COLLECTION CASES

39 cases pending

ENVIRONMENTAL CASES

1 case completed
2 cases pending

The Trooper in the Criminal Division is constantly investigating criminal offenses and cooperates with all law enforcement agencies in the area.

In the field of consumer protection, the following cases were dealt with by this office covering the period of July 1, 1973 to June 30, 1974.

<i>OPENED</i>	<i>CLOSED</i>	<i>PENDING</i>	<i>SAVINGS</i>
1592	1307	456	\$250,070.05

(The closed and pending figures include cases carried over from the previous year.)

The staff also fulfills speaking engagements concerning consumer protection.

The office gives legal assistance to various state agencies upon request.

Our total correspondence on various matters other than consumer complaints average over 135 letters per month and ranges from explaining uniform support, birth control, abortion, pornography, and civil liberties, to housing, rights of privacy, conflict of interest and zoning problems.

The staff consists of three Assistant Attorney Generals, one Deputy Assistant Attorney General, three Special Assistant Attorney Generals, one investigator in Consumer Protection, one State Trooper in the Criminal Division and two secretaries.

Torts, Claims and Collections Division

The tort division represents officers and employees of the Commonwealth against whom claims are made for acts arising within the scope of their employment.

These cases run the gamut of the law. We have defended employees charged with such offenses as assault, battery, false imprisonment, malicious prosecution, illegal commitments to mental institutions, libel,

slander, conversion and destruction of personal property, pollution of streams and sources of drinking water, wrongful suspension of driver's license, violation of rights secured by the Constitution of the United States, claims of death and injury resulting from medical malpractice and many cases of claims of death, injury and property damage resulting from improperly maintained state highways and negligently operated state motor vehicles.

The bulk of cases involved motor vehicle accidents. During the fiscal year 1973, 157 cases were tried or settled and \$172,567.75 was paid to claimants as compared to 159 cases tried or settled with \$86,264.07 paid for the fiscal year 1972.

The highway defect claims and "moral claims" disposed of in the fiscal year were 136 for an expenditure of \$13,358.13 as compared with 104 cases and the expenditure of \$12,854.47 for the fiscal year 1972.

The Supreme Court in the landmark decision of *Morash & Sons vs. Commonwealth*, 1973 ADV. SH. 785 in reversing the trial court, held that the doctrine of sovereign immunity does not bar a suit against the Commonwealth for injury caused to realty by the commission of a nuisance.

General Laws, Chapter 12, §4-5, authorizes the Attorney General's Office to collect monies due the Commonwealth.

The Collection Section during Attorney General Quinn's administration collected over \$409,000.00 annually as compared to the previous decade in which \$267,000.00 was collected annually.

From January 1969, until June 30, 1973, the Collection Section has collected \$2,631,389.48. This is approximately the amount collected in the previous eleven years.

The type of cases handled by the Collections Section include care and support claims against patients of state hospitals, damage to state property, claims for tuition at the state colleges and universities, and subrogation claims arising out of workmen's compensation benefits paid to state employees.

The following is a survey of cases involved in this phase of the Division's work:

Department Involved	Amount Received	No. of Claims
Department of Mental Health	\$193,369.58	54
Department of Public Health	50,070.04	111
Department of Public Works	118,535.45	241
Metropolitan District Commission	17,338.83	58
Education	5,599.43	88
State Colleges	3,234.04	34
Welfare	837.69	18
Industrial Accidents Division	22,274.44	11
Office of the Secretary	694.25	17
Department of Correction	292.08	4
Corporations & Taxations	43,970.82	1
Public Utilities	20.00	3
Parole Board	675.00	1
Public Safety	3,000.00	2
Waterways Division	4,213.13	2

Board of Retirement	904.04	1
Natural Resources	592.00	5
Administration & Finance	650.14	5
Milk Control Commission	122.29	2
Division of Employment Security	144.50	1
Youth Services	775.00	1
Aeronautics Commission	6,393.20	1
TOTAL	473,705.95	661

General Laws Chapter 258A, an act providing for compensation of victims of violent crimes, became effective July 1, 1968. The office of the Attorney General has the responsibility of investigating and reporting upon such claims to the District Courts of the Commonwealth. All claims are based on out-of-pocket losses of the victims.

In 1968 this office received fifty-five petitions from victims and nine claims were adjudicated with total awards amounting to \$4,498.58. Presently the office of the Attorney General receives thirty petitions per month. In fiscal year 1974 alone, 351 claims were completed with awards totaling over \$600,000.00

The Attorney General prepared and distributed one hundred thousand pamphlets entitled *Compensation for Innocent Victims of Violent Crimes* in order to advise the citizens of their rights under the law.

In a case of first impression under the Violent Crime Statute, the Supreme Court in *Gurley vs. Commonwealth*, 1973 Mass. ADV. SH. 769, virtually assured the dependents of a victim of a violent crime who dies as a result thereof, that they would recover the maximum award of \$10,000.00

Under the authority of Mass. General Laws, c.168, §31, Attorney General Quinn has recovered over three quarters of a million dollars in unclaimed bank deposits standing in the name of the First Judge of Probate for each county for the benefit of beneficiaries who could not be located.

It was the first time that a complete search was made in every probate court in the State. Some bank books have been on file for 100 years. In Worcester, a \$3.00 deposit made in 1870 grew with interest to \$93.00.

The State Treasurer has, in fiscal year 1974, received the following amounts as a result of the Attorney General's efforts:

County	Amount
Norfolk	\$ 64,436.82
Bristol	18,603.63
Essex	38,970.91
Dukes	4,127.96
Worcester	183,089.32
Barnstable	1,001.39
Suffolk	126,688.15
Hampshire	13,973.61
Nantucket	1,867.46
Berkshire	54,274.94
Franklin	29,027.51
Plymouth	12,047.12
Middlesex	101,232.24
Springfield, Hampden	137,609.68
TOTAL	\$786,950.74

FISCAL YEAR REPORT

July 1, 1973 - June 30, 1974

# of cases pending at beginning of fiscal year	1,256
# of new cases	553
# of cases closed	335
# of cases pending at end of fiscal year	1,474

Motor Tort

# MT Cases disposed	167
Total claimed on MT	\$214,023.69
Total paid on MT	131,343.47
Average amt. paid on MT	\$ 779.90

Moral Claims

# Moral Claims disposed	102
Total claimed on Moral Claims	\$ 9,727.17
Total paid on Moral Claims	8,016.42
Average amt. paid on Moral Claims	\$ 78.59

Defect Claims

# Defect Claims disposed	35
Total claimed on Defect Claims	\$ 9,753.17
Total paid on Defect Claims	8,766.29
Average amt. paid on Defect Claims	\$ 250.47

Deer Claims

# Deer Claims disposed	11
Total claimed on Deer Claims	\$ 5,068.81
Total paid on Deer Claims	2,730.29
Average amt. paid on Deer Claims	\$ 248.21

Misc. Tort Claims

# Misc. Tort Claims disposed	5
Total Claimed on Misc. Tort	\$ 18,165.67
Total paid on Misc. Tort	11,800.00
Average amt. paid on Misc. Tort Claims	\$ 2,360.00

THE STATISTICS FOR THE FIRST SIX FISCAL YEARS RE: VIOLENT CRIME CLAIMS

	FY 69	FY 70	FY 71	FY 72	FY 73	FY 74
Claims Filed	55	129	138	251	274	351
No. Of Hearings	9	33	41	92	61	147
No. of Denials	Unavailable	Unavailable	Unavailable	10	1	1
No. of Awards	9	33	41	82	60	146
Total Awards	\$4,498.58	\$60,885.76	\$45,974.04	\$97,296.10	\$119,874.10	\$690,000.00
Aver. Awards	\$ 499.79	\$ 1,845.02	\$ 1,121.31	\$ 1,185.44	\$ 1,997.85	\$ 4,725.34
Total awards paid	\$1,000.00	\$30,000.00	\$65,000.00	\$57,000.00	\$150,000.00	\$600,000.00
FY End-Files						
open	46	96	97	159	213	417
FY End-Awards						
unpaid	\$3,498.58	\$30,885.76	\$11,859.76	\$52,156.00	\$ 22,030.10	\$ 90,000.00

Of the 1198 claims filed from the inception of the program to the end of the Fiscal Year on June 30, 1974, there were about 800 claims filed with the aid of counsel. In the last Fiscal Year ending on the same date, there were 351 filed, 227 with the aid of counsel.

Number 1

July 9, 1973

His Excellency Francis W. Sargent

Governor of the Commonwealth

State House

Boston, Massachusetts 02133

Dear Governor Sargent:

You have requested my opinion as to the constitutionality of H-6966, "AN ACT PROVIDING THAT CERTAIN HOSPITALS AND HEALTH FACILITIES SHALL NOT BE REQUIRED TO ADMIT PATIENTS FOR CERTAIN PURPOSES NOR TO FURNISH FAMILY PLANNING SERVICES AND THAT CERTAIN MEDICAL PERSONNEL SHALL NOT BE REQUIRED TO PARTICIPATE IN CERTAIN MEDICAL PROCEDURES. You have advised me that the bill has passed both houses of the General Court and is now before you for your approval. In light of the recent Supreme Court decisions, *Doe v. Bolton*, 409 U.S., 93 S. Ct. 705 (1973) and *Roe v. Wade*, 409 U.S., 93 S. Ct. 739 (1973), and two decisions by inferior federal courts, I am of the opinion that the bill would be constitutional if enacted into law.

The bill would give legal protection to all hospital personnel, who by reason of religious and/or moral convictions, choose not to become involved in sterilization and abortion procedures. The bill would also grant to each privately controlled hospital or other health facility the right to establish a policy not to admit for, or permit patients to obtain, abortions or sterilizations and not to provide contraceptive devices or information. The bill further allows such hospitals or facilities to choose not to make available family planning services or to make referrals for such services — when offering such services is in violation of the religious or moral principles of the hospital or health facility. The bill would give to each privately controlled hospital the right to determine its own policy with reference to such services; it would not require any hospital, presently providing abortions and sterilizations or contraceptives or family planning services, to cease offering such services.

The recent *Wade* and *Bolton* decisions of the Supreme Court of the United States hold that the right to make the abortion decision is one protected by the Fourteenth Amendment. A statute which makes the performance of an abortion a crime, *Roe v. Wade*, *supra*, or which requires the medical profession to observe unnecessary abortion-restricting rules, *Doe v. Bolton*, *supra*, is thus invalid. Yet, the existence of the right is not a declaration that private hospitals or other private health facilities must provide abortions. [The public-private distinction as to the institution removes from the present consideration the First Circuit's decision in *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1973). There, the Court ruled that a prohibition imposed with respect to a *city* hospital barring the use of its facilities in connection with any consensual sterilization violated the Equal Protection Clause and amounted to an attempt at an all-encompassing anti-birth control

policy, which was suspect under the guidelines of the *Wade* and *Bolton* decisions. That decision was not further appealed.]

The Georgia abortion statute which was considered by the Supreme Court in *Bolton* contained a provision somewhat similar to that found in H-6966:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person." *Criminal Code of Georgia*, Chapter 26-1202 (e).

The Supreme Court did not expressly pass on the validity of the above-quoted section, but the Court reviewed the entire statute, and I note that the section was attacked in an *amicus* brief submitted to the Court. A reasonable inference can be drawn, that such a provision was not considered unconstitutional, in my opinion.

In discussing the statutory requirement of approval for abortions, the Court stated, "These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital." 41 U.S.L.W. 4238-39. The bill which is presently before Your Excellency for approval is broader than the earlier draft reported out by the Committee on Social Welfare. That draft, in Section 3, referred to health facilities operated by and under the direction of a recognized religious order or group. Nevertheless, the principle as applied to individuals is the same in either draft.

Several courts have ruled on or have cases pending as to the constitutionality of a private hospital prohibiting its facilities to be used for the performance of abortions. At the present time, the U. S. Court of Appeals for the First Circuit has neither decided nor has such a case pending. The United States Court of Appeals for the Seventh Circuit, in *Doe v. Bellin Memorial Hospital*, F.2d No. 73-C-230 (June 1, 1973), held that the defendant hospital, regulated by the State of Wisconsin and having accepted financial support pursuant to the Hill-Burton Act, 42 U.S.C. § 291, could refuse to perform abortions without offending the Civil Rights Act, 42 U.S.C. § 1983. The Court noted that the hospital was operating under rules restricting abortions to cases (1) where pregnancy would seriously threaten the health or life of the mother, (2) or would result in delivery of an infant with grave and ir-

reparable physical deformity or mental retardation, or (3) if the pregnancy had resulted from legally established rape or incest. The Court stated, after distinguishing the Bellin Hospital situation from a public institution, "There is no constitutional objection to a state statute or policy which leaves a private hospital free to decide for itself whether or not it will admit abortion patients or to determine the conditions on which such patients will be accepted." (Slip Opinion, p. 7). The opinion rejected the plaintiff's contention that the hospital's right to make that decision had been limited by two federal statutes, the Hill-Burton Act and section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983. The Court stated: "There is no evidence, however, that any condition [in the obtaining of Hill-Burton funds], related to the performance or non-performance of abortions . . . We find no basis for concluding that by accepting Hill-Burton funds to the hospital unwittingly surrendered the right it otherwise possessed to determine whether it would accept abortion patients." (Slip Opinion, p. 8). Neither the direct financial support received from both the federal and state governments, nor the detailed regulation of the hospital by the state was sufficient to bring the hospital's conduct within the ambit of § 1983.

In an unreported decision, *Taylor et al. v. St. Vincent's Hospital*, Docket No. 1090 (Nov. 1, 1972), the United States District Court for the District of Montana, in considering the defendant hospital's prohibition of sterilization procedures absent serious medical indications, treated the same Hill-Burton and § 1983 problem, reaching a different conclusion. The Court granted the plaintiff's motion for an injunction forbidding the denial to the plaintiff, and her physician or physicians, the use of defendant's facilities for the performance of a tubal ligation contemporaneously with a caesarian section, and the Court also denied a motion to dismiss the complaint for lack of jurisdiction. (The order granting injunctive relief is now on appeal to the U. S. Court of Appeals for the Ninth Circuit and is *sub judice* before that Court.) The District Court held "that where a hospital in this state [Montana] is or makes itself the exclusive source of services, and where it benefits from the receipt of Hill-Burton Act funds, it necessarily acts under color of law for purposes of jurisdiction under 42 U. S. C. § 1983."

In this same context I also note that P. L. 93-45 was recently enacted. It provides that receipt of federal funds by any individual or entity does not authorize any court, public official or public authority to require individuals or entities to perform or make facilities available for the performance of abortions or sterilizations if such procedures are contrary to the religious beliefs or moral convictions of the individuals or entities.

In considering these two decisions and their relation to H-6966, several factors should be emphasized. First, the decisions were reached in the context of adversary proceedings where the statutes were applied to concrete factual settings. Particularly, the *Taylor* case presented a situation where the hospital, by its own volitional acts, had become the single institution in the area equipped to provide the maternity and post-natal services which the plaintiff sought. The Court itself in a footnote allows

for the possibility of a different result if the plaintiff had been able to obtain reasonable alternative services. Your request for my opinion is, of course, not predicated on any factual basis. The proposed statute is before me for an opinion as to its facial constitutionality. As previously indicated, I am therefore of the opinion that the bill, if enacted into law, would be constitutional.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 2
Honorable James M. Shepard, Director
Division of Fisheries and Game
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

July 17, 1973

Dear Mr. Shepard:

You have requested my opinion with respect to whether you, as Director of the Division of Fisheries and Game, have authority to require on applications for antlerless deer hunting permits the statement: "I certify under the pains and penalty of perjury that this is the *only* antlerless deer permit application being submitted by this applicant."

You have advised me that since 1967 your Division has, through a regulatory system, established antlerless deer hunting. You indicate that in establishing a procedure for selecting permits, a computer card was chosen with an application to be filled out by an individual and a tear-off section for the actual issuance of the permit. You further advise me that to avoid an individual submitting many applications, thereby increasing his chances of receiving a permit, you had the statement quoted above included on the application.

By virtue of G. L. c. 131, § 5, the Director is given statutory authority to regulate the open season on antlerless deer hunting. Inherent in this regulatory power is the authority to prescribe appropriate procedures concerning the application and selection process in issuing permits.

General Laws, c. 131, § 32 provides that "A person shall not falsely make any representation or statement for the purpose of procuring any . . . permit . . . for himself or another."

General Laws, c. 131, § 33 provides that "A person shall not . . . procure or attempt to procure a . . . permit . . . by fraud or false statements of any kind . . ."

Since you, as Director, are the official given authority over the antlerless deer hunting permit selection process, and in light of G. L. c. 131, §§ 32 and 33 outlawing the obtaining of permits in a fraudulent manner, there appears no sound reason why you would lack authority to require the statement in question. In addition, it is noteworthy to mention G. L.

c. 131, § 12, by which the Legislature has authorized you to require data and statements under the penalty of perjury in regards to your authority to issue licenses. There appears to me no valid reason why such authority would be given you concerning the issuance of licenses but denied regarding antlerless deer hunting permits.

Accordingly, I answer your inquiry in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 3
Honorable George G. Burke
*District Attorney for the
Norfolk District*
Superior Court House
Dedham, Massachusetts 02026

July 17, 1973

Dear Mr. District Attorney:

You have requested my opinion with respect to the powers of the police in relation to G. L. c. 111B, which went into effect July 1, 1973. First, you indicate concern with the arrest and search powers of police officers who arrive at the scene of an automobile accident and find that one or more of the parties involved have apparently been operating a motor vehicle under the influence of an intoxicating liquor, a misdemeanor. Until the present, as you note in your request, the police could only arrest a person for a misdemeanor committed in their presence, and under this rule, the provisions of G. L. c. 111B would preclude the arrest of a person for driving under the influence of intoxicating liquor or driving to endanger until a warrant or a complaint issues from a district court, since drunkenness is no longer a misdemeanor. Such a situation, in effect, would negate the breathalyzer provisions of the General Laws, as well as the right to search pursuant to a lawful arrest under those circumstances.

However, the situation you posit has been rectified by c. 461 of the Acts of 1973 which revised G. L. c. 90, § 21 to insert the following provision which took effect on July 1, 1973:

“Any officer authorized to make arrests may arrest without warrant and keep in custody for not more than twenty-four hours, unless Sunday intervenes, any person operating a motor vehicle on any way who does not have in his possession a license to operate motor vehicles granted to him by the registrar, and who violates any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles and any officer authorized to make arrests, provided such officer is in uniform or conspicuously displaying his badge of office, may arrest without warrant any person, regardless of whether or not such person has in his possession a

license to operate motor vehicles issued by the registrar, if such person upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, operates a motor vehicle after his license or right to operate motor vehicles in this state has been suspended or revoked by the registrar, or whoever upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, or who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor, marijuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene, or any combination thereof . . .”

This amendment gives a policeman the power to arrest any person he has probable cause to believe is operating or did operate a motor vehicle while under the influence of intoxicating liquor, marijuana or narcotic drugs, or depressant or stimulant substances, if he is in uniform or conspicuously displays his badge of office. In view of the revision, it is unnecessary for me to answer your question relating to search and towing of the arrested person’s motor vehicle.

Secondly, you request an opinion relative to the maintaining of records of persons held in “protective custody” pursuant to G. L. c. 111B, and whether or not such records could be used in a subsequent criminal action or civil suit arising out of the incident which resulted in the person being held in protective custody, and whether or not they are to be considered public records. General Laws, c. 111B, has the following provision which took effect July 1, 1973:

“A person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been arrested or to have been charged with any crime; however, an entry of custody shall be made indicating the date, time, and place of custody, which record shall not be treated for any purposes as an arrest or criminal record.” G. L. c. 111B, § 8.

It is my opinion that the record cannot be treated for any purpose as an arrest or criminal record, in any subsequent criminal action or civil suit. Whether or not it can be introduced for any other purpose will be based upon the facts of the case and the relevance and materiality of the records to the issue before the court. Concerning whether such records are public, G. L. c. 4, § 7 provides in part:

“ ‘Public Records’ —Twenty-sixth, ‘Public Records’ shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, district, city, town or authority established by the general court to serve a public purpose, which is the property thereof, and in or on which

any entry has been made or is required to be made by law.”

A recent decision of the Supreme Judicial Court, *Town Crier Inc. and Others v. Chief of Police of Weston, Massachusetts*, 1972 Adv. Sh. 891, 895, interpreting the above statute, stated:

“The proper construction of G. L. c. 4, § 7, Twenty-sixth, in our view is that the two categories of records encompassed by the definitions are (a) those in which ‘any entry has been made . . . [pursuant to a legal requirement]’ and (b) those in which ‘any entry . . . is required to be made by law,’ . . .”

It is my opinion that records maintained pursuant to G. L. c. 111B, § 8 are public records, since an entry of custody indicating the date, time, and place of custody is to be maintained as “required to be made by law,” namely, G. L. c. 111B, § 8.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 4

July 26, 1973

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

Dear Mr. Secretary

Mr. Edward C. Kloza, State Registrar of Vital Statistics within your office, has requested my opinion on the effect of the new legislation allowing males between the ages of 18 and 21 to marry in Massachusetts without parental consent, G. L. c. 207, §§ 7, 33 and 33A, as amended by St. 1971, c. 255. The questions presented are:

“1. May a person between the ages of eighteen and twenty-one, whose parents reside in a state other than the Commonwealth, establish a residence within the Commonwealth for the purpose of obtaining a marriage license as per Chapter 207, Section 19 of the General Laws?

“2. If the answer to the first question is in the negative, do the laws of the state in which the parents reside apply with respect to any requirements of parental consent?”

The Massachusetts statutes in question here, G. L. c. 207, §§ 7, 33 and 33A, are applicable to Massachusetts domiciliaries. A person must be a domiciliary to have the marriage laws of the state apply. See Restatement — Conflict of Laws, § 132. A person, domiciled in another state, who comes to Massachusetts to marry is subject to the marriage laws of his domiciliary state. G. L. c. 207, §§ 11 and 12.

In general, “domicil” means actual residence, coupled with an intention to remain indefinitely. See *Putnam v. Johnson*, 10 Mass. 487, 500-501; *Opinion of the Justices*, 5 Met. 587, 590; *Rummel v. Peters*,

314 Mass. 504, 511. The intention to remain indefinitely does not mean an intention to stay forever, but merely that there is no present intention of leaving. *Putnam v. Johnson*, *supra*; *Rummel v. Peters*, *supra*.

In Massachusetts the age of majority is 21. A legitimate minor child is ordinarily domiciled with his father or guardian. See *Green v. Green*, 351 Mass. 466, 467-468; *Glass v. Glass*, 260 Mass. 562, 564; *Worcester v. Springfield*, 127 Mass. 540, 541; Restatement-Conflict of Laws, § 31. An emancipated minor may establish his own domicile separate from that of his father or guardian. Restatement-Conflict of Laws, §31. An unemancipated minor may only establish his own domicile with the assent, express or implied, of his parents or guardian. See *Kirkland v. Whately*, 4 Allen 462. Traditionally, without the consent of his parents, an unemancipated minor may not establish his own domicile until he reaches the age of majority. See *Green v. Green*, *supra*; *Glass v. Glass*, *supra*; *Worcester v. Springfield*, *supra*; Restatement-Conflict of Laws, § 31. If these domicile principles were to apply to marriage, an unemancipated minor between the ages of 18 and 21 would be restricted to marrying in conformity with the laws of the state of his father's or guardian's domicile. See G. L. c. 207, § 12.

However, the rules pertaining to domicile change for different purposes. They are, for instance, different for property tax liability, probate jurisdiction of wills, custody of children and voting.¹ Marriage is a status and, as such, for conflict of laws purposes, is governed by the laws of the domicile of the party or parties. Restatement-Conflict of Laws, § 121. In enacting legislation, Massachusetts can change the status of only its own domiciliaries; otherwise it must adhere to the laws of the domiciliary state, G. L. c. 207, § 12, or the marriage is void, G. L. c. 207, § 11. The purpose of the domicile requirement is to establish the superiority of one state's laws as against another's concerning the marriage.

In my opinion, to restrict the ability of an unemancipated minor, over the age of 18, to choose his domicile for marriage purposes, but not restrict him for voting purposes serves no useful purpose and is unconstitutional. See *Op. Atty. Gen.*, 71/72-3. The new 18 to 21 year old resident would be put in a separate category from the lifelong resident. The lifelong resident is permitted to establish a separate domicile from his father or guardian for marriage and voting purposes, whereas the new resident would be denied the right to establish a separate domicile for marriage purposes. Such a classification has no rational basis, cannot be justified by a compelling governmental interest and constitutes invidious discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. It could also act as a restriction on the freedom to travel and establish a new domicile. See *U.S. v. Guest*, 383 U.S. 745; *Shapiro v. Thompson*, 394 U.S. 618; *Dunn v. Blumstein*, 405 U.S. 330; *Opinion of the Justices*, 357 Mass. 827.

In conclusion, a male between the ages of 18 and 21, whose parents reside in a state other than the Commonwealth, may establish a domicile

¹See e.g., *Texas v. Florida*, 306 U.S. 398, 413-428, *Op. Atty. Gen.*, 71/72-3, p. 3-6.

within the Commonwealth for the purpose of contracting marriage. The determination whether a person between the ages of 18 and 21 has made his new Massachusetts residence his domicil for marriage purposes is a question of fact to be determined by all the circumstances of the case. *Commonwealth v. Davis*, 284 Mass. 41, 49; *Tax Collector of Lowell v. Hanchett*, 240 Mass. 557, 561.

In view of my answer to the first question, no answer is required as to the second.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 5
Honorable Wallace C. Mills, Clerk
House of Representatives
State House
Boston, Massachusetts 02133

August 2, 1973

Dear Mr. Mills:

The House of Representatives has requested my opinion (House No. 6799) on the question: "Would House Bill 5233, entitled 'An Act to stimulate the economy through business and industrial financial assistance' if passed, violate any provisions of the Constitution of the Commonwealth or of the United States?"

House Bill 5233 provides for the creation of a "Board of Business Assistance Approval" (hereafter "the Board") within the Department of Commerce and Development consisting of ten members, five of whom are public officials specified by the bill and five appointed by the Governor to serve at his pleasure (subsections 14 and 15 of section 7). The declared purpose of the bill is "to protect the public welfare by reducing the high level of unemployment, lessening the number of people on welfare rolls and increasing income tax revenues for the Commonwealth by encouraging lending institutions to extend credit to those industries and businesses which may preserve or create jobs for the people of the commonwealth." To this end, the bill provides for the establishment of a "mortgage guarantee fund" (subsection 19 of section 8), a "business loan guarantee fund" (subsection 25 of section 9), and a "capital participation loan fund" (subsection 29 of section 10). Additionally, the Board is authorized to borrow money by issuing revenue bonds for the purpose of financing industrial projects within the Commonwealth of Massachusetts (subsection 33 of section 11).

1. Public Purpose

House Bill 5233 appropriates public money for the mortgage guarantee fund (section 13), the business loan guarantee fund (section 14) and the capital participation loan fund (section 15). Public money is money raised by Taxation. *Opinion of the Justices*, 354 Mass. 779, 784 (1968).

Since it is a long-established principle of constitutional law that public money can be used only for a public purpose and not for the advantage of private individuals, *Opinion of the Justices*, 337 Mass. 800 (1958); *Eisenstadt v. County of Suffolk*, 331 Mass. 570 (1954); *Opinion of the Justices*, 261 Mass. 523 (1927); *Duffy v. Treasurer and Receiver General*, 234 Mass. 42 (1919); *Lowell v. Boston*, 111 Mass. 454 (1873), House Bill 5233 raises the question whether the expenditure of public funds is hereby authorized for other than a public purpose.

Such a determination depends upon the circumstances of each particular case. *Opinion of the Justices to the Senate and House of Representatives*, 341 Mass. 738 (1960), with the paramount test being whether the expenditure confers direct public benefit of a reasonably general character to a significant part of the public, as distinguished from a remote and theoretical benefit. *Opinion of the Justices*, 349 Mass. 794 (1965); *Opinion of the Justices*, 347 Mass. 797 (1964); *Opinion of the Justices*, 337 Mass. 777 (1958). Thus, where the Commonwealth provides assistance to or utilizes a private individual or enterprise in aid of a valid public objective, such a scheme is not rendered unconstitutional simply because that private person or institution receives some incidental advantage or benefit which is secondary to the accomplishment of the predominant public purpose of the plan. *Opinion of the Justices*, 356 Mass. 814 (1971); *Opinion of the Justices*, 354 Mass. 779 (1968); *Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co.*, 348 Mass. 538 (1965); *Allydonn Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 292-293 (1939). And it has been declared that weight should be given to legislative findings of fact as to existing conditions material in such a determination. *Opinion of the Justices*, 349 Mass. 794 (1965); *McLean v. City of Boston*, 327 Mass. 118 (1951) (legislative finding of public emergency not met by way of ordinary private action); *Opinion of the Justices*, 320 Mass. 773 (1946).

It is my opinion, in light of the stated purpose of the bill and the recitation of legislative findings of fact as to the high unemployment rate in the Commonwealth, that the passage of this bill would not entail an unconstitutional expenditure of public funds, and would benefit a significant part of the public.

The Justices of the Supreme Judicial Court, in *Opinion of the Justices*, 356 Mass. 814 (1971), have held that a statute authorizing the Commonwealth to borrow money and to lend such money to private businesses for construction of water pollution waste treatment facilities did not involve the expenditure of public funds for other than a public purpose where the purpose of the statute was the abatement of industrial water pollution. The Justices relied upon findings by the Legislature that such pollution constituted an obvious danger to public health, safety and welfare, and determined that any benefits received by recipients of loans would be incidental to the accomplishment of the primary purpose of the act. It is my opinion that the instant bill encouraging lending institutions to extend credit to certain private industries and businesses which may preserve or create jobs for the people of the Commonwealth involves a

scheme comparable to the water pollution waste treatment plan, and a similar determination as to public purpose is warranted.

Moreover, Art. 88 of the Articles of Amendment to the Constitution of the Commonwealth provides that "The industrial development of cities and towns is a public function and the cities and towns therein may provide for the same in such manner as the general court may determine." See, *Opinion of the Justices*, 356 Mass. 814 (1971) (abatement of industrial water pollution without impairment of local industrial development involves an important public purpose).

Finally, the bill contains language designed to insure that the public interest prevails over the private. Subsection 24 of section 9 requires that the Board may enter into a business loan guarantee agreement only if "the borrower can establish to the satisfaction of the Board that jobs will be created or preserved through the availability of financial assistance." An identical provision is included in subsection 28 of section 10 pertaining to capital participation loan agreements. As to the Board's authority to issue revenue bonds under section 11, although it is my opinion that this is not an expenditure of public funds or an extension of public credit, still subsection 36 includes language which further indicates the intention of the Legislature that the bill be primarily for the benefit of the public.

The only provision that appears constitutionally questionable on a public purpose ground is that regarding mortgage guarantee agreements, since this section does not include any of the language to which I have referred. It is possible that a court would interpret this omission as signifying a different intention on the part of the Legislature and thus declare it constitutionally invalid.

II. Credit of the Commonwealth

Article 62, §1 of the Articles of Amendment to the Constitution of Massachusetts (as amended by Art. 84 of the Amendments) provides that: "The commonwealth may give, loan or pledge its credit only by a vote taken by the yeas and nays, of two-thirds of each house of the General Court present and voting thereon. *The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed.*" (Emphasis supplied.) House Bill 5233 involves the guaranty of loans made by lending institutions to industries and businesses in the Commonwealth which are unable to secure such loans without state assistance through the mortgage guarantee fund, the business loan guarantee fund, and the capital participation loan fund. In addition, the Board is authorized to borrow money.

Since it has been decided that a guaranty by the Commonwealth is a loan of the credit of the Commonwealth, *Opinion of the Justices*, 337 Mass. 800 (1958), as is borrowing and lending of money, *Opinion of the Justices*, 356 Mass. 814 (1971), House Bill 5233 raises a question concerning potential violation of Art. 62, § 1 of the Articles of Amendment to the Constitution of Massachusetts.

However, it is my opinion that there is no loan or pledge of the credit of the Commonwealth on the face of this bill, *Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co.*, *supra*, except with regard to the capital participation loan provision. In section 8 of the bill, creating the mortgage guarantee fund, there is very specific language in subsection 20 to the effect that "the total amount of the debt service obligation payable on account of all loans to all mortgagors which are subject to mortgage loan guarantee agreements shall not exceed the amount of the mortgage fund." And in subsection 22 it is clearly stated that an "obligation shall be payable solely from the mortgage guarantee fund and shall not constitute a pledge of the taxing power or the faith and credit of the commonwealth." Similar language restricts the business loan guarantee provisions (subsections 23 and 26 of section 9) and the power to issue revenue financing bonds (subsections 30 and 34 of section 11). The Board thus may not become obligated beyond its own resources, and may not in any way rely upon the credit of the Commonwealth. Statutory language of this type has been interpreted by the courts to effectively withhold commitment of the state's credit and thus comply with the requirements of Art. 62, § 1 of the Articles of Amendment to the Constitution of Massachusetts. See, *Massachusetts Housing Finance Agency v. New England Merchants National Bank*, 356 Mass. 202 (1969); *Opinion of the Justices*, 354 Mass. 779, 779-81 (1968).¹

Therefore, it is my opinion that the powers given the Board do not involve an unlawful pledge of the credit of the Commonwealth or an unlawful delegation of authority in violation of Art. 62, § 1 of the Articles of Amendment to the Constitution of Massachusetts, except with regard to the capital participation loan provisions where no disclaimer is included. Here again, omission may be interpreted as notice of a different intention.

III. Borrowing Power

Article 62, § 3 of the Articles of Amendment to the Constitution of Massachusetts declares that: "In addition to the loans which may be contracted as before provided, *the commonwealth may borrow money only by a vote, taken by the yeas and nays, of two-thirds of each house of the general court present and voting thereon.* The governor shall recommend to the general court the term for which any loan shall be contracted." (Emphasis supplied.) Since House 5233 would authorize the Board to borrow money, it raises the question of unlawful delegation of power by the Legislature to the Board on matters of borrowing money. The issue turns upon whether the Board has a "substantive existence independent of the Commonwealth" so that borrowing by it does not constitute borrowing by the Commonwealth. *Opinion of the Justices*, 354 Mass. 779, 785 (1968); *Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co.*, *supra*; *Opinion of the Justices*, 334 Mass. 731 (1956); *Opinion of the Justices*, 322 Mass. 745 (1948).

¹I note that one case, *Ayer v. Commissioner of Administration*, 340 Mass. 586 (1960), stated by way of dicta that "the Act provides that the bonds shall not constitute a debt of the Commonwealth or a pledge of its faith or credit. (§ 14). This disclaimer is ineffective if, contrary to the disclaimer, such be the natural and reasonable effect of the statute." However, I find no reason to believe, on the face of the bill, that the disclaimer will be ineffective.

It is my opinion that the Board of Business Assistance Approval would, in effect, have an independent existence of its own, and that borrowing by it would not constitute borrowing by the Commonwealth of Massachusetts. Borrowing of money would be done by the Board which would be primarily liable for the payment of all its notes and bonds and all loans incurred by it (subsection 34 of section 11). See, *Opinion of the Justices*, 322 Mass. 745 (1948). The Commonwealth incurs no liability from dealings of the Board. Moreover, what the Supreme Judicial Court said about the independent status of housing authorities in *Johnson-Foster Co. v. D'Amore Construction Co.*, 314 Mass. 416, 419, seems applicable here as well:

"The statutes establishing housing authorities make it plain that such an authority, although organized by and in each city and town in cooperation with the State, is nevertheless, when organized, a complete corporate entity in itself, distinct from the municipal corporation within whose territory it is set up, and exercising its powers in its own independent right. . . . It is an instrumentality of government, but it is also a corporation having the contracting powers of a corporation and suable as such 'in the same manner as a private corporation.' . . . Its contracts are its own and are not those of the municipality."

In a similar manner the Board of Business Assistance Approval, although established by the Commonwealth, will have a genuine existence of its own which is distinct from the existence of the Commonwealth. It has the power to make contracts and own property which cannot accurately be said to be property of the Commonwealth (subsection 30 of section 11). *Opinion of the Justices*, 322 Mass. 745 (1948). The Board must pay all its obligations without the assistance of the Commonwealth or its credit. I have noted that the Supreme Judicial Court has recognized the independent status of certain governmental instrumentalities even where the State did extend its credit to guarantee bonds and loans made by the agency. *Opinion of the Justices*, 354 Mass. 779 (1968) (Massachusetts Educational Facilities Authority); *Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co.*, *supra*; *Opinion of the Justices*, 322 Mass. 745 (1948) (Financing of low rent housing projects for war veterans). Finally, the Board has not been set up "as merely colorable entities or as a subterfuge to evade the provisions of Art. 62, § 3, and to enable the Commonwealth to borrow money without the two-thirds vote of each house and the recommendation of the Governor required by section 3." *Opinion of the Justices*, 322 Mass. 745 (1948); *Ayer v. Commissioner of Administration*, *supra*. It is the Board which decides to borrow money and how that money should be used.

Thus I must agree with the statement of the Justices of the Supreme Judicial Court when they declared, regarding the status of housing authorities in *Opinion of the Justices*, 322 Mass. 745 (1948), that to say that the Commonwealth would be borrowing money under this bill "would involve a failure to recognize the true relations intended to be

brought about and would extend the word 'borrow' beyond its natural signification as used in Art. 62, § 3."

Although it is my opinion that House 5233 does not violate the intent of Art. 62, § 3 of the Amendments to the Constitution of Massachusetts, there is language, however, in the bill that might be construed by a court as indicative that the Board does not constitute an independent entity. In particular, I note that the Board of Business Assistance Approval is "created and placed in the department of commerce and development," (subsection 14 of section 7) and that it acts "for and on behalf of the commonwealth" (subsection 18 of section 8, subsection 23 of section 9, and subsection 27 of section 10). Such language draws into doubt the substantive independence of the Board, and, in my opinion, weakens the bill from a constitutional standpoint.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 6
Honorable William F. McRell
Acting Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

August 9, 1973

Dear Mr. McRell;

I have your letter dated July 11, 1973, calling my attention to St. 1973, c. 320, and requesting my opinion on the following questions:

- "1. On what date does the act take effect?
- "2. Which of the following would be a correct interpretation and implementation by the Division of Civil Service?
 - a) Any examination administered prior to that date is subject to the rights of appeal in existence prior to the effective date of ch. 320, and the process of review and appeal is to be carried through to its completion regardless of date.
 - b) Only examinations *marked* prior to the effective date are subject to the right of appeal, carried to completion as in (a) above.
 - c) Only *if applicants have been informed of their marks* prior to the effective date do they have the right of appeal as in (a) above.
 - d) Only *if a request for review has been filed*, in accordance with the present provisions of ch. 31, prior to effective date, may a person exercise the present right of appeal.
 - e) All review and appeal rights which are abolished by ch. 320 are terminated as of the effective date, regardless of the stage they reached in the review and appeal process.

“3. If none of the above is a correct construction, what construction shall be placed upon this act?”

St. 1973, c. 320 amends various sections of G. L. c. 31, the Civil Service Law, the principal change being an elimination of the right of an applicant to request a review of the markings of his examination paper. General Laws, c. 31, §§ 2(b), 2A(1) and 12A, in relevant part, provided as follows prior to the enactment of St. 1973, c. 320:

“§ 2. . . . the [civil service] commission shall—

* * * * *

(b) Hear and decide all appeals from any decision or action of, or failure to act by, the director, upon application of a person aggrieved thereby . . .”

“§ 2A. . . . the director [of civil service] shall—

* * * * *

(1) Decide in the first instance all reviews of markings on examinations papers requested by applicants.”

“§ 12A. Not later than seventeen days after the date of mailing of the notice of the director to the applicant of the results of his examination or notice that he did not meet the requirements for admission to the examination, *the applicant may file with the director a request for a review of the markings of his examination paper*, . . . a request for a review of his marking of training and experience, or a request for a review of the finding by the director that he did not meet the requirements for admission to the examination established by the director . . .

* * * * *

“Within six weeks after acceptance of a request for a review of markings on any examination paper, the director shall cause such paper and the markings thereon to be reviewed, and shall transmit a copy of his decision to the applicant . . .

“Not later than seventeen days after the date of mailing of the notice of the decision of the director, the applicant may appeal to the commission by filing a petition in a form approved by it and containing a brief statement of the facts as presented to the director for his review.

* * * * *

“After filing of such an appeal, the commission shall hold a hearing, render a decision and transmit a copy of such decision to the appellant and to the director.” (Emphasis supplied.)

Sections 1, 2 and 8 of St. 1973, c. 320 amend these sections of G. L. c. 31, in relevant part, as follows:

2(b)

“Hear and decide appeals from decisions or actions of, or failures to act by, the director, except in matters relating to findings of the director relative to the grading of written, oral, or practical tests in a competitive examination, upon application of a person aggrieved thereby . . .”

2A(1)

“Decide in the first instance all reviews requested by applicants of markings of training and experience or findings that requirements for admission to examinations were not met; provided, however, that in the event of an error in the markings of examination papers the director shall have full authority to make any corrections he may deem necessary.”

12A

“Not later than seventeen days after the mailing of the notice of the director to the applicant of the results of his examination or notice that he did not meet the requirements for admission to the examination, the applicant may file with the director a request for a review of the marking of his training and experience, a request for a review of the finding by the director that he did not meet the requirements for admission to the examination established by the director or a request that the computations of his general average mark be checked for error. Within six weeks after acceptance of the request, the director shall cause such marking or such finding to be reviewed, and shall transmit a copy of his decision to the applicant. Not later than seventeen days after the date of mailing of the notice of the decision of the director, the applicant may appeal to the commission by filing a petition in a form approved by it and containing a brief statement of the facts as presented to the director for his review. After the filing of such an appeal, the commission shall hold a hearing, render a decision and transmit a copy of such decision to the appellant and to the director . . .”

There is no Emergency Preamble in St. 1973, c. 320, nor is there a “savings clause” which excepts from the operation of c. 320 examinations administered prior to the effective date of this statute.

St. 1973, c. 320 is an Act subject to Referendum and, therefore, under the Constitution of the Commonwealth, becomes effective 90 days after approval of the Act. Const. Amend. Art. 48, Pt. 1; *E. B. Horn v. Assessors of Boston*, 321 Mass. 579, 580; *Greenaway's Case*, 319 Mass. 121. The Act was approved by the Governor on May 29, 1973, and it therefore becomes effective on August 27, 1973.

The right to request review of the markings of an examination paper, granted by G. L. c. 31, § 12A prior to the enactment of St. 1973, c. 320, is a right created by statute and is purely procedural in nature. Procedure and remedies may be changed by the Legislature, and there is no violation of the Constitution if it does so. *Greenaway's Case*, 319 Mass. 121, 123; *Devine's Case*, 236 Mass. 588, 593. “Where situations relate merely to remedy or procedure and do not affect substantive rights, they have generally been held to operate retroactively.” *Greenaway's Case*, *supra*, at 123. In other words, statutes involving changes in procedure apply to pending cases equally with those arising after their enactment, unless a contrary purpose is expressed or fairly inferable from the words used. *Lindberg v. State Tax Commission*, 335 Mass. 141, 143; *Hollingsworth & Vose Co. v. Recorder of Land Court*, 262 Mass. 45,

47. However, a statute which changes procedure will not invalidate a step in procedure lawful when taken, *E.B. Horn Co. v. Assessors of Boston*, 321 Mass. 579, 584, as where a request for review of markings of an examination has been filed.

Applying the foregoing rules to your inquiries, your questions may be answered as follows:

1. The effective date of the Act is August 27, 1973.
2. - 3. Applicants have no right to file a request for a review of the markings of their examination papers after August 27, 1973, with respect to examinations administered prior to that date, whether or not marked prior to that date, and whether or not they have been informed of their marks prior thereto. However, if an applicant files or has filed a request for a review of the markings of his examination paper prior to August 27, 1973, that appeal is valid and must be heard and determined in accordance with the provisions of G.L. c. 31, § 12A and §§ 2 and 2A, as they existed prior to the enactment of St. 1973, c. 320.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 7
Honorable Malcolm E. Graf
Associate Commissioner
Department of Public Works
100 Nashua Street
Boston, Massachusetts 02114

August 10, 1973

Dear Commissioner Graf:

You have requested an opinion on behalf of the Board of Commissioners of your Department whether the Department of Public Works [the "Department"] properly assessed Ramada Inns, Inc. the sum of \$11,333.25 as compensation for the granting of license #5942 to Ramada Inns, Inc. Said license allows Ramada Inns, Inc., subject to certain restrictions, to " . . . *maintain existing fill* in a former tidal area . . . to *add and maintain fill* on the bank of the existing fill and to install and maintain a storm drain outfall into the Chelsea River . . . " You state that the charge of \$11,333.25 was assessed at the rate of 37½ cents per cubic yard of tidewater displacement and " . . . was based on the fact that the fill was placed without benefit of a license in a tidal area and therefore constituted a public nuisance." I am also advised that the subject property was included in the flats surrounding Noddle Island, all of which was granted to Samuel Maverick by Colonial ordinance on April 1, 1633 and was also subject to an eminent domain taking by the United States government in 1942. Finally, you advise that the existing tidal displacement was accomplished prior to the 1942 eminent domain taking by the United States.

General Laws, c. 91, § 21 provides for compensation to be paid to the Commonwealth for the displacement of tidal water as follows:

"The amount of tide water displaced by . . . any filling of flats, shall be ascertained by the department, which shall require the persons who cause such displacement to make compensation therefor . . . by paying to the commonwealth . . . an amount assessed by the department, not exceeding thirty-seven and one half cents per cubic yard of water displaced . . . ""*

The Legislature has expressly provided that the Department may license and prescribe the terms (including compensation for water displacement) for the filling of tidal flats. G. L. c. 91, §§ 14, 21.

The filling of tidal flats without a license or in violation of a license is considered a public nuisance and the Attorney General, upon request of the Department, may cause the nuisance to be abated. G. L. c. 91, § 23; *Attorney General v. Bernice Baldwin*, 1972 Mass. Adv. Sh. 345.

The authority of the Department over the displacement of tidal waters was originally vested in the Board of Harbor Commissioners established by St. 1866, c. 149. St. 1866, c. 149 was followed by St. 1869, c. 432 [now G. L. c. 91, § 23] which gave the Board of Harbor Commissioners the authority to license and regulate the filling of tidal flats. Legislative enactments prior to the passage of St. 1869, c. 432, which authorized individuals to fill tidal areas have been held to operate as irrevocable grants and are not subject to regulation or licensing by the Department. *Commissioners of Public Works v. Cities Service Oil Company*, 308 Mass. 349, 353; *Treasurer and Receiver General v. Revere Sugar Refinery*, 247 Mass. 483; *Bradford v. McQuesten*, 182 Mass. 80, 81, 82; VIII Op. Atty. Gen. 216. Where a legislative grant prior to St. 1869, c. 432 authorizes the grantee to fill tidal waters, neither the grantee nor his successors in title are liable to the Commonwealth to pay compensation for tidal displacement. *Bradford v. McQuesten*, *supra*.

In order to answer your request, I must determine whether the Colonial ordinance of 1633 or any subsequent Colonial ordinance or legislative enactment amounted to such a grant as to render the subject property without the Department's jurisdiction to license tidal filling under G. L. c. 91, § 14. Although no particular words are necessary to constitute a legislative grant of the right to fill tidal flats, such an enactment should declare the grantee has the *right to build upon or fill tidal flats*. *Bradford v. McQuesten*, 182 Mass. 80, 81-82.

The Colonial ordinance of April 1, 1633 granted Noddle Island to Samuel Maverick ". . . to enjoy to him and his heirs forever . . ." Vol. I Records of Massachusetts Bay, Shurtleff, p. 104. Noddle Island was the subject of another Colonial ordinance on May 13, 1640 which declared that the flats "round about Noddle Island" do belong to Noddle Island to the ordinary low water mark. Vol. I Records of Massachusetts Bay, Shurtleff, p. 291. A third Colonial ordinance dated February 7,

*Subsequent to the time this opinion was requested, the Legislature deleted 37½ cents as the maximum charge allowed for displacement. See St. 1972, c. 684, §11.

1682 granted Noddle Island in fee to Samuel Shrimpton and extinguished all rents, obligations and encumbrances. Vol. V Records of Massachusetts Bay, Shurtleff, p. 413. I do not find it necessary to determine if any of these three ordinances have the stature of a legislative grant, since it is my opinion that none of the Colonial ordinances granted the authority to fill tidal areas and therefore could not render the subject area without the Department's licensing authority pursuant to G. L. c. 91, § 14. See *Bradford v. McQuesten*, 182 Mass. 80, 81-82. The effect of the Colonial ordinances was to give the owner of the land subject to the ordinance title in fee, subject to lawful regulation. *Michaelson v. Silver Beach Improvement Assoc., Inc.*, 342 Mass. 251, 254; *Old Colony Street Railway v. Phillips*, 207 Mass. 174, 176.

The only applicable legislative enactment relative to Noddle Island is St. 1833, c. 152, § 2, which authorized the East Boston Company, subject to certain restrictions, to:

“ . . . purchase, hold and possess, in fee simple or otherwise, all or any part of that island . . . , known by the name of Noddle's Island, with all flats around the same, and the privileges and appurtenances thereto appertaining, and all rights, easements and water courses therewith used and enjoyed . . . ”

This enactment did not convey any right to fill tidal water. I must, therefore, conclude its only effect was to allow the East Boston Company to purchase Noddle's Island and that St. 1833, c. 152, § 2 did not operate as a legislative grant to fill tidal areas.

Another question for my resolution is whether the eminent domain proceeding in 1942 had any effect on the Department's authority to license and exact displacement compensation with respect to the subject property. In this connection, I note that the tidal displacement present when license #5942 was issued took place prior to the 1942 condemnation proceedings. It is clear that the eminent domain taking was an *in rem* proceeding which vested independent title in fee in the United States. *Collector of Taxes of City of Boston v. Revere Building Inc.*, 276 Mass. 576, 579; *Weeks v. Grace*, 194 Mass. 296; Vol. I Nichols on Eminent Domain, § 1.142[1]. In my opinion, the fact that the United States acquired an independent title in fee to the subject property did not extinguish obligations arising from the presence of unauthorized tidal fill nor extinguish the public nuisance created by such illegal filling. See G. L. c. 91, § 23. The mere acquisition by a governmental body of property which contains or constitutes a nuisance does not extinguish the nuisance. *Kurtigian v. City of Worcester*, 348 Mass. 284, 288. Consequently, Ramada Inns, Inc. could be subjected to abatement proceedings pursuant to G. L. c. 91, § 23 and perhaps extraordinary tort liability if it maintained the subject property without benefit of a license. See *Commr. of Public Works v. Cities Service Oil Co.*, 308 Mass. 349 (abatement); *Fuller v. Andrew*, 230 Mass. 139 (tort liability). I therefore conclude that Ramada Inns, Inc. was properly subject to the licensing requirements of the statute.

However, I note that G. L. c. 91, § 21 only requires persons "who cause" tidal displacement to pay compensation to the Commonwealth. Since Ramada Inns, Inc. did not cause the filling of tidal flats prior to 1942, it should not have been assessed for the filling that took place prior to that time or to the date it acquired title to the subject property. It is therefore my opinion that the assessment of \$11,333.25 should be abated to the extent that Ramada Inns, Inc. be reimbursed a proportionate amount of the assessment which reflects the charge assessed for unlicensed filling which took place prior to Ramada Inns, Inc. ownership of the property. The remaining share of the assessment may be retained by the Department as compensation exacted pursuant to G. L. c. 91, § 21.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 8

August 22, 1973

Mr. Walter J. Poitras
Director of Building Construction
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Poitras:

I am in receipt of your request for my opinion with regard to whether the Director of Building Construction and the Secretary of Transportation and Construction must comply with the procedures outlined in G. L. c. 7, § 30B when employing an architect or engineer to prepare a preliminary plan or specification for improvements necessary to maintain state-owned property pursuant to G. L. c. 6A, § 28.

As you have stated, G. L. c. 7, § 30B establishes a Designer Selection Board and outlines the Board's authority with respect to projects undertaken by the Bureau of Building Construction. Specifically, G. L. c. 7, § 30B provides in pertinent part:

"Any project subject to the control and supervision of the director of building construction . . . shall be referred by the commissioner [Commissioner of Administration and Finance] to the board, which shall promptly provide suitable public notice of the proposed project."

General Laws, c. 7, § 30B further delineates the procedure for selection of a designer for such projects through a process of recommendation made by the Board to the Commissioner of Administration and Finance who has ultimate responsibility in appointing a designer. See 1965-66 Op. Atty. Gen. 151. The procedure outlined by G. L. c. 7, § 30B clearly must be followed in approving a designer for "any project" subject to control of the Director of Building Construction. General

Laws, c. 6A, § 22 enacted simultaneously with G. L. c. 7, § 30B, includes within such projects "all building construction projects" meeting three specific criteria as to (1) source of funding, (2) estimated cost, and (3) type of construction or repair. The procedures of G. L. c. 7, § 30B, then, must be followed before a designer can be selected to undertake an *actual* construction project subject to the control and supervision of the Director of Building Construction.

On the other hand, G. L. c. 6A, § 28 specifically deals with examination of *requests for projects* pursuant to G. L. c. 29, § 7 and for development of projects of his own by the Director of Building Construction, "whenever *in his judgment* the maintenance of state-owned property requires such improvements to prevent deterioration or costly future repair." (Emphasis supplied.) That G. L. c. 6A, § 28 is addressed to preliminary study of potential construction projects in which the Director of Building Construction has authority to employ architects, engineers, etc. on a temporary basis without any proceeding before the Designer Selection Board, is clear from the following language of that section:

"Said director shall cause to be made and filed with him preliminary plans and descriptive specifications sufficient for a careful estimate by a competent expert; and for such purpose such sums as may be appropriated or otherwise made available therefor may, *with his approval*, be expended and *he may*, with the approval of the secretary, *employ temporarily such architects*, engineers, contractors and consultants *as may be necessary*." (Emphasis supplied.)

Thus, such preliminary studies are not "projects" for the purposes of G. L. c. 7, § 30B, and as defined in G. L. c. 6A, § 22, but rather they are initial steps in estimating costs of potential projects. The employment of temporary designers for such preliminary studies is within the discretion of the Director of Building Construction and the Secretary of Transportation and Construction. Accordingly, it is my opinion that the Director of Building Construction and the Secretary of Transportation and Construction need not comply with the procedures delineated in G. L. c. 7, § 30B when appointing temporary architects for the limited purposes authorized by G. L. c. 6A, § 28.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 9

August 22, 1973

Honorable Edward S. Graham
Assistant Superintendent
Massachusetts Hospital School
Canton, Massachusetts 02021

Dear Mr. Graham:

You have requested my opinion on the following two questions:

- 1) Do the Trustees of the Massachusetts Hospital School have the authority to request, receive, and disburse federal, state, county, corporate or personal grants and gifts under the existing statutes of the Commonwealth?
- 2) What procedures must be followed in adopting regulations for the conduct of student/ patients at the Massachusetts Hospital School?

In regard to your first question, G.L. c. 111, § 62K provides, "The trustees shall be a corporation for the purpose of taking and holding . . . any grant or devise of land or any gift or bequest of money or other personal property made for the use or benefit of the school . . . and for the purposes of preserving and investing the proceeds thereof in notes or bonds . . . with all powers necessary to effect said purposes . . . In the use, management and administration of such gifts or trusts, the trustees or their agents shall in their discretion so act as most effectively to aid the beneficiaries in accordance with the terms of the gift of trust . . ." It would appear clear from the face of § 62K that the Trustees may request and receive all grants and gifts, and disburse the proceeds of such grants and gifts subject to the limitation of the last sentence quoted above. Accordingly, I answer your first question in the affirmative.

With respect to your second question, G. L. c. 111, § 62M authorizes the Trustees to make rules and regulations regarding the admission and discharge of patient/students. General Laws, c. 30A, § 1(5) exempts regulations of public health and educational institutions from the requirements of the Administrative Procedure Act of the Commonwealth. It would therefore seem that no particular procedure need be followed in adopting rules regarding the conduct of patient/students at the Hospital School, other than the rules of procedure governing the Board of Trustees, contained in the corporate charter of the institution. I should add, however, that in order to avoid possible constitutional problems, the Hospital School should publish its regulations and make them easily accessible to patient/students, *see Hasson v. Boothby*, 318 F. Supp. 1183 (D. Mass. 1970). I believe that you have already planned to take such action.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 10
Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

August 22, 1973

Dear Commissioner Kehoe:

You have requested my opinion on the question of whether the heads of municipal fire departments are obliged to carry out a directive from the State Fire Marshal requiring the certification of trucks carrying flammable liquids. Upon examining the applicable statutes and regulations, specifically G. L. c. 148 and FPR-7 (Rules and Regulations Governing the Transportation of Flammable Liquids by Tank Vehicles, Pipe Lines or other Methods Within the Commonwealth), I conclude that local department heads are obliged to carry out such a directive.

The duties of the Board of Fire Prevention Regulations of the Department of Public Safety are contained primarily in G. L. c. 148. The following sections have particular importance to the question you have asked. Chapter 148, § 9 provides in pertinent part as follows:

“The board [of fire prevention regulations] shall make rules and regulations for the keeping, storing, use, manufacture, sale, handling, transportation or other disposition of . . . explosive or inflammable fluids or compounds . . .”

Chapter 148, § 10 provides in pertinent part as follows:

“The board of fire prevention regulations shall make, and from time to time may alter, amend and repeal, rules and regulations relative to fire prevention which said board is authorized or required under any provision of this chapter to adopt or make . . .”

Chapter 148, § 10A provides in pertinent part as follows:

“The head of the fire department in each city, town, or fire district shall grant, in accordance with the rules and regulations of the board, such permits for use in such city, town or fire district as may be required by such rules and regulations, and make such inspections therein, and have and exercise such powers and duties in connection therewith, as the marshal may direct.”

Under the provisions of G. L. c. 148, § 10, quoted above, it is clear that the duty to make rules and regulations relative to fire prevention in general, and under the provision of G. L. c. 148, § 9, quoted above, rules and regulations specifically relative to inflammable liquids, rests with the Board of Fire Prevention Regulations. In compliance with this statutory mandate, the Board has established rules and regulations governing the transportation of flammable liquids by tank vehicles within the Commonwealth. These rules and regulations are contained in bulletin FPR-7. [Note: References in FPR-7 are to “flammable liquids”; references in G. L. c. 148 are to “Inflammable fluids”; Webster’s Dictionary defines “flammable” as “capable of being easily ignited and of

burning with extreme rapidity — now used technically in preference to inflammable.”] [For similar statutory interpretation of Fire Prevention Regulations see 1965-1966 Op. Atty. Gen. 332.]

Section 4a of FPR-7 provides that no tank truck, as defined in section 1(a), shall be used to transport any flammable liquid (defined as Class A and Class B, section 2), unless the vehicle has been submitted for approval to the State Fire Marshal and his approval is evidenced by the issuance of a certificate of approval. The provisions of section 4a are extended to other vehicles capable of carrying such liquids by succeeding sections 4b, 4c and 4d. The Regulations authorize the Marshal to exercise wide authority in obtaining any information which he may deem necessary before the issuance of his certificate of approval. A physical inspection of any such vehicle is, in my opinion, wholly consistent with the purpose of the Regulations, and is analogous to the provision provided in G. L. c. 148, § 4, for inspection of buildings and other premises. Realizing the potential hazards inherent in the transportation of flammable liquids, the Board has promulgated these regulations to protect the safety of the public, and to maintain a system for determining the adequacy of vehicles to carry such liquids.

The directive of the State Fire Marshal to all fire chiefs authorizes and directs them to biennially conduct the inspections and to issue certificates of approval which are to be attached to any vehicle which meets the inspection standards. This certificate of approval is referred to as a “permit” under FPR-7, section 4 which states “The certificate of approval herein provided for shall serve as a *permit* to transport flammable liquids for a period not to exceed two years.” (Emphasis supplied.) This making of the inspection for the purpose of issuing the certificate is a process within the purview of section 10A, and as such falls within the scope of duties which can be delegated to heads of local fire departments, in accordance with regulations of the Board. Furthermore, section 10A provides that the head of the local department “shall” make such inspections and exercise such powers and duties in that connection as the Marshal may direct. The local fire chiefs are also required to keep a record of every permit so issued, and may charge a fee of up to fifty cents for each permit issued. In my opinion, this is a definite and binding directive to exercise the delegated powers in so far as the implementation of the permit system is concerned. I intimate no opinion as to the Fire Marshal’s powers in other situations, as no other facts are before me.

For the above-stated reasons, I am of the opinion that the Board of Fire Prevention Regulations, in accordance with c. 148, §§ 9 and 10, has authority to make regulations governing the transportation of flammable liquids by tank vehicles within the Commonwealth. Further, heads of municipal fire departments are obliged to carry out the directive from the State Fire Marshal requiring the certification of such tank vehicles carrying flammable liquids.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 11
Honorable Robert L. Meade
*Chairman, Department of Public
Utilities*

September 4, 1973

Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Chairman:

You have requested my opinion as to the alternatives available to recover possible overcharges collected since 1954 by Gray Line, Inc., Rawding Tours, Royal Blue Bus Line, and Pilgrim Sightseeing Company, Inc. (hereafter "Gray Line"). You have informed me that Gray Line last filed a sightseeing tariff schedule with the Department of Public Utilities on March 1, 1954 and since then has raised its rates several times without filing any new tariffs. Gray Line has now filed with your department new tariffs concerning sightseeing rates and has asked your department to waive the usual notice requirement for allowing rate increases to become effective. You have specifically inquired whether there is anything the Department of the Attorney General or the Department of Public Utilities can or should do about the overcharges and whether any statute of limitations might pose a problem. Finally, you note that uncertainty exists as to whether Gray Line's rate changes from 1954-1973, although made in violation of departmental rules and regulations, were otherwise reasonable.

Section 5 of c. 399 of the Massachusetts Acts and Resolves of 1931, as amended by c. 93 of the Massachusetts Acts and Resolves of 1933, delineates the role of the Department of Public Utilities in regulating automobile sightseeing services:

"No person or corporation shall offer or furnish service by sight-seeing automobiles in or from the city of Boston unless said person or corporation has obtained from the department of public utilities a certificate declaring that public convenience and necessity require such operation. Said department may, after public hearing, issue or refuse to issue such a certificate and may attach to the exercise of the privilege conferred by said certificate such terms and conditions as to operation and fares as the said department may deem that public convenience and necessity require. Said department may, after notice and hearing, suspend or revoke any such certificate for cause or alter or amend any terms or conditions attached to the exercise of the privilege conferred thereby. Said department may make suitable and reasonable rules, orders and regulations governing the operation and fares of sightseeing automobiles carrying persons in or from the city of Boston, and may revise, alter, amend and annul the same . . ."

Based upon my reading of this statute, the applicable cases, and the facts you have furnished, I am of the opinion that the said statute empowers your department to suspend or revoke the certificate of public convenience and necessity under which Gray Line operates. *Commonwealth v. Reardon*, 282 Mass. 345. Gray Line's failure to file new tariffs for its rate increases would constitute cause within the meaning of section five's suspension or revocation clause.

Should less Draconian measures be deemed appropriate, said § 5 empowers your department to attach such terms and conditions as to operation and fares as public convenience and necessity are deemed to require. Implicit in this power is the requirement that the terms and conditions imposed be reasonable and in furtherance of the public convenience and necessity. Allowing Gray Line to continue its operation as a sightseeing carrier might well be made contingent upon its seeking to rectify the situation created by its having operated in derogation of statutory and regulatory commands for a prolonged period. The exact amount of such terms and conditions not being before me, I will not speculate as to their propriety. Suffice it to say that whatever terms and conditions are imposed must be reasonable and in furtherance of the public convenience and necessity.

Your department's rule ordering that all bus lines furnishing sightseeing service in and from Boston file rate tariffs with the department appears to comport with the statutory requirement that rules, orders, and regulations governing operation and fares be "suitable" and "reasonable." Even were the various increases in Gray Line's rates from 1954-1973 reasonable in light of costs to the carrier, the rule requiring advance filing of increased tariffs is a suitable and reasonable method of governing the operation and fares of sightseeing automobiles. Requiring advance filing of increased tariffs protects sightseers from overcharges and avoids precisely the *post facto* proof of what is a "reasonable rate" that is presented here. Proving today what was a reasonable rate in 1955 or 1957 will be difficult, time consuming and subject to distortion; moreover, the sightseers who may have been overcharged years ago will not likely be located nor able to prove they were users of Gray Line's service and thus entitled to a rebate. No Federal constitutional obstacles of interstate commerce obtain in this situation. See *Commonwealth v. Reardon*, *supra*; *Commonwealth v. New England Transportation Company*, 282 Mass. 429.

In addition to the revocation and suspension powers and the power to impose terms and conditions outlined above, § 6 of c. 399 of said Acts of 1931 provides penalties for violations. Violators "shall be punished by a fine of not more than fifty dollars or by imprisonment in the house of correction for not more than one month, or both." The language of § 6 is mandatory, not precatory. Moreover, that section gives the Supreme Judicial Court and Superior Court equity jurisdiction to restrain violations of any rule, order or regulation of your department upon petition by your department or any interested party. Finally, § 6 provides for a maximum \$25 fine against anyone who operates any sightseeing au-

tomobile as a driver in violation of any rule, order or regulation of your department. *Commonwealth v. Reardon, supra.*

General Laws, c. 159A, §11A specifically excludes sightseeing automobiles licensed under c. 399 of the Acts of 1931 from the definition of the term "charter service" and "special service" as defined in that section; hence the provisions of c. 159A, §15 do not govern here. See *Op. Atty. Gen.*, Dec. 31, 1947, p. 43.

In *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18, the Supreme Judicial Court held that the Department of Public Utilities had no power to award reparations to customers for overcharges collected by an electric company: "The department was correct in ruling that it had no power to award reparations. Such a power must be expressly conferred by statute, as it was in the case of carriers (G. L. c. 159, § 14)." 352 Mass. at 26. The provisions of c. 159, § 14 being inapplicable to the instant facts, and no other express statutory authorization obtaining, your department has no power to award reparations to customers for overcharges. Whether Gray Line's rates constituted "unfair methods of competition," or "unfair or deceptive acts and practices" within the meaning of G. L. c. 93A, § 2(a) cannot be determined on the facts now before me.

Your final inquiry asks whether and to what extent a statute of limitations would apply here. General Laws, c. 260, § 5 states:

"Actions for penalties or forfeitures under penal statutes, if brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced only within one year next after the offence is committed. But if the penalty of forfeiture is given in whole or in part to the commonwealth, an action therefor by or in behalf of the commonwealth may be commenced only within two years next after the offence is committed."

Section 6 of c. 399 of said Acts is a penal statute in which the penalty is given to the Commonwealth. A two-year statute of limitations is applicable. Moreover, based upon the facts you have provided, I am of the opinion that separate causes of action accrued at each illegal change in the tariff charged by Gray Line between 1954 and 1973. Chapter 260, § 5 would preclude recovering at this time for past violations not occurring within the last two years unless a tolling provision were operative. Chapter 260, § 12 provides that fraudulent concealment tolls the statute, but I am unable to ascertain from the facts whether any fraudulent concealment is involved in this case. Mere non-feasance would not be enough; positive acts done with intent to deceive are required. *Connelly v. Bartlett*, 286 Mass. 311; *Maloney v. Brackett*, 275 Mass. 479. The statute of limitations in c. 260, § 5 has no effect upon your powers to revoke or suspend or to impose terms and conditions under § 5 of c. 399 of the Acts of 1931. That section admits of no limitation and empowers your department to take action at any time.

In conclusion, I am of the opinion, subject to the caveats expressed above, that your department may suspend or revoke Gray Line's certificate or impose such terms and conditions relative to operation and fares

as the public convenience and necessity require. However, your department may not award reparations to consumers for past overcharges, although these consumers may seek reparations on their own behalf.

Finally, the Commonwealth is authorized to seek enforcement of the penalties provided for violation subject to the applicable limitations statute.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 12
Honorable Louis J. Resteghini
Director, Division of Registration
100 Cambridge Street
Boston, Massachusetts 02202

September 5, 1973

Dear Mr. Resteghini:

You have requested on behalf of the State Examiners of Electricians, my opinion on the following question:

“Is a homeowner excluded from the provisions of Section 1 of Chapter 141 of the General Laws (Ter. Ed.) as it relates to installing electrical wiring in his own home?”

Section 1 provides, “No person, firm or corporation shall enter into, engage in, or work at the business of installing wires, conduits, apparatus, fixtures or other appliances for carrying or using electricity for light, heat or power purposes, unless such person, firm or corporation shall have received a license and a certificate therefor, issued by the state examiners of electricians and in accordance with the provisions hereinafter set forth.” The key word in the section, as it is involved in your request, is “business.” While the word may connote mere “activity,” for profit or otherwise, it also may be construed more narrowly to include only the engagement of one’s self for some kind of compensation. I am inclined to the view that the General Court intended the latter construction.

The principal aim of the section, and of c. 141 generally, appears to be the protection of those who deal with electricians. The State Examiners, in effect, give electricians their credentials so that the public will be assured of their qualifications. There is no need for such credentials when an individual does his own electrical work, and thus the section is inapplicable to such a person.

My conclusion is supported by the unreported opinion of Chief Justice McLaughlin of the Superior Court in *Herrick v. Butler* (Nantucket Superior Court, Eq. No. 1524) (1972). There, the Chief Justice ruled that the provisions of G. L. c. 142, dealing with plumbing but similar in language to those of c. 141, were directed at regulating the practice of plumbing as a profession and were not aimed at preventing individuals

from doing their own work. He stated that the latter purpose was accomplished by other sections, whose counterparts are not found in c. 141.

In conclusion, for the reasons stated above, I answer your question in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 13
The Honorable Joseph M. Leavey
Commissioner
Department of Youth Services
73 Tremont Street
Boston, Massachusetts

September 20, 1973

Dear Commissioner Leavey:

You have requested my opinion as to whether or not you must honor a court's choice of a particular location, as stated on a mittimus, when a child is committed to the Department of Youth Services for further examination, trial or continuance, or for further indictment and trial, pursuant to Massachusetts G.L. c. 119, §68. Pursuant to Section 68, the Department of Youth Services may provide special foster homes and detention homes for children held for further examination or trial.

In considering your question, it appears that the provisions of G.L. c. 119, § 68B are applicable. That section provides:

"The department of youth services may use or provide special foster homes and places of temporary custody commonly referred to as detention homes, at various places in the commonwealth which shall be completely separate from any police station, town lockup or jail, and which shall be used solely for the temporary care, custody and study of children committed to the care of the department of youth services. The commissioner of youth services may at his discretion transfer any child thus committed from any foster home or detention home to another such foster home or detention home."

It seems clear that you as Commissioner may transfer any child committed on a temporary basis from any foster home at your discretion, if you comply with other applicable statutes concerning the types of places to be maintained.

I therefore answer your question in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 14
Louise Maloof, Esquire
Executive Secretary Pro Tem
Executive Council
State House
Boston, Massachusetts 02133

September 25, 1973

Dear Miss Maloof:

You have requested my opinion on behalf of the Executive Council on the question whether "veterans' benefits under G. L. (Ter. Ed.) C. 115, S 5 may be paid to a veteran whose debt was incurred prior to the date of application to the Boston Department of Veterans' Services, as in the manner described in the attached report from the Commissioner of Veterans' Services." Based on the facts given to me in the Commissioner's report, I answer your question in the affirmative.

I. Validity of the Application

The Commissioner's report states that at the time the veteran, Henry D. Corse, entered the Massachusetts General Hospital for a hernia operation, "[i]t appears . . . [he] filled out a form at the hospital naming the Veterans' Services Department as the public assistance agency from which he was requesting aid." About three weeks after his discharge from the hospital, he filed an application with the Boston Veterans' Office requesting assistance for the payment of his hospital bills.

The Boston Veterans' Office denied his application, ostensibly on the basis of G. L. c. 115, § 5, which provides in pertinent part that:

"No payment of benefits shall be made for any period of time prior to the date of application; provided, however, that the commissioner, on recommendation of the veterans' agent of the city or town paying the benefits, may authorize the payment of benefits for not more than sixty days prior to the date of the application if the necessity therefor has been caused by serious accident or illness to the applicant or to one or more dependents of the veteran upon whose service the application is made."

The question thus arises: whether Corse's filling out of the form provided him by the Massachusetts General Hospital is equivalent to his filing an application at the Boston Veterans' Office.

Typed on the hospital's form under the heading "remarks", is the comment that the veteran must contact Veterans' Services after his discharge. In my opinion, the filling out of this form constitutes a temporary application for assistance which becomes permanent and final, when, and if, the veteran, upon his discharge, applies at his local veterans' office for assistance.¹

Such a procedure is a sound and adequate one to meet the needs of a veteran who is hospitalized in an emergency and who is, therefore, unable to apply for aid at his local office.

¹I am informed by the Office of the Commissioner of Veterans' Services that they have agreed to such procedure and consider the hospital's form sufficient notice of a veteran's application for assistance.

Accordingly, it is my opinion that Henry D. Corse filed a valid application for medical aid with Veterans' Services and that nothing in G. L. c. 115, § 5 renders him ineligible for such assistance.

II. *Student Status*

According to the information you have provided me, the Boston Veterans' Office also rejected Corse's application for medical aid on the ground that his current status as a graduate student at Emerson College rendered him ineligible. Additionally, they maintain that Corse fraudulently obtained financial aid from them during October and November, 1971, and July and August, 1972, by not disclosing his student status at those times.

It is my opinion that Corse's student status did not render him ineligible for medical aid from Veterans' Services. There is nothing in the General Laws or the regulations of the Commissioner of Veterans' Services which mandates a contrary result. Moreover, the Office of the Commissioner of Veterans' Services has declared in a memorandum to local veterans' offices:

"The policy of the Office of the Commissioner of Veterans' Services regarding eligible veterans attending school is as follows:

1. The veterans shall be aided for all medical.
2. Veterans may have their medical insurance paid by Veterans' Benefits.
3. Veterans may be allowed Ordinary Benefits equal to the Veterans Administration amount of subsistence until the veterans receive said Veterans subsistence.
4. Veterans attending high school may be allowed Ordinary Benefits."

Since Corse is apparently otherwise eligible for veterans' assistance but for his student status, sections one and three of the policy statement of the Office of the Commissioner of Veterans' Services just quoted render him eligible for medical assistance from the Boston Veterans' Office.

III. *Waiver of Application*

Finally, the Boston Veterans' Office justified its rejection of Corse's application on the fact that a woman who accompanied him at the time of his admission to the hospital allegedly agreed to be responsible for the costs of Corse's hospitalization.

You do not provide me with enough information to determine whether this woman did, in fact, assume such responsibility. But, you do provide me with sufficient factual data to determine whether Corse knowingly waived his application for veterans' medical assistance. In this regard, it is my opinion, on the basis of the facts presented, that the woman acted on her own, without Corse's sanction and, therefore, could not have possibly deprived Corse of his rights to veterans' assistance.

In conclusion, then, it is my opinion that veterans' benefits under G. L. c. 115, § 5 may be paid to a veteran whose debt was incurred prior to

the date of application to the Boston Department of Veteran's Services in the manner described in the case of Henry D. Corse. Accordingly, in my opinion, the Boston Veterans' Office improperly rejected Corse's application for medical assistance.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 15
The Honorable Nicholas L. Metaxas
Commissioner
Department of Corporations and Taxation
100 Cambridge Street
Boston, Massachusetts 02204

October 2, 1973

Dear Commissioner Metaxas:

You have requested my opinion concerning the status of an employee of your department during the time when he is on leave of absence from your department and commencing employment with the Federal service.

You have stated that the employee is seeking a leave of absence from September 24, 1973 through November 12, 1973 (representing thirty-four days accumulated vacation leave), and that he is to begin Federal employment on October 8, 1973.

You ask "whether said employee can be on vacation leave, with pay, during a period of time when he will also be on a Federal payroll —?"

While a prohibition exists against a person receiving more than one salary from the Commonwealth at the same time (G.L.c.30 sec. 21), there is no prohibition against Federal service by a person on leave of absence from Commonwealth service. This is particularly true in this case where the monies to be paid by the Commonwealth have already been earned by accumulated vacation days.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 16
Mr. Thomas W. Devine, Director
Vietnam Bonus Division
Treasury Department
State House
Boston, Massachusetts 02133

October 29, 1973

Dear Mr. Devine:

In your letter dated September 10, 1973 referring to St. 1968, c. 646, as amended by St. 1969, c. 325 and St. 1973, c. 692, all of which carry

Emergency Preambles, you inquire whether Vietnam Bonuses are payable under certain conditions. Thus you inquire whether

"1. Under the most recent amendment, Acts of 1973, c. 692, s. 1, are veterans who meet all other requirements of the statute, who served in the Vietnam area between July 1, 1958 and April 1, 1973 for *any* period of time, eligible to receive the \$300.00 payment authorized by the statute?

"2. With respect to veterans who serve during the aforestated dates of the Vietnam conflict *outside* the Vietnam area, must their active service have begun not later than October 1, 1972 in order to be eligible for payment of the \$200.00 authorized by the statute, assuming all other statutory requirements are met?

"3. With respect to the definition of 'active service in the armed forces' as appearing in Acts of 1969, c. 325, does such definition exclude from eligibility to receive payment of \$300.00 or of \$200.00, a member of the army national guard or air national guard whose unit was not federalized but who, under orders of his military superiors, served in the Vietnam area during the aforestated time frame for the purpose of providing assistance and supplies to regular units of the armed forces of the United States operating in the Vietnam area?"

Section 1 of c. 646 of the Acts of 1968 originally imposed as a primary condition for eligibility of a veteran for a Vietnam bonus that he "shall have served for a period of six months or more." Thus, in pertinent part, § 1 provided:

"SECTION 1. Upon application . . . there shall be . . . paid . . . to each person, who shall have served in the armed forces of the United States for a period of six months or more since July first, nineteen hundred fifty-eight until the end of the Vietnam conflict . . . the sums hereinafter specified . . .

(1) Three hundred dollars to each such Vietnam veteran who performed active service outside the continental limits of the United States in the Vietnam area, as said area is described by proper federal authority.

(2) Two hundred dollars to all other such Vietnam veterans whose active service was performed within the continental limits of the United States, or without the continental limits of the United States in an area other than the Vietnam area."

St. 1969, c. 325, added a second, third and fourth paragraph to SECTION 1 as it appears in St. 1968, c. 646, the second and fourth paragraphs being as follows:

"'Active service in the armed forces', as used in this section shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

"The benefits of this section shall also extend to include those persons who served on active duty less than six months since July first, nineteen hundred and sixty-eight, who have been discharged or released due to a disability or disease incurred in the line of duty, or were killed or died of injuries incurred while serving on active duty of less than six months; provided, however, they meet the requirements of this act."

Section 1, as it appears in Section 1 of Chapter 692 of the Acts of 1973, is materially changed as to the requirements of length of service provided for in the first paragraph and now provides, in pertinent part, as follows:

"*Section 1.* Upon application . . . there shall be . . . paid . . . to each person, who shall have served in the armed forces of the United States *in active service*, since July first, nineteen hundred and fifty-eight and prior to April first, nineteen hundred and seventy-three . . . the sums hereinafter provided . . .

(1) Three hundred dollars to each such Vietnam veteran who performed active service outside the continental limits of the United States in the Vietnam area, as said area is described by proper federal authority.

(2) Two hundred dollars to each such Vietnam veteran who performed active duty within the continental limits of the United States, or without the continental limits of the United States in an area other than the Vietnam area *for a period of six months or more.*" (Emphasis supplied.)

Section 1 of Chapter 646 of the Acts of 1968, as amended by the 1969 and 1973 statutes, would appear to eliminate the six month service requirement for veterans otherwise eligible to receive a \$300.00 bonus, and to reduce the length of service requirement for veterans otherwise eligible to receive the \$200.00 bonus but who did not complete six months of active duty because of disability or disease or death in the line of duty. Thus the answer to your first question is in the affirmative.

The answer to your second inquiry, namely, must active service have begun not later than October 1, 1972, in order to be eligible for the \$200.00 payment provided for in subparagraph (2) of Section 1 as amended, is in the affirmative. No person is eligible to receive a \$200.00 bonus unless he served between July 1, 1958 and April 1, 1973, and served at least six months. Any service which commenced after October 1, 1972 would be for a period less than six months prior to April 1, 1973, and therefore would not entitle a veteran to a \$200.00 bonus under said subparagraph (2) unless the six-month requirement is excused by reason of disease, disability or death as provided in the fourth paragraph of Section 1.

The answer to your third question is that a member of the army national guard or air national guard whose unit was not federalized but who under orders of his military superiors served in the Vietnam area is

entitled to a bonus of \$300.00 if otherwise qualified. I note that both the titles and statutory language contained in St. 1968, c. 646, as amended by St. 1973, c. 692 authorize the award of a bonus to Massachusetts residents " . . . who *served* in the armed forces of the United States during the Vietnam conflict." The Supreme Judicial Court has consistently held that language inserting a statute into the General Laws should be given force in determining legislative intent. *Commonwealth v. Giles*, 350 Mass. 102, 118; *Silverman v. Wedge*, 339 Mass. 244, 245; *Dunn v. Commissioner*, 281 Mass. 381. The word "served," in the context of military service, has been held to contemplate:

" . . . participation in situations where army, navy, and marine corps were engaged in performing the objects for which they were called into being and the individual members were acting their several parts. So understood, service is not necessarily confined to combat with enemy forces." *Dunn v. Commissioner of Civil Service*, 281 Mass. 376, 380; see also, *Weiner v. City of Boston*, 342 Mass. 67.

In my opinion the exclusion from award of the bonus, contained in St. 1969, c. 325, of army national guard, air national guard or army reservist, whose only active duty was active duty for *training* does not disqualify members of the army reserve, air national guard or army national guard whose service qualifies as performing military objectives. Whether a bonus applicant has performed military objectives is, of course, a factual determination which you must make.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 17
Honorable Edward Powers
Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

November 6, 1973

Dear Mr. Powers:

Your predecessor requested my opinion whether the position of Town Accountant of the Town of Methuen is subject to the operation of the Civil Service Law and Rules.

On March 15, 1944, when the Town of Methuen was a town, it accepted c. 31, pursuant to § 47 thereof. In a "town," the position of Town Accountant is subject to the Civil Service Law and Rules under G. L. c. 41, § 55, third sentence. However, in 1972 the Town of Methuen adopted a new Charter.

I have previously determined that the Town of Methuen is a city by reason of the applicable provisions of its new Charter. See my letter dated December 6, 1971, to Kenneth H. Pollard, Chairman of the

Methuen Charter Commission, relating to the preliminary draft of the Charter. The final draft calls for a town government having a town council of 21 members and a town administrator, as in the preliminary draft, and my conclusion that the Town of Methuen is a "city" remains the same.

General Laws, c. 31 provides, in relevant part, as follows:

"§ 5.

No rule made by the commission shall apply to the selection or appointment of any of the following: —

Officers whose appointment or election is by a city council, or subject to its confirmation, except those expressly made subject to this chapter by statute . . ."

"§ 47.

. . . This chapter shall be in force in all cities of the commonwealth of less than one hundred thousand inhabitants with respect to the official service . . ."

According to the last census in 1971, the population of the Town of Methuen is 35,081.

Section 2-8 of the Methuen Charter provides in part:

"(a) Town Accountant — As soon as practicable after the council has been organized, the town council shall elect by ballot or otherwise a town accountant to hold office for the term of two years and until his successor is qualified . . ."

The position of Town Accountant is in the "official service." Accordingly, the position is exempt from civil service, and it is not necessary for the Town of Methuen to act under St. 1973, c. 420 in order to formalize that exemption.

In view of the foregoing analysis, it is unnecessary to speculate what effect the attainment of the status of a city by the Town of Methuen had on its prior acceptance of Chapter 31 when it was a town, since by virtue of § 47 it is subject to Chapter 31, and the position of Town Accountant is expressly excepted under § 5.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 18

November 6, 1973

Harold F. Kowal, Esquire

Special Counsel

Alcoholic Beverages Control Commission

Leverett Saltonstall Building

100 Cambridge Street

Boston, Massachusetts 02202

Dear Sir:

You have requested an opinion whether in accordance with G. L. c. 138, § 17 there are any seasonal liquor licenses available in the town of Carver. General Laws, c. 138, § 17 delineates the procedure for the granting of seasonal licenses. After consideration of the statute, the estimate of population increase filed by the local licensing authority with your Commission, and the circumstances under which the estimate was made, I am of the opinion that the estimate is improper and not in accordance with the statutory provisions.

General Laws, c. 138, § 17 provides, in pertinent part:

“The local licensing authorities of any city or town, except the city of Boston, may make an estimate prior to March the first in any year of any temporary increased resident population in such city or town as of July the tenth following, and one additional license under section fifteen [of Chapter 138], to be effective from April the first to November the thirtieth only, may be granted by said authorities for each unit of five thousand or additional fraction thereof of such population as so estimated, . . . provided, that not more than one additional license shall be granted under this paragraph to the same person or for the same premises in any one year; and provided, further, that the local licensing authorities of any city or town, except the city of Boston, may grant, in addition to and irrespective of any limitation of the number of licenses contained in this section, seasonal licenses under section twelve [of Chapter 138], to be effective from April the first to November the thirtieth only, . . . to the amount or number that such authorities deem to be in the public interest. Every estimate hereunder of temporary resident population shall be made and voted upon by the local licensing authorities at a meeting of said authorities called for the purpose after due notice to each of the members thereof of the time, place and purpose of said meeting and after investigation and ascertainment by them of all the facts and after co-operative discussion and deliberation. A copy of such an estimate, signed by a majority of the members of said authorities, stating under the penalties of perjury that all the foregoing requirements have been complied with and that the estimate is true to the best of their knowledge and belief, shall be forwarded forthwith to the commission.”

Pursuant to G. L. c. 138, § 17, the local licensing authority of Carver, the Board of Selectmen, held a meeting on February 13, 1973, and estimated that the temporary increased resident population as of July 10, 1973 would be 9000. However, it appears from the facts presented that (1) one member of the Board was not notified by any person or any member of the Board that the matter of estimating temporary resident population for purposes of G. L. c. 138, § 17 would be discussed; (2) there was no investigation and ascertainment of the facts of any temporary resident population increase in the town of Carver as of July 10th, as required by Section 17; (3) there was no cooperative discussion and deliberation of any kind whatever during the meeting of the facts upon which the temporary resident population increase estimate was based.

The validity of the estimate and the availability of any seasonal licenses pursuant to the statutory authorization is dependent upon a factual determination whether the statutory provisions were complied with. *Pettengell v. Alcoholic Beverages Control Commission*, 295 Mass. 473. Therefore, for the reasons stated above, the statute was not complied with, the estimate of temporary resident population was made in contravention of the statute, and is invalid and not binding upon the town of Carver or upon the Alcoholic Beverages Control Commission. For these reasons, I am of the opinion that no seasonal licenses are available in the town of Carver in accordance with G. L. c. 138, § 17.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 19
Honorable George J. Coogan, Director
Massachusetts Gas Regulatory Board
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

November 6, 1973

Dear Sir:

You have requested my opinion as to the authority of the Massachusetts Gas Regulatory Board and of the Gas Inspector of the town of Plymouth as to inspections of trailers, mobile homes and recreational vehicles. At the present time, the Arnold Trailer Company, with a place of business in Plymouth, is the only manufacturer of such vehicles within the Commonwealth. The present controversy involves inspection of the gas fittings which are found in this company's trailers and mobile homes.

The authority of gas inspectors is established in G. L. c. 143, § 30, which states that "[e]ach city and town shall provide by ordinance or by-law for the appointment of an inspector of gas piping and gas appliances in buildings . . ." A building is defined by G. L. c. 143, § 1 as

“a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals or property.” As such, the vehicles or mobile homes manufactured by the company involved, fall into this definition and are within the inspecting authority of the local inspector. [See as to a recent interpretation of a mobile home as a conventional home or building, *Ellis v. Board of Assessors of Acushnet*, 358 Mass. 473 (1970)].

A question is raised by the manufacturer as to the authority of the local gas inspector to inspect the trailers while they are within the premises of the company, rather than at their principal place of garaging. I am of the opinion that consistent with the statutory authority given to the Gas Regulatory Board and the local gas inspectors, such inspections can take place. The statutes as presently existing today were principally enacted to meet the inspection needs of permanent and fixed structures — not mobile vehicles like many of the products of the manufacturer. However, this does not detract from the fact that pursuant to the existing statutory definition of a building, G. L. c. 143, § 1, quoted above, a travel trailer or a mobile home is included and as such can be inspected. Under the present statutory scheme, it is within the jurisdiction of the state regulatory authorities to have an interest in the inspection and regulation of these vehicles which are becoming increasingly more popular and prevalent throughout the Commonwealth. Considering both the mobile nature of these vehicles, and the danger factor which exists if gas fittings within these vehicles are not properly operating, it is appropriate that they be inspected at the place of manufacture by a licensed gas fitter.

While in my opinion authorized inspectors have statutory authority to inspect gas fittings at the place of manufacture, the Board may wish to promulgate regulations before exercising its authority in this particular. The correspondence accompanying your opinion request indicates that uncertainty as to the Board's authority in this area, both on the part of the Board and on behalf of industry, led to discussions by all interested parties as to possible appropriate regulations. The Board might wish to elaborate on its statutory mandate by adopting specific regulations which would eliminate any ambiguities occasioned by the broad statutory language.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 20

November 13, 1973

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

Dear Mr. Secretary:

You have requested my opinion whether or not the Commission for the Blind would be eligible to be awarded the contract for the purchase by the Supervisor of Public Records, Commonwealth of Massachusetts, of ink-filled cartridges.

In considering your question, the provisions of G. L. c. 66, § 2 are applicable as to whether or not the Supervisor of Public Records can advertise for proposals as stated in your request. That section provides:

“The supervisor of records shall advertise for proposals to furnish the several departments and offices of the commonwealth, and of the counties, cities or towns in which public records are kept, with ink of a standard, and upon conditions, established by him, at such periods and in such quantities as may be required, and he may make contracts therefor. . . .”

Furthermore, G. L. c. 6, § 134 provides:

“The state purchasing agent, such officers in charge of state institutions as may be authorized by him to make purchases and officers in charge of other public institutions shall purchase brooms, mops and other supplies, other than products of prison labor, from the commission of the blind; provided, that the commission has the same for sale and that they were produced by persons under the supervision of the commission or in industrial schools or work shops under its supervision”

It seems clear that the Commission for the Blind would be eligible to be awarded the contract for the purchase of ink-filled cartridges by the Supervisor of Public Records, provided, that the Commission has the same for sale, and that they were produced by persons under the supervision of the Commission or in industrial schools or work shops under its supervision.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 21

November 15, 1973

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

Dear Mr. Chairman:

You have requested my opinion as to whether the Department of Public Utilities (hereafter "Department") has jurisdiction to regulate rates in the sale of synthetic natural gas (hereafter "SNG") by a wholly owned subsidiary to its parent. You have informed me that Algonquin Gas Transmission Company (hereafter "Algonquin") has a wholly owned subsidiary, Algonquin SNG, Inc. (hereafter "Algonquin SNG"), which subsidiary was created to produce SNG for sale to Algonquin and through Algonquin¹ for resale to distributors and eventually to consumers.

The Algonquin SNG plant is located in Freetown, Massachusetts, and the gas manufactured there will be sold to Algonquin in Massachusetts. You have also provided me with a memorandum submitted to the Department by Algonquin; for the purposes of this opinion, I assume that the additional facts disclosed therein are as stated.

I. The threshold consideration is whether the Legislature has invested the Department with the power to regulate rates in the instant circumstances. General Laws, c. 164, § 1 defines "gas company" as "a corporation organized under the laws of the commonwealth for the purposes of making and selling, or distributing and selling, gas within the commonwealth . . ." Since neither Algonquin nor Algonquin SNG are domestic corporations, neither falls within said section. However, I am of the opinion that Algonquin and Algonquin SNG each constitute a "gas company" within the meaning of G. L. c. 164, § 2. That section provides in relevant part:

"In construing sections seventy, seventy-one, seventy-four to eighty-three, inclusive, ninety-two to ninety-five, inclusive, . . . unless the context otherwise requires, the terms 'corporation', 'gas company' and 'electric company' shall include all persons, firms, associations and private corporations which own or operate works or a distributing plant for the manufacture and sale or distribution and sale of gas for heating and illuminating purposes, or of electricity, within the commonwealth . . ."

A foreign private corporation is a "gas company" for purposes of the enumerated sections when the corporation engages in the activities specified in said c. 164, § 2. The rate regulatory sections, sections 94-95, are among those enumerated. Algonquin owns and operates "works"

¹Algonquin, a natural gas company under the Natural Gas Act (15 U.S.C. § 717) by reason of its transportation and sale for resale of natural gas in interstate commerce, owns a natural gas pipeline the main line of which extends from Lambertville, New Jersey to Boston, Massachusetts.

for the "distribution and sale of gas for heating and illuminating purposes" within the Commonwealth. Similarly, Algonquin SNG manufactures and sells gas for heating and illuminating purposes within the Commonwealth. That the gas sold by Algonquin SNG to Algonquin is subsequently resold to various distributors does not preclude such a construction. 2 Op. Atty. Gen. 311 (1902).

Nothing contained in said §§ 94-95 suggests that the Legislature desired to exempt the sale of the entire output of the plant of a corporation's subsidiary to its parent. In fact, § 94B evidences a desire to control such dealings. That section states in part:

"No gas or electric company shall, without the approval of the department, hereafter enter into a contract with a company related to it as an affiliated company, as defined in section eighty-five . . . unless such contract contains a provision subjecting the amount of compensation to be paid thereunder to review and determination by the department in any proceeding brought under section ninety-three or ninety-four . . ."

The legislative history of this enactment is of similar purport:

"We . . . feel that supervision of the intercorporate contracts of gas and electric companies is vitally necessary. The number of such contracts between affiliated companies is so large and the forms of affiliation so devious that the only practicable way of regulating contracts where there is an inequality of bargaining power is to give the Department control over all contracts. We emphatically recommend legislation to this effect." Report of Massachusetts Special Committee on Control and Conduct of Public Utilities (1930) at 82.

The relationship between Algonquin and Algonquin SNG falls within the definition of *affiliated company* contained in c. 164, § 85. An *affiliated company* "shall include any corporation, society, trust, association, partnership or individual (a) controlling a company subject to this chapter . . . either directly . . . or indirectly . . . or (c) standing in such a relation to a company subject to this chapter that there is an absence of equal bargaining power . . . in respect to their dealings and transactions." Algonquin and Algonquin SNG are affiliates of each other within the meaning of said section.

Neither does a 1902 Opinion of the Attorney General demand the conclusion that your Department may not regulate here. In that Opinion, 2 Op. Atty. Gen. 311, one of my predecessors ruled that the New England Gas and Coke Company, an unincorporated association of individuals engaged in the manufacture and sale of its entire product of gas to the Massachusetts Pipe Line Company (which in turn sold and delivered the gas so received to companies engaged in the sale and distribution of gas to consumers) was not subject to the jurisdiction of the Gas and Electric Light Commissioners. The statutory grant of jurisdiction pertinent to that Opinion extended "to all persons owning or operating

works for the manufacture and sale of gas for heating or illuminating purposes within the Commonwealth." That Opinion observed:

" . . . Although the business of the company in question is to not sell its product directly for heating or illuminating purposes, but to a corporation for the purpose of sale and distribution by that corporation for those purposes, and is therefore not strictly within the terms of [that section], yet, for the purposes of this opinion, I assume that the language of the section is broad enough to include the individuals composing the company in question. They are . . . engaged in the manufacture and sale of gas *intended to be used for heating or illuminating purposes* . . ." (Emphasis supplied.)

The initial point worthy of note is that my predecessor assumed the statutory language to be broad enough to cover sales for resale by companies engaged in the manufacture and sale of gas intended to be used for heating and illuminating purposes. Although that Opinion concluded that the rationale of the regulatory statute involved argued against regulation, the basis of such a ruling was the view that the regulations appropriate for quasi public corporations would be intolerable as applied to a private individual carrying on a business not connected with the public:

"But when there is no possible relation between the gas manufacturer and the public, the justification for the regulation so imposed is entirely wanting . . . [I]t is not to be presumed, unless the intention be clearly expressed, that it was the purpose of the Legislature to impose upon an individual enjoying no public rights, and having no relations with the public, a supervision so extraordinary and minute . . ." 2 Op. Atty. Gen. 314-315.

In the instant case, there is a relation between Algonquin SNG and the public: the price charged by Algonquin SNG to its parent becomes a cost component of the parent which is passed on to consumers. Since Algonquin SNG is a wholly owned subsidiary, Algonquin has no incentive to enter contracts for SNG at the lowest possible cost. In fact, a *disincentive* dominates. By entering a contract with Algonquin SNG for the highest possible cost which will meet with FPC approval in rate cases establishing Algonquin's resale price of SNG, Algonquin can pass on costs to consumers and simultaneously benefit from the profit accruing to Algonquin SNG.

More importantly, no presumption need be engaged in that the Legislature intended to impose regulation upon companies such as Algonquin SNG. Chapter 164, § 94B discloses an unequivocal legislative purpose to regulate contracts between affiliated companies such as Algonquin and Algonquin SNG.

In sum, I am of the opinion that the Department does have jurisdiction over the sales of SNG from Algonquin SNG to its parent.

II. Having stated that G. L. c. 164 invests the Department with jurisdiction compels me to consider whether such an interpretation con-

travenes any provision of the Federal constitution, particularly Article I, Section 8, Clause 3 (the "Interstate Commerce Clause"). That sales of SNG from Algonquin SNG to Algonquin are sales in interstate commerce even though the SNG is produced wholly within Massachusetts and even though the transfer of title and possession occurs wholly within Massachusetts appears beyond dispute. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 512; *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83; *Peoples Natural Gas Co. v. Public Service Commission*, 270 U.S. 550, 554.

The instant factual situation is analogous to that in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298. There the Supreme Court held that the sale and delivery of natural gas to distributing companies which then sold and delivered the gas to various local customers was not subject to regulation by the Public Utilities Commission of Missouri because that sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce — not local but essentially national in character — and enforcement of a selling price in such a transaction places a direct burden upon such interstate commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve." Although distinctions exist between the *Kansas Natural Gas* factual situation and Algonquin's, none are determinative. The fact remains that Department regulation of sales from Algonquin SNG to its parent raises the spectre of directly burdening interstate commerce.

Because of cases such as *Kansas Natural Gas*, Congress in 1938 enacted the Natural Gas Act (15 U.S.C., § 717) to close the gap created by judicial prohibition of state regulation. In *Panhandle Eastern Pipe Line Co.*, *supra*, the Supreme Court at 514-516 discussed the legislative history of the Natural Gas Act and of the judicial history stimulating its enactment:

"[A]s the (judicial) decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipe-line carrier . . . On the other hand, sales for resale, usually to local distributing companies, were beyond the reach of state power, regardless of the character of the ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.

"The impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act."

In short, the demarcation line between permissible and impermissible state regulation is drawn between sales for use, of whatever kind, and sales for resale. *Panhandle Eastern Pipe Line Co.*, *supra*, at 520.

The crux of the present problem lies in the reluctance of the Federal Power Commission (contrary to recommendation of its staff) to assume jurisdiction in this area — this in a time of dire predictions of natural gas

shortages. The FPC has interpreted the Natural Gas Act as not applying to SNG because SNG is artificial and not "natural gas" as defined in the Act, 15 U.S.C., § 717(a) (5). *Algonquin SNG Inc., Opinion No. 637*, FPC. Consequently, sales from Algonquin SNG to its parent are not subject to direct FPC regulation — although the FPC has indicated that approval of Algonquin's resale of SNG will be conditioned upon its selling SNG at a maximum initial rate.

The opinion of the FPC that SNG is not within the ambit of the term "natural gas" might be challenged. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, offers support for a contrary holding. There the Supreme Court held that the FPC had jurisdiction in a borderline area:

"Although federal jurisdiction (under the Natural Gas Act) was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare." 406 U.S. at 631.

Louisiana Power & Light illustrates the Court's inclination to interpret the Natural Gas Act as plugging all the gaps in regulation. Accord, *Federal Power Commission v. East Ohio Gas*, 338 U.S. 464 at 472.

In conclusion, while I am of the opinion that the Department has jurisdiction under G. L. c. 164 to regulate sales between Algonquin SNG and Algonquin, the exercise of such jurisdiction is subject to Federal constitutional attack, which attack, in my view, would be successful. I reach this conclusion even though, regrettably, a regulatory gap may exist under the Federal Power Commission decisions to which I have referred. However, as of this writing, the extent and scope of such a gap is far from clear.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 22

November 20, 1973

Mrs. Glendora M. Putnam, Chairman
*Massachusetts Commission Against
Discrimination*
120 Tremont Street
Boston, Massachusetts 02108

Dear Mrs. Putnam:

You have requested my opinion on the question whether the Department of Education may legally require, as a condition of school construction grants, that local school authorities include in all school construction contracts a provision requiring affirmative action in regard to the employment of minorities.

The Department of Education seeks to derive authority for such action from the Governor's Executive Order #74, the so-called Code of Fair Practices. The Executive Order, issued as "the governing and guiding policy of the Executive Branch of the Government of the Commonwealth of Massachusetts," purports to insure equality of opportunity in the internal affairs of state government, binding "all agencies and appointing authorities of the Commonwealth."

The construction of school buildings is a task delegated principally to local municipalities and agencies thereof, with only indirect contact by the Department of Education, whose activity would be under the guidance of the Executive Order. General Laws, c. 71, § 68 states that every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children entitled to attend the public schools. The construction and maintenance of schoolhouses seems to fall under the classification of a local matter which the Home Rule amendment to the Massachusetts Constitution (Article LXXXIX of the Amendments), places under the control of the cities and towns, subject only to the standards and requirements of the General Court. The Executive Order appeared without any accompanying legislation binding municipalities and agencies thereof, and, at the present time, the Legislature has not imposed any such affirmative action plan on local authorities.

Although the mandate of c. 71, § 68 extends to local authorities, the Department of Education has the right to insist upon certain policy and conditions in regard to school construction grants, including conditions relating to approval of locally submitted construction plans and financial arrangements, but not extending to the employment practices of the contractors who bid on the work. As such, in that the contract for construction is one between a municipality or agency thereof and a private contractor, and only receives state approval as to certain of its aspects, Article IV of Executive Order #74, entitled "State Contracts," would not be applicable. Further, although the contract for school construction would be governed by G. L. c. 149, § 44A, as a contract for the construction of a building by a governmental unit of the Commonwealth (assuming a greater than \$2,000 construction cost), that chapter pertains not to employment practices, but rather to the assurance of fair competition in the bidding process itself.

The Department of Education is further involved in the construction of school buildings by the activity of the School Building Assistance Bureau, which provides financial assistance to cities and towns for the construction of school buildings. This Bureau was originally established as the School Building Assistance Commission by St. 1948, c. 645 and was within the Department of Education, but not subject to its control. However, St. 1965, c. 572, § 42 abolished the Commission, conferring its powers, duties and liabilities on the Board of Education.

In order for a municipality to receive financial assistance to meet the cost of school construction, the local governmental unit must file an application in the form prescribed by the Bureau accompanied by any in-

formation that the Bureau may require. Appendix to G. L. c. 70, § 1-7. The Bureau may examine such application and any facts, estimates or other information relative thereto, and determine whether the proposed construction is in the best interests of the local unit "with respect to its site, type of construction, sufficiency of accommodation, and otherwise." Appendix to G. L. c. 70, § 1-8. Although the Department of Education, in regard to its own projects, follows the guidelines of Executive Order #74 and establishes affirmative action programs, the duties of the School Building Assistance Bureau as stated in § 1-8 of the Appendix to c. 70, in passing upon local applications, are limited to matters such as construction, location and accommodation; the words "and otherwise" in § 1-8 should, in my opinion, be interpreted in line with such, and not extended to include the employment practices of the contractors or subcontractors employed on the project.

I do not view either the Department of Education's mandate to supervise all of the educational work of the Commonwealth, G. L. c. 69, §1, or any action taken pursuant to Executive Order #74 to more equitably utilize qualified minority employees of the Commonwealth in the construction industry, or the Department's control over the disbursement of funds through the School Building Assistance Bureau as lending a sufficient amount of "state action" to a proposed local school construction contract so as to include it under Article IV of the Executive Order. Neither would the failure to initiate an affirmative action program on such a construction project cause the state to become a joint participant with private persons, the contractors, in a pattern of racially discriminatory conduct, prescribed by the Fourteenth Amendment. As such, the present situation is distinguishable from the line of cases stemming from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and including *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

There are legal precedents which require affirmative action programs where federally assisted construction projects are involved. See *Contractors Association of Eastern Pennsylvania v. Shultz*, 311 F. Supp. 1002 (E.D. Penn. 1970), (upholding the "revised Philadelphia Plan" which implemented the Presidential Executive Order No. 11246). A recent U. S. District Court, District of Massachusetts decision, *Associated General Contractors of Mass. Inc. et al. v. Alan Altshuler et al.*, Civil Action No. 72-3410-F (May 31, 1973), upheld as constitutional the inclusion of affirmative action language in public construction contracts of the Commonwealth. However, the question presented here involves neither a federal nor a state construction project, but rather a project under the control of a local municipality of the Commonwealth. In such circumstances, the Department of Education would be powerless to enforce against a municipality, or an agency thereof, any affirmative action plan with respect to minority employment, due to the inapplicability of Executive Order #74, and the lack of statewide statutory implementation of such a policy by the General Court. Until the necessary legislation is enacted by the General Court, any affirmative action

at the municipal level must be put into effect solely on a voluntary basis with the various municipalities of the Commonwealth.

For the foregoing reasons, I am of the opinion that the Department of Education may not legally require, as a condition of school construction grants, that local school authorities include in all school construction contracts a provision requiring affirmative action in regard to the employment of minorities.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 23

November 30, 1973

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

Dear Chairman Rosenfeld:

You have requested my opinion concerning the following questions:

- "1. do M.G.L. c. 6 secs. 167-178, inclusive, restrict the dissemination of some or all court records and papers by clerks of the courts of the Commonwealth, which might otherwise be open to public inspection pursuant to M.G.L. c. 4 sec. 7 par. 26, c. 66 sec. 10, c. 218 sec. 12 and c. 221 sec. 14;
- "2. what information maintained or obtained by the courts may not be disseminated by the clerks of court to unauthorized parties pursuant to M.G.L. c. 6 secs. 167-178, inclusive; and
- "3. what information may be disseminated by the clerks of court to the general public in spite of M.G.L. c. 6 secs. 167-178, inclusive?"

Massachusetts General Laws, c. 6, §§ 167-178, known as the Criminal Offender Record Information System Act (hereinafter "the Act"), became law pursuant to St. 1972, c. 805 and took effect on September 19, 1972. It is important to note at the outset that this Act regulates only one kind of information — criminal offender record information — and no other. With respect to criminal offender record information, the Act provides:

"Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to (a) criminal justice agencies and (b) such other individuals and agencies as are authorized access to such records by statute." G. L. c. 6, § 172.

As a starting point in answering the three questions you ask, it is clear that the Act prohibits the dissemination of criminal offender record information to the general public but does not restrain the dissemination of

any other kind of information. It follows that the three questions asked are in substance one question: to what extent are court records and papers criminal offender record information?

This term is defined in the Act as:

"... records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation and release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or of any consequent proceedings related thereto. It shall not include intelligence, analytical and investigative reports and files, nor statistical records and reports in which individuals are not identified and from which their identities are not ascertainable." G. L. c. 6, § 167.

The above-quoted definition limits the concept of criminal offender record information to information compiled: (1) by "criminal justice agencies" and (2) for the stated purposes. "Criminal justice agencies" are defined in G. L. c. 6, § 167 as

"those agencies at all levels of government which perform as their principal function, activities relating to (a) crime prevention, including research or the sponsorship of research; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information."

By this definition, police departments, district attorneys' offices, probation departments, and similar agencies are clearly criminal justice agencies because their principal function relates to crime. Accordingly, summaries of criminal arrest information relating to individuals prepared by such agencies would clearly constitute criminal offender record information and court clerks may not disseminate such summaries or any part of such summaries to the public.

Other items of information will, inevitably, be harder to classify under the statutory definition of criminal offender record information. In each case, it must be determined whether the information in question was compiled by a "criminal justice agency" and whether it is the kind of summary information regulated by the Act. Having stated these general principles, I think it would be inappropriate for me to attempt to anticipate and to classify the many kinds of information a clerk of court may come to possess. Each case must be decided upon its own facts.

I will, however, state my opinion concerning the application of the Act to court records prepared by the clerks of court themselves. The Act does not state whether the courts or the clerks of courts are "criminal justice agencies" within its terms. This would appear to depend upon whether the court or its clerk "perform[s] as [its] principal function

activities relating to . . . (b) the apprehension, prosecution, adjudication, incarceration or rehabilitation of criminal offenders." G. L. c. 6, § 167. Some court clerks attend to criminal business as their principal function; others attend solely to civil business; others attend to criminal and civil business co-equally. Compare G. L. c. 218, § 69 to § 70 and § 75A to § 79. Depending upon their particular functions, some court clerks may thus be "criminal justice agencies" within the meaning of the Act and others may not, but I find it unnecessary to decide that question now.

Even if one assumes that the records kept by court clerks are "compiled by criminal justice agencies" within the meaning of the Act, it is my opinion that such records do not meet the other criteria of criminal offender record information. Criminal offender record information is information compiled and summarized with respect to a particular individual. While probation officers have explicit statutory authority to compile comprehensive criminal records of individuals, court clerks do not. Court clerks are authorized only to make records which concern the particular courts they serve. Compare G. L. c. 276, § 85 with c. 221, § 14 and c. 218, § 12. Such records may be indexed by the names of plaintiffs and defendants and may, in a sense, summarize the court record of a particular individual. But so long as such records list only cases brought in the court which the clerk serves, it is my opinion that such records would not be the kind of comprehensive compilations and summaries which the Act seeks to regulate.

I therefore answer your three questions together by saying that the Act prohibits public dissemination of criminal offender record information, as I have construed that term, but does not restrain court clerks from disseminating any other kind of information.¹

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 24
Honorable Alfred F. Nataloni
*Director, Division of Marine
& Recreational Vehicles*
64 Causeway Street
Boston, Massachusetts 02114

December 3, 1973

Dear Mr. Nataloni:

You have requested my opinion whether "prior to the enforcement and/or application as against [any person] of Section 4, Article 16 entitled 'Regulation of Boating' of the By-laws of the Town of Sharon, as amended, the Town of Sharon is required to obtain the approval of the Director of Marine and Recreational Vehicles in accordance with the provisions of Massachusetts General Laws, Chapter 131, Section 45, and/or Chapter 90B, Section 15 (a) (b) (c), as the case may be."

¹My opinion is not altered by the recent amendments to the public records law, St. 1973, c. 1050. The new statute exempts from the definition of public records "materials . . . specifically or by necessary implication exempted from disclosure by statute." Criminal offender record information comes within this exemption.

The by-law of the town of Sharon, in question, provides as follows in Article 16:

“After April 1, 1973, no person shall operate a boat on Lake Massapoag powered by internal combustion engines whose total horse power rating at time of original manufacture exceeds sixty (60) horsepower, except as approved by the Board of Selectmen for safety or rescue purposes.”
(Added under Article 26 of the Warrant for the 1972 Annual Town Meeting.)

On May 8, 1972, I approved the by-law, stating, through my staff, as follows:

“The by-law adopted under Article 26 does not appear to require the approval of the Division of Recreational Vehicles since it does not regulate the operation of motorboats, but prohibits the use of boats of over sixty horsepower. It must be presumed that this is done in pursuance of G.L., c. 40, s. 21 (1), empowering towns to make by-laws respecting their internal police.”

On May 18, May 25 and June 1, 1972 the by-law was published in the Sharon Advocate, a newspaper published in Sharon, and became effective on June 1, 1972, if the approval of your Division was not necessary, or, if necessary, was improperly withheld.

Under date of August 22, 1972, in a letter to the then Director of the Division of Marine and Recreational Vehicles, the Executive Secretary of the Town of Sharon set forth the vote embodying the by-law in question, attaching to the letter the “approval of said by-law by the Attorney General,” and concluded with the statement: “Your approval is requested.”

Under date of October 5, 1972, an Assistant Director of your Division replied as follows:

“With reference to your correspondence dated September 21, 1972, relative to Mr. Bamber’s letter of August 22 on the amended Article 26 to the Motorboat Bylaws of the Town of Sharon, it is the opinion of this Division that it is not the size of the motor of a boat which creates the problem, but rather the manner in which the boat is operated. Therefore, amended Article 26 is most respectfully denied.”

The relevant statutes are as follows:

G. L. c. 90B.

“§ 11. The director shall administer and enforce the provisions of this chapter, and, for such purposes, is authorized to make rules and regulations not contrary to the laws of the Commonwealth or of the United States. He shall (1) submit to the secretary for his approval a numbering system for motorboats, and (2) require that all applications for number, certificates of number, and reports of boating accidents con-

tain the same information as that contained in similar documents of the Coast Guard.

He may —

(k) Make the provisions of this chapter and rules and regulations made under authority thereof and such other rules and regulations as he may deem in the interest of the public safety applicable to any vessel not otherwise subject to the provisions of this act when operated or maintained on any waters lying wholly within the land boundaries of the Commonwealth, except ponds less than ten acres in area and owned by one person.

(n) Approve or disapprove any ordinance or by-law of any city or town which regulates the operation of such vessels and such activities as are subject to the provisions of this chapter or of any rule or regulations made under authority hereof, on such waters of the Commonwealth as lie within such city or town.

“§ 15. (a) The provisions of this chapter shall govern the numbering, operation, equipment and all other matters relating thereto of any vessel subject to the provisions of this chapter or of any rule or regulation made under authority hereof, whenever any such vessel shall be operated or maintained on the waters of the Commonwealth, or whenever any activity regulated by said chapter or said rules and regulations shall take place thereon.

(b) Nothing in this section shall be construed as prohibiting any city or town from regulating, by ordinance or by-law, not contrary to the provisions of this chapter or of any rule or regulation made under authority hereof, other than numbering, of such vessels on such waters of the Commonwealth as lie within the city or town, or such activities which take place thereon . . .

(c) No such ordinance or by-law shall be valid unless it shall have been approved by the director and published in a newspaper of general distribution in said city or town not less than five days before the effective date thereof.”

St. 1960, c. 275, which inserted c. 90B into the General Laws, vided in section 4 of c. 275 as follows:

“SECTION 4. Any ordinance, by-law or regulation of any city, town or other public body or authority relative to the identification of motorboats or other vessels shall become null and void upon the effective date of this act, and any such

ordinance, by-law or regulation *relative to the operation of motorboats* or other vessels shall become null and void on the ninetieth day following said effective date." (Emphasis supplied.)

General Laws, c. 131, § 45 provides as follows:

"§ 45. [E]very great pond . . . shall be public for the purpose of hunting or boating thereon and shall be open to all inhabitants of the Commonwealth for fishing purposes; provided, that any city or town in which the whole or any portion of any great pond not exceeding five hundred acres in extent is situated may, as to so much thereof as is located within its boundaries, *make and enforce rules and regulations relative to hunting, fishing and boating thereon. Any such rule and regulation relative to boating may include, on all or any portion of said pond, for all or any portion of the year, any of the following: a speed limit, a limit on engine horsepower, a prohibition of the use of internal combustion engines, a ban on water skiing and other high speed uses, and a limitation of such uses to certain areas and certain times.* Any such rules and regulations shall, to the extent that they authorize hunting or fishing, or both, be subject to the approval of the director, and, to the extent that they *authorize any other use thereof, be subject to the approval of the department of public works or the director of the division of motorboats*, as the case may be. All persons shall be allowed reasonable means of access to such ponds for the purposes aforesaid."

The portions of section 45 underlined by hatching were added by St. 1971, § 498. The solid underscoring which appears is inserted herein for later reference.

The Department of the Attorney General has consistently taken the position that a prohibition of a boating activity does not fall within the provisions of G. L. c. 131, § 45, relating to Great Ponds, or of G. L. c. 90B, § 15, relating to "waters of the Commonwealth as lie within" a city or town and that, therefore, a by-law prohibiting such uses adopted pursuant to the authority conferred by G. L. c. 40, § 41, is valid without the approval of the Director of the Division of Marine and Recreational Vehicles of the Registry.* Reference is made to opinion of my staff dated June 31, 1966, to the Town Clerk of Concord (prohibition by town by-law of operation and use of any internal engine in or upon the portion of White Pond in the Town of Concord); letter dated June 15, 1966 to Wilton J. Vaugh, Director, Division of Motor Boats, confirming this opinion as to White Pond); letter dated August 13, 1968 to Albert H. Zabriskie, Public Access Board, concerning prohibition by by-law of Town of Wellesley of internal combustion engines on the portion of Morse's Pond within said town; and letter dated May 8, 1972, approving the Sharon by-law here in question.

*Formerly the Director of the Division of Motorboats, G. L. c. 16, as amended by St. 1971, c. 103, § 5; G. L. c. 90B, § 1, as amended by St. 1971, c. 103, § 3.

The Sharon by-law prohibiting the operation of a motorboat with a horsepower in excess of sixty, in so far as it is so limited, is, in my opinion, valid without the approval of the Director.

It is, of course, well settled that every presumption is to be indulged in favor of the validity of a by-law. *Brown v. Carlisle*, 336 Mass. 147, 148. Prior to the insertion of the underlined second sentence of G. L. c. 131, § 45 by St. 1971, c. 498, the first sentence of section 45 ended with the following proviso:

“provided, that any city or town in which the whole or any portion of any great pond not exceeding five hundred acres in extent is situated may, as to so much thereof as is located within its boundaries, make and enforce rules and regulations relative to hunting, fishing and boating thereon.”

The section went on to provide, in the next to the last sentence, that “[a]ny such rules and regulations shall . . . to the extent that they authorize any other use thereof, be subject to the approval of the . . . director of the division of motor boats . . .” It is to be noted that the proviso empowers cities or towns to make and enforce “rules and regulations *relative to . . . boating thereon*” whereas the requirement for approval thereof by the Director applies only “to the extent that they *authorize* any other use thereof.”

The 1971 amendment, which inserted the second sentence expressly authorizing rules and regulations imposing a speed limit, a limit on horsepower, a prohibition of the use of internal combustion engines, a ban on water skiing and other high speed uses, and a limitation of such uses to certain areas and times, would appear to emphasize the distinction between restriction and prohibition on the one hand, and authorization or regulation on the other. This distinction also appears in G. L. c. 90B, § 15(b) and (c), which allows cities and towns to regulate vessels subject to the chapter on the waters of the Commonwealth within their boundaries, subject to approval by the director. In my view, the 1971 amendment to G. L. c. 131, § 45 is confirmatory of the powers of a municipality to regulate such activities in the interest of maintenance of peace and good order. *West Roxbury v. Stoddard*, 7 Allen 158, 170-171; *Commonwealth v. Baronas*, 285 Mass. 321, 323; *Brown v. Carlisle*, 336 Mass. 147.

A subsidiary question is raised by the following emphasized language in the Sharon by-law:

“ . . . no person shall operate a boat on Lake Massapoag powered by internal combustion engines whose total horsepower rating . . . exceeds (60) horsepower, *except as approved by the Board of Selectmen for safety or rescue purposes.*”

If the emphasized language means that motorboats with over a 60 horsepower rating may be used if they comply with the requirements imposed by the Board of Selectmen for safety or rescue purposes, i.e. as to equipment of the vessels or their operation, then this would seem to be a

regulation requiring approval by the Director. However, a similar requirement, admittedly not directly involved in the case cited below, was not questioned by the Supreme Judicial Court, which, in *Brown v. Carlisle*, 336 Mass. 146, held valid a by-law which provided that: "No person shall fire or discharge any firearms or explosives of any kind within the limits of any highway, park or other public property except with the permission of the board of selectmen; or on any private property, except with the consent of the owner or legal occupant thereof; provided, however, that this by-law shall not apply to the lawful defense of life or property nor to any law enforcement officer acting in the discharge of his duties . . ." The Court held that the by-law was not invalid on the ground that the field of legislation had been preempted by the General Court. It would seem that the emphasized language of the by-law was inserted merely for the purpose of controlling the number of motorboats and the persons available for rescue and safety; otherwise, every owner of a boat over 60 horsepower would claim he was operating it for safety or rescue.

Finally, since the approval of the Director was not required, I deem it unnecessary to pass on the validity of the reasons given for the Director's disapproval. In my view, the by-law became effective upon its publication in May and June of 1972, without regard to the action taken on it by your Division.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 25
Honorable William Bicknell, M.D.
Commissioner of Public Health
600 Washington Street
Boston, Massachusetts 02111

December 17, 1973

Dear Commissioner Bicknell:

You have sought my interpretation of St. 1973, c. 843 (inserting a new section 127M in Chapter 111 of the General Laws), which provides:

"No sewage disposal system shall be constructed or maintained within one hundred feet of any known source of water supply or tributary thereto. No sewage disposal system shall be constructed within seventy-five feet for a single dwelling, or one hundred feet for a multiple dwelling as defined in section one of chapter one hundred and fifty-one B, of any great pond, stream, brook, tidal water, river, or swamp, without the prior written approval of the department."

Your questions are:

- (1) Does the provision regarding the prior written approval of the Department, included in the second sentence of the quoted part, apply to the first sentence as well?

- (2) Does the first sentence of the quoted part apply to all water supplies, both public and private?
- (3) Does the use of the word "maintain" in the first sentence of the quoted part mean that existing systems must be removed?

With respect to your first question, I am of the view that the quoted language is so clear as to leave no doubt that the approval provision applies only to the second sentence. Any other construction would amount to a rewriting of the statute.

An answer to your second question requires a review of the legislative history of the act. The original version of the statute, as it appeared in H. 6087, provided, in relevant part:

"No sewage disposal system shall be constructed or maintained within seventy-five feet for a single dwelling, or one hundred feet for a multiple dwelling as defined in section one of chapter one hundred and fifty-one B, of any known source of water supply, great pond, stream, brook, tidal water, river, or swamp, without the prior written approval of the department of public health for such construction."

However, the Governor was concerned with the bill because it would allow construction beyond seventy-five feet for a single dwelling, and would inadvertently pre-empt Public Health Regulation 3.2 of Article 11, Sanitary Code, which prohibits the construction of such systems within one hundred feet of "water supplies," that term being parenthetically equated with "reservoirs." To overcome this problem, the Governor recommended that the bill be amended to read as the enacted version now reads, *see* Message of the Governor to the General Court accompanying H. 7482. The first sentence of the quoted part of the current statute, added by the Governor and prohibiting construction or maintenance of a sewage disposal system within one hundred feet of a water supply, would thus appear to be merely a statutory codification of the Public Health Regulation. As the regulation is limited to sewage systems near "reservoirs," public water supplies, the first sentence of that part of the act quoted above should also be construed as being so limited.

The legislative history of the statute is also relevant to your third question. As I have just discussed above, the first sentence of the quoted part appears to be a codification of Sanitary Code, Article 11, Regulation 3.2. That regulation deals only with the creation of new sewage disposal systems. As I believe that the sentence was intended to go no farther than the regulation, I am of the view that the use of the word "maintain" in the sentence does not mean that existing systems must be removed. Rather, I believe that the term was used to cover situations where a new building is being erected and its natural surroundings are such that no "construction" need actually take place, i.e., that a natural sewage system already exists. Furthermore, it is unlikely that the General Court could have intended that every structure within the Commonwealth whose sewage disposal system passes within one hundred feet of a public water supply must now be altered to put an end to such passage, at possibly extreme expense to the owner.

Accordingly, I answer all of your questions in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 26
Honorable Louis J. Resteghini
Director of Registration
Room 1520, Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

December 17, 1973

Dear Sir:

The State Examiners of Electricians, through you as the Director of the Division of Registration, have requested my opinion as to the following questions:

- (1) May a person, firm or corporation holding a master electrician's license form a subsidiary company upon the basis of the original examination passed by the person holding the license?
- (2) May a person, firm or corporation hold two licenses on the basis of one examination?
- (3) If either or both questions (1) and (2) are answered in the affirmative, may the Board charge an issuing fee of \$25.00 for each company and subsidiary company and a renewal fee for each company and subsidiary company under the provisions of G. L. c. 141, § 3, Paragraphs 3 and 4?

The provisions of G. L. c. 141, entitled "Supervision of Electricians", are far from clear on these points. The statute, in section 3, in-pertinent part provides:

"Two forms of licenses shall be issued. The first, hereinafter referred to as 'Certificate A,' shall be known as 'master electrician's license' . . .

(1) 'Certificate A' shall be issued to any person, firm or corporation engaged in or about to engage in the business of installing electrical wires, conduits, apparatus, fixtures and other electrical appliances, qualified under this chapter. The certificate shall specify the name of the person, firm or corporation so applying, and the name of the person, who in the case of a firm shall be one of its members, and in the case of a corporation, one of its officers, passing said examination, by which he or it shall be authorized to enter upon or engage in business as set forth therein. . . .

I am advised that it has been the policy of the State Examiners of Electricians to issue one "Certificate A" master electrician's license. The certificate holder may (1) operate under his own name and if he desires to use a "doing business as", provided he is the sole owner of the

business, he is permitted to do so; or (2) act as the qualifying officer in one corporation or a partnership. If an individual acting as the qualifying officer chooses to obtain the license for a corporation, the license attaches to the corporate entity.

The Examiners have informed me that they have received numerous inquiries of the following nature which have prompted this opinion request. For example, (1) John Jones who was issued a "Class A Certificate", master electrician's license on the basis of an examination he passed, wishes to operate under the following names under the original license issued to him as John Jones:—Jones Electric; Jones Fire Alarm Co.; Jones Burglar Alarm Co. (2) On the basis of one examination may the following licenses be held:— John Jones (individual); Jones' Electrical Corp., Inc. (corporation); Jones and Doe Company (partnership).

My attention has been called to the 1969 amendments to the statutes governing the issuance of plumbing licenses, G. L. c. 142, § 3G, inserted by St. 1969, c. 731, § 2, which specifically authorize a person licensed as a master plumber to apply "for a certificate of a plumbing corporation or a certificate of a plumbing partnership. . . ." It is clear, in the case of plumbers, that the General Court has authorized the issuance of multiple licenses on application by a master plumber. However, no such authorization is found in the statutes governing the licensing of electricians. That fact coupled with the long-standing *supra* practice of the State Examiners to limit licenses as I have described *supra* leads me to the conclusion that, in the case of electricians, multiple licensing is not now permissible. Accordingly, I answer questions one and two in the negative. No answer is therefore required with respect to the last question.

Nothing in this opinion should be construed, of course, to prevent the State Examiners from filing legislation to amend the regulatory statutes in order to permit multiple licensing, if that course of action is deemed desirable.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 27
Honorable Louis J. Restighini
Director of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

December 17, 1973

Dear Mr. Restighini:

The State Examiners of Electricians, through you, have requested my opinion on the following question:

"Under the provisions of Section 3L of Chapter 143 of the General Laws, does the City or Town Inspector of Wires,

appointed pursuant to the provisions of Section 32 of Chapter 166 of the General Laws, inspect electrical work performed on state-owned property, other than the State House?"

Since the Examiners have not submitted specific facts with their request, I can only answer in general terms. 1966-67 *Op. Atty. Gen.* 221. For the reasons stated herein, I answer your question in the affirmative.

My prior opinion to the Director of Building Construction, examining several statutory provisions relating to the inspection of electrical wiring, is dispositive of your inquiry. 1971-72 *Op. Atty. Gen.* No. 36. That opinion reaffirmed an opinion of one of my predecessors in which it was stated that G. L. c. 166, § 32, authorizes the appointment of an inspector of wires by cities, towns and districts, does not grant said inspector of wires jurisdiction over the installation of wiring by the Commonwealth in and on property of the Commonwealth. 1957-58 *Op. Atty. Gen.* 65. Simultaneously, however, said opinion reaffirmed an opinion of my predecessor in which it was stated that, with but few exceptions,¹ all buildings and structures, other than the State House, which are owned or operated by the Commonwealth are subject to the provisions of c. 143 to the same extent as if privately owned or operated. 1966-67 *Op. Atty. Gen.* 221, 222.

The statutory amendments to G. L. c. 143, §§ 2A and 3L,² which were enacted after my earlier opinion and which are to become effective on January 1, 1975, do not require a different conclusion.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 28
Honorable Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

December 18, 1973

Dear Commissioner Anrig:

You have advised me that the Department of Education is in possession of certain types of information such as information contained in applications for original licenses, information contained in applications for renewal of licenses, and information contained in teacher applications, for both Private Trade Schools and Private Business Schools. The material relating to Private Trade Schools has been submitted pursuant to G. L. c. 93, § 21B; the Private Business School material has been submitted pursuant to G. L. c. 75D, § 4. No representation as to confidentiality appears on the applications for original license or teacher applica-

¹See 1960-61 *Op. Atty. Gen.* 50, which concludes that the Massachusetts correctional institutions are not subject to the provisions of c. 143, § 2A.

²St. 1972, c. 802, § 13 amended G. L. c. 143, § 2A; St. 1972, c. 802, § 18 amended G. L. c. 143, § 3L.

tions of Private Trade Schools. On the applications for renewal of license for such schools, there appears a note, which reads, "The information required by this Report is confidential and is available to others only by court order." With respect to Private Business Schools, a statement regarding confidentiality, identical in language to that appearing on Trade School renewal applications, appears on the former's original license and license renewal applications. No statement as to confidentiality appears on the Business School teacher applications.

Your question is whether, in light of the above facts, the Department of Education may release the information contained in the applications to certain segments of the press which have requested it.

A response to your question involves the initial consideration of whether or not the completed applications are "public records", since G. L. c. 66, § 10 provides:

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

Thus, if the materials are "public records", their release is not only *permitted* but is *required* by law.

In so far as is relevant to your situation, "public records" are defined in G. L. c. 4, § 7(26) as:

"any . . . paper . . . of . . . any authority established by the general court to serve a public purpose, which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of . . . such authority has received or is required to receive for filing. . . ."

Without considering whether the applications are "papers on which any entry has been made or is required to be made by law," within the meaning of the section, for the reasons outlined below, I am of the view that they are papers which the Department "has received for filing" and are therefore "public records."

Neither my predecessors nor the Supreme Judicial Court has, as a general rule, viewed the "received for filing" clause as including within its scope all papers which are required by law to be submitted to a state agency. Rather, the clause has been construed to include only papers required to be submitted by law *and* intended by the General Court to be kept open for public inspection. For example, a predecessor of mine concluded that financial returns of natural gas companies, required to be filed by statute with the Board of Gas and Electric Light Commissioners, were not public records under R.L. c. 35, § 5, the statutory forerunner to G. L. c. 4, § 7(26), because the legislative intent in requiring their submission was to aid the Board in its task of regulating the companies, not to keep the returns on record for public inspection, 1 Op. Atty. Gen. 186. Similarly, the Supreme Judicial Court, in *Round v. Police Commissioner for the City of Boston*, 197 Mass. 218 (1908), ruled that records of

pawnbrokers, required by statute to be furnished to the local licensing board, were not public records under R.L. c. 35, § 5, because the basic reason for requiring their submission was to aid the police in identifying the location of stolen goods and to assist the board in its licensing function, rather than to bring such records to the view of the public.

While there must be an indication of a legislative intent to make documents submitted to a state agency pursuant to law open to public inspection, in recent years a very liberal approach has been taken in ascertaining such an intent. This approach was reflected in the opinion of the Court in *Lord v. Registrar of Motor Vehicles*, 347 Mass. 608 (1964). There, G. L. c. 90, § 26 required drivers in certain kinds of automobile accidents to submit reports to the Registrar. Unlike other sections of the motor vehicle statute, section 26 contained no provision as to what the Registrar was to do with the reports. In ruling that the reports were public records, the Court recognized that a significant legislative purpose in requiring their submission to the Registrar was to enable him to compile accident statistics. However, the Court went on to observe that the reports would be highly useful to the public and other authorities, for example, in the preparation of litigation resulting from the accidents. Since public policy indicated that the reports should be open to public inspection, the Court inferred an intent to make them so on the part of the General Court.

Applying the *Lord* analysis to the materials in question here, I have noted above that all of the materials relating to Private Trade Schools are required to be filed with the Department pursuant to G. L. c. 93, § 21B. That section provides, in relevant part:

“No person shall operate or maintain a private trade school unless he is licensed so to do by the commissioner of education as hereinafter provided. Said commissioner shall not issue a license to operate or maintain such a school unless and until he shall have approved as to such school the proposed standards adopted and methods of instruction to be followed, the equipment and housing provided, the training and experience of the teachers to be employed, the form and contents of the student enrolment agreement or contract and the method of collecting tuition, nor and unless and until such schools shall have filed in the office of said commissioner its current advertising, if any. All advertising used by any such school subsequent to the receipt of a license hereunder shall from time to time be filed in the office of said commissioner. No license shall be granted hereunder unless said commissioner shall determine that the school possesses a sound financial structure with sufficient resources for its proper use and support . . . Every such license shall run for one year from date of issuance and the fee therefor shall be one hundred dollars for an original license and fifty dollars for each renewal thereof. Said commissioner may adopt and from time to time alter and amend rules and regulations, in conformity with this section, governing such schools and the

licensing thereof. Each person operating a private trade school shall make an annual report to said commissioner in such form as he may prescribe."

The materials relating to Private Business Schools are required to be filed pursuant to G. L. c. 75D, § 4, which provides:

"Any person desiring to operate a private business school within the commonwealth whose application has been granted initial approval by the state auditor pursuant to section three shall submit to the commissioner, on a form supplied by him, such information as he may require, including but not limited to:

(a) the training and experience of the instructors employed or to be employed by the school;

(b) the building facilities and equipment available or to be available for the instruction to be offered by the school;

(c) the form and content of the courses to be offered by the school;

(d) the particular field of instruction to be offered by the school; and

(e) the form of any contract or agreement to be executed by a prospective student.

If, after investigation, the commissioner finds that the applicant is qualified to operate a private business school, he shall issue a license to such person authorizing the operation of such school.

If the commissioner finds that the applicant is not qualified to operate a private business school, he shall refuse to issue a license. The commissioner shall state his reasons therefor in writing. The applicant shall be entitled to a hearing before the commissioner and judicial review subject to the provisions of chapter thirty A.

The commissioner shall also approve each separate course of instruction offered by a licensee according to such standards or guidelines as may be established by the commissioner. A licensee shall submit course changes, improvements and modifications to the commissioner. Course approval shall be valid for one year from the date of issue, but may be revoked or suspended if the commissioner finds that the form or content to the course substantially differs from standards or guidelines established by him."

A reading of the sections set forth above clearly suggests that one purpose of requiring submission of the materials is to assist the Commissioner in determining that the criteria for licensing have been met. However, no one can deny that the public has a strong interest in the information contained in the application. Education is of fundamental importance to the inhabitants of the Commonwealth. In this regard, certainly, everyone should have the opportunity to determine the nature and qual-

ity of the schools which he or his children are able to attend. It is just that kind of opportunity which the information involved here would supply. There is, then, a public policy favoring disclosure of the application information, and the existence of such a policy suggests that an intent to make the material public existed at the time G. L. c. 93, § 21B and G. L. c. 75D, § 4 were enacted. Accordingly, in my opinion, the applications do fall within the scope of the "received for filing" clause of G. L. c. 4, § 7(26) and are therefore "public records." Accordingly, under G. L. c. 66, § 10, they must be released to the press upon request, unless there is other law to the contrary.

In the latter respect, the teacher applications for both types of schools and the original license applications for Private Trade Schools contain no representations as to confidentiality. Certainly one has no right to prevent public disclosure of information that he has unconditionally volunteered. As for the other materials, on which a representation of confidentiality does appear, you have suggested that Executive Order #75 mandates that they be withheld from the public. It is true that the Executive Order provides that "an agency shall withhold information requested by a citizen . . . if the matters requested are . . . commercial or financial information obtained from a person on a privileged or confidential basis." However, this mandate is prefaced with the proviso, "unless otherwise specifically required by any general or special law." Thus, the Order clearly cannot be construed as superseding the requirement of G. L. c. 66, § 10 that all public records be publicly disclosed.

Nor do the schools have any common law or statutory right to non-disclosure. A close reading of the statement of confidentiality, as it appears on the forms, leads me to conclude that it was not intended as a promise of the kind which might give rise to a contract by estoppel or other common law rights. Rather, it appears to be merely a statement of the Department's policy at the time the applications were submitted, to which one could not reasonably expect the Department to be bound. Even if the statement were a promise, I am of the view that it would not be breached by disclosure here. The statement declares that the information contained in the application will be confidential, but shall be disclosed if a court so orders. Since a court order may be obtained whenever the law mandates disclosure, the proviso as to such order means, in effect, that the applications remain confidential only in so far as the law otherwise allows. The statement was not intended to establish a right to nondisclosure for the applicants beyond any they already possessed. As I have indicated above, G. L. c. 66, § 10 requires disclosure. Consequently, any "promise" of confidentiality is, by its own terms, suspended, and the applicants have no right to prohibit release of the information.

The above analysis also disposes of any suggestion that disclosure of the information in question violates the statutory right to privacy created by St. 1973, c. 941. Under the circumstances, the information is simply not confidential and therefore not "private."

Since all of the applications are public records, since G. L. c. 66, § 10

requires public disclosure of information contained in all public records, and since there is no law to the contrary prohibiting disclosure of the information contained in the applications, I conclude that you must release such information to those who request it.¹

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 29
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

January 24, 1974

Dear Mr. Secretary:

With regard to the duties of the Registrar of Vital Statistics to record births, you have asked for my opinion on the following question:

"May a birth of a legitimate child born to a married mother living with her husband who is the father of the child and who has had *her* name legally changed from her married name to her maiden name be recorded under *her* legal surname rather than that of her husband?"

The short answer to your question, for the reasons that follow, is "yes."

Under G. L. c. 46, § 1, each town clerk must record the following information as to births:

"In the record of births, date of record, date of birth, place of birth, name of child, his sex, names, places of birth and residence of his parents, including the maiden name of the mother and occupation of the father. In the record of birth of an illegitimate child, the name of, and other facts relating to, the father shall not be recorded."

The duty is to record the "name" of the child. See also, G. L. c. 46, § 3. The statute, G. L. c. 46, § 1, does not require that the name of the child include the father's surname as the baby's surname. Nor does such a requirement exist in any other statute of this Commonwealth. For instance, while the Commonwealth has required certain conditions be met before people marry, G. L. c. 207, there is no requirement that the children born of that marriage bear the father's surname. In short, there is no statutory requirement that a baby's surname be identical with its father's surname.

It is, of course, customary in this country for the baby's surname to be the patronymic rather than the matronymic. Such a practice is, however, only custom and does not have the force of law. See *Laflin & Rand Co. v. Steytler*, 146 Pa. (31 Crumrine) 434, 442 (Pa. 1892);

¹I have considered the amendments made to the public records statutes by St. 1973, c. 1050 (effective July 1, 1974) in reaching my conclusions. Since the amendments considerably liberalize the public records law, a conclusion that the information in question constitutes public records open to inspection under the present law would not change under the amendments.

Application of Shipley, 205 N.Y.S.2d 581, 586; *In re Cohen*, 255 N.Y.S. 616 (Sup. Ct. 1932); *Fulgham v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972). But cf. *Sobel v. Sobel*, 46 N.J. Super. 284, 134 A.2d 598, 600 (1957).

Nor is it inconsistent with the law of names for a legitimate child not to bear its father's surname. First, it has not always been customary for a legitimate baby to share its father's surname. *In re Snook*, 2 Hilt. 566; *Application of Shipley*, *supra*. As was said in *Smith v. United States Casualty Co.*, 197 N.Y. 420, 423 (1910):

"In the early life of all races surnames were unknown, while given names have been used from the most distant times to identify and distinguish a particular individual from his fellows. In England surnames were unknown until about the tenth century and they did not come into general use or become hereditary until many years later. (8 Nelson's Encyc. 386.) At first they were used, sometimes for an easy method of identification and at others from accident, caprice, taste and a multitude of other causes. Mr. Bardsley in his *History of English Surnames* gives thousands of instances of change through selection, the action of neighbors in applying descriptive epithets, the use of nicknames and pet names and the gradual development through circumstances and the necessity of identification as population increased. Thus the son of John or Peter became known as John's son or Peter's son and finally as Johnson or Peterson, aside from his given name. It is well known that the word meaning 'son' in different languages, such as Fitz and Mac, was prefixed to the Christian name of the father to give the son a surname and 'O' to give one to the grandson, and thus we have the names FitzGerald, MacDonough, O'Brien and many others. The place of birth or residence, the name of an estate, the business pursued, physical characteristics, mental or moral qualities and the like, were turned into surnames. It is to be noted, however, that the surname in its origin was not as rule inherited from the father, but either adopted by the son, or bestowed upon him by the people of the community where he lived. (Dudgeon's *Origin of Surnames*, 252.) Father and son did not always have the same surname and it was not regarded as important, for both frequently had more than one. Coke wrote in the forepart of the seventeenth century: 'Special heed is to be taken of the name of baptism as a man cannot have two, though he may have divers surnames.' (Coke Lit. [1st Am. ed.] 3, a. m.)."

Even as custom changed so that it became common for the child to share the father's surname, custom may in the future change and other patterns of naming became common.

Second, the practice of giving the baby the father's surname stems, in part, from the past practice of both married parents sharing a common surname, usually the father's. See 6 Op. Atty. Gen. 207; *Application of Green*, 283 N.Y.S.2d 242 (N.Y.C. Civil Court 1967). There is no legal requirement that parents share a common surname, and, in this instance, they do not. Correspondingly, there does not appear to be a requirement that a baby share its father's surname. *In re Faith's Application*, 22 N.J. Misc. 412, 39 A.2d 638, 640 (1944).

Although it has been customary in this country for a married woman to take her husband's surname on marriage, it is unclear whether there was any requirement at common law that she do so. It is said that no such requirement existed by law in England. 19 Halsbury's *Laws of England* 829 (3d 1957) and C. Ewen, *A History of the British Isles*, 391 (London 1931), quoted in *Stuart v. Board of Supervisors of Elections*, 226 Md. 440, 295 A.2d 223 (1972). Jurisdictions in this country have split in their views on this question, compare *Stuart, supra*, and cases listed therein, with *State ex rel Krupa v. Green*, 114 Ohio App. 497, 177 N.E.2d 616 (1961). The majority view appears to be that there was no such common law requirement. The precise question has not been adjudicated in this Commonwealth. Regardless of whether there is a common law requirement that a married woman take her husband's surname, and in my opinion the better view is that there is no such requirement, Massachusetts has provided a statutory procedure by which a married woman may retain her maiden name. G. L. c. 210, § 12. Thus, Massachusetts law does not require parents to hold a common surname and cannot, consequently, be said to have expressed a strong interest in requiring a baby, as a matter of law, to share its father's surname.

Further, the practice of parents having a common surname may stem from that era in the law when a married woman was thought not to exist as a legal entity, except under the aegis of her husband. That era is over and married women now are recognized to have their own legal identity.

These changes in law and custom indicate it is not mandatory for a baby to have its father's surname.

Third, Massachusetts law recognizes a common law right to change one's name. Such a right is entirely consistent with the rights of these parents to name their baby as they have.

The common law rule regarding name changes was stated in *In re Snook, supra*:

"but though the custom is widespread and universal for all males to bear the names of their parents, there is nothing in law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequence growing out of it, except so far as it may lead to or cause a confounding of his identity."

Massachusetts law recognizes a common law right to change one's name.

In *Buyarsky, Petitioner*, 322 Mass. 335, 338 (1948), the court stated:

"A man, if acting honestly, may assume any name he desires and by which he wishes to be known in the community in which he lives or in the trade circles in which he does his business. *The law does not require a man to retain and to perpetuate the surname of his ancestors.* The common law recognizes his freedom of choice to assume a name which he deems more appropriate and advantageous to him than his family name in this present circumstances, if the change is not motivated by fraudulent intent. The statute, G. L. (Ter. Ed.) c. 210, § 12, does not restrict his choice but aids him to secure an official record which definitely and specifically establishes his change of name." (Emphasis supplied.)

See also, *Merolevitz, Petitioner*, 320 Mass. 448, 450 (1946); *Mark v. Kahn*, 333 Mass. 517, 520-21 (1956). In a case where a petitioner sought to invoke the statutory procedure to change his surname, the Supreme Judicial Court noted:

"It is not open to the court to inquire into the motives that prompt one to change one's name, provided, of course, they are not for dishonest or unlawful ends. *Merolevitz, petitioner*, 320 Mass. 448, 449-450. We believe that most persons are entirely content, indeed proud, to bear the names which they acquired at birth. But there may be some who for one reason or another do not care to do so. These reasons may be good or indifferent, wise or unwise, but it is not the function of the courts to pass upon them." *Rusconi, Petitioner*, 341 Mass. 167, 170 (1960).

The common law right of free change of name has been held available to minors as well as adults, *Bruquier v. Bruquier*, 12 N.J. Sup. 350, 79 A.2d 497 (Ch. 1951); and courts have allowed statutory procedures to change the infant's surname from its father's surname. *Application of Yessner*, 304 N.Y.S.2d 901 (N.Y.C. Civil Ct. 1969). See also *Mark v. Kahn*, *supra*; *Margolis v. Margolis*, 338 Mass. 416 (1959). However, this particular matter does not involve a dispute between the parents over the name of the child, a situation arising sometimes out of a divorce. The principles of law governing such disputes are inapposite here. See *Margolis v. Margolis*, *supra*; *Sobel v. Sobel*, *supra*.

In summary, the statute requiring the recording of births does not contain any requirement that a legitimate baby's surname be its father's surname. No other statute of this Commonwealth contains such a requirement. And while it has been customary for a child to share its father's surname, this is a matter of custom only and not of law. See Note, 44 Cornell L.Q. 144, 146 (1958). There being no law requiring a legitimate baby to be named with its father's surname as its surname, the right to name the baby otherwise is a right retained to the parents. The birth of a legitimate child born to a married woman living with her husband and who has had her name legally changed from her married name

to her maiden name must be recorded under her legal surname rather than that of her husband if the parents so request.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 30
Honorable Robert Q. Crane
Treasurer and Receiver General
Chairman, State Board of Retirement
73 Tremont Street
Boston, Massachusetts 02108

February 7, 1974

Dear Mr. Crane:

On behalf of the State Board of Retirement, you have requested my opinion on the following question:

"Is the widow of a retired former state employee, who retired under Section 69 (a) in 1953 and died in 1973, entitled to the benefits of Section 101, as amended, of Chapter 32 of the General Laws if said retiree was not married at the time of his retirement?"

General Laws, c. 32, § 69 relates to pensions for the Metropolitan Police and provides as follows:

"The state board of retirement upon the recommendation of the metropolitan district commission shall retire any permanent member of its police department, who began continuous service therein prior to July first, nineteen hundred and twenty-one, as follows:

(a) If such member has become permanently disabled, mentally or physically, by injuries sustained through no fault of his own in the actual performance of his duty, from further performing duty as such member . . ."

General Laws, c. 32, § 101 provides in relevant part as follows:

"In the event of the death of any former employee who had been retired under the provisions of this chapter after having been found to be incapacitated for further duty by reason of injuries sustained while in the performance of his duties . . . under which retirement he was unable to provide for any annual allowance to be paid to his widow at the time of his death, there shall be paid to such widow an annual allowance in the amount of sixteen hundred and eighty dollars, subject to the provisions of paragraph (e) of section 102 for as long as she remains unremarried . . ."

It can be seen that section 101 is silent on the question of whether the spouse of the retired former state employee is required to have been married to him at the time of his retirement. Where the Legislature has intended that the widow be one who was married to the retiree at the

time of his retirement, it has expressly so provided. See for example, G. L. c. 32, § 77A, Option B, which gives a city or town employee who was eligible for superannuation retirement the right to elect a pension which provides that a portion thereof be "paid to his widow who was his spouse at the time of his retirement." Inasmuch as there is no express indication in section 101 that the widow be the spouse of the retiree at the time of his retirement, I cannot imply such a restriction. Compare the opinion of one of my predecessors with respect to St. 1963, c. 526, § 1, which requires that "the state board of retirement shall pay to the surviving widow of such member an annuity amounting to sixteen hundred and eighty dollars . . ." where it was held that, under the plain words of the section, remarriage of a widow who is receiving an annuity thereunder does not terminate her right to receive benefits. 1966 Op. Atty. Gen. 349.

Accordingly, the answer to your question is in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 31
Mr. John W. McIsaac
Executive Secretary
Brokers and Salesmen
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

February 8, 1974

Dear Mr. McIsaac:

You have requested my opinion regarding the following question: "Are the employees of the Board of Registration of Real Estate Brokers & Salesmen prohibited from holding licenses as real estate brokers or salesmen?"

General Laws, c. 13, § 54 provides for the appointment of a Board of Registration of Real Estate Brokers and Salesmen "consisting of five members . . . three of whom shall have been actively engaged in the real estate business as a full time occupation for at least seven years prior to their appointment and who shall be licensed real estate brokers, and two of whom shall be representatives of the people." The public members cannot themselves be licensed real estate brokers. 1964 Op. Atty. Gen. 115, 116. General Laws, c. 13, § 57 provides in part that "The board may, subject to chapter thirty-one, employ a secretary and such other clerical and technical assistants as may be necessary to discharge its official duties, shall establish their duties, and, subject to the provisions of sections forty-five through fifty, inclusive of chapter thirty shall fix their compensation . . ." There is no express provision in section 57 or elsewhere which prohibits the employees of the Board from holding licenses as real estate brokers or salesmen. Where the Legislature has intended

to impose restrictions on the type of employee of a particular Board it has done so. For example, G. L. c. 13, § 36, which creates a Board of State Examiners of Plumbers, provides that "[s]aid board shall appoint an executive secretary who . . . has had at least ten years' continuous practical experience as a plumber." General Laws, c. 13, § 43, referring to the Board of Registration of Hairdressers, provides that it "may appoint such agents and employees as the work of the board may require; provided, that inspectors or investigators appointed by the board shall be registered hairdressers. An inspector or investigator shall not, while so employed, own, operate or be employed in a shop or otherwise actually do the work of hairdressing for compensation."

The opinion of my predecessor cited above, to the effect that public members cannot themselves be licensed real estate brokers, rests upon a necessary implication in the statute that the words "representatives of the people" would be meaningless if they could be licensed real estate brokers, because the statute specifically provides that only five members can be licensed real estate brokers. I find nothing in G. L. c. 13, §§ 54-57 which would prohibit employees of the Board from holding licenses as real estate brokers or salesmen. It is clear from G. L. c. 112, 87§§ and the following related sections that written examinations, rules and regulations, and all policy decisions are to be made by the Board and that, conversely, the employees of the Board have no discretion and that their sole function is to carry out the ministerial duties imposed upon them by the Board. Therefore, there would seem to be no abuse of their duties merely by reason of their being licensed as aforesaid. If there is any such abuse, their licenses may be revoked by the Board pursuant to G. L. c. 112, § 87AAA and under G. L. c. 112, § 61.

Finally, I find nothing in the conflict of interest statute, G. L. c. 268A, which is a bar to the employment of such licensed persons except of course to the extent that they violate the provisions of the statute in the course of their official or personal conduct. The attention of such employees should be directed to the statute, particularly the Code of Ethics section. See G. L. c. 268A, § 23.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 32

March 12, 1974

Mr. Adam D. Strachan, Chairman
Board of Elevator Regulations
Department of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Chairman Strachan:

You have requested my opinion whether plans and specifications pertaining to the installation or alteration of an elevator must comply with amendments to the Rules and Regulations of the Board of Elevator

Regulations (Form ELV-2 Revised) which are promulgated subsequent to the date of approval but prior to the execution of said plans and specifications. With your request, you have submitted a copy of the approval form presently employed by the Department of Public Safety. That form states that "[t]hese plans are approved subject to the provisions of the Commonwealth of Massachusetts Elevator and Escalator Regulations now in effect." My answer is in the negative.

An elevator may not be installed or altered in Massachusetts unless and until a copy of the plans and specifications for such a project are approved by the appropriate inspector. G. L. c. 143, § 62. Generally, the approval, as indicated by reference to both the preamble of ELV-2 and the form of approval, is based upon the rules then in effect. The rules and regulations of the Board (and the amendments thereto), enacted pursuant to G. L. c. 143, §§ 68-69, become effective when published by the State Secretary pursuant to section 6 of the State Administrative Procedure Act (G. L. c. 30A).¹ A later date may be specified in the rules. While ELV-2 does not provide for a late effective date, it accomplishes the same effect by providing:

"Amendments to these regulations hereafter formulated by the Board of Elevator Regulations shall become applicable to a new installation, a re-location or a material change for which plans and specifications are submitted for approval on or after the 180th day following the effective date thereof."

The rules do not contain any provision which requires either that plans conform to subsequent amendments to the rules or that they be completed within a certain amount of time. Since the approval under the present rules is thus unconditional, the Board does not have the authority to retroactively vary the terms of such approval. Cf. *Commissioner of the Department of Community Affairs v. Boston Redevelopment Authority*, Mass. Adv. Sh. (1972) 1743.

There would be no legal impediment however to the Board's enacting a regulation under its broad statutory authority, G. L. c. 143, §§ 68-69, that would require plans not completed within a certain time to be re-submitted for approval in accordance with existing regulations. Any particularly harsh result which might result from the literal application of such a regulation could be alleviated under the remedial provisions pertaining to appeals by aggrieved parties. Under G. L. c. 143, § 70, the Board may modify or extend the time period involved when an order is appealed to the Board. *Op. Atty. Gen.*, Dec. 14, 1964, p. 144.

In conclusion, it is my opinion that conditioned approvals of plans and specifications for the installation or alteration of an elevator may only be effectuated if specific rules and regulations providing for such approvals are enacted by the Board of Elevator Regulations.

Very truly yours,
ROBERT H. QUINN
Attorney General

¹Before the enactment of the State Administrative Procedure Act, the rules and regulations become effective upon deposit with the State Secretary. G. L. c. 143, § 69; *Op. Atty. Gen.*, Jan. 10, 1956, p. 60.

Number 33

March 12, 1974

Honorable Edward S. Zelazo
Chairman, Division of Industrial Accidents
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Zelazo:

You have requested my opinion as to which statutory provision controls reimbursement to members of the Industrial Accident Board for their travel expenses. You state that the members of the Board have had a difference of opinion with the Comptroller of the Commonwealth as to the interpretation and effect to be given to G. L. c. 30, § 25 (cited in your letter as section 35). In connection with your request, the Comptroller has submitted a statement of his views on the question.

The problem arises because G. L. c. 30, § 25 provides that officers of the Commonwealth who are required to travel "shall be allowed *their actual reasonable expenses* incurred in the performance of such duties, if such expenses are authorized by law to be paid by the commonwealth." (Emphasis supplied.) The Comptroller contends, and the members of the Board dispute, that travel expenses are governed by the rules promulgated by the Director of Personnel and Standardization pursuant to the mandate of G. L. c. 7, § 28. That section requires the Director to promulgate rules which "shall regulate . . . travel and meals for persons traveling within or without the commonwealth. . . . for officers other than those exempted by such rules"

Rule G-5 of the Rules provides, in turn, that:

"Unless otherwise specified, these rules shall apply to all persons employed in the executive branch of the state government . . . with the exception of . . . Members of Boards, Commissions or Committees, established by statute . . ."

The appropriations act for the Fiscal Year 1974 applies the rules of the Director, as follows. St. 1973, c. 466, § 5 provides:

"No monies appropriated under this act shall be expended for reimbursement for the expenses of meals for persons traveling within or without the commonwealth at the expense thereof unless such reimbursement is in accordance with rules and rates established in accordance with section twenty-eight of chapter seven of the General Laws."

The third paragraph of section 6 of the same act provides:

"The allowance to state employees for expenses incurred by them in the operation of motor vehicles owned by them and used in the performance of their official duties shall not exceed ten cents a mile."

It is clear that the rules and regulations of the Director of Personnel and Standardization, by themselves, do not apply to members of the In-

dustrial Accident Board. Rule G-5 has the effect of exempting members of the Board from the operation of the rules. Such an exemption led one of my predecessors to conclude that the rules were inapplicable to members of the Youth Board. 1966 *Op. Atty. Gen.* 98 (August 23, 1965). However, the 1974 appropriations act makes clear that the rules for expenses for meals apply to members of the Board, for section 5 prohibits reimbursement unless in accordance with the rules. The prohibition must be read as a limitation on the more general provision in G. L. c. 30, § 25 which permits reimbursement for "actual reasonable expenses." I also note that section 25 permits reimbursement only "if such expenses are authorized by law to be paid by the commonwealth." The inclusion of such language clearly indicates an intent on the part of the Legislature that the payment of such expenses be subject to appropriation.

However, a closer question is presented with respect to payment of travel expenses. Section 6 of the appropriations act for Fiscal Year 1974 applies the ten cents a mile figure to "state employees." While "employees" may not be strictly construed to include "officers of the commonwealth," the Legislature may have intended in enacting the 1974 appropriations act to have included all persons in the employ of the Commonwealth within the term "state employees" as that term is used in section 6 of the Act. However, for the reasons stated hereinafter, I find it unnecessary to resolve that precise question.

As noted above, G. L. c. 30, § 25 permits reimbursement for "actual reasonable expenses." Such expenses are required to "be itemized . . . before their allowance by the comptroller." The term "reasonable" is nowhere defined in the statute, but it is my opinion that the term may be given content by the Comptroller who must allow the claims for reimbursement. Inasmuch as the Legislature has placed a limitation of ten cents a mile for travel expenses of state employees, however such a group of persons may be defined, it is my view that the Comptroller may adopt such a limitation as the upper limit of what is "reasonable" in the light of G. L. c. 30, § 25.

Accordingly, it is my opinion that the rules and regulations of the Director of Personnel and Standardization may be applied to claims for reimbursement of expenses submitted by members of the Industrial Accident Board pursuant to G. L. c. 30, § 25.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 34
Honorable Francis A. Murdy, O.D., Secretary
Board of Registration in Optometry
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

March 12, 1974

Dear Sir:

I am in receipt of your request for my opinion on the following ques-

tion:

"In the event that a registered optometrist is retained to continue the practice of a deceased registered optometrist at the request of the widow or widower of such deceased optometrist, is the retained registered optometrist subject to all the provisions of Sections 66 through 73B, inclusive, of the General Laws, Chapter 112, and the rules and regulations promulgated thereunder, with respect to the continuation of the practice of such deceased optometrist as well as any other optometric practice in which he may be engaged?"

You have further informed me that a specific optometrist who maintains a principal optometry office and who also maintains a branch office at his personal residence, has been engaged by the widow of a deceased optometrist to conduct her late husband's practice on a part-time basis. Although you concede that a widow or widower of a deceased optometrist can continue the practice of optometry by employing a registered optometrist pursuant to G. L. c. 112, § 73, you have sought my opinion as to whether a registered optometrist conducting an optometry practice on behalf of the widow or widower of a deceased optometrist is specifically limited by Rule 3 of the Rules and Regulations Governing the Practice of Optometry, rule 3, as promulgated by the Board of Registration in Optometry, reads as follows:

"3. An optometrist shall not establish an office other than his principal office, except that under written approval from the Board, an optometrist may establish a branch office in his personal residence. In the event that an optometrist ceases to personally reside on premises for which the Board has approved the establishment of a branch office, such branch office must be terminated forthwith."

The Board of Registration in Optometry was established by G. L. c. 13, § 16. The powers and duties of the Board are delineated in G. L. c. 112, § 66-73B. The Board has the authority to "make rules and regulations governing its procedure, governing registration and applications therefor, and governing the practice of optometry." G. L. c. 112, § 67. However, the rules and regulations promulgated by the Board, must be consistent with G. L. c. 112, §§ 66-73B. See *Silverman v. Board of Registration in Optometry*, 344 Mass. 129, 131.

In the instant situation, Rule 3 prohibits an optometrist from *establishing* more than one branch office. A registered optometrist who, in addition to conducting his own practice, assists a widow or widower in conducting the practice of the deceased spouse has not, in fact, *established* a branch office. The verb, "to establish," has been defined as meaning, *inter alia*, "to bring into being; to build; . . ." *BLACK'S LAW DICTIONARY* 643 (Rev. 4th Ed. 1968). When a registered optometrist assists a widow or widower in conducting the optometry practice of a deceased spouse, the registered optometrist is being employed to continue the operation of a practice already in existence.

The conclusion that Rule 3 does not apply to the specific situation you have described is further compelled by the statutory proviso contained in G. L. c. 112, § 73 which states in pertinent part:

“ . . . nor shall said section [66-72A] prevent the widow or widower of a registered optometrist, or the wife or husband of a registered optometrist who is incapacitated, from continuing the practice of optometry under a registered optometrist.”

If Rule 3 were interpreted to bring within the purview of the “establishment of a branch office,” the continuation of the practice of a deceased optometrist by a registered practicing optometrist on behalf of the widow or widower of the deceased optometrist, it would then be clearly inconsistent with G. L. c. 112, § 73. Such an interpretation might restrict a qualifying widow or widower to continuing the practice of the deceased spouse only when the widow or widower could obtain the assistance of a previously non-practicing optometrist or of a practicing optometrist who would be willing to forego his present practice. Such a result is inconsistent with the statutory purpose expressed in G. L. c. 112, § 73.

Accordingly, it is my opinion that Rule 3 of the Rules and Regulations Governing the Practice of Optometry is not applicable to the situation in which a practicing optometrist assists in continuing the practice of a deceased optometrist on behalf of the deceased optometrist's widow or widower. Of course, Rule 3 is still applicable to prohibit the optometrist in question from establishing any additional branch offices on his own and apart from his employment on behalf of a widow or widower of a deceased optometrist.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 35
Honorable Bruce Campbell
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

March 12, 1974

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

Gentlemen:

You have jointly requested my opinion concerning the authority and the obligation of the Department of Public Works to remove billboards and signs illegally maintained without a permit in violation of Section

4(a) of the Outdoor Advertising Board's rules and regulations. As you have stated, outdoor signs which are required to be licensed by the Outdoor Advertising Board and which are maintained without a permit have statutorily been deemed to be public nuisances. G. L. c. 93, § 30A. This same statute provides the Board with the authority to abate and remove such nuisances as is given a board of health of a town to abate and remove health nuisances pursuant to G. L. c. 111, §§ 123-125. You have requested my opinion as to four specific questions relative to the authority of the Department of Public Works to remove such nuisances at the request of the Outdoor Advertising Board.

First, you have sought my opinion as to whether G. L. c. 16, § 14 permits and/or requires the Department of Public Works to cooperate in enforcing the Outdoor Advertising Board's rules and regulations only along interstate and primary highways, only along state highways or everywhere throughout the commonwealth.

General Laws, c. 93D, §§ 1-7 imposes upon the Department primary enforcement responsibility with respect to billboards along all interstate and primary highway systems in the Commonwealth. General Laws, c. 93, §§ 29-33 delineates the powers and responsibilities of the Outdoor Advertising Board for the regulation of outdoor advertising. However, G. L. c. 10, § 14, which establishes the criteria for the selection of Board members, requires that one member of the Board be the Commissioner of Public Works or his representative, and further requires:

"It shall be the duty of the commissioner of public works, . . . in addition to his other duties as member of the board, to arrange for the co-operation of district engineers and other field employees of the department of public works in reporting the location of billboards, signs or other advertising devices along state highways, and in enforcing the rules and regulations of the board." (Emphasis supplied.)

The Legislature has imposed two distinct duties upon the Department of Public Works: (1) a duty to cooperate in reporting billboard locations which extend only to state highways, and (2) a duty to cooperate in enforcing the Board's rules and regulations which is not limited to state highways and therefore applies throughout the Commonwealth. Although the Legislature, subsequent to the enactment of G. L. c. 16, § 14, transferred the Outdoor Advertising Board out of the Department of Public Works and into the Executive Office of Environmental Affairs pursuant to St. 1969, c. 704, there is no indication that by this action the Legislature further intended to relieve the Commissioner of Public Works of his duty to arrange for cooperation of his Department in enforcing the Board's rules and regulations. Accordingly, it is my opinion that G. L. c. 16, § 14 continues to impose upon the Commissioner a duty to arrange for cooperation in enforcing the Board's rules and regulations throughout the Commonwealth.

Secondly, you have requested my opinion as to whether the duty to cooperate requires the Department to remove illegally maintained signs

upon the request of the Board. An opinion of one of my predecessors to which you have referred, 1938 *Op. Atty. Gen.*, p. 125, indicated that the Department had the authority to remove illegally maintained signs. Subsequent to that opinion, the Outdoor Advertising Board was created with primary responsibility for the regulation of outdoor advertising. G. L. c. 93, §§ 29-33. However, there remains in the Department of Public Works by virtue of G. L. c. 16, § 14 an affirmative obligation of cooperation in enforcing the Board's rules and regulations. It is my opinion that G. L. c. 16, § 14 authorizes the Department to remove illegally maintained billboards when requested to do so by the Board and, further, that duty imposed by G. L. c. 16, § 14 extends to requiring the Department to comply with a Board request to remove an illegally maintained sign within a reasonable time after such request has been received.

Thirdly, I have been asked to determine whether the Department or the Board should hear any expenses incurred in removing illegally maintained signs. As I have noted, G. L. c. 16, § 14 imposes upon the Department a duty of cooperation in enforcement of the Board's rules. Although there is no explicit provision in the statute requiring that the Department bear the expenses of enforcing the Board's rules and regulations, it is my opinion that such a requirement is implicit in the statutory scheme. In this respect, I note further that G. L. c. 111, § 125 provides that expenses incurred in removing a public nuisance are recoverable from the owner or occupant in an action of contract.

Finally, you have requested my opinion as to whether Commonwealth personnel, after giving due notice, must obtain a court order before entering upon private property to remove illegally maintained signs and billboards statutorily deemed nuisances. G. L. c. 93, § 30A; G. L. c. 93D, § 4. The authority to summarily abate public nuisance has its origins in early common law and is subsumed within the limits of the police power of the states derived from the Tenth Amendment of the Constitution of the United States. *Lawton v. Steele*, 152 U.S. 133, 136 (1893). In this Commonwealth, the power to summarily abate nuisances has long been recognized. *Salem v. Eastern R.R. Co.*, 98 Mass. 431 (1868). However a recent Supreme Court decision, *Fuentes v. Shevin*, 407 U.S. 67 (1972), suggests that the power of a state to act summarily is severely limited by due process considerations of a right to notice and a hearing prior to any taking of property. The Court in *Fuentes* reviewed its three-step test which must be satisfied to justify summary action without a hearing. Any seizure has to be directly necessary to secure an important governmental or general public interest; secondly, there has to be a special need for very prompt action; and thirdly, the person initiating the action must be a government official who, acting under the standards of a narrowly drawn statute, determines that the action is necessary and justified. 407 U.S. 67, 91. Subsequent to *Fuentes*, summary action to abate a nuisance of emergency proportions has been upheld by at least one state court. *Apartment House Coun. v. Mayor & C. of Ridgefield*, 301 A.2d 484 (New Jersey 1973).

It is my opinion that summary action in removing illegally maintained signs meets the tests articulated in *Fuentes*, particularly in light of growing concern for the protection of the environment. Also, I find that the Board's rules and regulations provide an opportunity for a hearing to obtain a billboard permit sufficient to satisfy the due process right to notice and a hearing.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 36
Mr. Patrick E. McCarthy, Chancellor
Board of Higher Education
182 Tremont Street
Boston, Massachusetts 02111

March 15, 1974

Dear Chancellor McCarthy:

You have requested my opinion whether the Massachusetts General Hospital (hereinafter referred to as "MGH"), which was incorporated by act of the Legislature, St. 1811 (Jan. Sess.), c. 94, is eligible to seek from the Board of Higher Education authority to grant academic degrees. As you note in your letter, the Board has the responsibility to investigate and make a determination concerning the incorporation of any college or educational institution seeking the power to award degrees. G. L. c. 69, § 30. You advise me that since its opening in 1813, MGH has carried on the traditional functions of a teaching hospital, *i.e.*, patient care, research, and the teaching of physicians and other medical personnel. I am further advised that the by-laws of MGH have always included as one of its purposes the following:

"To carry on any educational activities related to the care of the sick and injured; or to the promotion of health and the prevention of disease, that in the opinion of the Board of Trustees may be justified by the facilities, personnel, funds, and other requirements that are, or can be, made available."

Your question asks specifically "whether by act of the [L]egislature and the precedent of teaching activity that Massachusetts General Hospital could for purposes of [G. L. c. 69, § 30] be considered an educational hospital." For the reasons stated below, I decline to answer your question in the specific form in which it is phrased; I do, however, conclude that upon the fulfillment of certain conditions MGH would be eligible for approval of degree-granting authority.

General Laws, c. 69, § 30, provides, in part, as follows:

"The state secretary, before approving a certificate or organization in connection with the *proposed incorporation* of a college, junior college, university or other *educational institution with power to grant degrees, or articles of amendment to*

the charter of an existing educational institution which will give it such power, or changing its name to a name which will include the term 'college', 'junior college' or 'university', shall refer such certificate or articles to the board of higher education. Said board shall immediately make an investigation . . . and subject to the provisions of section 31, shall make a determination . . . , and shall forthwith report its findings to the state secretary . . . If it appears . . . that said board does not approve of such certificate or articles, he shall refuse to endorse his approval thereon, otherwise he shall endorse his approval thereon unless he finds that the provisions of law relative to the organization of the corporation or the amendment to its charter have not been complied with . . ." (Emphasis supplied.)

Section 31 of Chapter 69 refers to junior colleges and provides in part that the Board of Higher Education shall not approve a certificate of incorporation or articles of amendment in connection with the proposed incorporation of a junior college with power to grant degrees or an amendment of the charter of any existing educational institution which will give it the power to grant junior college degrees, etc., unless —

“Second, the institution is organized under the laws of the commonwealth as a non-profit educational institution, and shall have operated as such an institution for . . . not less than one year immediately prior to the filing of the petition for such privilege . . .”

As I have previously pointed out to your predecessor, 1970-1971 Op. Atty. Gen. No. 32, the specific requirement in G. L. c. 69, § 31, Second, that a junior college be organized “as a non-profit educational institution” and the absence of any such express requirement in § 30 for a college, university or other educational institution lead to the conclusion that the latter types of institutions need not be non-profit organizations. Section 30 also lacks the requirement that the institution have operated as an educational institution for one year. Accordingly, any corporation whose articles of organization provide that its purposes include that of operating an educational institution comes within section 30 and an amendment to its charter giving it the power to grant degrees (other than junior college degrees) may be approved.

It is not clear that the purposes of MGH set out in the act of incorporation would qualify it as an “existing educational institution” under c. 69, § 30. As noted previously, the by-laws apparently have always included education as a corporate purpose. And it appears that in their petition to the Legislature the incorporators stressed the educational advantages that experience in a hospital would offer to medical students. Yet the charter granted by the Legislature stated the corporation’s purpose simply as “the erection, support and maintenance of a General Hospital, for sick and insane persons.” St. 1811 (Jan. Sess.), c. 94, § 2. However, as I noted in my previous opinion referred to above, MGH

could simply amend its articles of organization* to include as a corporate purpose the operation of the institution for specified educational purposes, and in addition amend the articles to provide degree-granting power. 1970-1971 Op. Atty. Gen. No. 32, *supra*. The Board would thereupon have authority to review the proposed granting of degrees.

My opinion is not affected by G. L. c. 180, § 13, which provides, in part:

“A corporation organized under this chapter for medical purposes shall not confer degrees, or issue diplomas or certificates conferring or purporting to confer degrees, unless specially authorized thereto by the general court.”

The foregoing section has not been amended since the Legislature in 1943 delegated to the Board of Collegiate Authority (predecessor to the Board of Higher Education) the responsibility, previously exercised by the Legislature itself, for reviewing and approving petitions of institutions which intend to grant degrees. St. 1943, c. 549, repealing G. L. c. 3, §§ 6 and 6A, and inserting G. L. c. 69, § 30. Since by repealing G. L. c. 3, §§ 6 and 6A, the Legislature left open no procedure for presenting to it petitions for degree authority, it is my opinion that the Legislature intended to delegate to the Board *all* of such responsibility, including that of reviewing petitions by medical corporations for degree authority.

In conclusion, then, it is my opinion that if MGH amends its articles of organization to include as a corporate purpose the operation of an educational institution, and further amends its articles to provide for degree-granting authority, the latter amendment should, upon reference to the Board by the State Secretary, be reviewed pursuant to G. L. c. 69, § 30, and may be approved.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 37
Honorable William I. Cowin
Secretary of Administration
Executive Office for Administration
and Finance
State House
Boston, Massachusetts 02133

April 8, 1974

Dear Secretary Cowin:

You have inquired whether non-professional employees of the University of Massachusetts whose compensation is paid from grants and trust funds received by the University of Massachusetts under the authority and subject to the provisions of G. L. c. 75, § 11, and not from any appropriation of the General Court, may be classified and paid by

*It appears that MGH may amend its articles of organization under G. L. c. 180, § 7, notwithstanding that it was originally chartered by the Legislature. See G. L. c. 180, § 1; St. 1811 (Jan. Sess.) c. 94, § 11.

the University without regard to G. L. c. 30. Specifically, you request my opinion as to the following questions:

- “1) Are such non-professional positions contemplated by General Laws, Chapter 75, Section 11, deemed to be included within the classification plan of the Commonwealth as set forth in General Laws, Chapter 30, Section 45 (1)?
- “2) Are such positions as defined above included in the pay plan of the Commonwealth as set forth in General Laws, Chapter 30, Section 45 (4)?”

Section 45 of G. L. c. 30 provides in part as follows:

“The director of personnel and standardization shall establish, administer and keep current and complete an office and position classification plan and a pay plan of the commonwealth.

(1) In pursuance of such responsibilities as to the said classification plan, the said director shall classify all appointive offices and positions in the government of the commonwealth, excepting such offices and positions in the professional staffs serving under governing boards of institutions of higher education . . . (c) for each such class shall establish specifications which shall include (i) an appropriate descriptive title and code number for the class, which shall be the official title of all offices and positions in the class and shall be set forth on all pay rolls by name or code . . .

* * * * *

(4) In pursuance of his said responsibilities as to the said pay plan, the director of personnel and standardization shall allocate, as provided in paragraph five of this section, each such office or position to the appropriate job group in the salary schedule set forth in section forty-six, excepting such offices and positions the pay for which is or shall be otherwise fixed by law and those the pay for which is required by law to be fixed subject to the approval of the governor and council . . .”

General Laws, c. 75, § 14 grants virtual autonomy to the Trustees of the University with respect to the classification, title, salary and conditions of employment of its professional staff “within funds available by appropriation of the general court or from other sources” and subject to certain procedures which are spelled out in section 14. The only reference in section 14 to “non-professionals” is the definition (“all employees who are not classified as professional personnel, such as clerical, custodial, security, labor, maintenance and the like”), and the following provisions:

“The non-professional personnel of the university shall continue as state employees under the provisions of chapter thirty and except as otherwise provided in this paragraph, shall be employed in authorized permanent positions in ac-

cordance with the provisions of section forty-five of said chapter; provided, however, that the university shall have the authority without prior approval and within the limits of appropriations to establish and fill temporary, part time and seasonal positions within existing titles and rates within available appropriations for the fiscal year. A notice of action taken in filling all such positions shall be filed with the director of personnel and standardization and with the comptroller.

"All officers and employees, professional and non-professional, of the university shall continue to be employees of the commonwealth irrespective of the source of funds from which their salaries or wages are paid. They shall have the same privileges and benefits of other employees of the commonwealth such as retirement benefits, group insurance, industrial accident coverage, and other coverage enjoyed by all employees of the commonwealth."

The immediate impression given by a superficial reading of the quoted sections of G. L. c. 30 and G. L. c. 75 is that non-professionals must be subject to the classification and pay plan procedures set forth in G. L. c. 30, § 45 because professionals "serving under governing boards of institutions of higher education" are expressly excluded from the operation of G. L. c. 30, § 45 (1), but non-professionals so employed are not expressly excluded, and because G. L. c. 30, § 45 (1) expressly grants to the University virtual autonomy as to classification and pay plan procedures only as to professionals. However, in my view a more careful reading of the statutes makes clear that the Legislature intended to grant autonomy in these respects as to non-professionals paid from grants and trust funds. A situation where a question rose as to the authority of the University in the face of an apparently restrictive statute, and which seems determinative of the issues raised here, is *Opinion of the Justices*, Mass. Adv. Sh. (1973) 535, where the Justices stated that G. L. c. 8, § 10A, which provides in part:

"The commonwealth, acting through the executive or administrative head of a state department, commission or board and with the approval of the superintendent [of buildings] and of the governor and council of the commissioner of administration, may lease for the use of such department, commission or board, for a term not exceeding five years, premises outside of the state house or other building owned by the commonwealth, if provision for rent of such premises for so much of the term of the lease as falls within the then current fiscal year has been made by appropriation."

did not apply to the University of Massachusetts and that the University could obligate the Commonwealth on a lease of tenancy at will of real estate without first obtaining the approval of the state officials mentioned in G. L. c. 8, § 10A. The Court based its opinion in part upon the legislative history of G. L. c. 75, concluding that the University had au-

onomous authority to enter into the leases and tenancies at will in question notwithstanding the provisions of G. L. c. 8, § 10A. The Court referred to section 1 which provides:

“There shall be a University of Massachusetts which shall continue as a state institution within the department of education but not under its control and shall be governed solely by the board of trustees established under section twenty of chapter fifteen. In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning. In exercising such authority, responsibility, powers and duties said board shall not in the management of the affairs of the university be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except as herein provided.”

The Court also referred to the provision in section 11 that “The trustees shall have the authority . . . to enter into agreements or contracts with . . . individuals where such agreements or contracts, in the judgment of the trustees, will promote the objectives of the university.” I believe, therefore, that the answers to your questions concerning non-professionals turn on the question of whether there is any provision in the applicable statutes which limits the administrative autonomy of the University with respect to non-professionals paid out of grants and trust funds.

General Laws, c. 75, § 11, the section which gives the Trustees the authority to enter into agreements or contracts with individuals, also empowers the Trustees to receive, hold and disburse grants and trust funds from sources other than appropriations of the General Court. Thus, under section 11 the Trustees have the authority to employ non-professionals and to pay them from these sources. It is unnecessary to go through the appropriation process for this purpose. Moreover, G. L. c. 75, § 14 clearly indicates that the Legislature, in referring to non-professionals in the first quoted paragraph above, was thinking only of those non-professionals who are paid out of appropriations of the General Court. Note the reference to the filling of temporary, part time and seasonal positions “within available appropriations for the fiscal year.” That the Legislature had clearly in mind the fact that other sources of funds were available out of which professionals and non-professionals could be paid is made evident by the next quoted paragraph in section 14 which states that employees of the University “shall continue to be employees of the commonwealth irrespective of the source of funds from which their salaries or wages are paid” and as such have the same privileges and benefits as other employees of the Commonwealth. If the latter sentence had not been inserted, a question naturally would arise as to whether employees paid out of grants and trust funds had such privileges and benefits.

If we examine G. L. c. 30, § 45 in the light of the foregoing analysis, we find that it applies only to positions for which funds are or must be appropriated by the General Court. See, for example, the following sections of G. L. c. 30, § 45 which are set forth below in pertinent part:

“(5) No permanent allocation or reallocation, in accordance with this section, of any office or position subject to the classification and pay plans provided by this section, shall be effected, unless and until

* * * * *

(c) the written recommendation complying with clauses (a) and (b) shall have been filed on or before November fifteenth, and from time to time thereafter, by the director of personnel and standardization *with the budget director and the house and senate committees on ways and means, and shall be considered as a part of the budget preparation as provided in section six of chapter twenty-nine . . .*” (Emphasis supplied.)

Section 46 provides, in pertinent part:

“(9) No increase in salary shall be effective for any position before the effective date of the *appropriation act which includes an appropriation made for the purpose of, and sufficient to cover, the cost of such increase.*” (Emphasis supplied.)

Accordingly, G. L. c. 30, § 45 is inapplicable to non-professionals hired by the University and paid out of grants and trust funds.

I have alluded above to the fact that certain professionals are expressly excluded from the operation of G. L. c. 30, § 45 (1), thus raising the implication that “non-professionals” are thereby made subject to the statute. However, inasmuch as the statute is not applicable to non-professionals who are not paid from appropriations, the failure of the Legislature to state specifically that non-professionals paid from grants and trust funds, and not from appropriations, are exempted from G. L. c. 30, § 45 is not significant. *Opinion of the Justices*, Mass. Adv. Sh. 1973, *supra*, at pp. 542, 543.

Your questions, therefore, are both answered in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 38
Honorable David J. Lucey
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

April 8, 1974

Dear Mr. Lucey:

You have inquired whether your Chief Deputy Registrar, Mr. E. Theodore Gunaris, who attained the age of 65 years on February 9, 1974, falls within the mandatory retirement age of 70 years or 65 years.

Your office advises me that your officials are classified in the Registry of Motor Vehicles in the following job classification order, immediately below the office of Registrar:

- One Chief Deputy Registrar
- One Deputy Registrar of Administration
- Two Deputy Registrars of Enforcement (Grade 23)
- Two Directors of Field Operations (Grade 23)
- Six Assistants to the Registrar
- Three Assistants to the Deputy Registrar

General Laws, c. 32, § 1 provides that the "maximum age" for the Groups described in G. L. c. 32, § 3(2) (g) is age 70 for Group 1 and age 65 for Group 4.

General Laws, c. 32, § 3(2) (g) classifies each member of the State Retirement System into four Groups, Group 1 and Group 4, the pertinent Groups, being set forth in relevant part as follows:

"Group 1. — Officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified."

"Group 4 — . . . officials and employees of the registry of motor vehicles appointed by the registrar under section twenty-nine of chapter ninety . . ."

I understand that prior to the present structure of Chief Deputy Registrar, Deputy Registrar, etc., enumerated above, there was only one Deputy Registrar and an Assistant to the Registrar. This was consistent with the authorization to the Registrar to make appointments as that authority existed in G. L. c. 90, § 29, which then read in relevant part as follows:

"The registrar shall appoint competent persons to act as investigators, examiners and safety instructors, may remove them for cause, and may define their duties. He may also appoint, and for cause remove, *a deputy registrar, an assistant to the registrar*, hearings officers, supervising inspectors with power to hold hearings, supervisors of special services, and assistant supervisors of special services, and may delegate to such deputy, assistant, hearings officers, supervising inspectors, supervisors and assistant supervisors the performance of any duty imposed upon the registrar relative to the administration or enforcement of laws relating to motor vehicles." (Emphasis supplied.)

St. 1973, c. 702 strikes out the second sentence of § 29 and substitutes the following sentence, the underlined words being the only changes in the sentence as it previously existed.

"He may also appoint, and for cause remove, *a director of field operations*, a deputy registrar, an assistant to the registrar, hearings officers, supervising inspectors with power to hold hearings, supervisors of special services, and assistant supervisors of special services, and may delegate to such

director of field operations, deputy, assistant, hearings officers, supervising inspectors, supervisors and assistant supervisors the performance of any duty imposed upon the registrar relative to the administration or enforcement of laws relating to motor vehicles." (Emphasis supplied.)

It is to be noted, however, that the Registrar has been given additional power to make appointments by G. L. c. 16, § 9, which reads in relevant part as follows:

"There shall be a division of motor vehicles, to be known as the registry of motor vehicles. The governor shall appoint an officer, to be known as the registrar of motor vehicles, who shall be the executive and administrative head of the division . . . In addition to the deputy registrar, assistant to the registrar, hearings officers, supervising inspectors, investigators and examiners authorized to be appointed by the registrar under section twenty-nine of chapter ninety, he may appoint such other officers and employees as may be necessary to carry out the work of the division. In the event of a vacancy in the office of registrar, his powers and duties shall be exercised and performed by the deputy registrar until a registrar is duly qualified. . . ." (Emphasis supplied.)

The position "Chief Deputy Registrar" does not appear in G. L. c. 90, § 29, the latter section referring in pertinent part only to appointment of a "director of field operations, a deputy registrar, as assistant to the registrar" as well as other lower rated positions. However, G. L. c. 16, § 9, as indicated above, authorizes the Registrar to "appoint such other officers and employees as may be necessary to carry out the work of the division." Superficially, this provision in G. L. c. 16, § 9 might seem to authorize the Registrar to appoint a Chief Deputy Registrar. However, § 9 expressly provides that "[i]n the event of a vacancy in the office of registrar, his powers and duties shall be exercised and performed by the deputy registrar until a registrar is duly qualified." (Emphasis supplied.) The only Deputy Registrar referred to in G. L. c. 16, § 9 is the Deputy Registrar provided for in G. L. c. 90, § 29. It is clear that the Legislature intended that only the person holding the position listed by the Legislature immediately below the office of Registrar should have the authority to perform the duties of the Registrar in the event of a vacancy in that position. It would seem, therefore, that the present "Chief Deputy Registrar" is the "deputy registrar" referred to in G. L. c. 90, § 29. This rationale is consistent with other legislation relating to disability of state officials or vacancies in their offices. Thus, G. L. c. 7, § 4D authorizes the Commissioner of Administration and Finance, except as otherwise provided by law, to appoint all employees of his office, and § 5 of c. 7 authorizes the Commissioner, with the consent of the Governor, to appoint a "first deputy commissioner of administration" who "in the absence or incapacity of the commissioner or in the event of a vacancy in the position of the commissioner . . . shall act as the commissioner until the absence or incapacity shall have terminated or the vacancy shall

have been filled." Similarly, although § 2 of G. L. c. 9 authorizes the State Secretary to "appoint a first deputy, a second deputy, and a third deputy and a fourth deputy each of whom shall perform the duties of a division head" and § 3 authorizes his deputies to perform their duties during the Secretary's disability, § 3 empowers only the First Deputy to "perform all statutory duties of the secretary until a secretary is duly qualified." Similar language is found in G. L. c. 11, which authorizes the appointment of a First Deputy Auditor (§ 2) and a second, third and fourth Deputy Auditor (§ 5), but empowers only the First Deputy to perform the duties of the State Auditor's office if by reason of sickness, absence or other cause the State Auditor is temporarily unable to perform the duties of his office, and in the event of a vacancy in that position, to perform all the statutory duties of the Auditor until an Auditor is duly qualified (§ 2).

In my opinion, therefore, it is clear that the "deputy registrar" referred to in G. L. c. 90, § 29 and c. 16, § 9 is the chief executive officer serving immediately below the Registrar, and that that person is the Chief Deputy Registrar. Accordingly, Mr. Gunaris must be classified in Group 4 for retirement purposes, and his mandatory retirement age is 65.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 39
The Honorable Nicholas L. Metaxas
Commissioner
Department of Corporations and Taxation
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts

April 24, 1974

Dear Commissioner Metaxas:

You have requested my opinion upon several questions of law arising from your intent to appoint as a "Chief of Bureau" in the Department of Corporations and Taxation an individual who is presently a member of the Legislature.

You have indicated that the position, one of twelve "Chiefs of Bureau", is currently vacant and that it is your duty to fill that vacancy by appointment.

You have also indicated that funds providing salary increases for each of the twelve "Chiefs of Bureau" were included in St. 1973, c. 466 sec. 7, and that such increases were subsequently approved by the Joint Committee on Ways and Means.

You further indicate that you have doubts concerning the propriety of such an appointment in light of the provisions of Article LXV of the Amendments to the Constitution of the Commonwealth.

You have asked the following questions:

1. Since the position of Chief of Bureau in the Department of Corporations and Taxation is not explicitly created by statute, is such position an "office" as that term is used in Article LXV of the Amendments to the Constitution of the Commonwealth?
2. If the answer to question one is "yes" is it proper, in light of the requirements of Article LXV of the Amendments to the Constitution of the Commonwealth for me to appoint to the position of Chief of Bureau in the Department of Corporations and Taxation a legislator serving in the General Court at the time of the general appropriation and specific action of the Joint Committee on Ways and Means of the Senate and House of Representatives referred to above?
3. If your answer to question two is "no", is it possible, pursuant to Stat. 1973, c. 466, S. 7, for the Joint Committee on Ways and Means of the Senate and House of Representatives to withdraw its approval of the upgrading in salary of a particular Chief of Bureau position which is presently vacant?
4. If your answer to question three is "yes", would it then be constitutionally permissible to appoint a present legislator to the above-mentioned position at the pre-existing salary notwithstanding the general appropriation (Stat. 1973, c. 466, s. 2, line item no. 1201-0100) which provides for various salary increases?

Article LXV of the Amendments to the Constitution of the Commonwealth, in pertinent part, provides that "[n]o person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term . . ."

I have determined that the position of "Chief of Bureau" was created prior to the current term of the Legislature.

From what I have learned of the duties and responsibilities of a "Chief of Bureau", it would appear that such person is an officer and that the position of such person would be an "office" within the meaning of Article LXV. To each of the twelve Bureau Chiefs, you have delegated certain duties within your Department. Administrative and executive power have been conferred upon them. (See *Opinion of the Justices* 302 Mass. 605, 620)

An examination of our Massachusetts decisions reveals, by all tests, such position to be an "office", In *Attorney General v. Tillinghast* 203 Mass. 539, the Court delineated the differences between an office and an employment. The duties of the officer are not merely clerical or those of an agent or servant. They must be performed in the execution of administration of the law. The duties of the officer are public in nature "involving in their performance the exercise of some portion of the sovereign power whether great or small . . ." Also, "a subordinate or inferior officer is none the less an officer." (See also *Opinion of the Justices* 347 Mass. 797, 800).

Funds necessary for a salary increase for the position in question were included in St. 1973 C. 466 sec. 2. The increase was later approved by the Joint Committee on Ways and Means.

It is obvious, therefore, that the vacant position is an office, the emoluments whereof have been increased during the term of your intended appointee.

My answer to your first question, therefore, is in the affirmative.

My answer to your second question is in the negative.

The approval by the joint committee on ways and means of salary rates on permanent positions is an on-going process, one which is not necessarily confined to a period immediately preceding the annual general appropriation act. It is a process which continues throughout the year, even after the enactment of the general appropriation. My understanding of the process is such that, for sufficient cause, the joint committee may withdraw its approval of a specific position or positions.

If, for example, you request that the joint committee withdraw its approval of the salary increase for the position in question, it is my opinion that the committee may properly withdraw its approval.

If the joint committee on ways and means withdraws its approval, the pre-existing salary would obtain and, therefore, the individual in question would be eligible for appointment.

Consequently, my answer to your third question is in the affirmative and my answer to your fourth question is in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 40
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

May 1, 1974

Dear Mr. Secretary:

You have requested my opinion whether the Division of Public Records of your office may award the Commission for the Blind with the contract for supplying pens with ink-filled cartridges without advertising for proposals and without competitive bidding pursuant to G. L. c. 6, § 134, if all other applicable statutes are complied with.

In considering your question, the provisions of G. L. c. 66, § 2 are applicable as to whether the Supervisor of Public Records should advertise for proposals as stated in your request. That section provides:

"The supervisor of records shall advertise for proposals to furnish the several departments and offices of the commonwealth, and of the counties, cities or towns in which public records are kept, with ink of a standard, and upon conditions,

established by him, at such periods and in such quantities as may be required, and he may make contracts therefor. . . ."

It seems clear that the Division of Public Records must advertise for proposals in accordance with the above-mentioned statute. There is no applicable statute or regulation in the Massachusetts General Laws that requires that there be competitive bidding for the supplying of pens with ink-filled cartridges.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 41
Honorable Arnold R. Rosenfeld
Executive Director
Committee on Criminal Justice
80 Boylston Street
Boston, Massachusetts 02116

May 3, 1974

Dear Mr. Rosenfeld:

Your Committee, acting through its Legal Counsel, has requested my opinion whether employees of the Committee on Criminal Justice are state employees under G. L. c. 152, § 69, thereby entitling them to utilize the Commonwealth as the insurer for workmen's compensation.

The Committee on Criminal Justice was created by St. 1973, c. 1021, which, among other things, amended G. L. c. 6 by striking out § 156 and inserting new §§ 156, 156A and 156B. The Committee is, in effect, a continuation of the former Committee on Law Enforcement and Administration of Criminal Justice which was created by the original § 156 of G. L. c. 6. Section 156B, as appearing in Chapter 1021, provides in the last two sentences thereof as follows:

"The executive director shall, with the approval of the governor, establish such staff positions and employ such administrative, research, technical, legal, clerical, and other personnel and consultants as may be necessary to perform the duties of the committee. Such personnel shall receive such compensation as the executive director, with the approval of the governor, shall from time to time fix, and shall not be subject to the provisions of chapter thirty-one or of section nine A of chapter thirty."

The last paragraph of § 156, as appearing in Chapter 1021, provides in part as follows:

"The committee may . . . accept gifts, grants, contributions, and bequests of funds from any department, agency or subdivision of federal, county, or municipal government and any individual, foundation, corporation, association, or public authority for the purpose of providing or receiving services,

facilities, or staff assistance in connection with its work. Such funds shall be deposited with the state treasurer and may be expended by the committee in accordance with the conditions of the gift, grant, contribution, or bequest, without specific appropriation. The committee may expend for services and other expenses any amounts that the general court may appropriate therefor."

You have advised me that the Committee has an executive director who is a full time employee and that the Committee's staff is composed of full and part time employees and that it also utilizes temporary help under contract to a third party, as well as consultants.

The Workmen's Compensation Act, G. L. c. 152, defines an employee as "every person in the service of another under any contract of hire, express or implied, oral or written" (§ 1(4)). The Workmen's Compensation Act is made applicable to the Commonwealth by §§ 69 and 74.

The pertinent provisions of § 69 are:

"The commonwealth . . . shall pay to laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment, or, in the case of death resulting from such injury, to the persons entitled thereto, the compensation provided by this chapter . . . Sections seventy to seventy-five, inclusive, shall apply to the commonwealth . . . The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive, shall include . . . other employees . . . regardless of the nature of their work, of the commonwealth . . . to such extent as the commonwealth . . . acting . . . through the governor and council . . . shall determine, as evidenced by a writing filed with the department . . ." [Now the Division of Industrial Accidents].

Section 74 provides in part as follows:

"Sections sixty-nine to seventy-five, inclusive, shall apply to all laborers, workmen and mechanics in the service of the commonwealth . . . under any employment or contract of hire, express or implied, oral or written, including those employed in work done in performance of governmental duties . . ."

You have advised that the Governor and Council voted on March 10, 1937, "to so extend the terms 'laborers, workmen and mechanics' as to include all employees, regardless of the nature of their work or duties, but not to include employees of the police or fire force." You have also advised that evidence of the action of the Governor and Council was submitted in writing to the Department of Industrial Accidents on March 11, 1937.

In your accompanying brief you further informed me that:

"Committee employees are currently classified as 02 employees within the Department of Administration and

Finance's classification scheme for state employees. Committee employees' compensation is a mix of federal and state funds drawn from one account administered by the Department of Administration and Finance. The Committee has designated all state matching funds to the federal grant from the Law Enforcement Assistance Administration for use solely in compensating Committee employees. On a monthly basis compensation might be made completely from federal funds, completely from state funds, or a combination of the two; however, on a yearly basis, compensation is sixty percent federal funds and forty percent state funds. Consultants hired by the Committee are hired solely with federal funds.

"Committee employees are governed by the same rules which cover state employees who are covered by workmen's compensation. Full-time employees are classified as 02 employees by the Department of Administration and Finance. Each full-time employee works the standard thirty-seven and one half hour work week. Vacation leave is accumulated at the rate of one working day per month, up to ten days per year, until after five years when leave accumulates at the rate of one and one quarter days per month. Sick leave is accumulated at the rate of one and one quarter working days per month. Employees receive yearly raises based on the step increases established in M.G.L. c. 30, sec. 46. Employees must comply with state agency travel regulations. Full-time Committee employees have no expected termination date. They are expected to work at the Committee so long as they continue to perform their duties in conformance with the standards of their positions.

"Committee employees, although partially compensated with federal funds, are not eligible for inclusion in the retirement system for United States Civil Service employees. However, they are required to participate in the Commonwealth's contributory retirement system for state employees as 02 employees. Committee employees are also eligible for participation in the Group Health Insurance program for state employees and are eligible for participation in the credit union.

"Part-time employees usually are paid on an hourly basis and receive no other benefits. Temporary help and consultants generally are compensated pursuant to contracted provisions and are ineligible to receive regular state employee benefits."

I believe that the source of funds for payment of the Committee's employees is immaterial. The statute gives the Committee the power to accept federal funds (subject to depositing them in the State Treasury) and empowers the executive director with the approval of the Governor to employ the specified personnel and consultants and to fix their compensation. The fact that the Department of Administration and Finance has

classified them as employees and that they are eligible for the group health insurance program for state employees would support the conclusion that they in fact are employees of the Commonwealth. Accordingly, they would be entitled to workmen's compensation and can look to the Commonwealth as an insurer. My conclusion does not, of course, apply to temporary help who are employed under contracts with third persons, or to consultants, who are independent contractors.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 42
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston Massachusetts 02133

May 28, 1974

Dear Mr. Secretary:

I hereby certify that the attached "Amendment to An Initiative Petition" signed by seven persons being registered voters of the Commonwealth was filed with me on May 17, 1974. I further certify that the "Amendment" pertains to an Initiative Petition filed with me not later than the first Wednesday of August, 1973, entitled "AN ACT CREATING A CORRUPT PRACTICES COMMISSION AND STRENGTHENING THE LAWS RELATING TO CAMPAIGN EXPENDITURES AND CONTRIBUTIONS" which petition was filed with you on or about the first Wednesday of September, 1973 and was completed under the provisions of Article 48 of the Articles of Amendment to the Constitution of the Commonwealth and transmitted by you to the Clerk of the House of Representatives under the provisions of Amend. Art. 48, Init., Pt. 2, § 4. It appears that the General Court has failed to pass the proposed law within the period of time specified in Amend. Art. 48, Init., Pt. 5, § 2.

The "Amendment" is signed by a majority of the registered voters (being ten in number) who first signed the original Initiative Petition. In my opinion, the amendment made by such proposers is perfecting in its nature and does not materially change the substance of the measure, the amendment having been made necessary by intervening legislation enacted by the General Court and approved by His Excellency, the Governor, namely, St. 1973, c. 1173.

In my opinion, the summary previously furnished to you with respect to the original Initiative Petition requires no change.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 43

May 28, 1974

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

Dear Commissioner Kehoe:

With respect to your duties as executive and administrative head of the Department of Public Safety, you have requested my opinion whether a certain rule enacted pursuant to G. L. c. 147, § 1 applies to members of the Uniformed Branch of the Massachusetts State Police. Revised Rule 8.3 states that no inspector or officer may take outside employment unless he provides the Commissioner of Public Safety with an opinion of the Attorney General stating that such outside employment would not contravene the provisions of G. L. c. 268A regulating the conduct of public employees. My answer is in the negative.

The Department of Public Safety presently consists of the division of state police, the division of inspections and the division of fire prevention. G. L. c. 22, § 3. The division of state police is divided into the detective branch and the uniformed branch.

Appointments to the detective branch are made pursuant to G. L. c. 22, § 6 and those to the uniformed branch pursuant to G. L. c. 22, § 9A. While § 9A refers on its face to the division of state police and not merely to the uniformed branch, the administrative practice of maintaining distinct branches has been ratified by the Legislature. Various provisions enacted subsequent to § 9A have explicitly referred to either uniformed members appointed pursuant to § 9A or detectives appointed pursuant to § 6, or both. G. L. c. 22, § 9D (additional hours of duty for uniformed members); G. L. c. 22, § 9I (additional hours of duty for detectives); G. L. c. 32, § 26 (retirement of state police officers); G. L. c. 262, § 53B (witness fees of state police officers); G. L. c. 262, § 53C (compensatory time off to police officers.)

The officers and inspectors appointed pursuant to G. L. c. 22, § 6 are governed by the departmental rules enacted pursuant to G. L. c. 147, § 1. The preamble to those rules explicitly provides that "[t]hese rules and regulations shall not be deemed to apply to an officer of the division of state police (uniformed branch)." The members of the uniformed branch are governed by separate and distinct rules and regulations enacted pursuant to G. L. c. 22, § 9A. Therefore, any conditions pertaining to the outside employment of uniformed members must be made part of those rules.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 44

May 28, 1974

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

Dear Commissioner Koplow:

You have requested my opinion with respect to the legality of a plan whereby a certain savings bank intends to make available to its customers an extension of credit by means of a revolving credit account against which the customer may draw negotiable checks. You state that these checks are essentially identical with the instruments used by savings banks in connection with savings deposit accounts subject to withdrawal (i.e., a "N.O.W. account", so-called), as described in *Consumer Savings Bank v. Commissioner of Banks*, Mass. Adv. Sh. (1972) 929, and may be negotiated and used for any purpose for which ordinary checks are used. Instead of being charged against a savings deposit account, however, the proposed type of check is debited against a revolving credit account, and the customer would receive periodic statements of the kind commonly used under credit card plans.

You state that the revolving credit account will also be used in conjunction with an ordinary "N.O.W. account," so that if a depositor draws an overdraft against his "N.O.W. account," the bank will automatically make a "book-entry deposit" to the "N.O.W. account," sufficient at least to cover the overdraft, and charge the amount of the "book-entry deposit" to the depositor's revolving credit account.

You state that you question the legality of these plans, and ask the following questions:

- (1) "May a Massachusetts savings bank allow a borrower to draw fully negotiable checks against a revolving credit account?"
- (2) "May a Massachusetts savings bank, upon presentment to it of a check drawn against a negotiable withdrawal order account which at the time of presentment contains insufficient funds to pay the check, credit the depositor's account by an amount equal to or greater than the amount of the deficiency, honor the check, and debit a revolving credit account maintained by the depositor for the amount of the advance to the deposit account?"

Your Deputy Commissioner and General Counsel has submitted to me his views on these questions, as have counsel for the Savings Bank Association of Massachusetts and for the Home Savings Bank. For the reasons set forth below, I answer both questions in the affirmative.

The plan you have outlined, in each of the variations described in your questions, is, as you have suggested, similar in some respects to the situation involved in the *Consumers Savings Bank* case, *supra*. In that case the question was whether a savings bank subject to G. L. c.

168 had authority to allow a depositor to withdraw funds from his savings account by means of an order of withdrawal in negotiable form, without a passbook and without the necessity of the depositor or his representative appearing at the bank. The negotiable withdrawal order, like the familiar form of a check, was an unconditional order to the bank signed by the drawer-depositor to pay a specified sum to order and on demand. The Supreme Judicial Court held that since there was no express statutory prohibition of such a plan, there was "no reason in law why the bank should be prohibited from putting its plan into effect . . ." Mass. Adv. Sh. (1972) at 930. Since a savings depositor could in any event take his withdrawal in the form of a cashier's check or money order, allowing him to withdraw the funds by means of a negotiable withdrawal order was "a distinction without a difference." *Id.* at 931.

The plan being currently proposed is even closer to that considered in an unreported decision of the Superior Court for Suffolk County in *Golden Credit Corp. v. Koplow, Commissioner*, Suffolk Superior Ct. No. 94420 Equity (Findings, Rulings & Order for Decree, Aug. 3, 1972). In that case a savings bank offered to its customers a line of credit in the form of a revolving credit account. The line of credit was available up to a maximum limit established by the bank, and a check guarantee card was issued to the depositor. The depositor could thereafter initiate a loan by making out a draft to any established merchant, business or firm in the United States. The payee of the draft agreed to deposit it for collection in the bank upon which it was drawn within five business days from the date of the draft. The Superior Court held that the savings bank had authority to implement its plan under G. L. c. 168, §§ 37 and 37B.

General Laws, c. 168, § 37, provides in part that savings banks

"may make a loan or series of loans to one or more responsible borrowers, evidenced by note, loan agreement, or other instrument, with or without security, at such lawful rate of interest and subject to such other lawful charges as the board of investment shall by rules or regulations determine . . ."

Section 37B provides in part that savings banks

"may issue credit cards for the purpose of making loans to one or more persons. Such loans shall be made by such means as the board of investment shall determine, including but not limited to means of paying to or for the account of any party the amount of any transaction in which goods or services were sold or cash advanced to said party in reliance on a credit card issued by such [savings bank] . . ."

"Such credit cards, loans, advances, and documents used in connection therewith shall be in such form and upon such terms and conditions as the board of investment shall determine . . ."

The court in the *Golden Credit* case stated the issue as being whether a savings bank was authorized to disburse loan proceeds to persons other than the borrower by means of guaranteed drafts drawn by the

customer-debtor. Relying by analogy on the above-quoted language in the *Consumers Savings Bank* case, *supra*, and authority cited therein, the court held that since §§ 37 and 37B of c. 168 do not specify the manner in which savings banks must disburse the proceeds of loans or credit-card transactions to its customers, there was nothing to prevent the bank from disbursing them to a designated payee.

In my opinion the present plan as described in your letter is permissible under the rationale of the *Consumers Savings Bank* case and, more particularly, the *Golden Credit* case. With respect to your first question, whether a savings bank may allow a borrower to draw fully negotiable checks against a revolving credit account, I see no essential difference between such a practice and the plan in the *Golden Credit* case. It is true that the court in that case noted that the "checks" concerned there were not negotiable by the payee: he was required to present them within five days for collection at the specified bank. However, the court in the *Golden Credit* case held in effect that the "check" was merely an "other instrument" (see G. L. c. 158, § 37) evidencing the loan. Nothing in § 37 prohibits such "other instrument" from being negotiable. In view of the court's reliance on the *Consumers Savings Bank* case, where the checks drawn on a savings account were fully negotiable, I do not think that the court placed any particular weight on the limited negotiability of the checks. Since the payee could upon presentment receive the loan proceeds from the collecting bank in the form of a cashier's check or money order, the limited negotiability of the instrument creating the loan amounts to "a distinction without a difference" under the reasoning of the *Consumers Savings Bank* opinion.

With respect to your second question, whether an overdraft on a depositor's "N.O.W." savings account may be honored by, in effect, transferring funds from his revolving credit account to his savings account, it is my opinion that this variation of the plan is also permissible under present law. The use of negotiable withdrawal orders for savings accounts was authorized by the decision in the *Consumers Savings Bank* case, and the creation of a loan by drawing a negotiable instrument is, as stated above, consistent with the decision in the *Golden Credit* case. I am aware of nothing in the statutes which prohibits the use of the two plans in tandem, assuming that all proper disclosures have been made to the depositor as to the liability or interest charges he might incur. The crediting of the loan created by the overdraft to the depositor's "N.O.W." account is simply another method of disbursing the proceeds of the loan, and as the court held in the *Golden Credit* case, neither § 37 nor § 37B specifies any particular manner in which such proceeds must be disbursed.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 45

June 10, 1974

Mr. John F. Cullen

*Executive Secretary**State Examiners of Electricians*

Leverett Saltonstall Building

100 Cambridge Street

Boston, Massachusetts 02202

Dear Mr. Cullen:

You have requested my opinion as to whether the Board of State Examiners of Electricians may pay the Board's Public Service Member a salary while he is also employed by the Department of Mental Health as a Supervisor of Laundry. According to your letter, John P. Chiulli was appointed as a member of the Board of State Examiners of Electricians in 1972 pursuant to G. L. c. 13, § 32, which provides that "the appointive members shall each receive for their services thereunder a salary of seven hundred and fifty dollars." (Emphasis supplied.) On April 1, 1974, Mr. Chiulli was appointed to a Civil Service position in the Department of Mental Health, and it is assumed that this appointment is in the nature of a full-time salaried position.

The first statute which applies under the facts provided is G. L. c. 30, § 21 which provides in pertinent part that "a person shall not at the same time receive more than one salary from the treasury of the commonwealth." The statute operates to prohibit the receipt of two salaries regardless of how "unrelated the positions in question may be." 1966 *Op. Atty. Gen.* 171. Although some opinions of my predecessors discuss the meaning of the word "salary," in the present situation, the phraseology of the statute under which Mr. Chiulli was appointed resolves the issue as it specifically states that Mr. Chiulli will receive a "salary." 1959 *Op. Atty. Gen.* 95. Therefore, the answer to the question of whether he can hold two positions and receive two salaries is in the negative.

If G. L. c. 30, § 21 did not operate as a bar, G. L. c. 29, § 31 would. The latter provides that "[S]alaries payable by the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." Since the statute precludes a person from "receiving compensation for any other service rendered during the usual hours of employment in the salaried position which he occupies," 1956 *Op. Atty. Gen.* 42 (quoting *V Op. Atty. Gen.* 699, 701), Mr. Chiulli may not be paid by the Commonwealth for services rendered at Board meetings during his hours of employment with the Department of Mental Health.

I note that the statutes to which I have made reference constitute a bar to receipt of two salaries and not to holding two unrelated positions with the Commonwealth. It is therefore possible for Mr. Chiulli to waive receipt of the salary from the Board of State Examiners of Electricians but not a portion of the salary received from the Department of Mental Health, as long as the fulfillment of his duties with the Department of Mental Health is not affected. 1966 *Op. Atty. Gen.* 171; 1956

Op. Atty. Gen. 42. Finally, my conclusion is limited to the receipt of salaries and not such other compensation, e.g., travel expenses, which are not encompassed by the definition of salary.

“ ‘Salary’ is limited to compensation for services established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated annual compensation.” 1970 *Op. Atty. Gen.* 66.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46

June 10, 1974

Mr. Herman H. Golding, C.P.A.
Chairman, Board of Public Accountancy
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Golding:

You have asked my opinion on the constitutionality of the citizenship requirement of M.G.L. c. 112, § 87A(a), which provides:

“(a) The board of public accountancy, hereinafter in this section and in sections eighty-seven B to eighty-seven E, inclusive, called the ‘board,’ shall register as a certified public accountant and issue a certificate of ‘certified public accountant’ to any person who (1) *is a citizen of the United States*, (2) is domiciled in the commonwealth, (3) has attained the age of eighteen years, (4) is of good moral character, (5) shall have successfully passed a written examination given by the board in such subjects as the board shall determine to be appropriate, or shall receive a partial or total waiver of examination under regulations made by the board and (6) shall have satisfied the board that he meets the requirements respecting education and experience set by regulations made by the board under this section.” (Emphasis supplied.)

For the reasons which follow, it is my opinion that the citizenship requirement of M.G.L. c. 112, § 87A(a) is unconstitutional and may not be enforced.

The Fourteenth Amendment to the Constitution of the United States protects aliens as persons who may not be deprived of the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Included within this guarantee of equal protection is the right to pursue an occupation without discrimination based on race or nationality. *Truax v. Raich*, 239 U.S. 33 (1915). It has been held unconstitutional for a state to deny fishing licenses to aliens. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

In *Graham v. Richardson*, 403 U.S. 365, at 372 (1971), the Supreme Court held that:

“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”

A state which adopts such a suspect classification as alienage bears a heavy burden of justification. In two recent cases, the Supreme Court found that there were no sufficient state interests to justify excluding aliens from admission to the bar, *In re Application of Griffiths*, 413 U.S. 717 (1973), or to justify excluding aliens from civil service positions, *Sugarman v. Dougall*, 413 U.S. 634 (1973).

In *Griffiths*, the Court rejected arguments that the alienage classification was justified by any considerations of the role of attorneys as “officers of the Court.” The Court noted that the state’s substantial interest in the qualifications of those admitted to the bar was not served by a broad prohibition on aliens as a class. The state was still free to reject individual unqualified candidates.

In *Sugarman*, the Court held that while it might be permissible for states to exclude aliens from high public offices, it is not permissible for states to prevent all aliens from holding positions in the classified, competitive civil service.

Whatever interests the Commonwealth may have in excluding aliens from licensing as public accountants, they do not appear to be any stronger than the interests involved in *Griffiths* and *Dougall*. Accordingly, it is my opinion that the citizenship requirement of G. L. c. 112, § 87A(a) violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is invalid.

Very truly yours,
ROBERT H. QUINN
Attorney General

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