



The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1980



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The Commonwealth of Massachusetts

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, 1980.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

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FRANCIS X. BELLOTTI

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*Assistant Attorneys General Assigned to Division of
Employment Security*

Robert Lombard³⁵
George J. Mahanna

John Mendelsohn

Chief Clerk
Edward J. White

Assistant Chief Clerk
Avis Patten

APPOINTMENT DATE

- 1. 1/21/80
- 2. 12/19/79
- 3. 3/3/80
- 4. 1/2/80
- 5. 7/23/79

TERMINATION DATE

- 50. 2/8/80
- 51. 8/17/79
- 52. 12/28/79
- 53. 2/21/80
- 54. 7/12/79

6. 12/19/79
7. 2/25/80
8. 8/6/79
9. 6/2/80
10. 4/14/80
11. 1/28/80
12. 2/19/80
13. 8/20/79
14. 12/19/79
15. 3/10/80
16. 2/4/80
17. 3/3/80
18. 2/4/80
19. 11/1/79
20. 3/24/80
21. 5/12/80
22. 3/31/80
23. 4/7/80
24. 6/9/80
25. 5/19/80
26. 10/2/79
27. 1/28/80
28. 7/16/80
29. 6/30/80
30. 9/4/79
31. 3/3/80
32. 5/27/80
33. 1/2/80
34. 11/14/79
35. 1/29/80
36. 5/11/80
37. 1/21/80

55. 11/23/79
56. 1/2/80
57. 3/17/80
58. 5/15/80
59. 10/26/79
60. 5/30/80
61. 5/16/80
62. 11/23/79
63. 5/2/80
64. 11/21/79
65. 6/30/80
66. 10/9/79
67. 1/17/80
68. 10/3/79
69. 9/25/79
70. 1/2/80
71. 12/7/79
72. 9/28/79
73. 12/10/79
74. 4/25/80
75. 2/18/80
76. 8/17/79
77. 5/9/80
78. 8/16/79
79. 1/21/80
80. 6/27/80
81. 5/9/80
82. 2/28/79
83. 9/28/79

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1980

<i>Account Number</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advances</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0001	Administration	\$6,324,692.13	\$5,360,899.63	\$1,915.00	\$127,770.64	\$ 834,106.86
0810-0014	Public Utilities Auth. by Ch. 1224 1973	250,000.00	189,394.60	—	60,596.45	8 95
0810-0021	Medicaid Fraud Control Unit	964,419.00	865,913.92	—	25,312.81	73,192.27
0810-0031	Local Consumer Aid Fund	250,000.00	248,850.06	—	227.36	922.58
0810-0100	LEAA Hard Cash Matching Funds	161,722.00	81,056.02	—	5,556.00	75,109.98
0810-0201	Insurance; Auth. by Ch. 266, 1976	200,000.00	152,016.72	—	47,933.39	49.89
0810-8771	Capital Outlay Furnishings and Equipment - Law Library	85,020.18	42,167.37	—	8,141.17	34,711.64
0821-0100	Settlement of Claims	250,000.00	81,037.95	—	168,962.05	—
	TOTALS	<u>\$8,485,853.31</u>	<u>\$7,021,336.27</u>	<u>\$1,915.00</u>	<u>\$444,499.87</u>	<u>\$1,018,102.17</u>
	Federal Funds					
	from Schedule 2	<u>\$1,213,575.20</u>	<u>\$ 859,362.05</u>	<u>—</u>	<u>—</u>	<u>\$ 354,213.15</u>
	GRAND TOTAL	<u>\$9,699,428.51</u>	<u>\$7,880,698.32</u>	<u>\$1,915.00</u>	<u>\$444,499.87</u>	<u>\$1,372,315.32</u>

FEDERAL GRANTS

Schedule 2

Receipts and Disbursements
July 1, 1979 to June 30, 1980

<i>Account Number</i>	<i>Account Name</i>	<i>July 1, 1979</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance</i>
					<i>6/30/80</i>
0810-6610	Attorney General Trust Fund	\$ 66,700.26	\$ 18,841.67	\$ —	\$ 85,541.93
0810-6630	Water Pollution Control Program	24,553.72	155,500.00	120,555.39	59,498.33
0810-6631	Air Pollution Control Program	5,764.89	50,000.00	45,108.69	10,656.20
0810-6637	Department of Justice Anti Trust Enforcement Unit	26,736.64	275,098.00	279,499.95	22,334.69
0810-6638	Federal Energy Administration				
0810-6639	Office of Consumer Services	24,484.35	155,000.00	159,488.06	19,996.29
	Department of Health, Education, & Welfare Consumer Education				
0810-6640	Violent Crime Unit	4,718.00	—	—	4,718.00
0810-6641	Organized Crime Unit	154.58	—	—	154.58
0810-6642	Tax & Insurance Prosecution Division	103,812.51	—	102,712.51	1,100.00
0810-6643	Anti Trust Enforcement Program	—	50,000.00	49,988.00	12.00
	N. England Bid Monitoring Project				
0810-6644	C.A.P.E.S.	—	76,000.00	55,655.78	20,344.22
0810-6645	Tax & Insurance Prosecution Division	—	140,000.00	19,463.26	120,536.74
0810-6661	Coastal Zone Management Program Implementation	5,110.58	31,100.00	23,480.11	7,619.89
	TOTALS	<u>\$262,035.53</u>	<u>\$951,539.67</u>	<u>\$859,362.05</u>	<u>\$354,213.15</u>

Schedule 3

SUSPENSE FUNDS

Receipts and Disbursements

July 1, 1979 to June 30, 1980

Account Number	Account Name	July 1, 1979	Balance	Receipts	Disbursements	Balance	6/30/80
0810-6701	Dexter Nursing Home Case	\$ 344.95					\$ 344.95
0810-6703	Miami Vacations Inc. d/b/a Resort Hotel	869.05					— 869.05
0810-6704	Framingham Civil Service School						
	Dante Gregorie d/b/a United Auto	16.18					16.18
0810-6705	Buyers Trust Account						
	Mass. Rentals Inc. d/b/a City Wide	1,100.00					1,100.00
0810-6708	Rentals						
	C. Murphy, W. Hartwick, Bird, Inc.	380.00					380.00
0810-6712	Univ.	162.49					162.49
0810-6716	Compact Auto Inc.	1,500.00					1,500.00
0810-6721	Wish Realty Association	1,000.00			1,000.00		—
0810-6724	Bluebird Realty Trust	1,168.50					1,168.50
0810-6726	Kenneth T. & Michael Wasil	1,297.05			1,297.05		—
0810-6732	Thomas C. McMahon V. Nyanza	34,379.98					34,379.98
0810-6733	G.C. Services	500.00					500.00
0810-6737	Allan G. Edward M.D.	.10					.10
0810-6738	General Motors Corp.						
	Wallace Civic Center; Roberta Flack	52.21			32.00		20.21
0810-6739	Concert	.92			.92		—
0810-6747	Brookfield Insurance Agency	290.63					290.63
0810-6748	M.A.R. Auto Wholesalers	6.00					6.00
0810-6749	Richard Boisvert						
	Joseph D. Shuman d/b/a Roch Insurance	300.00			300.00		—
0810-6751	Agency	10,000.00					10,000.00
0810-6752	J.J. Bodner Insurance Agency	2,605.45			2,605.45		—
0810-6754	TKO Insurance Agency	10,000.00					10,000.00
0810-6756	Diamedic Weight Control Center Inc	5,000.00					5,000.00
0810-6758	Peregrine White Sanctuary Inc	23,200.69					23,200.69
0810-6759	Don's Getty Service Station	1,500.00					—
0810-6760	Frank H. Parks	945.00		741.10	2,241.10		1,335.00
0810-6761	Hilltop Toyota David Riener	—		390.00			—
				738.40	738.40		—

SUSPENSE FUNDS
Receipts and Disbursements
July 1, 1979 to June 30, 1980 (Cont.)

Account Number	Account Name	July 1, 1979	Receipts	Disbursements	Balance
0810-6762	Alfred Zimei d/b/a Dinner Tours Assurance	\$ —	\$ 450.00	\$ 400.00	6,30.80
0810-6763	Comm. v. Central Secret Service Bureau	—	300.00	300.00	\$ 50.00
0810-6764	Comm. v. Int'l Computer Match of Boston	—	1,500.00	1,500.00	—
0810-6765	Comm. v. William Aubin	—	32,000.00	32,000.00	—
0810-6766	Comm. v. Francis A. Connor d/b/a Car Finders	—	2,000.00	2,000.00	—
0810-6767	Comm. v. Automotive Products and Richard Ryll	—	550.00	—	550.00
0810-6768	Comm. vs. Robert Chalve	—	595.00	—	595.00
0810-6769	Comm. v. Eastfield Auto Sales	—	1,500.00	1,500.00	—
0810-6770	United Marketing Corporation	—	3,600.00	2,600.00	1,000.00
0810-6771	Comm. vs. C. L. Stott	—	3,510.00	3,510.00	—
0810-6772	Main St. Insurance	—	20,245.88	19,880.50	365.38
0810-6773	Owen's Motors	—	2,812.50	—	2,812.50
0810-6774	King B's Auto Mart	—	7,000.00	—	7,000.00
0810-6775	John Roche, et al	—	30,961.54	27,476.70	3,484.84
0810-6776	Leonard Corporate	—	1,000.00	999.80	.20
0810-6777	Middlesex Vacuum Cleaners	—	1,250.00	—	1,250.00
0810-6778	General Mass. Mktl.	—	305.00	—	305.00
0810-6779	Image One, Inc	—	659.00	—	659.00
0810-6780	Bonded Dodge	—	3,000.00	—	3,000.00
	TOTALS	\$96,619.20	\$115,108.42	\$100,381.92	\$111,345.70

DEPARTMENT OF THE ATTORNEY GENERAL

Schedule 4

STATEMENT OF INCOME
FOR FISCAL YEAR ENDED
JUNE 30, 1980

Account Number	
0801-40-01-40	Fees, Filing Reports, Charitable Organizations
0801-40-02-40	Fees, Registrations, Charitable Organizations
0801-40-03-40	Fees, Professional Fund Raising Council
0801-41-01-40	Fines & Penalties - Miscellaneous
0801-41-02-40	Fines & Penalties, Civil Actions
0801-62-01-40	Reimbursement for Services, Cost of Civil Actions
0801-62-02-40	Reimbursements for Services, Cost of Investigations
0801-67-01-40	Reimbursements, Indirect Cost Allowances
0801-69-99-40	Miscellaneous
	TOTAL INCOME
	\$ 135,970.00
	15,690.00
	300.00
	—
	7,150.00
	2,490.57
	8,747.07
	1,473,706.10
	<u>4,586.57</u>
	\$1,648,640.31

The Commonwealth of Massachusetts

In accordance with the provisions of section 11 of Chapter 12 and of section 32 of Chapter 30 of the General Laws, I hereby submit the Annual Report of the Department of the Attorney General. This document covers the period from July 1, 1979 to June 30, 1980 and is the sixth Annual Report I have filed as the Attorney General of the Commonwealth.

Each of the five reports I have previously filed opens with a recitation of the administrative changes made in the Department during the relevant fiscal year and a brief summary of the most significant accomplishments of the four Bureaus which comprise the Department. This report is different. While the body of the report chronicles the activities of the Department as a whole, I wish to take this opportunity to describe individual non-delegated responsibilities I have as Attorney General.

The single most time consuming of my personal responsibilities during fiscal year 1980 was my participation as a member of the Special Commission Concerning State and County Buildings. This Special Commission was established by Chapter 5 of the Resolves of 1978 to investigate and study, as a basis for legislative action, the existence and extent of corrupt practices and maladministration affecting the award of contracts related to the construction of state and county buildings. The Resolve, as amended, makes me not only the only governmental figure on the Special Commission but also the only law enforcement official who is a Commissioner. My experience as an elected official and as an attorney with extensive criminal law background, both as defense counsel and a prosecutor, make me unique among the Commissioners, and I have therefore felt compelled to devote a large portion of my energies to the work of the Commission.

The work of the Special Commission is a beginning rather than an ending point. Our primary function is to investigate and make findings to provide the factual basis for legislative reform of the public construction system. We have, in fact, conducted the required investigations and have drafted a series of bills in furtherance of our legislative mandate. At the close of the period covered by this report, it appears that the Special Commission is about to score a series of significant legislative successes. As this legislative session winds to a close, a series of bills filed by the Commission are near final enactment or are awaiting gubernatorial approval. Among those bills are a comprehensive campaign finance measure, which would create a mixed system of public and private funding,¹ an equally comprehensive bill designed to improve the system of public construction in the Commonwealth,² and a measure creating the office of Inspector General.³ Passage of any or all of these bills will make my efforts worthwhile.

¹ After the close of the reporting period the campaign finance bill failed to be enacted.

² After the close of the reporting period the measure was enacted and signed into law. St. 1980, c. 579.

³ After the close of the reporting period the measure was enacted and signed into law. St. 1980, c. 388.

Apart from the Special Commission, one of my more satisfying personal accomplishments was also legislative in nature and came with the passage of the Commonwealth's new civil rights act. St. 1979, c.801. The act, which the Department of the Attorney General helped draft and for which we lobbied extensively, affords this office and the private citizens of the Commonwealth significant new opportunities to vindicate their rights in state, as opposed to federal, court.

The civil rights act, like the measures proposed by the Special Commission, has special significance because it reflects the personal philosophy I have attempted to imbue in the individuals who staff the Department. Many of those individuals have been associated with the Department since I took office six years ago. With the passage of time it would be extremely easy for us to lose our initiative and to become passive in our representation of the public interest. In order to combat inertia, it is imperative that we constantly seek new solutions to the state's legal problems and new tools to accomplish those ends.

These legislative measures are prime examples of our quest, but they are by no means the only examples. Many of the cases brought by this Department are equally illustrative of this philosophy, and a significant portion of my time is spent supervising attorneys in the prosecution of those cases.

One of the hallmarks of my first term as Attorney General was our aggressive enforcement of environmental safeguards. This year, while we have continued to maintain the degree of intensity we always brought to our traditional civil enforcement work, we have also begun to use our new criminal tools to prosecute hazardous waste cases. During the reporting period, the Criminal Bureau obtained more than one hundred indictments against those who have polluted our air, water and land by illegally disposing of hazardous waste. The coordination of the efforts of attorneys of the Criminal Bureau with those assigned to the Environmental Protection Division has been time consuming, but the results have justified that commitment of time.

In the Public Protection Bureau we attacked such issues as the level and cost of health care services and the skyrocketing costs of energy by bringing an imaginative series of cases under the consumer protection act. G.L. c.93A. We also utilized our common law powers to obtain nearly a million dollars in recoveries for women in the work force who had been victimized by unlawful maternity leave policies or by discriminatory employment practices in the publishing industry. Each of these efforts required my personal supervision, but again the results attained for the citizens of the Commonwealth were startling.

Perhaps because of my work on the Special Commission, I have been particularly sensitive to construction-related legal cases and the constantly escalating costs of government. In the Civil Bureau we dealt with the first of these problems by creating a special unit to deal with public construction cases, and in the Government Bureau we addressed the second by "initiating" a series of cases designed to insure that property owners paid fair taxes throughout the Commonwealth and another series of cases against federal governmental agencies seeking additional funds under a wide variety of revenue-sharing programs.

By focusing on my personal activities and on the foregoing developments illustrating our resistance to complacency, I by no means intend to disparage our more traditional efforts. Rather, the success of this administration can best be measured by our ability to simultaneously perform our traditional role as

defense lawyers for the Commonwealth, its agencies and officers and to bring affirmative public interest litigation affecting the lives of the citizens of Massachusetts. I am confident that the accomplishments reflected in the ensuing pages of this Report reflect the balance we have attempted to instill in the Department.

MONEY RECOVERED AND SAVED FOR THE COMMONWEALTH AND ITS CITIZENS

I. MONEY RECOVERED FOR THE COMMONWEALTH TREASURY

1. Antitrust Civil Penalties	\$ 15,000
2. Charitable Registrations	138,530
3. Escheats	211,930
4. Collections, Rent	343,085
5. Collections, General	697,589
6. Delinquent Unemployment Compensation Claims Recovered	850,440
7. Fraudulent Unemployment Compensation Claims Recovered	166,698
8. Civil Penalties in Environmental Protection Cases	250,000
9. Restitution and Fines in Tax Fraud Cases	55,000
10. Restitution, Vocational Education Cases	500,000
	<u><u>TOTAL \$3,228,272</u></u>

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

1. Antitrust Recoveries	\$ 571,100
2. Back Pay Recovered for Female Employees at Publishing Companies	450,000
3. Judgments and Restitution in Consumer Protection Court Cases	1,265,340
4. Consumer Recoveries- Non-Court Cases	444,314
5. Consumer Recoveries- Springfield Office	68,318
6. Consumer Savings- Springfield Office	24,714
7. Donation Negotiated for Child Guidance Center	4,500
8. Maternity Disability Payments Recovered	500,000
9. Savings in Auto Insurance Hearings	100,000,000
10. Savings in Utility Rate Hearings	92,682,051
	<u><u>TOTAL \$196,010,337</u></u>

I. CIVIL BUREAU

CONTRACTS DIVISION

The responsibility of the Contracts Division generally involves three areas:

- A. Litigation involving matters in a contractual setting;
- B. Advice and counsel to state agencies concerning contractual matters; and
- C. Contract review.

A. *LITIGATION*

The Contracts Division represents the Commonwealth, its officers and agencies in all Civil actions involving contract disputes.

A majority of the cases handled by the Division concern state highway, building or public work construction claims. Other typical types of cases in the Division involve disputes arising from leases, employment contracts, statutes, rules and regulations. The Contracts Division attorneys represent the Commonwealth as both a party plaintiff and defendant.

In contract actions against the Commonwealth, G.L., c. 258, § 12, is, for the most part, the controlling statute. That section permits actions not arising from tort to be brought against the Commonwealth in the Superior Court.

Increasingly, additional parties are becoming involved in contract actions, since there has been a tendency to implead consultant engineers and architects as third-party defendants.

Typically, plaintiffs routinely seek temporary restraining orders and preliminary injunctive relief against the Commonwealth, its agencies and officers at the commencement of actions. The granting of such relief would delay the execution of contracts, increase contract costs, and result in additional claims for damages. During the fiscal year, the Division attorneys have successfully resisted all such attempts for injunctive relief.

Discovery in contract cases is prolonged due to the sheer volume of the documentation, especially in building construction cases. Issues in contract cases are usually complex, and cases are frequently referred to masters.

Bid protests in the rapidly evolving data processing area are occurring with increasing frequency. Challenges relative to the propriety of the award of building construction contracts have also increased, primarily because of more intensive scrutiny of bidders by the Bureau of Building Construction.

Seventy-six (76) new actions were commenced during the fiscal year. Fifty-one (51) have been closed. As of June 30, 1980, there were 290 pending cases in the Division.

B. *ADVICE AND COUNSEL TO STATE AGENCIES*

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

The economy has its effect on bids and bidding procedures in the State Purchasing Agent's Office. All materials, supplies and equipment purchased by the state (except military and legislative) must be advertised, bid and awarded by the Purchasing Agent. We receive, on a weekly basis, new requests for assistance in purchasing matters. Members of the Division counsel the Purchas-

ing Agent and his staff, interpret regulations, and attend informal protest hearings. We also have an equivalent relationship with the Department of Public Works, Metropolitan District Commission, the Secretary of Transportation, the Regional Community Colleges, the Data Processing Bureau, the Department of Mental Health, the Department of Youth Services, the Department of Water Resources, the State Lottery Commission, and the Department of Public Welfare.

C. CONTRACT REVIEW

The Division reviews all state contracts, leases and bonds submitted to us by state agencies. During the fiscal year, the Division approved as to form a total of 2,224 such contracts. In 292 cases, we rejected the documents and later approved them after the deficiencies were eliminated.

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

The monthly count for the fiscal year is:

July, 1979	183
August	151
September	190
October	203
November	162
December	148
January, 1980	228
February	149
March	199
April	225
May	208
June	178
TOTAL	2,224

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

EMINENT DOMAIN DIVISION

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

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

Informal advisory services, both written and oral, are rendered to practically every state agency in existence, whether it be Executive or Legislative in na-

ture. Every agency which has an eminent domain or real estate question or problem either writes or calls this division for consultation and advice. This division also appears before Legislative Committees to give advice on legislation of importance to this office as well as other state agencies. During 1979 we were instrumental in convincing the Legislature of the necessity of passing Senate 741 filed by the Attorney General which provided protection for state land damage appraisals until after completion of trial. This Bill passed as Chapter 230 of the Acts of 1979 with an emergency preamble on June 1, 1979.

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

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

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

Division trial attorney assigned handles both matters at the time of trial.

In addition, the Eminent Domain Division has the responsibility of protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without our office being given a full and complete opportunity to be heard. Some of these issues are tried out to a judicial conclusion while others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation.

The Land Court involves the full-time activities of an Assistant Attorney General on a daily basis. Its jurisdiction covers every type of land transaction from foreclosure, tax takings, to determination of title absolute and all the equity rights arising therefrom.

More and more, the equity is being used along with the temporary restraining order and injunction process. Zoning cases are now being sent to the Land Court from the Superior Court and also being commenced at the first impression in the Land Court. The Attorney General is involved in all these cases due to the declaratory nature and constitutional issues involved therein.

The Attorney General's Office is involved in almost every petition to confirm or register titles. The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements and the assurance that the decree is entered subject to all of the above.

In addition, the Land Court determines so-called "water rights". As indicated in last year's report, this is becoming a new problem area in that many rivers and streams have been cleaned and improved as a result of federally funded projects, bringing into question the Commonwealth's rights and responsibilities. Also, the tidal areas of the Commonwealth are creating additional litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting adverse possession and prescriptive rights in the flats of the tidelands and access to beaches.

One of the most recent cases of this type is presently pending before the Appeals Court after a decision of the Land Court upholding prescriptive rights in a beach for all purposes of bathing, swimming and recreation relating to the general public's use thereof. *Daley v. Town of Swampscott, et al*)

The litigation involves Whales Beach in Swampscott and the public's eye of said beach. Locally, the press has been quick to emphasize the public interest involved and rightly so, because of the lack of public access to beaches in general and the necessity for the preservation of those areas involved in which the public does have the use of tidelands, as emphasized in our last report. The other areas involved are the waterfront maritime areas which are being converted into condominiums, changing the uses provided for in the early 18th century statutes. The most recent example is the *Boston Waterfront Development Corporation*, otherwise known as the *Lewis Wharf* case and the construction given to the statutes enacted in the early 1830's.

During the past six months, this office has received 45 miscellaneous cases dealing with zoning, ejectment, trespass, and nuisance, including areas of damages not heretofore involved in the Land Court. In addition, more claims are

being made against the Insurance Fund.

We have gone to the Appellate Courts on at least eleven cases in the last two years. At least six of these cases have been matters of first impression in this Commonwealth.

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

This Division also was instrumental in assisting the Department of Food and Agriculture to expedite and carry out the mandates of Chapter 780 of the Acts of 1977, known as The Agricultural Preservation Restriction Act. Since 1949, farming acreage in the Commonwealth has declined from approximately 2 million acres to about 600,000 acres in the year 1975. This loss has necessitated Massachusetts to import some 85% of her food supply from other states as distant as Florida and California. Recognizing of the increased cost of transportation and fuel, and need to encourage local agriculture, the Massachusetts legislature enacted The Agricultural Preservation Restriction Act. This Act offers the only real hope for preserving our remaining agricultural land, by providing for the public purchase of agricultural preservation restrictions, commonly referred to as "Developmental Rights". This program is completely voluntary. It allows the farmer to obtain the developmental value of his land without destroying its productive capacity as farmland. The statute provides that the Commonwealth will pay the farmer the difference between the agricultural value of the land and its appraised market value. Stated simply, the farmer keeps his farmland but sells his developmental rights. A deed is then filed in the appropriate registry wherein it is agreed that the land be restricted in perpetuity to farming purposes.

The Eminent Domain Division worked very closely with the Department of Food and Agriculture in launching this program and is pleased to report that in the last few months restrictions have been purchased on three farms with another due shortly, encompassing more than 500 acres of prime Massachusetts farmland.

The Eminent Domain Division consists of a Chief, seven full-time trial attorneys, two special attorneys general, two investigators, one administrative assistant, one administrative trial clerk and three legal secretaries. We also enjoy the services of a full-time Assistant Attorney General stationed in Springfield.

During the fiscal year July 1, 1979 through June 30, 1980, the following statistics are indicative of the activity of this division:

New Land Court Cases	197
Land Court Cases Closed	132
Land Court Cases Pending	297
New Land Damage Complaints Received	126
Land Damage Cases Disposed of in Superior Court	91
Land Damage Cases Disposed of by Settlement	68
Land Damage Cases Pending	611
Total Cases Pending	908

Cases argued before the Appeals Court	4
Cases argued before the Supreme Judicial Court	4
Rent Cases Closed by Special Assistant Attorney General	139

Rent owed to the Commonwealth - Collected by Special Assistant Attorney General	<u>\$343,085.45</u>
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INDUSTRIAL ACCIDENT DIVISION

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

There were 12,664 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 593 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 2,046 new claims for compensation and 142 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 140 claims by lump sum agreements and 17 by payments without prejudice.

This Division appeared for the Commonwealth on 1,345 formal assignments before the Industrial Accident Board and before the Courts on appellate matters. In addition to evaluating new cases, this Division continually reviews the accepted cases; that is, those cases which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1979 to June 30, 1980 were as follows:

General Appropriation (Appropriated to the Division of Industrial Accidents)

Incapactiy Compensation	\$6,032,433.21
Medical Payments	<u>1,809,889.13</u>
TOTAL DISBURSEMENTS	<u>\$7,842,322.34</u>

Metropolitan District Commission (Appropriated to M.D.C.)

Incapacity Compensation	\$ 578,811.99
Medical Payments	<u>113,353.17</u>
TOTAL DISBURSEMENTS	<u>\$ 692,165.16</u>

This Division also has the responsibility of collecting payments due the "Second Injury Fund" set up by Chapter 152, section 65, and defending the fund against claims for reimbursement made under Chapter 152, sections 37

and 37A. During the past fiscal year this Division appeared on 164 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1980, the financial status of this fund was:

Unencumbered Balance	\$ 139,183.97
Invested in Securities	<u>200,000.00</u>
TOTAL	<u>339,183.97</u>
Payments Made to Fund	\$ 213,885.31
Payments Made Out of Fund	<u>742,641.63</u>

Pursuant to Section 11A (Acts of 1950, C. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. This involves reviewing and acting upon claims for compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties. During the past fiscal year the Chief of this Division appeared at the sitting of this Board and acted on 10 claims.

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

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

TORTS, CLAIMS, AND COLLECTIONS DIVISION

The Torts Division of the Department of the Attorney General continues to be composed of three sections handled generally by all legal personnel in the division. Tort actions against the Commonwealth, Collections of accounts for the various state agencies, hospital and schools, the thirdly Petitions For Compensation To Victims Of Violent Crimes. The division presently has seven lawyers in addition to the Division Chief. There are presently four investigators assigned to the Division, but one is presently on sick leave and another on voluntary leave. However, the two remaining investigators are being ably assisted by the help of an investigator from one of the other divisions. The number of secretarial and clerical personnel is seven.

We still have several cases pending which were commenced under Chapter 12, section 3A through 3D now repealed. We have succeeded in getting many old cases, which were pending against the Commonwealth, dismissed as the result of the passage of the new Tort Claims Act. Actions against the Commonwealth are beginning to increase for incidents arising since August 16, 1977, the retroactive date of the new Tort Claims Act. We are late in receiving these claims because of the requirement that they be first presented to the Executive Secretary responsible for the agency involved. When the central claims office, being set up in the Office of Administration & Finance, finally becomes operative it may reduce the number of small Tort actions which are

presently reaching this division. We believe that the overall final results of Tort actions disposed of in the courts during this fiscal year have been favorable. There were 159 new Tort cases opened during the fiscal year and 204 Tort suits were commenced. We closed 242 Tort cases during this period. The sum of \$81,037.95 was paid out on releases and executions.

Violent Crime Compensation cases increased during this fiscal year when we opened 422 cases but we also closed 402. The Treasurer's Office paid out \$524,690.80 in awards during this period. Although we are desirous of seeing that all valid petitioners receive just awards, we are equally vigorous in resisting unfounded and unwarranted claims. The new Rule, which this office was instrumental in having promulgated, has brought about the disposition of many cases without the necessity of court appearance.

The division continues to be diligent in its attempt to collect monies due to the various agencies. Our total collections for this fiscal year was \$697,589.63.

II. CRIMINAL BUREAU

The Criminal Bureau, consisting of Trial, Organized Crime and Appellate Sections, a Medicaid Fraud Control Unit, and the Employment Security Division, continued to accelerate the number and increase the scope and intensity of investigations and prosecutions of criminal activity throughout the Commonwealth during fiscal 1979-1980. The following recitation has been designed to reflect a representative sampling of cases the Bureau has processed in fulfilling its investigative and prosecutorial mission.

Trial Section: The newly formed tax and insurance prosecution unit, acting under a mandate to prosecute crimes impacting on state regulatory agencies, initiated 40 tax cases involving 56 indictments, claiming a total amount in excess of \$432,000 unlawfully withheld from the Commonwealth in violations of state revenue laws. More than \$55,000 in fines and restitution has been collected from 6 individuals prosecuted thus far. For the first time in the history of the Commonwealth, a conviction has been obtained on indictments charging tax evasion.

The recently enacted Hazardous Waste Act has provided the unit with the necessary enforcement powers to aggressively prosecute the unlawful transport, storing and disposal of substances deemed dangerous to public health and welfare. Following a multi-state investigation involving the illegal dumping of hazardous wastes in Suffolk, Middlesex and Plymouth Counties, more than a hundred indictments, each containing numerous counts were returned against 18 individuals and four corporations.

In a continuing effort to detect and prosecute instances of official corruption, the division's activities proved quite fruitful. Five individuals, including a Northeastern University professor, were indicted in the largest recipient welfare fraud case in Massachusetts history involving more than a million dollars.

The Student Government President at Boston State College was charged with larceny, forgery and conspiracy to steal more than \$15,000 in money and equipment from the Student Government Association.

A Brookline Health Inspector was indicted for receiving bribes of money from a local restaurateur and a Building Inspector in the Town of Haverhill

was convicted of taking bribes from a property owner in return for issuing building permits.

A state employee was sentenced for illegally raising grades on the civil service firefighters' examination and a former state and MDC police detective was indicted when he illegally offered for sale copies of a forthcoming civil service police promotional examination.

A number of cases were disposed of this fiscal year which had been initiated by grand jury investigation at an earlier time. Ninety-three of the 103 indictments naming 32 individuals as defendants in crimes ranging from armed robbery and receiving stolen goods, to distribution of controlled substances which were uncovered during "Operation Lobster" resulted in guilty findings with the majority of defendants sentenced to prison. A few more await trial.

While grand jury investigations are still proceeding in a number of counties, trials of arson defendants have concluded with guilty findings in Suffolk County. Four more defendants have been convicted in the vocational educational scandal with restitution almost reaching the half million dollar level. A Boston school teacher was sentenced to imprisonment for his involvement with child pornography. A defendant found guilty of fraudulently obtaining workmen's compensation also received a prison sentence.

Prosecutorial attention to the specialized area of organized crime continued unabated throughout the fiscal year. Thirteen of sixteen individuals indicted for their participation in a state-wide illegal gambling syndicate already have been convicted of the charges while the remainder await trial. Ten individuals including two commercial printers were recently indicted in a major automobile theft ring whose operation involved the printing of counterfeit Massachusetts motor vehicle titles. The conspiracy operated throughout New England and has had an economic effect upon the entire Northeast Region.

Organized Crime Section: In addition to its participation in the arson and hazardous waste investigations and prosecutions, the Organized Crime Section continues to be involved in such divers areas as gaming, bribery, cigarette smuggling, and theft from state agencies.

The Unit also investigates and prosecutes all crimes that may directly or indirectly relate to transactions reflecting organized criminal activity.

This Section cooperates with other agencies in combatting the activities of criminal organizations. It investigates cases at the request of the various district attorney's offices and results are then transmitted to those county officials for prosecution.

In addition to the investigative, prosecutorial and technical assistance functions, the Unit also collects, analyzes and stores intelligence on organized crime elements. Upon proper request and for sufficient reasons, this material may be disseminated to other law enforcement agencies.

The Technical Assistance Center of the Unit provides services to other law enforcement agencies in such areas as photograph and voice print identification, information retrieval and electronic investigative aids.

Appellate Section: The case load of the Appellate Division again increased this fiscal year. 194 new cases were opened, an increase of 22 cases. 59 cases were closed. Approximately 205 active cases are presently pending.

The vast majority of the cases involve civil litigation arising from underlying criminal convictions rather than direct appeals. Of the 81 cases filed in the

various state courts, 53 sought relief either by way of habeas corpus, declaratory judgment or civil rights damage actions. Nine (9) suits under G.L. c. 123A §9 (SDP) were filed since we assumed representation of the Treatment Center for Sexually Dangerous Patients in December. Eleven (11) suits claiming relief under 211 §3 were filed with the Single Justice. Eight (8) appeals were argued before either the Full Bench of the SJC or the Appeals Court.

On the federal side, 82 cases were filed in the federal district court, with 68 petitions for writ of habeas corpus and 14 civil rights actions or requests for declaratory and injunctive relief.

Fifteen cases were argued in the Court of Appeals for the First Circuit.

Twelve petitions for writ of certiorari were opposed in the Supreme Court of the United States. Four unsuccessful petitions for certiorari were filed.

The one case argued in the Supreme Court, *Commonwealth v. Meehan*, was dismissed on the ground that certiorari was improvidently granted.

One major civil rights case tried this year (*Layne v. Moriarty*) resulted in an award of substantial damages against officials of the Department of Corrections. The case is on appeal and cross appeal to the First Circuit and will be argued in the fall. The division also argued as intervenor before the SJC in defense of the constitutionality of capital punishment. The "protective custody cases", *Commonwealth v. Blaney*, are finally close to resolution. The Special Master has recommended acceptance of a proposed Final Judgment.

The Appellate Division also processes rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and governors of other states are examined and an opinion rendered as to the legal adequacy of each demand. Approximately 226 rendition demands were processed during fiscal 1979-1980 - 105 foreign requests and 121 requests from Massachusetts authorities. In addition, an attorney must appear in court whenever a rendition warrant is challenged.

Medicaid Fraud Control Unit: During the past fiscal year, the Unit's prosecutorial efforts have again centered around investigations conducted by a Special Grand Jury created upon the petition of the Attorney General and empowered with the exclusive mandate to investigate fraud and abuse within the Medicaid system.

MFCU prosecutorial efforts resulted in the return of 31 indictments against individuals representing virtually the entire range of the Medicaid provider industry. Those indicted included nursing home owners, administrators, and various support staff; doctors, dentists; podiatrists; pharmacists; laboratories; optometrists and transportation services. Further investigations are currently pending involving similar providers as well as hospitals, psychiatrists and durable medical equipment vendors. Of those cases which reached disposition during the year, the Unit maintained a 96% conviction rate (23 defendants convicted, only one acquitted.)

These efforts, combined with investigations which identified non-criminal abuses (and subsequent referral to Department of Public Welfare sanctions for appropriate action) identified \$2,838,309 taxpayer dollars for recovery.

The Unit's legislative efforts were also particularly fruitful this year, resulting in the enactment into law of two Medicaid related bills drafted by Unit attorneys. One bill focuses on the abuse of nursing home patients and creates a specific reporting system to alert immediately the Attorney General's Office and

the Department of Public Health of potential instances of patient abuse, mistreatment and neglect. More importantly, the bill creates a new criminal statute making the above mistreatment or neglect of a nursing home patient a crime. It also imposes criminal sanctions for the failure to report such incidents.

The second bill entitled the Medicaid False Claims Act also creates a new criminal statute which makes the filing of any false information on a claim for medicaid payment a five year felony.

Finally, the Unit has also pursued a vigorous training program. In-house training has been instituted with regularly scheduled seminars designed to meet the needs of the Unit personnel. In addition, Unit staff (including attorneys, investigators and auditors) have given training sessions to employees of the other state agencies and regional seminars to other New England Medicaid Fraud Control Units.

Division of Employment Security: This Division provides the Director of Employment Security with legal assistance and the representation necessary to enforce the Employment Security Law (G.L. c. 151A, §42A). Thus, whenever an employer fails to comply with the statute and refuses to pay the taxes due on his account, the matter is referred to the Attorney General for criminal prosecution.

In a number of cases where extenuating circumstances are present the matter may be settled without the necessity of an expensive criminal trial, with the collection of taxes thereby expedited.

During the fiscal year ending June 30, 1980, 1295 employer tax cases were processed by the Division. 1021 cases were on hand July 1, 1979 and 274 additional cases were received during the fiscal year. 128 were closed leaving a balance of 1167 employer tax cases on June 30, 1980. 156 criminal complaints involving 1588 counts were brought in the Boston Municipal Court charging 117 employers with nonpayment of taxes totalling \$838,508.82 owed on delinquent tax accounts. \$850,440.20 in overdue taxes was collected during the fiscal year. Monies collected were deposited in the Unemployment Compensation Fund.

When an individual wrongfully obtains unemployment compensation as the result of fraud, the criminal process is used against the offender following an investigation of the circumstances. Charges under the larceny statute (G.L. c. 266, §30) are brought in a court of appropriate jurisdiction both to punish the offender, and assist in recovering funds stolen from the Division of Employment Security.

During the fiscal year ending June 30, 1980, 1013 fraudulent claims matters were processed by the Division. 903 cases were on hand July 1, 1979. 110 additional cases were received during the fiscal year and 23 cases were closed leaving a balance of 990 cases on hand June 30, 1979. Criminal complaints involving 68 counts were brought in courts holding jurisdiction over the offenses, which charged 5 individuals with larceny of \$5,954.00 in unemployment benefits fraudulently collected. The amount of \$166,698.55 was collected during the fiscal year ending June 30, 1980, and returned to the Unemployment Compensation Fund.

In addition, 18 cases were argued in the Supreme Judicial Court. The Division is also charged with the responsibility of investigation and prosecution of CETA fraud and internal criminal conduct.

III. EXECUTIVE BUREAU

ELECTIONS DIVISION

A. CAMPAIGN AND POLITICAL FINANCE

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

Under statutory mandate (G.L. c. 55), the Division is directly engaged in the enforcement of laws pertaining to campaign and political finance. In fiscal 1980, the Office of Campaign and Political Finance reported fifty-five (55) candidates or treasurers who had failed to file the required financial disclosure reports. Compliance with the statute was affected in some twenty-eight (28) instances by administrative action, and in eighteen (18) instances by the institution of civil litigation. There are currently nine (9) such suits remaining in litigation. In addition, city and town clerks throughout the Commonwealth reported some ninety-three (93) individuals who had not complied with the filing requirements. Of that number, only three (3) are still in litigation, the rest having since complied.

B. LOBBYISTS

The Elections Division also enforces the statute requiring legislative agents and their employers to file financial disclosure statements with the Office of the Secretary of the Commonwealth. (G.L. c. 3, §§ 43, 44, 47). In fiscal year 1980, thirty (30) violations of these sections were reported by the Secretary. As a result of administrative action taken by this Division, the required statements were filed by all reported violators.

C. LITIGATION

During fiscal year 1980, the Elections Division also successfully upheld the validity of state statutes dealing with the electoral process. In the case of *Palermo v. McGonagle*, the constitutionality of the incumbent first provision of G.L. 53, § 34 and G.L. 54, § 43 was once again attacked. The litigation was dismissed upon the defendants' motion for a directed verdict in that the plaintiff had failed to demonstrate that the statute lacked a rational basis. In the case of *Harvey v. Connolly*, the constitutionality of the statute requiring that candidates who seek election without the benefit of the nomination of either political party, be unenrolled from any political party for the prior ninety (90) days was upheld both at the Superior Court and upon appeal to the State Appeals Court. Further, there were several separate lawsuits brought in the Superior Court challenging decisions of the State Ballot Law Commission regarding candidates whose names are to appear on the 1980 primary and final election ballots. In each instance, the Elections Division was successful in upholding the challenged decisions.

The Elections Division also investigated and resolved numerous complaints made in regard to specific election practices and procedures by various candidates.

Another major activity of the Elections Division, during fiscal year 1980, was the receipt and processing of twenty-two separate initiative or referendum petitions. It is the obligation of this Division to review those petitions and

determine whether or not they are appropriate for inclusion on the ballot, and whether they deal with excluded matters as defined by Article 48 of the Amendments to the Constitution of this State. In all instances when the measure is to appear on the ballot, it is the function of this Division to draft a fair and concise summary of the petition.

The Division continued in its efforts to enforce the "Open Meeting Law" at the state level, both administratively and through litigation.

VETERANS DIVISION

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

During the fiscal year 1980, the Division handled several Superior Court suits regarding challenges to decisions of the Veterans' Administration to deny certain benefits to veterans or their dependents.

IV. GOVERNMENT BUREAU

The Government Bureau has four main functions:

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

A report on those functions as well as several additional responsibilities follows.

DEFENSE OF STATE AGENCIES

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

During fiscal 1979-1980, the Bureau received 659 new cases. By subject matter and client, these new cases fell into the following categories (with miscellaneous cases omitted):

<i>Type of Lawsuit</i>	<i>Number</i>
Automobile surcharge	161
Civil Service	77
Welfare	50
Defense of cases brought against judges and court personnel	42
Taxation	28

Education cases	
(including 766 cases)	27
Registry of Motor Vehicles	26
Alcoholic Beverage Control Commission	20
Personnel Administration	19
1983 (Civil Rights) cases	19
Public Health	13
Insurance cases	12
Boards of Registration cases	12
Racing Commission	11
Mental Health	11
Lottery Commission	10
Department of Public Utilities	10
Retirement Board	10
Public Safety	9
Rate Setting Commission	8
Housing	8
Banking Department	4

The relative time spent representing specific agencies cannot be measured by the number of cases. The representation of certain agencies involved a significant commitment to complex litigation, although the total number of law suits brought against those agencies might have been quite small. For example, as in the previous three fiscal years, substantial Government Bureau resources were devoted to overseeing implementation of consent decrees in the five cases seeking improvement in the conditions and treatment in state institutions for the mentally retarded. Four Bureau lawyers had responsibility for these cases. These decrees set forth significant capital improvements to buildings at all four institutions and addressed in detail the entire spectrum of services that will be made available to residents of those institutions.

Government Bureau lawyers argued seven cases in the Court of Appeals for the First Circuit. In *Burns v. Sullivan*, in which the Bureau represented the Personnel Administrator, the court held that a Cambridge police officer had no property interest in a promotion because his civil service examination score gave rise to no expectation of promotion. Thus, failure to promote him did not violate due process protections. The court in *15,844 Welfare Recipients v. King*, upheld the District Court's denial of a preliminary injunction barring the state from implementing a computer match system for detecting welfare fraud by comparing welfare records to social security earner's records.

A Bureau lawyer successfully defended the constitutionality of a statue establishing criminal penalties for purchase of alcoholic beverages by persons under the age of 20. In that case, *Gabree v. King*, the court found that the plaintiff was not a member of a suspect class, and that the state has legitimate interests in controlling consumption of alcoholic beverages. In other cases, the court: (1) upheld the District Court's dismissal under the abstention doctrine of an appeal of automobile rates set by the Commissioner of Insurance (*Allstate Insurance Co. v. Sabbagh*); (2) affirmed the Civil Service Commission's refusal to allow examinees to inspect grading of multiple choice questions (*Lauash v. Kountze*); (3) affirmed dismissal of certain claims against the Commonwealth under the Indian Non-Intercourse and Trade Act (*Epps v. Andrus*) and (4) upheld dis-

dismissal of a suit brought by District Court employees against the Chief Administrative Judge, in which the employees sought a higher pay schedule. (*Walsh v. Mason*).

In fiscal 1979-80, Government Bureau lawyers also argued 19 cases before the Supreme Judicial Court. These included the following cases. In *Kenniston v. Board of Assessors of Boston*, the court upheld the constitutionality of statutory assessment practices, finding that the statutory approach is constitutional as a temporary remedy to the potential erosion of revenues.

Globe Newspaper v. Superior Court involved a challenge to the constitutionality of a statute permitting the court to close a criminal trial to the press. The court held that the judge has discretion to close certain trials, but that he should hold a hearing where those to be excluded have an opportunity to state objections. In *Association Industries of Mass. v. Commissioner of Revenue*, Government Bureau lawyers successfully defended the constitutionality of the Act by which the legislature classified real property in four classes according to property use.

Grace v. Town of Brookline concerned (which had previously been approved by the Attorney General) a challenge to the constitutionality of a Brookline by-law. That by-law regulated certificates of eviction when rental apartments are converted to condominiums. The court upheld the by-law. In *Levy v. Board of Registration of Medicine*, the court upheld the Board's revocation of Levy's license to practice medicine for conviction of criminal offenses relating to payments the Commonwealth made to him for operation of nursing homes he owned. The court found that these statutes were closely related to the practice of medicine.

Other cases argued by Government Bureau lawyers included the following: (1) defense of a statute requiring that anyone engaging in the funeral directing business cannot engage in any other business (*Blue Hills Cemetary v. Board of Registration in Embalming and Funeral Directing*); (2) defense of a marine fisheries regulation preventing permits to take a purse seine (*White Dove v. Director of Marine Fisheries*); (3) a case in which the court addressed the issue of whether the Department of Public Welfare has subrogation rights regarding property in a divorce suit. (*Brady v. Brady*); (4) a successful challenge to a zoning ordinance and decision which attempted to block residential facilities for the retarded (*Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg*) (the Attorney General was an amicus curiae); (5) the affirmance of the discharge of a Revenue Department employee (*Commissioner of Revenue v. Lawrence*); (6) a decision by the court that an inheritance tax could not be levied on income from a pension which reverted to the widow of a judge (*Nippe v. Commissioner of Revenue*); and (7) a decision that the Revenue Department and State Treasurer have no statutory authority to arrange for revaluation of real property and deduct the cost of that process from a municipality's local aid. *Commonwealth v. Town of Andover*.

Bureau lawyers also argued 15 cases in the state Appeals Court. In *Barkin v. Milk Control Commission*, the court upheld the dismissal of the Director of Milk Control Commission finding he was not covered by veteran's tenure and that he served at the pleasure of the Commission. *Town of Brookline v. Medical Area Service Corp.* involved the issue of whether the Harvard Medical Area Power plan could be constructed without a determination of need from the state

Public Health Council. The Court held that because the plant did not directly relate to medical care of patients, it did not require a determination of need.

In *Myers v. Town of Lee*, the court held that when highways or bridges damaged by a natural disaster are repaired with public funds, any damages in tort recovered by the town from a third party should be paid to the Commonwealth. In another case, the court upheld the Department of Public Welfare's interpretation of a rule limiting emergency assistance awards to once in a twelve-month period. In *Mullaney v. Commissioner of Public Welfare*, the court dismissed the appeal of a probation officer who had been discharged by the District Court (*Sampson v. Committee on Probation*). In *Cast Iron Soil Pipe Inst. v. Board of State Examiners of Plumbers and Gas Fitters*, the court agreed with the state Board of Examiners of Plumbers that no adjudicatory hearing was required when the Board disapproved a type of pipe coupling.

AFFIRMATIVE LITIGATION

The Attorney General established the Affirmative Litigation Division within the Government Bureau in April, 1975. It was created to provide agencies of the Commonwealth with litigation services when performance of their statutory functions requires resort to the state and federal courts. During the fifth full year of existence, the Affirmative Litigation Division continued to increase the scope and intensity of its activities.

Cases which the Affirmative Litigation Division brings may be divided into three broad, and often over-lapping, categories: (1) advocacy litigation; (2) grant-in-aid related litigation; and (3) enforcement litigation. The first category subsumes cases which the Attorney General commences either on behalf of a state agency with an advocacy responsibility or in furtherance of his own obligation to advance the public interest. In prior years, suits related to the imposition of taxes by the state and federal governments and increases in postal rates have comprised the bulk of this litigation category, and similar matters were the subject of litigation during FY 80. Litigation related to grant-in-aid programs, most significantly the various public assistance programs operated by the Department of Public Welfare, accounted for a substantial portion of the Affirmative Litigation Division's efforts. These cases also tend to be the most significant ones undertaken by the Division when financial value is the dominant consideration. Finally, the Division continues to perform the traditional Attorney General enforcement functions by commencing suit on behalf of state regulatory and licensing agencies. The following paragraphs contain brief descriptions of representative cases drawn from each of these broad categories.

Advocacy Litigation

The Attorney General continued to litigate one substantial advocacy matter begun several years ago during the reporting year. *Brouillette v. New Hampshire*, an action which the Attorney General commenced against the State of New Hampshire to recover tax payments made by Massachusetts residents pursuant to an unconstitutional commuter tax, moved into settlement discussions concerning the claims remaining after the New Hampshire Superior Court in large part sustained the defendants' motion to dismiss.

Grant-in-Aid Litigation

The Affirmative Litigation Division continued to concentrate its grant-in-aid

litigation efforts on the problems which the Department of Public Welfare experienced during the reporting year with its principal federal funding agencies, the United States Department of Health, Education, and Welfare (which became the Department of Health and Human Services toward the end of the reporting year) and the Food and Nutrition Service of the Department of Agriculture. Disputes concerning reimbursement for Medicaid expenses and food stamp grants were the principal controversies.

The Attorney General filed a third-party complaint against the Secretary of Health and Human Services seeking federal financial participation in expenditures which the Department of Public Welfare was forced to make as a result of injunctive orders entered by the federal District Court and the Court of Appeals for the First Circuit in cases involving payment for abortions to Medicaid recipients. On the last day of the reporting year, the Supreme Court of the United States decided that the so-called "Hyde Amendment" was constitutional. As a result of this decision, the litigation against the Department of Public Welfare will terminate in its favor, but the third-party actions against the Secretary will continue.

The Affirmative Litigation Division continued its effort to secure restitution from a nursing home provider on behalf of the Welfare Department. *Newfield House, Inc. v. The Massachusetts Department of Public Welfare*, Civil Action No. 76-3724-G, was decided largely in the Department of Public Welfare's favor, but the District Court refused to order complete restitution and denied the defendant state officials leave to file a third-party complaint against the Secretary of Health and Human Services.

In *Commonwealth v. Goldschmidt*, the Attorney General commenced in the federal District Court, at the request of the Commonwealth's Secretary of Transportation and Construction, a challenge of the decisions of the United States Department of Transportation intended to result in the withholding of millions of dollars in federal highway assistance funds from the states during the federal fiscal year. This suit, modeled upon similar actions filed in other states, was designed to assure continued federal financial support for the Commonwealth's highway maintenance and improvement efforts.

The Affirmative Litigation Division also devoted substantial time to examining grant-in-aid problems for their potential amenability to solution through litigation. Generally, this effort consists of advising a major department of government concerning its rights and duties under federal and state law and, an approved plan for program operation. For example, the Division assisted the Department of Public Welfare in its efforts to achieve greater cooperation from federally-funded agencies known as "Professional Standards Review Organizations". The increasing complexity of federal grant-in-aid programs and the substantial reliance which the Commonwealth places upon federal reimbursement revenues in order to maintain the delivery of important social services has required the Affirmative Litigation Division to devote ever increasing attention to the complicated legal issues to which these federal-state relationships give rise.

Regulatory Enforcement

The Affirmative Litigation Division continued to prosecute and commence a number of significant regulatory enforcement actions during the reporting year.

These cases generally sought judicial enforcement of state agency determinations or compliance with statutory requirements by private entities or units of local government.

A case which was decided during the prior reporting year, *Commonwealth v. Town of Andover*, Mass. Ad. Sh. (1979) 1619, an action to require an initial group of twenty-three cities and towns in the Commonwealth to appropriate funds required by their boards of assessors to perform revaluation of real property as directed by the Commissioner of Revenue, spawned further similar litigation against another group of recalcitrant cities and towns in the Commonwealth. Based upon the remedial approach which the Supreme Judicial Court adopted in *Andover*, *Agawam* progressed to final judgment against a number of the defendant communities by the end of the reporting year.

Another matter from a prior reporting year, *Commonwealth v. Norwood Housing Authority*, Civil Action No. 123722, Sup. Ct. Norfolk Cnty., an action which the Attorney General brought to require members of the Authority and its staff to make restitution to the Commonwealth of Authority funds which they improperly spent for personal purposes, continued during the reporting year.

The Affirmative Litigation Division commenced a similar action against the Boston Housing Authority, *Commonwealth v. Boston Housing Authority*, seeking restitution of state funds which the Authority spent to secure outside legal services in conjunction with its defense of tenant litigation seeking to place the Authority in receivership. Since the Department of Community Affairs had not approved the contracts for outside legal services, expenditures for these services violated the Authority's contractual obligations and direct orders of the Secretary of Communities and Development. At the close of the reporting year, the case was in the early stages of discovery proceedings.

During the prior reporting year, the Attorney General commenced an action against the Town of Wellesley on behalf of the Alcoholic Beverages Control Commission, seeking a determination of the validity of certain special licenses which the Town's board of selectmen have issued to certain educational and social organizations in the Town. Litigation was selected as a means of obtaining a final resolution of a controversy between the ABCC and the Town which has existed for several years. During the reporting year, the parties negotiated alternative approaches to placing the case in a posture appropriate for decision upon motion.

Enforcement litigation on behalf of the Department of Public Health and its certificate of need program continued during the reporting year. Appellate proceedings commenced in *Wing Memorial Hospital v. Frechette*, while a similar case was filed against the Hillcrest Hospital.

The Attorney General continued litigation commenced on behalf of the Commonwealth's Rate Setting Commission against the Affiliated Hospitals Center, Inc. This case, *Commonwealth v. Affiliated Hospitals Center, Inc.*, seeks the imposition of statutorily authorized civil penalties against the hospital for its alleged violations of the Commonwealth's charge control statute.

OPINIONS

General Laws chapter 12, section 3 authorizes the Attorney General to render legal advice and opinions to state officers, agencies and departments on matters relating to their official duties.

(1) Standards for Issuing Opinions

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

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

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

(2) Procedures in Requesting an Opinion

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

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

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

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should then be sent with the request.

When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations in addition to the requestor, this Department will solicit the views of such other agencies, individuals or organizations before the Attorney General renders an opinion.

In this way, the Attorney General seeks to make sure that he doesn't over-

look significant and relevant considerations.

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

(3) *Opinions for 1978-1979*

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

During FY 1979, 17 formal opinions of the Attorney General were issued. Formal opinions covered a variety of subjects, ranging from narrow questions of statutory interpretation affecting one individual to timely public policy issues.

Four opinions dealt with the immediate problems of state employees in their current positions. The Secretary of Consumer Affairs asked whether the present Executive Secretary to the Board of Registration in Nursing is qualified by law to serve in that position. The Attorney General concluded that, because the incumbent was not originally qualified for appointment as Executive Secretary, she is not now entitled to hold that office. However, the Board is not precluded from reappointing her at such time as she possesses the statutory prerequisites for appointment.

The Chairman of the Health Facilities Appeals Board asked whether as a consumer member and chairman of the Board, he may perform legal services for physicians in matters not related to their roles as providers of health care services. The Attorney General concluded that the prohibition of fiduciary relationships contained in G.L. c. 6, §166 does include the attorney-client relationship and therefore a consumer member of the Board may not render legal services to a physician even with respect to a matter unrelated to the physician's role as a provider of health care.

The Commissioner of Labor and Industries asked whether the present Commissioner of the Metropolitan District Commission (MDC) may receive pay in lieu of vacation time which he accrued while employed by the Department of Labor and Industries. The Attorney General concluded that the MDC Commissioner is not entitled to such payment because he has not separated from state service and if he does, the precise nature of his separation will determine the amount of payment to which he will be entitled.

Finally, the District Attorney for Middlesex County asked whether G.L. c. 12, §15, prohibits a district attorney from receiving a fee for legal services performed prior to his assuming this full-time position. That statute provides that district attorneys shall devote their entire time during ordinary business hours to their duties and shall neither directly nor indirectly engage in the practice of law. The Attorney General concluded that the acceptance of a fee for legal services performed prior to becoming a full-time district attorney would not violate G.L. c. 12, §15.

In addition to the requests discussed above, the Attorney General issued opinions on a wide variety of issues. The Secretary of State asked six questions

on the proper interpretation of G.L. c. 51, §1F which provides that certain unregistered persons may vote by absentee ballot in a presidential election. The Secretary of State asked whether section 1F is consistent with the Federal Voting Rights Act Amendments of 1970. The Attorney General concluded that G.L. c. 51, §1F provides an effective manner by which every citizen of the Commonwealth, who is otherwise qualified, may vote for presidential and vice-presidential electors and that the Commonwealth is in full compliance with the Federal Voting Rights Act.

The Commissioner of Public Health asked if physicians employed under "03" contracts are "public employees" within the meaning of the Commonwealth's Claims and Indemnity Act for purposes of liability and medical malpractice insurance. The Attorney General concluded that such physicians may not be "public employees" and are not immune from tort liability in that capacity. Accordingly such physicians are well advised to maintain personal malpractice insurance policies.

In response to a request from the Commissioner of Administration and Finance, the Attorney General issued an opinion concerning the nature and extent of the Commissioner's authority to establish and enforce regulations governing the use of motor vehicles owned by the Commonwealth. The Attorney General concluded that G.L. c. 30, §36 provides the Commissioner of Administration and Finance with specific authority to establish regulations for the use of state-owned motor vehicles and he may employ all ordinary means of enforcing the regulations, commensurate with the seriousness of the offense and comporting with appropriate due process standards.

The Commissioner of Environmental Management asked whether the Department's issuance of permits to property owners abutting the state-purchased Otis Reservoir, for exclusive use of the perimeter strip abutting their land, violates either the provisions of Article 97 or the public trust duties under which the Department holds title to the perimeter strip. The Attorney General concluded that the exclusive land use permits do not violate either the provisions of Article 97 or the public trust duties. Rather, the permits are a legitimate mechanism for implementing the Legislative policy of protecting the recreational and conservation uses of Otis Reservoir.

Other significant opinions concerned the authority of the Department of Public Works both to issue reducible load permits, to manage real property it acquired for the Department of Transportation Building, and to provide relocation services; the right of retired members of the teachers' retirement system to vote in the elections of the Teachers' Retirement Board; the possible conflict of the Commonwealth's Determination of Need statute with federal regulations governing the receipt of funds from the Department of Health, Education and Welfare; the authority of local appointing authorities to employ school adjustment counsellors on a part-time basis; and the authority of the State Lottery Commission to enter into a lease of premises containing escalation clauses.

In addition to these formal opinions, the Attorney General issued several letters of advice pursuant to G.L. c. 12, §9, to committees of the Massachusetts legislature on the legal effect of proposed legislation pending before them.

V: THE PUBLIC PROTECTION BUREAU

The Public Protection Bureau, the largest of the four Bureaus which make up

the Attorney General's Office, carries out affirmative litigation in the public interest in a number of significant areas. The Bureau made significant changes both in its staff and its activities during the 1980 fiscal year. New chiefs were named to several of the Bureau's divisions; work was initiated in subject areas such as arson and energy; and interdisciplinary efforts, involving the cooperation of various divisions within the Bureau, were expanded.

New chiefs were appointed during fiscal 1980 to head the Consumer, Insurance, Public Charities, Anti-Trust and Utilities Divisions of the Public Protection Bureau. The work of each of the divisions is described in the individual reports which follow.

The Bureau's Investigative Section was revitalized through the appointment of a new Chief Investigator and the training and hiring of additional staff investigators.

In addition, the receipt of a grant from the Law Enforcement Assistance Administration allowed the Public Protection Bureau to establish an Anti-Arson and Housing Unit. This effort will involve work with the Attorney General's Criminal Bureau and with community groups, employing new techniques to identify arson-prone properties and to reduce the incidence of arson in Massachusetts.

In fiscal 1980, the Bureau also named a Deputy Chief and hired a Chief Accountant. The Deputy Chief will train lawyers in trial skills, conduct major litigation projects in cooperation with attorneys from various divisions, and perform general administrative duties. The Chief Accountant will provide Bureau lawyers with ready access to expert financial assistance in conducting investigations and court actions.

During fiscal 1980 the Bureau increased the extent of its inter-divisional activity. Several major cases were initiated, involving cooperation among attorneys with different specialties. Examples include petitions filed with the U.S. Department of Energy to spur the federal government to investigate competition among oil refiners and recent extraordinary increases in heating oil prices, drafted with the participation of utilities, environmental, and consumer division lawyers; the Attorney General's lawsuit against the Amoco Oil Company for "credit redlining," prepared by attorneys specializing in civil rights and consumer affairs; and our intervention in administrative hearings to challenge proposed increases in "Medex" health insurance for the elderly, carried out by public charities and insurance attorneys.

Other Bureau activities during fiscal 1980 included cooperative investigations in such areas as health issues, maternity disability benefits, and anti-competitive consumer practices, as well as the initiation of intensive training in trial skills for sixteen Bureau attorneys. Finally, the Bureau sponsored conferences at various locations throughout the Commonwealth for lawyers and citizens dealing with such topics as anti-trust law and the treatment of hazardous wastes.

Reports of the Bureau's individual sections and divisions are as follows:

INVESTIGATIVE SECTION

A new Chief Investigator was appointed to head this section. He has 31 years of investigatory and administrative experience. The section underwent major changes in organization, in the scope of its investigations, and in its level of professionalism. We have continued to broaden the scope of investigation to

include cases brought by all seven divisions of the Public Protection Bureau.

The unit has enhanced its background of investigative experience by hiring two former FBI agents and a former police officer, and by engaging the services of two auditors. As part of the unit's reorganization, the position of Manager-Investigator was created to insure efficient day-to-day operations and to facilitate planning and the sharing of knowledge. Other new personnel include two investigators specially trained to investigate for the Anti-Arson and Housing Unit of the Bureau. One aspect of the new forms of investigation and organization is a confidential file system set up for investigations of particular importance; this system not only will provide a clear and concise organization of materials involved in active investigations but also will leave accurate records for future reference.

ACCOUNTING COMPONENT

The Bureau has long recognized the need to broaden the scope of professional expertise which can be brought to bear on complex public interest and consumer issues. A long step in that direction was taken late in the fiscal year with the establishment of an accounting component to the Bureau's cases and activities. A C.P.A. has been hired who, with students and bureau investigators, has begun participating in major utility and health projects as well as assisting in analyzing adequacy of capitalization, ability to pay damages and similar issues common to consumer, anti-trust and environmental cases. As the fiscal year came to a close, a major effort was being planned and organized to evaluate the compliance by hospitals in the Commonwealth with the requirement, imposed by the federal Hill-Burton Act, to provide free or reduced-cost services to persons unable to pay for hospital care.

COMPLAINT SECTION

During fiscal 1980, the complaint section opened 6,547 new cases and closed 4,222 cases. The section recovered for consumers \$444,314 in refunds, savings and the value of goods or services they would not have received but for our intervention. In addition, we referred over 4,000 written complaints to out of state agencies, other state agencies or departments, and local consumer groups.

Since the local consumer groups have expanded to cover over 275 cities and towns in Massachusetts, the section is now handling fewer complaints of a consumer nature. This has enabled us to erase the backlog and to handle complaints more quickly. It also enables us to devote more resources to identifying case trends and to conduct more surveys and other special projects. During the past year we used 213 volunteers from 46 colleges, law schools and high schools, all of whom receive training prior to commencing work.

Within the complaint section, we have a Citizens Intake Unit which handles citizens' telephone inquiries and complaints falling within the subject matter of any of the Bureau's seven divisions. The Unit received a total of 7,239 inquiries in fiscal 1980.

Their divisional composition was as follows:

Civil Rights	5,728
Consumer	293
Credit and Debt Collection	114
Public Charities	603
Insurance	19

Miscellaneous	475
Walk-ins	208
The disposition of these calls was as follows:	
Calls referred to other state agencies	2,158
Calls requesting information	3,783
Calls requesting materials	696
Complaint/Inquiry Forms	577
Inquiries when action was taken by the Civil Rights Division	25

The Unit recently acquired a Teletypewriter (TTY), which is a Telecommunications Device for the Deaf. This device enables the hearing and speech impaired population the ability to contact the Public Protection Bureau. Although we have received a limited number of calls (6) on the TTY Unit, we expect that this number will increase as the device becomes a more common household appliance amongst this population.

Our general information line staff received a total of 129,999 calls during the past year. 14,164 complaint/inquiry forms were sent to citizens, 15,486 citizens were given information, and 100,349 were referred to different agencies, departments or local consumer groups.

Special projects conducted by the Complaint Section staff this year included a survey of housing units equipped for the handicapped; a survey of foreign car dealers; and a survey of the fees and services bank attorneys charge or provide to mortgagors. We conducted a massive investigation of the warranties offered by rustproofing companies, and also investigated over 100 storage companies which are in apparent violation of state licensing laws. In addition to the above, we conducted full investigations of approximately 120 individual merchants or manufacturers and referred approximately 65 other cases for litigation or further investigation.

LOCAL CONSUMER AID FUND

For the fiscal year 1980, the Massachusetts Legislature appropriated \$250,000 to provide regional consumer groups throughout the Commonwealth with supplemental funding for consumer complaint mediation. This funding is distributed through the Local Consumer Aid Fund and is administered by the Department of the Attorney General.

Through this program, consumer complaints from 87% of the cities and towns of the Commonwealth are now serviced at the local level. This continued increase of complaint handling at the local level, a 77% increase over FY '79, has proven beneficial to both consumers and businesses, in that complaints are handled more quickly and a more workable rapport has developed between the merchants and the community. Their familiarity with local merchants enables groups to recognize patterns of unfair and deceptive practices at an early stage and has proven to be an asset to the Bureau in curbing these practices.

These funds have been distributed among twenty-five agencies in the following manner:

<i>Grant Recipient</i>	<i>Amount Awarded</i>
Arlington Office of Consumer Affairs	\$ 5,000
Berkshire County Consumer Advocates	15,000

Boston Consumers Council	11,000
Brockton Consumer Advisory Commission	2,500
Cape Ann Consumer Council	2,000
Cape Cod Consumer Assistance Council, Inc.	3,750
Duxbury Consumer Advisors	200
Fall River Community Development Service Center	10,250
Hampshire - Franklin District Attorney's Office	8,800
Haverhill Community Action Commission	11,500
Holyoke Community College Consumer Aid Center	4,000
Greater Lawrence Community Action Council	7,000
Lowell Community Teamwork, Inc.	9,000
Medford Consumers Council	9,000
Newton Department of Human Services	7,500
North Shore Community Action Program, Inc.	11,000
Northern Worcester County Consumer Rights Project	10,500
Quincy Consumers Council	11,500
Revere Consumer Affairs Office	9,000
So. Middlesex Consumer Protection Office	11,000
Southeastern Massachusetts Consumer Action Center	8,000
Somerville Multi-Service Center	8,000
Springfield Consumer Action Center	17,000
On the Corner Taunton Area Consumer Protection Program	13,000
Worcester Consumer Protection Coalition, Inc.	15,000

In addition to the above agencies, the following agencies participated in the 1979-1980 Local Consumer Aid Fund program. These agencies were not funded with FY '80 monies but rather supplemented their program with excess FY '79 monies previously awarded their agency.

Agawam Consumer Advisory Commission
 Consumer Action Center - Amherst
 Peabody Consumer Protection Office

ANTITRUST DIVISION

A. Introduction

Through continued federal funding, and increased staff capabilities, the Antitrust Division has continued in fiscal 1980 to increase its investigation and prosecution of past violations of the federal and state antitrust laws as well as its activities aimed at preventing future unreasonable restraints of trade and monopolistic practices within the Commonwealth.

B. Federal Funding

The Antitrust Division continued to receive its operating funds from a federal grant authorized under the Crime Control Act of 1976. In September, 1977 Attorney General Bellotti was awarded \$320,681.00 to establish and develop the Antitrust Division. In March of 1979 the Attorney General was awarded an

additional \$305,091.00 to continue the development of an antitrust enforcement program in the Commonwealth of Massachusetts. Such funds were used to fund all of the work of the Antitrust Division in fiscal 1980. Additionally in September, 1979, Attorney General Bellotti was awarded \$98,614 for further development of the New England Bid Monitoring Project (discussed *infra*, Section F).

C. Staff

During fiscal 1980, the Antitrust Division grew to five (5) attorneys and approximately ten (10) support personnel.

D. Litigation

During fiscal 1980, the Antitrust Division had sixteen cases which were in various stages of litigation in both the federal and state court systems.

1. *Commonwealth of Massachusetts v. N.B.M.A., et al.* (Northern District of Georgia)

This is a suit against 37 major producers of chicken in the United States charging them with conspiring to raise the price of chicken throughout the United States. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. The settlement, which is in excess of \$40 million, has been approved by the court in this global class action and the Commonwealth is presently awaiting a final determination of the potential recoveries available to the Commonwealth.

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

This is a suit against seven refiners of sugar alleging that they conspired to fix prices of sugar in violation of the Federal Antitrust laws. The Commonwealth is representing itself in its proprietary capacity as well as the Cities of Boston and Cambridge. Settlements have been reached with all defendants for a total recovery of \$26.5 million and the Commonwealth is awaiting distribution to determine what its share of the recovery will be.

3. *Commonwealth of Massachusetts v. Medical Oxygen Service Inc., et al.* (District of Massachusetts)

This is a suit against four distributors of medical oxygen in the New England area, charging them with conspiring to fix prices for their services and products as well as to divide the territories in which they do business. This case was brought on behalf of the consumers of the Commonwealth of Massachusetts. The case was settled during pretrial discovery. A consent decree was entered against both defendants prohibiting them from dividing territories by agreement.

4. *Commonwealth of Massachusetts v. Brinks, Inc., et al.* (Northern District of Georgia)

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

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

This is a suit by the Commonwealth, on behalf of itself and its political subdivisions against seven distributors of liquid asphalt products in the Commonwealth of Massachusetts alleging that they conspired to fix prices, rig bids, and allocate customers among themselves in the sale of liquid asphalt products in the Commonwealth. This case was settled with all defendants during fiscal 1980 giving the Commonwealth a total recovery of \$200,000. Additionally, pursuant to the terms of the Settlement Agreements with all defendants and the Consent Decree entered by the Federal District Court against one defendant, the defendants must redetermine their prices.

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

This is a suit by the Commonwealth, on behalf of itself and its political subdivisions, for injunctive relief and damages under the Federal Antitrust Laws alleging that the major wiring device manufacturers in the United States conspired to fix prices on wiring device products sold to the Commonwealth and to its citizens. The governmental portion of this case was settled with all defendants for a total of \$1.1 million. Massachusetts' share will be approximately \$150,000.

7. *Commonwealth of Massachusetts v. Boise Cascade, Inc., et al.*
(Eastern District of Pennsylvania)

This is a suit by the Commonwealth, on behalf of itself and its political subdivisions, against 15 major paper manufacturers charging them with conspiring to fix the prices of fine paper products throughout the United States. The Commonwealth has been certified as a class representative of its political subdivisions in this action. Presently there are more than \$30 million in settlements in this action. These settlements are from 6 to 15 defendants. Trial is scheduled for September 15, 1980 and the Commonwealth is currently assisting in preparation of plaintiff's case.

8. *Commonwealth of Massachusetts v. Rockwell Corp., et al.*
(Eastern District of Pennsylvania)

The Commonwealth brought suit in fiscal 1980 on behalf of four municipally-owned gas works against three major manufacturers of gas meters in the United States, alleging a conspiracy to fix prices and rig bids on gas meters. This case has been settled for in excess of \$15 million and the Commonwealth is presently awaiting a final resolution of the method by which the settlement monies will be distributed in order to determine how much will be recovered by four municipally-owned gas works.

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

This is a suit by the Commonwealth, on behalf of itself and its political subdivisions, against 12 distributors of architectural hardware in the Commonwealth of Massachusetts alleging that they had conspired to rig bids on governmental building projects within the Commonwealth of Massachusetts. Settlement was reached with nine of the defendants for a total of \$62,500.00.

Settlement negotiations continue with the remaining defendants as pretrial discovery progresses.

10. *Commonwealth of Massachusetts v. D.H. Jones, et al.*
(Hampshire County Superior Court)

This is a suit brought by the Commonwealth, on behalf of its citizens, seeking civil penalties and restitution for consumers as a result of an alleged conspiracy by real estate brokers to fix and raise the rate of real estate brokerage commission fees in the Amherst area. This is the first suit brought under the state antitrust act. The case was settled with the two defendants for a total recovery of \$60,000.00, of which \$40,000.00 will be distributed to persons overcharged as a result of the conspiracy. Additionally, a Consent Decree was entered against the two defendants prohibiting them from attempting to stop other agencies from charging lower commission rates, advertising lower commission rates or allowing a homeowner to sell his own home and yet use the Multiple Listing Service. The relief obtained in this Consent Decree was unique.

11. *Commonwealth of Massachusetts v. Massachusetts Nurses Association* (Suffolk County Superior Court)

This is a suit brought by the Commonwealth against the Massachusetts Nurses Association seeking a civil penalty, alleging that the Massachusetts Nurses Association has conspired with its members to promulgate minimum fixed fee schedules for private duty nursing services in the Commonwealth. The case was settled for \$2500. Additionally, a Consent Decree was entered prohibiting the defendant from setting minimum fee schedules for private duty nursing services.

12. *Commonwealth of Massachusetts v. Donnegan Office Supplies, Inc.* (Suffolk County Superior Court)

This is a suit brought by the Commonwealth, on behalf of itself and its political subdivisions, against the defendant claiming it and another supplier of film, Joseph Merritt & Co., had conspired to allocate territories within the Commonwealth. The case was in pretrial discovery as of June 30, 1980. Prior to filing the complaint, a settlement was reached with Merritt Co., which agreed to pay \$2650. A Consent Decree was entered prohibiting Merritt from allocating territories in the future.

13. *Commonwealth of Massachusetts v. Bang and Olufsen, Inc.*,
(District of Massachusetts)

The Commonwealth brought suit, in fiscal 1980, claiming that Bang and Olufsen, Inc., a manufacturer of stereo equipment, had been engaged in unlawful resale price maintenance activities with its distributors. The suit brought by the Commonwealth on behalf of itself and, as *parens patriae*, on behalf of consumers in the Commonwealth, asks for injunctive relief and damages. The case is presently in pretrial discovery.

14. *Commonwealth of Massachusetts v. B.L. Makepeace, Inc., et al.*
(District of Connecticut)

The Commonwealth, along with the five other New England states filed suit,

in fiscal 1980, against three suppliers of drafting equipment, charging them with an unlawful conspiracy to raise prices and allocate territories in New England. The action, seeking damages and injunctive relief, is in pretrial discovery, with motions to dismiss pending before the Court. This case is unique in that the six New England states joined together in filing a single action against the co-conspirators. Prior to filing of the complaint, settlement was reached with two other companies, allegedly participants in the conspiracy, for a recovery of \$135,000.00

15. *Commonwealth of Massachusetts v. Harborside Liquor, Inc., et al. (Dukes County Superior Court, District of Massachusetts)*

The Commonwealth brought two antitrust actions in fiscal 1980, one in state court and one in federal court, charging seven liquor stores on Martha's Vineyard with price-fixing for, at least, the last fifteen years. The state action seeks injunctive relief and a civil penalty, while the federal action, a *parens patriae* action, seeks injunctive relief and damages for consumers injured by the unlawful conspiracy. Both suits are in pretrial discovery. Prior to the filing of the complaint, the Commonwealth entered into a Settlement Agreement with an eighth liquor store, which agreement provided for payment of \$10,000 and entry of a Consent Decree in state court.

16. *Commonwealth of Massachusetts v. Milton Bradley Co., et al. (District of Massachusetts)*

The Commonwealth filed suit, in fiscal 1980, against the four major manufacturers of art supplies in the United States charging them with a nationwide conspiracy to raise the price of art supplies and bid rigging. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. At the end of fiscal 1980, the Commonwealth's case was awaiting consolidation with other civil antitrust actions brought against the same defendants and transfer to another district for coordinated pretrial proceedings. Class action discovery and merit discovery will commence upon transfer and consolidation.

E. *Additional Proceedings*

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

1. *In the Matter of Viking Sewing Machines*

The Commonwealth accepted a Letter of Assurance from Viking prohibiting it from engaging in resale price maintenance with respect to sewing machines. In addition, the Commonwealth accepted a civil penalty of \$15,000.00

2. *In the Matter of Gendel Enterprises, Inc.*

The Commonwealth accepted an Assurance of Discontinuance from Gendel wherein it agreed to refrain from engaging in resale price maintenance activities with respect to wood stoves distributed by it. Gendel Enterprises also agreed to pay the Commonwealth \$1750.00

3. *In the Matter of Thulman Eastern Co.*

The Commonwealth accepted an Assurance of Discontinuance from Thulman

wherein it agreed to refrain from engaging in resale price maintenance activities with respect to wood stoves distributed by it. Thulman also agreed to pay the Commonwealth \$1700.00

4. In the Matter of Hitachi Stereo Equipment

The Commonwealth accepted Assurances of Discontinuance from Hitachi of America, Inc., SCS Inc. (Tech Hi Fi) and Irwin Lazarus wherein they agreed not to engage in resale price maintenance activities in the Commonwealth with respect to Hitachi stereo equipment. Lazarus also agreed to pay the Commonwealth \$37,500.00

5. In the Matter of Lux Stereo Equipment

The Commonwealth accepted an Assurance of Discontinuance from Lux Audio, Inc. wherein it agreed not to engage in resale price maintenance activities in the Commonwealth with respect to Lux stereo equipment. The company also agreed to pay the Commonwealth \$2500.

6. In re Lawn and Garden Centers

Four lawn and garden centers agreed by Assurances of Discontinuance not to fix the prices on lawn and garden products.

7. In re Frost Company

The Commonwealth accepted an Assurance of Discontinuance from Frost Company which agreed to refrain from engaging in resale price maintenance activities with respect to lawn mowers.

8. In re Outboard Marine Corporation

The Commonwealth accepted an Assurance of Discontinuance from Outboard Marine Corporation which agreed to refrain from engaging in resale price maintenance activities with respect to lawn mowers.

9. In re Lawn-Boy of New England, Inc.

The Commonwealth accepted an Assurance of Discontinuance from Lawn-Boy of New England, Inc. which agreed to refrain from engaging in resale price maintenance activities with respect to lawn mowers.

F. Additional Activities

1. New England Bid Monitoring Project

In the summer of 1978, the Commonwealth began a pilot program to determine the feasibility of collecting and analyzing masses of bid data from municipalities in order to determine whether antitrust violations were occurring in the sale of certain specified products. As part of the project, the Antitrust Division collected bid data from over 100 towns and cities in Massachusetts and commenced development of computer programs for analysis of the data.

During fiscal 1980, the project's development and growth continued. Basic analysis of approximately 10 products was done, showing possible antitrust violations with respect to several. Analysis of one product indicated a possible criminal price-fixing conspiracy and, accordingly, the analysis was forwarded to the Justice Department for its review. The Justice Department was reviewing our data to determine whether or not a grand jury investigation would be author-

ized. Additionally, analysis of other products appears to give us a basis for issuance of Civil Investigative Demands in the near future.

Additionally, this Office on behalf of all of the New England states received a grant of approximately \$100,000 for further development and application of the project on a regional basis. Accordingly, collection of data on the specified products was expanded to cover governmental purchasers throughout New England. The Justice Department continues to show great interest in this project as it is the first of its kind to prove effective.

2. Public Education

In fiscal 1980, the Antitrust Division commenced a program of regional antitrust seminars to be held throughout the state. Two such seminars were held during the year, one in Worcester and the second in Springfield. At least two additional seminars are planned for the eastern part of the state.

Additionally, the Division wrote a manual entitled "Antitrust Enforcement In Massachusetts" which describes antitrust violations, the antitrust laws, and enforcement by state and federal agencies within the Commonwealth.

CIVIL RIGHTS DIVISION

A. INTRODUCTION

The Civil Rights and Liberties Division, established by G.L. c. 12, §11A, operates in broadly-defined areas to protect the civil rights and civil liberties of citizens in the Commonwealth. Specifically, the division initiates affirmative litigation on behalf of citizens, citizen groups, agencies and departments of the Commonwealth in matters involving constitutional protections, and defends government agencies in cases which raise constitutional issues. In addition, staff of the division advise the Attorney General of developments and issues of civil rights and constitutional protections, draft legislation, comment on agency regulations and investigate complaints of violations of civil rights brought to the attention of the division by citizens of the Commonwealth. Finally, the Division is given the authority, pursuant to the provisions of G.L. c. 151B, §§5, and 9, to initiate complaints before the Massachusetts Commission Against Discrimination (MCAD), to represent that agency before trial and appellate courts when judicial review of MCAD decisions is sought, and to bring legal actions for violations of Chapter 151B in the Massachusetts Superior Court.

In FY-1980, the division was staffed by a Chief, five assistant attorneys general, one of whom directed the Women's Rights Unit, and appropriate support personnel. In addition, throughout much of FY-1980, the general counsel to the Security and Privacy Council was located physically within the division and was available for specific case assignments in areas consistent with her expertise.

B. DESCRIPTION OF ACTIVITIES

In fiscal year 1980, two matters of extraordinary substance were concluded: two of the three so-called publishing company cases were resolved; and, the state civil rights bill was enacted by the legislature and approved by the Governor.

The Publishing Cases

In October, 1976, three Title VII discrimination complaints were filed in the

U.S. District Court against three publishing companies in the greater Boston area. The suits, filed as class actions on behalf of present and former female employees of the Houghton Mifflin Publishing Company, Allyn and Bacon, Inc., and Addison-Wesley Publishing Company, allege discrimination against women in hiring, pay, promotion and other terms and conditions of employment. In addition, the complaint against the Houghton-Mifflin Company alleges discrimination against minority employees as a class.

In FY-1980, the cases against Allyn and Bacon, Inc. and against Addison-Wesley Publishing Company were settled. The two settlements provide for the payment of approximately \$450,000 in back pay to approximately 600 female employees as well as significant affirmative action and training programs. The cases are discussed in more detail under the heading "Employment Discrimination", *infra*.

The State Civil Rights Act

A state civil rights bill was first filed with the state legislature in 1976. In that year, the bill expired in the Massachusetts House Ways and Means Committee.

Similar legislation, filed in 1977 and in 1978, came to similar ends, either in the House Ways and Means Committee or in the Joint Committee on Third Reading.

In FY-1979, the proposed legislation underwent considerable redrafting. With the help of the Civil Liberties Union of Massachusetts, a bill was drafted that a) authorizes the Attorney General to seek injunctive relief to protect the peaceable exercise and enjoyment of rights secured by the Constitution and laws of the Commonwealth and of the United States; b) provides a private cause of action for money damages on behalf of persons whose constitutional or civil rights have been interfered with; and, c) establishes criminal penalties of \$1,000, or one year imprisonment against persons found guilty of willfully injuring, intimidating or interfering with persons in the enjoyment or exercise of constitutional or civil rights. The criminal penalties are increased to a fine of \$10,000.000 and ten years imprisonment if bodily injury results.

The redrafted bill was enacted by the legislature on November 16, 1979, signed into law by the Governor shortly thereafter and became effective on February 14, 1980.

Other matters in which staff of the division were involved, either through litigation or non-litigation activity, occurred in the following substantive areas:

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

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

1. *Correctional/Youth Services*

Bellotti v. Deignan

This suit, filed in the Superior Court in July, 1979, seeks to enjoin the use of bare isolation cells in the Worcester County House of Correction and to have such cells declared to be in violation of Department of Public Health Regulations requiring a toilet, sink and bed in all jail cells.

On August 16, 1979, a preliminary injunction was issued enjoining the defendant sheriff from using any more than one of the seven cells for any purpose other than temporarily holding inmates who had attempted suicide and then only until they could be medically treated. In addition, the sheriff was ordered to convert six of the seven cells into regular cells.

The Sheriff filed a countersuit challenging standing of the Attorney General to bring suit and challenging the applicability of the DPH regulations. A consolidated trial was held in September. The Court ruled for the Sheriff. The Department appealed and obtained direct appellate review. Argument will be held before the Supreme Judicial Court in the fall of 1980.

Inmates of the John Connolly Detention Center v. Dukakis

Through FY-80, we continued to monitor DYS compliance with the consent decree in this case involving the Roslindale detention center.

Commissioner of Correction v. Myers

This case, argued before the Supreme Judicial Court, affirmed the authority of the Commissioner of Correction to compel a Department of Correction prisoner to undergo dialysis treatment.

In re Charlestown YMCA

In this case, we represented the Department of Youth Services before the Boston Board of Zoning Appeals to ensure the continued operation of a program for delinquent girls located in the Charlestown YMCA.

2. *Credit Discrimination*

Attorney General v. Amoco Oil Company

On July 12, 1979, suit was filed against Amoco Oil Company for discriminating against credit card applicants by "redlining" certain Massachusetts communities. The complaint alleges Amoco penalizes all credit applications from residents of 36 Massachusetts zip code areas, regardless of the personal qualifications of the applicants. This practice, we allege, has a disproportionately heavy impact on black residents because the penalized zip code areas include most of the black neighborhoods of Boston.

Suffolk Franklin Savings Bank v. Commissioner of Banks

In this case, we successfully represented the state banking Commissioner in a suit designed to prevent him from disseminating mortgage risk information on which studies of mortgage redlining was to be based.

3. *Problems of Developmentally Disabled Persons*

Bellotti et al. v. Sandwich School Committee et al.

This action, filed in the single justice session of the Supreme Judicial Court

in January, 1980, seeks to enforce the provisions of G.L. c. 19, §28, requiring school committees to pay the cost of transporting mentally retarded adults and children under the age of three who reside in their community to educational and habilitation programs. Negotiations with several other school committees were resolved without suit, with the towns agreeing voluntarily to provide required transportation.

In re. Spear School

Through administrative action, the Chapter 766 special education license of this school for emotionally disturbed children was suspended. Suspension of the license was based on serious health and safety conditions and on failure of the school to develop and implement educational plans as required by Department of Education regulations.

In the Matter of Scott Surette

In FY-80, at the request of the Select Committee to Investigate Seclusion, Restraint and Deaths in State Supported Facilities, we began an investigation into the death of a patient [while in four-point restraint] at the Solomon Mental Health Center in Lowell, Massachusetts.

In the Matter of Ann Davee

In FY-80, at the request of a state Senator, we began an investigation into the disappearance of a female patient at Metropolitan State Hospital, Waltham.

Architectural Barriers Board v. Clark

This action, filed in July, 1979, seeks to enforce decisions of the ABB requiring a shopping center in Bellingham, Massachusetts to comply with Board rules with respect to accessibility on the part of handicapped persons.

Regulations of the Architectural Barriers Board

In FY-80, we drafted a set of revised rules and regulations for the architectural Barriers Board to clarify the operating procedures of the board. These regulations will be subject to public hearing under G.L. c. 30A, §2, reviewed by the Commissioner of Administration pursuant to 801 CMR, §1.03(7), and published by the Secretary of State in accordance with G.L. c. 30A, §5.

4. *Equal Educational Opportunities*

Attorney General v. Massachusetts Interscholastic Athletic Association

On July 2, 1979, the Supreme Judicial Court issued its decision in this case, declaring that MIAA rules absolutely prohibiting any boy from playing on any girls' interscholastic athletic team was invalid under the state equal rights amendment.

Morgan v. McDonough

Throughout FY-80, we continued to represent the State Board of Education in *Morgan v. McDonough*, the Boston school desegregation case. Issues of primary concern during the period beginning July 1, 1979 and ending June 30, 1980, were the development and implementation of a long-range facility plan, including school closings, new construction and major renovation of existing buildings; and, the implementation of a unified vocational and occupational

plan, including the final stages of construction and the opening, in September, 1980, of the Hubert Humphrey Occupational Resource Center.

School Committee of Holyoke v. Department of Education

In this action, we represented the Department of Education in an appeal taken by the Holyoke School Committee from a decision of the Department's Division of Special Education that it had discriminated against black and hispanic students in special education programs.

The Greater Boston League

In FY-80, through our intervention and threat of suit, the Greater Boston League, an interscholastic athletic league of eight North Shore cities, reversed an earlier decision to exclude a girls' indoor track program from their participating schools' interscholastic athletic programs.

5. *Employment Discrimination*

Boughton v. Addison-Wesley

On June 4, 1980, Federal Judge Joseph Tauro approved the settlement in this Title VII sex discrimination case negotiated for a class of 500 women presently and formerly employed by the Addison-Wesley Publishing Company. The settlement provides for payments of \$350,000. in back pay, \$10,000. in insurance premiums for female employees, \$25,000. for tuition reimbursement, and \$15,000. costs. The consent decree also includes a three-year affirmative action plan for the company, and other relief.

Fewlass v. Allyn and Bacon; Akullian v. Allyn and Bacon

In January, 1980, Judge Joseph Tauro denied class certification in the original Title VII sex discrimination suit against Allyn and Bacon. After the addition of new plaintiffs and a request for an interlocutory appeal were denied, a substituted complaint was filed. Negotiations concluded in the spring of 1980 and, in May, 1980, a consent decree was filed. This decree provides nearly \$90,000 in damage payments to 109 women presently or formerly employed by Allyn and Bacon.

Richardson et al v. Houghton Mifflin Company

Throughout FY-80, discovery continued in this Title VII case filed in October, 1976 against a Boston publishing company. Unlike the two cases discussed above, this complaint alleges discrimination in employment on the basis of race as well as sex.

Holden v. MCAD

In this case, filed originally in 1973 when the role of the Civil Rights Division was almost exclusively to represent the MCAD, an attorney in the division is defending the Commission against charges of race discrimination. In June, 1980, a federal judge granted our motion for partial summary judgment. The remaining issues will be tried in the fall of 1980.

Melrose School Committee v. Sherwood

In October, 1979, a consent judgment was entered in this appeal of a MCAD decision involving failure on the part of the defendant Committee to allow a

teacher to use accumulated sick leave for pregnancy disability. An award of \$3,700. in back pay was ordered by the Court.

Pregnancy Disability Cases

Further settlements resulting in the payment of retroactive maternity disability payments to female employees were concluded in FY-1980. Between FY-1979 and FY-1980, approximately \$500,000. were recovered.

Regulations Regarding Reproductive Hazards

In June, 1980, we submitted comments to the Equal Employment Opportunities Commission concerning proposed guidelines on reproductive hazards. The guidelines would have allowed employers to exclude women from employment on the basis of alleged reproductive hazard, even though it had not been scientifically determined that the hazards affected women only.

6. Health

Frechette v. Bergland

In March, 1979, we received information indicating that the U.S. Department of Agriculture failed to follow published formulas in allocating money to the states for the Supplemental Food Program for Women, Infants and Children. As a result, we were informed Massachusetts had lost approximately \$600,000. in federal funding.

Negotiations with the federal government were not successful and in March, 1980, we filed suit against the federal defendants for the state's correct amount of funds. Discovery has concluded. Cross motions for summary judgment have been filed, briefed, and will be argued in September, 1980. Pending disposition of the merits, the federal defendants have agreed to set aside the amount in controversy.

Attorney General v. Dare, Inc.

This case, filed in May, 1980, seeks to compel Dare, Inc. to correct sanitary code violations in its juvenile community facilities. A preliminary injunction requiring corrections was obtained on May 14, 1980.

Custody of a Minor

In May, 1980, the Supreme Judicial Court issued its second decision in the Chad Green matter, holding that "metabolic therapy", utilizing laetrile, is not a viable alternative therapy for lymphocytic leukemia and renewing its prior decision precluding parents from asserting privacy interests on behalf of their children where, to do so, would lead to the death of the child.

Hill Burton Audit of Hospitals

In Fiscal Year 1980, with the assistance of the accounting component of the public protection bureau, we began to audit several hospitals in different parts of the state to determine whether they are in compliance with requirements of the federal Hill-Burton law that hospitals receiving Hill-Burton funds provide a reasonable amount of uncompensated services to people unable to pay and serve the needs of the community in which they are located.

In the Matter of Sheila Cramer

In this case, we represented the Department of Public Health in matters concerning the appointment of a guardian for an 87 year old patient at Lemuel Shattuck Hospital declared incompetent to make decisions regarding her health care and needs. The case is one of several in which the division has raised questions concerning the right to treatment, the right to refuse treatment, and issues of substituted consent. (See *e.g. Superintendent of Belchertown State School v. Saikewicz*).

7. *Housing*

Bellotti v. Corcoran Management Co.

In November, 1979, we reached settlement with Corcoran Management Company on charges that it discriminated against persons with children in the renting of apartments. In the settlement, Corcoran agreed to donate \$4,500. to a child guidance center and to take other actions to protect against future discrimination with respect to families with children.

This case was the first of several brought against realtors for discriminating against families and the first in which "sandwich tests" were used to determine differential treatment of applicants.

Attorney General v. Apartment Showcase

This case involves further attempts to enforce laws prohibiting discrimination against families with children in the rental of housing. This case differs from that described above in that it involves a rental service rather than an apartment complex.

Commonwealth v. Machinski; Commonwealth v. Tri-County Realty, Inc.

These two cases, filed in January, 1980 under G.L. c. 93A, the consumer protection law, sought to remedy DPH Sanitary Code violations in low income projects in Brockton. Preliminary relief was obtained. Defendant landlords have since taken voluntary action to remedy the deficiencies.

Commonwealth v. Marmer

In this case, the defendant was convicted of refusing to remove lead paint from his Haverhill apartment units. The conviction followed a two day jury trial held in August, 1979.

8. *Minority Business Enterprise*

Lincoln Industrial Supply Company, Inc. v. Carlin, et. al.

In this case, we represent the State Office of Minority Business Assistance (SOMBA) in a challenge to its denial of minority business enterprise (MBE) certification to a particular company on the grounds of lack of control by minority persons.

9. *Privacy*

Koloski v. Hall

On November 1, 1979, the state defendants' motion to dismiss was allowed in this case brought by a former DYS resident against former DYS Commis-

sioners alleging violations of her right to privacy while a resident of the Lancaster School for Girls.

TV Monitoring of Jail Cells

In May, 1980, we responded to an inquiry by the Chief of Police of the Town of Saugus regarding the privacy interests of pre-trial detainees and persons in protective custody who would be subjected to proposed TV monitoring of their cells as a means of preventing suicides. We concluded there would be no privacy violation as long as certain reasonable limits with respect to time, place and lighting were placed on the use of cameras and monitors.

Commonwealth v. Wiseman

In May, 1980, we sought to enjoin Frederick Wiseman from showing the film "Titicut Follies" to what appeared to be a general audience at the Boston 350 Jubilee Film Festival. This showing appeared to violate a permanent injunction issued in 1971 prohibiting showing of the film except to specialized professionals, students and members of organizations dealing with the social problems of custodial care and mental infirmity. The injunction was denied.

10. *Public Records Cases*

Bellotti v. Bennett

This public records case sought disclosure of addresses of eligible applicants for CETA public service jobs in Boston. The Superior Court entered judgment ordering disclosure.

Bellotti v. Board of Selectmen of Dennis

Through this public records case, we obtained abstracts of title to property taken by the Town of Dennis through eminent domain.

Attorney General v. Revere Housing Authority

On October 31, 1979, summary judgment was granted to the Attorney General in this case brought to require the housing authority to reveal the names of landlords receiving state housing subsidies.

Bellotti v. Assistant Commissioner of the Real Property Department of the City of Boston

This case sought disclosure of the records of all long distance telephone calls placed to or charged from any telephone in the offices of the mayor of Boston during the month of February, 1977. Through a motion for summary judgment, we were able to obtain partial disclosure of the telephone bills. An appeal has been taken to the Supreme Judicial Court which has recently remanded the case to the Superior Court of Suffolk County for a hearing on the merits of our further request.

11. *Voting Rights*

In October, 1979, we learned that weeks before a scheduled local election, the Voting Registrar of the City of Worcester had moved the voting place in a largely Hispanic ward of that city from a public housing project in the middle of the ward to an inaccessible location at the edge of the ward. Negotiations were successful in having the voting place returned to its original location.

12. Other

a. *Superintendent of Belchertown State School v. Civil Service Commission*

In FY-80, we successfully represented the Superintendent of Belchertown State School in a challenge to a Civil Service Commission order reinstating an employee of the school who had been terminated for several acts of misconduct, including unethical conduct.

b. *Lowell v. Kowalski*

In this case, we filed an amicus brief arguing for the constitutionality of G.L. c. 190, §5 and §7. The SJC, in April 1980, struck down the statute as unconstitutional in part because the statutes which prohibited illegitimate children from receiving share of their natural father's intestate estate except upon intermarriage of the parents violated the Equal Rights Amendment to the Constitution.

c. *Enforcement of Chapter 801 of the Acts of 1979*

Since the Civil Rights Bill became effective on February 14, 1980, activities on the part of division attorneys to enforce the act have focused on several means. A manual explaining the Act, containing court interpretations of similar provisions and suggesting elements of the various offenses or causes of action was prepared. This manual may be used as a training document in explaining the act to city and town police departments, district attorneys, and other interested persons. In addition, division attorneys met with several civic groups to discuss the Act.

Training sessions or meetings to discuss the provisions of Chapter 801 have been held with ranking superintendents of the Boston Police Department, with administrative staff of the Somerville Police Department and with the Arlington Police Department. In the future, meetings and conferences will be scheduled with other police officials in the larger cities and towns of the Commonwealth.

Several cases have been investigated for possible prosecution. These cases involved acts of racial violence in the Stonybrook Section of Hyde Park, in the Bowdoin area of Dorchester, in the Deitz Road section of Hyde Park, in the Fairmont Housing Project in Hyde Park, in the town of Arlington, in the town of Somerville, and in the Faneuil Street Housing Project in Brighton.

d. In March, 1980, the division sponsored a meeting with security personnel of several large shopping malls and representatives from handicapped persons' groups to consider enforcement of handicapped parking laws.

e. In June, 1979, at the request of administrative personnel from the Thompson's Island Educational Center, we convened a meeting with various law enforcement personnel to maximize protection and safety of visitors using the Island's land base at Kellys Landing in South Boston.

f. In July, 1979, an attorney with the Civil Rights Division testified before the United States Senate Commerce Committee concerning geographic redlining in the extension of credit.

g. On November 16, 1979, personnel from the Civil Rights Division presented a workshop on credit and housing at a conference organized by a New Bedford Womens' Group.

h. Throughout FY-80, an attorney from this division acted as chairman of a Department of Mental Health Task Force designed to recommend policy in the

areas of human sexuality, sex education and privacy for persons residing in DMH facilities.

i. In FY-80, we continued to review the application of a Massachusetts Interscholastic Athletic Association regulation limiting the age of students participating in interscholastic athletics and its possible adverse impact on handicapped students.

j. In FY-80, we investigated complaints by the U.S. Labor Party concerning their denial of first amendment rights to leaflet and speak on public property. Meetings were held with officials of the public property and the registry of motor vehicles, and the leafletting was permitted.

k. In FY-80, as a result of communications from this division, the Department of Corporations and Taxation modified its policy of holding the domicile of a married women to be that of her husband.

l. Through our intervention and coordination, the Department of Corrections has appointed a contact person in each correctional facility to assist veterans in obtaining state and federal benefits to which they are entitled. The need for such assistance was initially brought to our attention by a newspaper reporter.

CONSUMER PROTECTION DIVISION

I. INTRODUCTION

The Consumer Protection Division has continued to expand its activities in a number of important and complex areas. For example, during the past fiscal year a number of successful lawsuits have been brought involving investment schemes, nursing homes, and fraud in the sale of primary energy sources. The Division has also placed a major emphasis on developing legal forms which will increase our efficiency in cases which arise with some regularity.

Finally, the Division continues to maximize its resources through improved internal coordination with the investigation and complaint sections of the office, and effective cooperation with local, state, and federal law enforcement agencies, including the consumer protection divisions of many other states.

II. STATISTICS

During the past fiscal year, the Consumer Protection Division commenced 57 lawsuits in Superior Court; obtained 49 judgments; 37 assurances of discontinuance; and initiated 9 contempt of court proceedings. In addition, the Division obtained \$1,265,340 in judgments and restitution for Massachusetts consumers.

III. MAJOR CASE AREAS

A. Contempt

The Consumer Protection Division has continued to carefully monitor judgments entered in Superior Court. Contempt of court sanctions are sought in the event of serious noncompliance by a defendant. A number of important contempt cases were successfully completed during the past fiscal year.

1. *Bonded Dodge of Stoughton*: This case was tried in May, 1980. After three days of trial Bonded agreed to the entry of judgment of civil contempt of a previous court order. The contempt consisted of bait and switch advertising, misrepresenting that repairs had been made, using an unlawful warranty, and refusing to deliver motor vehicles at agreed upon prices. Bonded paid a fine of \$3,000 and was permanently enjoined from further violations.

2. *Supreme Remodeling*: A judgment was entered in this case finding the corporate and individual defendants guilty of civil contempt for gross and intentional failure to honor warranties on home improvement contracts. Fines totalling \$60,000 were assessed, and the defendant is required to notify the Attorney General and post bond of \$50,000 prior to performing home improvement services in the future in the Commonwealth.

3. *Randy Messineo*: In July, 1979 the defendant was found guilty by a jury of criminal contempt in connection with the violation of a court order regarding real estate activities. The defendant was sentenced to jail for 5 months and ordered to pay restitution of \$42,000.

B. Health Care

The Consumer Protection Division has continued to devote a substantial amount of time to health care litigation and investigations. Nursing homes, hospitals, insurance companies and medical laboratories have all been subject to litigation or investigation in the past fiscal year.

In the past fiscal year the Consumer Protection Division has filed seven patient abuse and neglect lawsuits. In each case, injunctions or judgments were obtained which required the nursing home owners and administrators to feed, clothe, and properly medicate the patients and to hire sufficient staff to manage the facility in compliance with state and federal regulations. In each abuse case, the Consumer Protection Division addressed the issue of "transfer trauma": the dramatic increase in morbidity among nursing home patients who are transferred precipitously, without appropriate medical and psychological counseling, from one facility to another. In cooperation with the Department of Public Health, the Consumer Protection Division worked with patients and families to reduce the risk of transfer trauma in those cases where it was necessary to transfer patients. We were also successful in one case in obtaining a court order requiring the nursing home owner to comply with the Department of Public Welfare transfer guidelines prior to transferring any patients.

Another major case and investigation area for the division is that of access to nursing home residents by community groups, legal services lawyers and paralegals. The Attorney General's nursing home regulations provide that community groups and legal workers have an unrestricted right of access to nursing home patients in some instances. We were successful in obtaining a preliminary injunction requiring an owner to abide by this regulation, with the exception that if visitors for a particular patient was medically contra-indicated, then visitors could be excluded, pending a trial on the merits.

The Division has also continued its involvement in the area of medical laboratories. In *Commonwealth v. Elm Medical Laboratory, Inc., et al*, the Consumer Protection Division obtained a temporary and preliminary injunction barring the defendants from continuing to perform medical tests in the areas of cytology (pap smears) and histopathology. The impetus for this lawsuit was the United States Center for Disease Control's conclusion that ELM's cytology operation constituted a grave risk to women because of the high probability of error in ELM's reading of pap smears. Throughout the litigation, we have continued to work closely with state and federal officials.

C. Automobiles

The Division has continued its traditional efforts in this area. For example,

five additional suits were commenced in the past fiscal year against automobile dealers who have altered odometers on used automobiles. Judgments have been entered for restitution for consumers in the amount of \$103,000. In addition, 6 assurances of discontinuance were obtained from automobile dealers whose advertisements failed to comply with the Attorney General's Motor Vehicle Regulations. Finally, the Division has commenced a major investigation to determine whether foreign automobile distributors and/or dealers are unlawfully refusing to sell vehicles to consumers without numerous expensive "options" added to the vehicle.

D. Investment Schemes

The Consumer Protection Division has made a major effort to identify and prosecute unlawful "boiler room" operations marketing opportunities for investment in gold, silver, or oil. Five lawsuits have been commenced in the past fiscal year, two of which are especially noteworthy.

1. *Ramco Petroleum, Inc.*: This company marketed spot crude oil contracts by telephone. The Superior Court enjoined Ramco from engaging in the solicitation and sale of unregistered securities. A receiver was appointed at the request of the Consumer Protection Division to assume control of the assets of the Corporation.

2. *American Gold & Silver Exchange, Ltd.*: In this case the Superior Court enjoined the defendants from selling unlawful commodity options in gold and silver and unregistered securities in spot market crude oil. In addition, a receiver was appointed by the Court to take control of the company.

E. Energy

In the past fiscal year the Consumer Protection Division has commenced a major effort to stop fraud in the sale of energy saving devices and fuel.

During the past heating season, when many consumers in New England turned to wood as an alternative or supplement to oil for heating their homes, this office began an enforcement effort to prevent unfair practices in the sale of wood to consumers. During 1979-80, 15 legal actions were filed by this office under the Consumer Protection Act, G.L. c. 93A, against wood dealers alleging violations of c. 94 by providing consumers less than the full measure of wood which consumers had ordered and paid for. We estimate that through the judgments and assurances which we obtained last year restitution of wood worth approximately \$6,000 was made to consumers in Massachusetts. Subsequently, one of the dealers against whom a Final Judgment was entered violated its terms by short measuring two more consumers. We filed a contempt petition against this dealer. The court entered an order finding him in contempt on five counts, ordered him to pay a civil fine of \$2,400 and to make restitution to the two consumers who had been short measured.

The Consumer Protection Division also filed six legal actions and commenced seven investigations relating to fraud in the sale and delivery of home heating oil. Working closely with the Massachusetts Division of Standards, the Division has discovered various unlawful practices by oil dealers which have resulted in excessive oil payments by consumers. The Division has sought injunctions, and obtained restitution in a number of cases.

F. Real Estate

1. *Land and Leisure, United Resources, et al*: The Division initiated a major lawsuit alleging misrepresentation and breach of warranty in the sale of land located in Florida. On behalf of approximately thirty Massachusetts consumers, the Division is seeking approximately \$250,000 damages because of the defendant's failure to install paved roads, sewage facilities and otherwise comply with consumer contracts. The Division has obtained a temporary order barring the defendants from spending about \$200,000 pending a trial on the merits. On December 13, 1979, at the request of the Consumer Protection Division, the Board of Registration of Real Estate Brokers revoked the license of a Massachusetts realtor as a result of the deceptive sale of land in Florida to Massachusetts Consumers.

2. *Trustees of Clarke - Jacob Realty Trust*: An Assurance of Discontinuance was entered in this case concerning practices of the trust relating to rental of apartments in Salem, Massachusetts. The Trust had attempted to charge its tenants retroactively for fuel costs which were already included in their rental payments. As part of the Assurance the Trustees agreed to withdraw the back charges and refrain from issuing any such charges in the future. Additionally, the Assurance provides that if the Trust represents that any future rent increase is necessitated by increased fuel costs they will provide tenants with access to all appropriate documents to support any such assertion.

G. Business Opportunity Schemes

The Division has developed an important monitoring program of advertisements for business opportunities. Early detection of fraudulent mail order or franchise operations is essential. Therefore, an attorney has been specifically assigned to monitor advertising in major Massachusetts newspapers.

IV. MAJOR APPELLATE DECISIONS

A. *Purity Supreme, Inc. v. Attorney General*: In June, 1980, the Supreme Judicial Court issued its decision on Purity Supreme's challenge to the rulemaking authority of the Attorney General. The Court held that regulations issued under the Consumer Protection Act have the force and effect of law, and that the regulations may properly seek to prevent unfair and deceptive practices. Purity had challenged the validity of the Item Price Regulation which requires that retailers affix a price to each product offered for sale.

B. *CUNA Mutual Insurance Society v. Attorney General*: In this case, the Supreme Judicial Court issued an important decision construing the Attorney General's investigative authority under the Consumer Protection Act. The Court determined that a civil investigative demand for the production of documents may be issued to a third party who possesses evidence relevant to the investigation of another. In addition, the Attorney General is not required to notify the recipient of a C.I.D. whether it is the target of the investigation.

C. *Northampton National Bank v. Attorney General*: This case considered the legality under Massachusetts law of the imposition by a credit card issuer of an annual membership fee. This case began in 1977 when the Attorney General took the position that such fees must be included in the calculation of the maximum finance charge. The Appeals Court ruled that membership fees may be imposed without regard to the truth in lending statutes.

D. *Commonwealth v. Hale*: In this case, the First Circuit Court of Appeals held that a default judgment entered in state court under the Consumer Protection Act was dischargeable in bankruptcy. The Court rejected the Commonwealth's argument that the policies underlying the Bankruptcy act would best be served by denying the bankrupt dischargeability of debts incurred in violation of the Consumer Protection Act.

E. *Attorney General v. Industrial National Bank of Rhode Island*: The Supreme Judicial Court held that the Attorney General was precluded by the National Bank Act from enforcing a civil investigative demand issued to the bank in the absence of facts showing a waiver of the venue provisions of federal law.

V. LEGISLATION

A. In cooperation with the Attorney General's Medicaid Fraud Control Unit, the Consumer Protection Division drafted a proposed statute "An Act Relative To Abuse Of Patients Or Residents In Long-Term Care Facilities". Governor King signed this statute into law on July 11, 1980. For the first time in Massachusetts, this statute defines abuse, mistreatment and neglect and empowers the Attorney General to bring action seeking civil penalties and fines criminal penalties in addition to remedies provided by c. 93A.

B. The venue provision of G.L. c. 93A, §4 was amended by Chapter 119 of the Acts of 1980. Where the Attorney General files suit under the Consumer Protection Act against multiple defendants, he may do so in the county where one defendant resides, or in Suffolk County. This change was recommended to the legislature by the Attorney General to reduce the inconvenience under the former venue provision.

CONSUMER PROTECTION CASE LIST

A. ADVERTISING

<i>Defendant</i>	<i>Status Disposition</i>	<i>County Court</i>
AAA Rental (T.V.'s)	Consent Judgment	Middlesex
Aaron Glickman	Consent Judgment	Suffolk
Amherst Radio/Electronics/Videsign	Assurance of Discontinuance	Suffolk
Anderson's Furniture	Consent Judgment	
Arkey Radio/Electronics	Assurance of Discontinuance	Suffolk
Aqua-King Pool Co.	Consent Judgment	Hampden
Atlantis Sound, Inc.	Assurance of Discontinuance	Suffolk
Audiosonics, Inc.	Assurance of Discontinuance	Suffolk
B & G Industries, Inc.	Assurance of Discontinuance	Norfolk
Booth Communications	Litigation	Essex
Boston Organ and Piano	Assurance of Discontinuance	Suffolk
Botolph Associates, Inc.	Assurance of Discontinuance	Suffolk
Brands Mart, Inc.	Assurance of Discontinuance	Suffolk
Building 19	Assurance of Discontinuance	Suffolk
Castro Convertible (Rinman, Inc.)	Assurance of Discontinuance	Suffolk
Columbia Research	Consent Judgment	Suffolk
Comm. Builders Supply	Assurance of Discontinuance	Suffolk
Crown Convertibles (Johema, Inc.)	Assurance of Discontinuance	Suffolk
Discount Records	Consent Judgment	
Eardrum of New England	Assurance of Discontinuance	Suffolk
Eclipse Sleep Prod. of N.E.	Assurance of Discontinuance	Suffolk

Ed's Radio	Assurance of Discontinuance	Suffolk
Edward's Wayside Furniture	Consent Judgment	Hampden
Emerson Rug	Assurance of Discontinuance	Suffolk
Furniture Gallery	Assurance of Discontinuance	Suffolk
H.M. Fisk/Emeralds	Judgment	Suffolk
Hercules Trouser Co.	Assurance of Discontinuance	Suffolk
Hyannis Hi-Fi	Assurance of Discontinuance	Suffolk
Gentlemen Warehouse Factory Outlet	Assurance of Discontinuance	Suffolk
Golub Furniture	Assurance of Discontinuance	Suffolk
Goodrich, B.F.	Assurance of Discontinuance	Suffolk
Graham Radio	Assurance of Discontinuance	Suffolk
Hi-Fi Buys/Leisure Distr.	Assurance of Discontinuance	Suffolk
Indiana Merchandising Corp/Nassi	Assurance of Discontinuance	Suffolk
Jordan Marsh	Assurance of Discontinuance	Suffolk
Kaplan's Furniture Co.	Assurance of Discontinuance	Suffolk
Labovitz, Stanley (Andrew Furn.)	Assurance of Discontinuance	Suffolk
Lafayette Radio	Assurance of Discontinuance	Suffolk
Lane Pools	Assurance of Discontinuance	Suffolk
Leonard, Paul	Consent Judgment	Hampden
Mass. Camera Centers	Assurance of Discontinuance	Suffolk
Max Okun Furniture Co., Inc.	Consent Judgment	Hampden
Miller's Furniture Co.	Assurance of Discontinuance	Suffolk
Minute Man Radio Co., Inc.	Assurance of Discontinuance	Suffolk
Nantucket Sound	Consent Judgment	
National Business Directory	Assurance of Discontinuance	Suffolk
New England Audio/Tweeter	Assurance of Discontinuance	Suffolk
New England Group	Assurance of Discontinuance	Suffolk
New England Photo	Assurance of Discontinuance	Suffolk
New England Sound Svc/Tech HiFi	Assurance of Discontinuance	Suffolk
Olde Colony Stereo	Assurance of Discontinuance	Suffolk
Overseas Employment Research	Assurance of Discontinuance	Suffolk
Paul's Furniture	Assurance of Discontinuance	Suffolk
Precision Motor Rebuilders	Consent Judgment	Middlesex
Professional Guild of America	Assurance of Discontinuance	Suffolk
Pyramid Construction Company	Litigation	Franklin
Railroad Salvage of Connecticut	Assurance of Discontinuance	Suffolk
Rautio, James d/b/a Treas. Chest	Assurance of Discontinuance	Suffolk
S & L Sales Corp./K&L Sound	Assurance of Discontinuance	Suffolk
Saab-Scania of America	Consent Judgment	Suffolk
Seiden Sound	Assurance of Discontinuance	Suffolk
Seiden Sound	Consent Judgment	Hampden
Shaker's Workshops	Assurance of Discontinuance	Suffolk
Sherman's	Assurance of Discontinuance	Suffolk
Shuman, Stanley	Consent Judgment	Suffolk
Siesta Sleep Shop	Assurance of Discontinuance	Suffolk
Sound II	Assurance of Discontinuance	Suffolk
Spartan Paint & Supply	Assurance of Discontinuance	Suffolk
Stavis, Steve	Litigation	
Stereo Component, Systems, Inc.	Assurance of Discontinuance	Suffolk
Strawberries, Inc.	Consent Judgment	Suffolk
Summerfield's	Consent Judgment	Middlesex
Todd's World of Furniture	Assurance of Discontinuance	Suffolk
Wholesale Furniture & Carpet	Assurance of Discontinuance	Suffolk
Wholesale Marketing/Joanne Scheff	Consent Judgment	Suffolk

Wilmington Ford	Consent Judgment	Middlesex
Y.D.I. Corp. (You Do It Electr.)	Assurance of Discontinuance	Suffolk

B. AUTOMOBILES

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Abel Ford	Consent Judgment	Suffolk
Avenue Auto Wholesalers/Brazel	Assurance of Discontinuance	Suffolk
Bart Auto Ctr. (Rev-Ben Enterp.)	Consent Judgment	Worcester
Belotti (Victor), Inc.	Assurance of Discontinuance	Suffolk
Big Beacon Chevrolet	Assurance of Discontinuance	Suffolk
Bob Brest Buick	Consent Judgment	Suffolk
Bonded Dodge	Judgment	Norfolk
Boston Imports/Lamb Lotus/Wasil	Consent Judgment	Suffolk
Brigham-Gill Pontiac AMC	Assurance of Discontinuance	Suffolk
Brockton Auto Sales	Consent Judgment	Plymouth
Brockton Dodge	Assurance of Discontinuance	Suffolk
Cape Motors	Consent Judgment	Suffolk
Car Finders	Consent Judgment	Hampden
Carol Cars	Litigation	Hampden
Chalet Motor Sales	Assurance of Discontinuance	Suffolk
Chestnut Hill Motors (odometer)	Assurance of Discontinuance	Suffolk
City Auto a/k/a Edward Borlen	Assurance of Discontinuance	Hampden
Clay Chevrolet	Assurance of Discontinuance	Suffolk
Colonial Motor Sales/B. Milton	Consent Judgment	Hampden
Cullinan (Joe) Ford, Inc.	Consent Judgment	Middlesex
Dazell Volvo	Assurance of Discontinuance	Suffolk
Delaney (Kevin) Pontiac	Assurance of Discontinuance	Suffolk
Desautels, William	Contempt	Bristol
Desautels, William (Car Dealer)	Litigation	Bristol
Dino Buick	Assurance of Discontinuance	Suffolk
Don's Getty Service Station	Consent Judgment	Hampden
Eastfield Auto Sales, Inc.	Judgment	Hampden
Eck's Auto	Consent Judgment	Norfolk
Eck's Auto Sales	Consent Judgment	Middlesex
English Chevrolet	Consent Judgment	
Excellent Car Co.	Assurance of Discontinuance	Suffolk
Falmouth Datsun	Assurance of Discontinuance	Suffolk
Falmouth Dodge	Assurance of Discontinuance	Suffolk
Fife, Walter	Consent Judgment	Middlesex
Fleischer Auto Sales	Consent Judgment	
Foreign Auto Import (Watertown)	Consent Judgment	Middlesex
Granese, Joseph	Judgment	Suffolk
Hallman Chevrolet	Assurance of Discontinuance	Suffolk
Holyoke Auto (Toyota of Holyoke)	Stipulation	Hampden
Howard Chevrolet	Assurance of Discontinuance	Suffolk
Imported Cars of Cape Cod	Assurance of Discontinuance	Suffolk
Infiorati (Owen), Inc.	Consent Judgment	Suffolk
Kent (Harold) Ford	Judgment	Hampden
King B's Automart/Joseph Graense	Judgment	Suffolk
Lakeside Auto Sales	Litigation	Worcester
Lord Toyota	Complaint	Norfolk
Lord Toyota	Consent Judgment	Suffolk
Lord Toyota	Assurance of Discontinuance	Suffolk
Main Street Auto Sales & Serv.	Assurance of Discontinuance	Suffolk

Mass. State Auto Dealers Ass'n	Litigation	Suffolk
Medeiros (William) Chevrolet	Assurance of Discontinuance	Suffolk
Morris Motors, Inc.	Assurance of Discontinuance	Suffolk
One Twenty Eight (128) Sales, Inc.	Litigation	Middlesex
One Twenty Eight - 128 Imports	Assurance of Discontinuance	Suffolk
Owens Motors	Consent Judgment	
Palazini, James/Waverly Auto	Litigation	Middlesex
Pete's Chrysler/Plymouth	Assurance of Discontinuance	Suffolk
Phillipoff, Thomas E.	Judgment	Hampden
Pierce Ford World	Litigation	
Plaza Oldsmobile	Assurance of Discontinuance	Suffolk
Precision Motor Rebuilders	Consent Judgment	
Robichaud Auto Sales, Service	Judgment	Worcester
Ryll Automotive Products	Consent Judgment	
Saab-Scania of America	Consent Judgment	Suffolk
Smyly Buick	Assurance of Discontinuance	Suffolk
Taunton Sales, Inc.	Consent Judgment	Bristol
Taurus Auto Sales, et al	Assurance of Discontinuance	Suffolk
Topor Motor Sales	Consent Judgment	Hampden
Toyota of Falmouth	Assurance of Discontinuance	Plymouth
United Auto Buyers/Gregorie	Consent Judgment	Worcester
United Auto Buyers/Gregorie	Litigation	U.S. Dist. Ct.
Valley Chevrolet	Assurance of Discontinuance	
Village Chevrolet	Assurance of Discontinuance	Suffolk
West & Alexander	Judgment	Hampden
West Country Motors, Inc.	Litigation	Hampden
West Springfield Chvy/Plymouth	Consent Judgment	Hampden
Westport Autorama	Consent Judgment	
Wilmington Ford	Consent Judgment	Suffolk

C. BANKING & CREDIT

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Allied Bond & Collection Agency	Litigation	Suffolk
Arthur Ind./1st Safety Nat'l Bnk	Litigation	Suffolk
Cambridge Trust Company	Litigation	
Central Secret Service	Consent Judgment	Suffolk
Chrysler Credit Corp.	Consent Judgment	Suffolk
Ford Motor Credit Corp.	Assurance of Discontinuance	Suffolk
General Motors Acceptance Corp.	Assurance of Discontinuance	Suffolk
Hull Cooperative Bank	Final Judgment	Suffolk
Industrial Nat'l Bank of R.I.	Consent Judgment	Suffolk
Leominster Savings Bank	Consent Judgment	
Merrimac Savings Bank	Judgment	Suffolk
Statewide Credit	Assurance of Discontinuance	Suffolk
Tuck & Pozzi	Consent Judgment	
Van Ro Credit Corp.	Consent Judgment	Suffolk

D. CONTRACTS

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
American Int'l Holidays	Assurance of Discontinuance	Suffolk
American Int'l Leisure/G. Paglia	Assurance of Discontinuance	Suffolk
Crimson Travel Service	Litigation	Middlesex
Diamedic, Inc.	Litigation	Norfolk
Great Amer. Travel (Southwind)	Consent Judgment	Suffolk

Intern'l Magazine Services	Assurance of Discontinuance	Suffolk
Kiddy Photographs	Assurance of Discontinuance	Suffolk
Northeast Marketing Services	Litigation	Suffolk
People's Furniture	Consent Judgment	Middlesex
Pereira Brothers Roofing	Litigation	Middlesex
Selective Singles	Litigation	Norfolk
Slimtique, Inc.	Litigation	Suffolk
Supersonic Tours	Assurance of Discontinuance	Suffolk
United Marketing Corp., et al	Judgment	Suffolk
WAAF, A-Ok Productions	Litigation	Norfolk
Walo & Levine	Consent Judgment	Middlesex
Zimei, Alfred	Litigation	Worcester

E. EDUCATION

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Allied Construction Training Cntr	Assurance of Discontinuance	Suffolk
E. Atlantic Tractor Trailer Train	Judgment	Hampden
Framingham Civil Serv. School	Consent Judgment	Middlesex
Graham Junior College	Consent Judgment	Suffolk
LaSalle Extension Univ.	Consent Judgment	
New England Appliance Sch/Solari	Consent Judgment	Suffolk
New England Sch. of Culinary Arts	Consent Judgment	Middlesex
New England Trac/Trail Training	Consent Judgment	Hampden
Solari/Tech Age	Litigation	Suffolk

F. ENERGY

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
All Star Fuel Co./Marshall	Litigation	Essex
Atlantic Farm, Inc.	Assurance of Discontinuance	Suffolk
Birch, J.T.	Assurance of Discontinuance	Suffolk
C & C Oil Co. (Isaac Cohen)	Consent Judgment	Suffolk
Caporale, Leonard	Consent Judgment	Suffolk
Cardelli, Aenzo	Consent Judgment	Suffolk
Caswell, Patrick/Pat's Fireplace	Assurance of Discontinuance	Suffolk
Clene Heat/R.J. Holding	Consent Judgment	Suffolk
Coy, Ron/Northern Tree	Consent Judgment	Suffolk
D & P Service Co.	Litigation	
D Oil Co./Jack DePalma	Litigation	Suffolk
Daigle, Barry	Assurance of Discontinuance	Suffolk
DePalma, Anthony	Litigation	Suffolk
DePalma, John	Consent Judgment	Suffolk
Forbes, Richard/Dick's Landscp.	Assurance of Discontinuance	Suffolk
Holding, R.J. Oil & Gas	Consent Judgment	Suffolk
King's Row Fireplace Shop	Assurance of Discontinuance	Suffolk
Levesque, Edward	Consent Judgment	Suffolk
Marchetta, Ron/Timberline Tree	Final Judgment	Suffolk
Millian, Robert (Newton St. Gulf)	Consent Judgment	Suffolk
Orleans Coal & Oil Co.	Consent Judgment	Middlesex
Palingo Oil Co.	Litigation	
Perry, Bill	Assurance of Discontinuance	Suffolk
Potter, Seth	Assurance of Discontinuance	Suffolk
Russo Oil Co.	Consent Judgment	Suffolk
Simonelli Oil Co.	Litigation	
Smith Farms/G. R. Smith	Assurance of Discontinuance	Suffolk

Smith, Mark	Assurance of Discontinuance	Suffolk
Spalt Industries, Inc.	Litigation	
Wheeler, Steve/Saddleback Farms	Consent Judgment	Suffolk
Wilkensky, Julius	Consent Judgment	Suffolk
Zion, Ronald	Consent Judgment	Suffolk

G. HOME IMPROVEMENT/APPLIANCE REPAIR

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
A-Z Appliance/Allen Zellin	Assurance of Discontinuance	Suffolk
AAA Rental/RBM Sales	Litigation	Middlesex
Acme Power Vac/Ralph Rigiono	Consent Judgment	Bristol
Air Temp Engineering, Inc.	Judgment	Middlesex
ALCO Aluminum Pool & Siding Co.	Judgment	Hampden
Anderson, Ralph & Anderson Cstr.	Consent Judgment	Suffolk
Associated Pools	Consent Judgment	Norfolk
Beacon Hill Roofing	Litigation	Suffolk
Hale/United Vinyl	Litigation	U.S. Dist. Ct.
Jack's Radio & TV (John Debie)	Consent Judgment	Essex
King Appliance Service	Consent Judgment	
Luisi, Paul, et al	Litigation	Suffolk
O'Connor Brothers	Litigation	Middlesex
Rigiono, Ralph/Acme Power Vac	Consent Judgment	Suffolk
Seamless Plumbing	Litigation	Suffolk
Stott Charles/Waltham Roofing	Litigation	Middlesex
Supreme Remodeling (Al Libman)	Judgment	1st Cir. Ct.
Ward, George/Waltham Roofing	Litigation	Middlesex
Watertown Roofing/Vlahakis	Litigation	Middlesex
Wonder Construction/Sesser	Consent Judgment	Middlesex

H. HEALTH

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Appelton, Lloyd O./Kings Mount	Assurance of Discontinuance	Suffolk
Beltone Hearing Aid Service	Consent Judgment	Hampden
ELM Med Lab, Inc/Baez-Giangreco	Litigation	Suffolk
Genesis Laboratory	Litigation	Norfolk
Inter-Church Team Ministries	Litigation	Bristol

I. INSURANCE

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Balfour Federal Credit Union	Litigation	Bristol
Blue Cross/Blue Shield, Inc.	Litigation	Suffolk
CUNA Mutual Insurance Society #2	Litigation	Middlesex
Edwards, Allan G., Jr. (M.D.)	Assurance of Discontinuance	Suffolk
Gallagher, Philip G. (M.D.)	Assurance of Discontinuance	Suffolk
Metropolitan Life Insurance	Litigation	Suffolk
Travelers Insurance Co.	Litigation	Suffolk

J. MOBILE HOMES

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Bluebird Acres Mobile Home Park	Consent Judgment	
Hampden Village	Judgment	Hampden
Hampden Village	Contempt	Hampden
Mogan's Mobile Home Park	Consent Judgment	Middlesex
Suburban Estates	Litigation	Bristol

K. *NURSING HOMES*

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Adams Nursing Home/Alessandroni	Partial Judgment	Suffolk
Algonquin RH/Whitlow, Hazel/Irv	Litigation	Suffolk
Almeida Lewis	Judgment	Bristol
Berkshire Nursing Home	Judgment	Berkshire
Dranetz, Marshall/Daley, Harry	Litigation	Barnstable
Fleetwood Nursing Home	Litigation	Berkshire
Hancock House Of Beverly	Litigation	Middlesex
Harvard Manor Nursing Home	Judgment	Middlesex
Havolyn Management/Ray Monahan	Consent Judgment	Suffolk
Havolyn Management/Ray Monahan	Contempt	Suffolk
Heritage Hill Nursing Homes	Litigation	Suffolk
Jewish Nurs. Home Of West. Mass.	Litigation	Hamden
Kimwell, Weston Manor Nurs. Home	Consent Judgment	Suffolk
Middlesex Manor Nursing Home	Judgment	Bristol
Resthaven Rest Homes	Litigation	Suffolk
People's Church Nursing Home	Judgment	Worcester
Twin Pine Corp./Weston Manor NH	Judgment	Middlesex

L. *PRICING/FOOD*

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
First Nat'l Stores	Assurance of Discontinuance	Suffolk
Purity Supreme	Final Judgment	Middlesex

M. *REAL ESTATE/HOUSING*

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Acres 'n Acres	Litigation	Essex
Alan Realty/Alan Zuker	Consent Judgment	Norfolk
Allen Realty	Consent Judgment	Norfolk
Apex Apartment Rentals	Consent Judgment	Suffolk
Battlegreen Construction	Litigation	Middlesex
Bluebird Realty Trust	Consent Judgment	
Bluebird Realty Trust	Litigation	
Cape Real Estate	Consent Judgment	
City Real Estate	Consent Judgment	
Citywide Rentals	Consent Judgment	
Clarke-Jacob Realty	Assurance of Discontinuance	Suffolk
Cohen, Terry (Bulfinch Realty)	Litigation	Suffolk
Colonial Realty	Litigation	U.S. Dist. Ct.
Commonwealth Condo Tr/Gear/Bern	Consent Judgment	Suffolk
Co-Ree Real Estate	Consent Judgment	
Countryside Realty	Consent Judgment	
Delta Realty Co., Inc.	Consent Judgment	
Elmwood Park Rlty Tr/Stivaletta	Assurance of Discontinuance	Suffolk
E-Z Rentals	Consent Judgment	
Gei-Ger Real Estate	Consent Judgment	
Gesner Construction Co.	Consent Judgment	Norfolk
Gladestone Realty Trust	Litigation	Middlesex
Golden Eagle Apartments	Assurance of Discontinuance	Suffolk
Gray Rental Properties	Assurance of Discontinuance	Suffolk
H & F. Realty	Consent Judgment	
Harkey, John Realtor	Consent Judgment	
Harwick (William) Construction	Litigation	Norfolk

Homes By Design	Consent Judgment	Middlesex
Hub Realty	Consent Judgment	
Kaufman & Broad	Litigation	Norfolk
Keith (John W.) Builders	Consent Judgment	
Land & Leisure	Litigation	Suffolk
Land Auction Bureau	Litigation	Suffolk
Ledgemere Farms/Davis Farm Rd.	Consent Judgment	Middlesex
Liberty Hill Management Corp.	Consent Judgment	
MacDonald Real Estate	Consent Judgment	
Marshfield Real Estate	Consent Judgment	Plymouth
Messineo, Randolph/Randy's Rty.	Litigation	
Murphy & Murphy Drive-in R.E.	Consent Judgment	
Murphy, Christopher/Bird, Inc.	Litigation	Middlesex
Parkwood Estates Realty	Consent Judgment	
Realty Sales Co.	Consent Judgment	
Sergi Enterprises	Consent Judgment	
Southbrook Real Estate	Consent Judgment	
Weiss, Sheila	Assurance of Discontinuance	Suffolk
Wish Realty Assoc., Inc.	Consent Judgment	Suffolk
Woods Real Estate	Consent Judgment	

N. SALES PRACTICES

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Apartment Showcase	Judgment	Middlesex
Aubin, Wm./North East Land Realty	Judgment	
Bonnie Rigg Camping Club, et al	Assurance of Discontinuance	Suffolk
BIC's	Consent Judgment	Middlesex
Bi-Lo Food Warehouse	Judgment	Hampden
Butcher's Pride	Assurance of Discontinuance	Suffolk
Diversified Hlth Ind/Roman Spa	Litigation	Hampden
Edwin R. Sage Co.	Consent Judgment	Suffolk
Executive Dating Serv. (Konior)	Final Judgment	
Farm Stand of Peabody	Consent Judgment	Suffolk
Food Marts	Judgment	Hampden
Foodmaster Supermarkets, Inc.	Consent Judgment	Suffolk
General Investment & Devel. Co.	Assurance of Discontinuance	Suffolk
General Motors Appliance Corp.	Assurance of Discontinuance	Suffolk
Gloucester Dispatch, Inc.	Consent Judgment	Essex
Guarino, Stephen	Consent Judgment	Suffolk
Hearing Dynamics of New England	Consent Judgment	Norfolk
Hill & Sons & Hill Food Service	Litigation	
Homelike Apartments	Assurance of Discontinuance	Suffolk
Hub Ticket Agency	Consent Judgment	Suffolk
International Health Spa (Keene)	Litigation	Suffolk
J & T Auto Repair	Assurance of Discontinuance	Suffolk
Jewell Companies, Inc.	Consent Judgment	Middlesex
Keene, Allen	Litigation	
Kilgo, John (Evelyn Wood)	Assurance of Discontinuance	Suffolk
Lamour, Inc.	Assurance of Discontinuance	Suffolk
Leisure Distributors/Hi Fi Buys	Assurance of Discontinuance	Suffolk
Liberty Park Equip. & Sales	Consent Judgment	
Main Street Auto Sales & Serv.	Assurance of Discontinuance	Suffolk
Mansfield Mattress Corp.	Assurance of Discontinuance	Suffolk
Mass. Business & Prof. Directory	Consent Judgment	

Mass. Distributors, Inc.	Assurance of Discontinuance	Suffolk
Maynard Market	Consent Judgment	Suffolk
Middlesex Vacuum	Litigation	Middlesex
Mold Specialists	Consent Judgment	Suffolk
Murphy, Wayne	Consent Judgment	
Out-of-Town Ticket Agency	Consent Judgment	Suffolk
People's Furniture	Consent Judgment	
Pieroway Electric Co., Inc.	Assurance of Discontinuance	Suffolk
Pioneer Pools	Consent Judgment	Norfolk
Promotional Sales Consultants	Assurance of Discontinuance	Suffolk
Purity Supreme	Final Judgment	Middlesex
Railroad Salvage of Conn.	Assurance of Discontinuance	Suffolk
Ray's IGA Store	Consent Judgment	Suffolk
Schultz Lubricants, Inc.	Assurance of Discontinuance	Suffolk
Selective Singles	Litigation	Suffolk
Skyline Manor	Judgment	Hampden
Stereo Component Systems, Inc.	Assurance of Discontinuance	Suffolk
Swim-Rite Pools, Inc.	Litigation	Norfolk
Supreme Furniture Co.	Consent Judgment	
Town & County Products/Leonard	Judgment	Hampden
Tyson Ticket Agency	Consent Judgment	Suffolk
Valenti Ticket Agency	Consent Judgment	Suffolk
Weight Loss Medical Center	Consent Judgment	Suffolk
West Springfield Chvy/Plymouth	Litigation	Hampden
Wilkensky, Julius	Consent Judgment	
Woods, Paul (Swimming Pools)	Consent Judgment	
World of Homes	Assurance of Discontinuance	Suffolk

O. TRAVEL

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Associated Travel Serv of Boston	Assurance of Discontinuance	Suffolk
G & G Travel	Litigation	Hampden
Intern'l Weekends	Litigation	Suffolk
Patt, Gloria/Quality Tours	Litigation	Norfolk
Quality Tours	Litigation	Norfolk
Trans National Travel	Litigation	Suffolk

P. WEIGHTS & MEASURES

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Blue Ribbon Dairy	Litigation	
Family Assoc.	Consent Judgment	
Holding, R.J. Oil & Gas	Consent Judgment	
Lamusta's Auto Service	Consent Judgment	Worcester
Scholbro Foods d/b/a Evergood Mkt	Litigation	

Q. MISCELLANEOUS

<i>Defendant</i>	<i>Status/Disposition</i>	<i>County/Court</i>
Able Rug Cleaners, Inc	Assurance of Discontinuance	Suffolk
Aetna/St. Anns Credit Union	Final Judgment	U.S. Dist. Ct.
Allied Constr. Training Corp.	Assurance of Discontinuance	Suffolk
Anchutz, Donald E.	Assurance of Discontinuance	Suffolk
Andrews Paint	Consent Judgment	
Artistic Typing Headquarters	Assurance of Discontinuance	Suffolk
Auer, Bob-d/b/a Bob Auer & Sons	Consent Judgment	

Barry, Henry	Consent Judgment	
Big-Y-Foods, Inc.	Consent Judgment	
Bragel, Shirley	Assurance of Discontinuance	Suffolk
Brettman, Hy	Consent Judgment	
Brigham's Ice Cream	Consent Judgment	Middlesex
Chala Foods	Judgment	Plymouth
Chatham Development Co.	Consent Judgment	
Chawa Tash	Assurance of Discontinuance	Suffolk
Codman Co.	Consent Judgment	
Coffman, Ralph	Assurance of Discontinuance	Suffolk
Comfort Comer	Assurance of Discontinuance	Suffolk
Consigli, Louis	Consent Judgment	
Continental Employment Agency	Assurance of Discontinuance	Suffolk
Coordinators, Inc.	Consent Judgment	
CUNA Mutual Insurance Society #1	Litigation	Suffolk
Datamarine International	Consent Judgment	Barnstable
Daylight Dairy Products	Consent Judgment	
Dorchester Wayport Trust	Assurance of Discontinuance	Suffolk
Doucette, Paul	Assurance of Discontinuance	Suffolk
E & S Enterprises	Consent Judgment	
Fafco Division, VSI	Consent Judgment	
Famalette, Anthony	Consent Judgment	
Feodoroff Agency	Consent Judgment	Suffolk
Ferioli, R.J., Inc.	Consent Judgment	Plymouth
Framingham Housing Authority	Consent Judgment	
Global Oil	Litigation	Suffolk
Goldstein & Gurwite Auctioneers	Consent Judgment	Worcester
Grochmal, Richard	Consent Judgment	
Hewitt Assoc., Inc.	Assurance of Discontinuance	Suffolk
Iaciavano, Dominic, et al	Litigation	Norfolk
Indiana Merchandising Corp/Nassi	Assurance of Discontinuance	Suffolk
Juno, Inc.	Assurance of Discontinuance	Suffolk
Katz, Raanan/Victory Realty	Judgment	Suffolk
Kitchen Delight	Consent Judgment	Suffolk
LaFranchise, Arthur Jr.	Consent Judgment	
Lawson Hill	Judgment	Middlesex
Lesnow Mfg. Co.	Assurance of Discontinuance	Suffolk
Liberty Hill Management Corp.	Consent Judgment	Middlesex
Little & Co.	Consent Judgment	
Loring Hills Assoc.	Consent Judgment	
Mass. Rentals	Consent Judgment	
Miller, Ephram	Assurance of Discontinuance	Suffolk
Millis Commodity Ltd.	Litigation	Suffolk
Moccasin Craft	Consent Judgment	Middlesex
N.I. Associates	Assurance of Discontinuance	Suffolk
Nassi Assoc.	Assurance of Discontinuance	Suffolk
National Marketing Consultants	Litigation	
New England Studio Co.	Consent Judgment	
Pickwick Int'l Corp.	Consent Judgment	
Quigley, Charles	Consent Judgment	
Rao (Roger), Inc.	Assurance of Discontinuance	Suffolk
Rautio, James d/b/a Treas. Chest	Assurance of Discontinuance	Suffolk
Ryan, Kenneth	Consent Judgment	
San-Mac Industries	Consent Judgment	Essex

Seren's, Inc.	Consent Judgment	
Stamps Information Associates	Consent Judgment	Suffolk
Valve Service International	Consent Judgment	
Wasserman, Max	Consent Judgment	
Waystack, Charles Jr.	Consent Judgment	
Wholesale Marketing	Consent Judgment	
Windsor Meadows	Assurance of Discontinuance	Suffolk

ENVIRONMENTAL PROTECTION DIVISION

General Laws c.12, §11D establishes the Environmental Protection Division. The Division's responsibilities lie in two main areas. It is litigation counsel to all the agencies of the Commonwealth, principally those within the Executive Office of Environmental Affairs, that are charged with protecting the environment. In this role the Division appears in court in matters such as air and water pollution, hazardous and solid waste control, wetlands protection and billboard control. In addition, and pursuant to its mandate under G.L. c.12, §11D, the Division initiates and intervenes in judicial and administrative actions for the purpose of protecting the environment of the Commonwealth. These cases include hearings before federal agencies on the siting of energy generating facilities and participating in state and federal appellate courts on issues of significance to the environment.

During the year the Division became increasingly involved in two issues of great significance to Massachusetts: acid rain and hazardous waste disposal. The acid rain problem is now being recognized as a serious threat to water quality and aquatic life and, potentially, to agriculture, forestry and human health. It is especially serious in the northeast because the pollutants that cause it are often carried long distances and deposited in this area. The Division is moving on this problem in several areas. We are a party in a Sixth Circuit Challenge to the federal government's relaxation of air pollution requirements in Ohio. (Much of the problem begins in the midwest). We are participating in administrative proceedings regarding the interstate transport of air pollutants. We have given testimony before a United States committee concerning the environmental effects of the coal conversion contemplated by the "oil backout" legislation and the need for amendments to the Clean Air Act.

The unlawful disposal of hazardous substances has been a problem in Massachusetts for some time. It threatens water supplies and public health, and the Division has for five years sought to combat the problem. Recent tightening of enforcement in the New York-New Jersey area has forced more hazardous material into New England. The Division has responded in several ways. Civil enforcement efforts have been increased. The Criminal Bureau and the State Police Unit of the Department have been enlisted to aid in the effort. The Division has set up a committee composed of assistant attorneys general from the entire northeast to coordinate responses to the problem.

As a result of its role in environmental enforcement the Division is the recipient of substantial grant money from the United States Environmental Protection Agency. In fiscal year 1980, the Division received one hundred and seventy-five thousand dollars (\$175,000.00) in such funds, which are primarily for staffing.

The Division's enforcement policy includes seeking monetary penalties in appropriate cases. During the year judgments have entered totalling approximately two hundred and twenty-five thousand dollars (\$225,000.00) in such penalties.

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

CATEGORIES

AIR

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

WATER

Water pollution cases are referred from the Department of Environmental Quality Engineering, Division of Water Pollution Control. Most of these cases involve violations of discharge permits issued jointly by the Division of Water Pollution Control and the United States Environmental Protection Agency. Others seek to recover costs expended in cleaning up oil spills. The statutory authority is G.L. c.21, §§26-52.

WETLANDS

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

SOLID WASTE

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

HAZARDOUS WASTE

Hazardous waste cases are referred by the Department of Environmental Quality Engineering, Division of Hazardous Waste. They involve the transport and disposal of hazardous substances in violation of state regulations. The statutory authority is G.L. c.21C.

BILLBOARD

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

SCENIC RIVERS

Scenic Rivers cases are referred by the Department of Environmental Management. They involve the defense of use restrictions made pursuant to the

Commonwealth's Scenic Rivers Act. The statutory authority is G.L. c.21, §17B.

OTHERS

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

SIGNIFICANT CASES

There follows a description of some of the cases the Division handled during the year.

Pennsylvania v. EPA

This action challenges EPA's suspension of sulfur dioxide emission limitations for two Cleveland Electric Illuminating Company power plants in Ohio. Sulfur dioxide emissions from midwestern sources (especially those with tall stacks) are believed to play a large role in the acid rain problem in the northeast. We have intervened as a party-petitioner and have filed a lengthy brief together with other northeastern states. Before the court ruled, EPA announced new emission limitations for the two plants and a new tall stack policy. The tall stack policy represents a major victory for Massachusetts. It requires case-by-case review of the necessity for tall stacks rather than their automatic approval in certain circumstances.

Tidelands Amicus Brief

On May 6, 1980 the Massachusetts Senate submitted six questions concerning Senate bill No. 2150 to the Supreme Judicial Court for an advisory opinion. The Attorney General was invited to submit a brief on the questions. The bill in question was an attempt to extinguish certain public rights in tidelands in Boston Harbor. Our brief took the position that the proposed Senate bill is unconstitutional and violates the duty of the commonwealth to hold such tidelands in public trust for the benefit of all citizens of the commonwealth. The S.J.C. has not yet issued an opinion in the case.

Warren Price v. Wesley Eaton

In another case involving the public trust, the Division argued that a municipality could not limit access to boat-mooring permits to its residents because waters along the shore are held in trust by the commonwealth for all its citizens. The court agreed, providing an important statement of public trust law.

Roxse Homes v. Adams, et al.

The MBTA, DPW, and the Executive Office of Transportation and Construction proposed a plan for major renovation in Roxbury (the Southwest Corridor

Project) which included relocation of the Orange Line and construction of a new street (Crosstown Street) and parks in the area. The Southwest Corridor project, the biggest construction project ever undertaken in Boston, will create 23,000 jobs for community residents, physically rehabilitate the area, and improve transportation between Boston and seven of its neighborhoods. A small group of plaintiffs attempted to block the project. The Division represented the defendants in Federal District Court and participated in settlement negotiations which removed the plaintiffs' objections. The case was dismissed in February 1980.

Red Line Alert v. Adams

This case involved the MBTA and EOTC's project to extend the Red Line from Harvard Square to Alewife. The project, which will take approximately five years to complete will relieve much of the present congestion in Harvard Square and will provide mass transit for thousands who cannot now use it. The Division represented the state defendants in a federal court challenge to the project. The court denied the plaintiffs' motion for a preliminary injunction, and construction is continuing.

Division of Water Pollution Control v. City of Leominster

Leominster was the last remaining discharger not involved in a program to prevent the release of insufficiently treated or untreated wastewater into the North Nashua River. The City frequently discharges 5 million gallons of untreated wastewater per day into the river. The Division brought suit in 1976 to compel construction of a wastewater treatment plant. The City entered into a Consent Judgment agreeing to complete construction of the 90% federally and state-funded plant. Thereafter, the City repeatedly asked for delays in the schedule. Governors Dukakis and King rejected the requests for delays. In January 1980, the City refused to take the next step in the schedule: advertisement for bids for construction. In March 1980 the Division filed a Petition for Contempt. The Superior Court ordered the mayor to authorize advertisement of bids for construction. Construction bids have now been received by the City.

Division of Water Pollution Control v. Garelick Farms

Garelick Farms is a dairy in Franklin that is the source of illegal discharges into both the wetlands surrounding its plant and the town's sewer system. The Division sued the dairy. In one of the largest settlements we have negotiated, Garelick agreed to pay a civil penalty of \$75,000 and to undertake a major construction program to upgrade its wastewater handling facilities and to eliminate all unpermitted discharges.

Division of Water Pollution Control v. City of Quincy

In another negotiated settlement, the City of Quincy agreed to an extensive rehabilitation program for the numerous municipal storm drains discharging onto Wollaston Beach. Over the years sewage has been finding its way into these drainpipes, either through illegal direct connections or through leachate from failed septic systems in the vicinity of a break in the pipe. As a result, coliform counts in the water off Wollaston Beach have been consistently high, and the area has been periodically closed to swimming and shellfishing. Under the terms of the agreement, the city is using TV surveys to locate breaks in the

pipes and illegal connections, and then is inserting plastic sleeves and grouting to reseal them.

The next three cases illustrate the cooperative effort underway among the Division, the Criminal Bureau, the State Police Unit and the Division of Hazardous Waste of the Department of Environmental Quality Engineering (DEQE).

Cannons Engineering

The defendant in these cases is one of the principal licensed handlers of hazardous waste in the Commonwealth. Information developed by the State Police Unit indicated the defendant's involvement in illegal disposal of and false reporting regarding some of the waste. Indictments followed, and the license was revoked. The Division represents DEQE in its efforts to secure compliance with the law and in its defense of a challenge to the license revocation. The parties have agreed to the appointment of a receiver to run the operation so that valuable waste disposal capacity is retained while the public is protected.

Department of Environmental Quality Engineering v. Giovanella

Information developed by the State Police Unit indicated the existence of a site in Kingston where substantial amounts of hazardous waste has been dumped. A search warrant was executed, and members of the Division and the Criminal Bureau and technical personnel from DEQE discovered a large disposal site. While the criminal investigation continues, the Division has filed suit and has attached a substantial amount of property, for use as reimbursement for clean up.

Chem-Waste

Information obtained by the State Police indicated that hazardous wastes were being stored illegally in a warehouse in Salem and that they were about to be moved to an illegal disposal site in Maine. A search warrant and a temporary restraining order were obtained, and the move was prevented. DEQE later moved the materials to a safe storage facility in Braintree, pending completion of analysis of their constituents. The Division has filed suit and is negotiating with the generators and haulers of the waste for storage and disposal costs.

South Essex Sewerage District

This a complicated case in which a large regional sewage treatment plant has been forced to discharge untreated sewage in violation of state and federal water laws by its lack of a legal disposal site for the ash (which has been declared a hazardous waste) that results from burning sludge and by the disturbance of local residents caused by the burning. DEQE has given the Sewerage District a great deal of technical assistance, and the Division, the District, and the City of Salem are negotiating toward resolution of the problems preventing treatment.

Nuclear Power

During the year the Division continued its work in cases involving the environmental implications of nuclear power. These cases concern specific siting decisions (the licensing proceedings for the Pilgrim II plant), generic safety issues (the Nuclear Regulatory Commissions' rulemaking on storage and dis-

posal of nuclear waste) and legal issues (*amicus* participation in federal appellate cases involving challenges to state regulatory schemes).

American Petroleum Institute v. Knecht

This case was filed by the oil industry trade association in the United States District Court for the District of Columbia to block federal approval of the Massachusetts Coastal Zone Management Program. The Division entered the case on behalf of the Executive Office of Environmental Affairs and argued that the plaintiff did not have standing to bring the suit. The court agreed and dismissed the case. The plaintiff appealed to the Circuit Court for the District of Columbia. After briefs were filed, the plaintiff withdrew the appeal. The program is in full operation, free of any doubt about its legality.

Georges Bank

The Division continued its efforts to secure the greatest possible protection for the natural resources of Georges Bank and for the fishing industry that depends on those resources. Those efforts included participation in the administrative process involving designation of Georges Bank as a Marine Sanctuary, negotiation with federal agencies that led to a scaling-down of the oil and gas lease-sale held in the area, an unsuccessful attempt to secure another injunction against the lease sale and continued monitoring of the administrative process involving promulgation of safety regulations and issuance of water discharge permits.

Agins v. Tiburon

A California real estate developer challenged a municipal land use ordinance on the ground that it unconstitutionally interfered with the use of his property. The challenge was rejected in the state courts. When the United States Supreme Court agreed to hear the case, the Division joined in a brief urging that the ordinance be upheld. This was done because a contrary decision would have placed in question a number of environmentally significant Massachusetts statutes, including the Coastal Wetlands Restriction Act, the Inland Wetlands Restriction Act and the Scenic Rivers Act. The Supreme Court rejected the challenge, thereby removing doubt about the validity of the Massachusetts statutes.

STATISTICS

Cases opened in Fiscal Year 1980, by category:

AIR	4
BILLBOARDS	5
HAZARDOUS WASTE	11
OIL SPILL	1
SCENIC RIVERS	7
SOLID WASTE	14
WATER	13
WETLANDS ENFORCEMENT	17
WETLANDS RESTRICTION	3
MISCELLANEOUS	<u>20</u>
TOTAL	<u>95</u>

Cases closed in Fiscal Year 1980, by category:

AIR	9
BILLBOARDS	3
HAZARDOUS WASTE	1
OIL SPILL	2
SOLID WASTE	10
WATER	21
WETLANDS ENFORCEMENT	5
WETLANDS RESTRICTION	9
MISCELLANEOUS	<u>15</u>
TOTAL	<u>75</u>

HOUSING AND ARSON PREVENTION UNIT

A. INTRODUCTION

The Housing and Arson Prevention Unit operates as part of the Attorney General's statewide Comprehensive Arson Prevention and Enforcement System (CAPES). This unit, as with all other parts of the CAPES Program is funded by a Grant from the Law Enforcement Assistance Administration for the period January 1, 1980 through June 30, 1981. The unit operates to identify buildings and owners engaged in unfair real estate and housing practices, with a particular emphasis on identifying buildings which exhibit characteristics similar to those of buildings which have been burned or been abandoned as a result of incendiary fires. Specifically, the unit has established demonstration programs in three areas of the city of Boston: Jamaica Plain, the South End, and a portion of Dorchester. In each of these areas the unit is working closely with community organizations to identify real estate abuse and potential arson problems. When a building is identified as exhibiting arson prone characteristics, a strategy is developed to lessen the factors of economic stress, or building vacancy which may lead to arson or otherwise create a public safety hazard with respect to the particular property. Often this strategy involves affirmative litigation initiated by the unit under powers given the department under G.L. c.12 §10, and G.L. c.93A §4. The resolution of problems with respect to any given building usually entails a cooperative and coordinated action between the community, city government, and the Department of the Attorney General. In addition, staff of the unit have worked with the State Building Commission, State Commissioner of Insurance, The Massachusetts Fair Plan and the State Commissioner of Banks on legislation, rules and regulations, and other practices which may have a general impact on arson prevention and real estate activities. The unit also advises the Attorney General of developments and issues in the area of arson prevention and housing, drafts legislation, comments on agency regulations and carries out investigations on buildings and owners which may be involved with housing problems and potential fires.

Organizational Efforts and Accomplishments

During the period covered by this report the unit largely focused its efforts on establishing itself institutionally within the Department of the Attorney General and developing cooperative relationships with other state and City of Boston agencies. Specifically, the unit was staffed with a Chief Assistant Attorney

General, a Staff Assistant Attorney General, a Principal Investigator, a Staff Investigator and an Administrative Assistant. Cooperative relationships have been formed between the unit and major City of Boston departments, including the Fire Department, Building Department, Housing Inspection Department, Boston Redevelopment Authority and the Collector-Treasurer. In addition the unit has worked closely with the Suffolk county Registry of Deeds, the State Fire Marshal, State Commissioner of Insurance, the Massachusetts Fair Plan and several community based organizations.

The unit worked jointly with its consultant, Urban Educational Systems, Inc. (UES) in establishing a Community Board made up of representatives from across Boston. UES and the unit also recruited three neighborhood researchers and commenced training them in the techniques of property research. These techniques will enable the community groups to report housing and potential arson problems to the unit in a meaningful way. Periodically research data is reviewed by the unit with UES, and strategies for reducing the likelihood of arson, or the prevalence of real estate abuse, are devised and implemented.

ADMINISTRATIVE AND RESOURCE DEVELOPMENT ACTIVITIES

The unit pursued several objectives to facilitate the systematization of its arson prevention efforts. A thorough set of property research forms and step-by-step protocols were devised and placed in a bound manual format. These forms and protocols are designed for the neighborhood researchers and hopefully will allow property research techniques to be readily learned by persons other than just the researchers. These research forms and procedures will be distributed to any District Attorney that requests them. UES and the unit developed a property owner-incendiary or suspicious fire index from Boston Fire Department data for the years 1976 to the present. This index permits one to find out how many, what kind, and which fires are associated with a particular owner. The unit was a major participant in the development of a new fire insurance application form, and devised new legislation supportive of this form.

Three target areas in the City of Boston were selected as the focal locations of the CAPES prevention effort. These areas comprise portions of Jamaica Plain, Dorchester, and the South End. The areas were selected on the basis of three criteria:

- 1) presence of a fire problem on the basis of Boston Fire Department data from 1976 through early 1980;
- 2) presence of a viable community organization or infrastructure with an ability and interest in dealing with land use and real estate problems; and
- 3) an arson problem related to gentrification, disinvestment of the community or a combination of gentrification and disinvestment.

In Dorchester, community arson sensitization and training was carried out at both the community organization and block group levels. Specifically, the unit's personnel worked closely with the neighborhood improvement association in conducting a neighborhood survey to identify buildings in great need of attention. As a result over 40 vacant buildings were identified and researched. In addition, the unit met with each of the 15 block organizations affiliated with the neighborhood improvement association to inform them of the CAPES prevention program and have them inform the unit of some of their block's particular problems.

INVESTIGATIVE AND LITIGATION ACTIVITIES

The Unit is preparing litigation under Chapter 93A to correct building deficiencies creating arson hazards.

INSURANCE DIVISION

The Insurance Division of the Public Protection Bureau represents the interests of Massachusetts citizens who purchase insurance. The Division has two areas of activity: Division attorneys intervene in administrative hearings held to consider insurance companies' requests for rate increases, and also bring affirmative litigation on behalf of victims of deceptive insurance sales practices, fraud, and other illegal insurance activities.

ADMINISTRATIVE HEARINGS

Automobile Insurance

The Insurance Division intervened this year in a major case involving requested rate increases for automobile insurance. After Division attorneys raised questions and presented extensive evidence, the state Commissioner of Insurance issued a decision cutting the industry's requested rate increase by more than one hundred million dollars.

MBTA Pass Proposal

The Division participated in administrative hearings in the fall of 1979 to support a proposal for an MBTA "Pass-Discount" program. The program has now begun, and provides regular users of the "T" system with a 10% discount on portions of their private passenger automobile insurance.

Blue Cross - Medex

Other matters in which the Division took an active part in FY 1980 included hearings on proposed rate increases in Blue Cross "Medex" insurance, which affects the Commonwealth's elderly citizens. In cooperation with the Bureau's Public Charities Division, our attorneys and retained experts scrutinized the basis for the Blue Cross request.

Cancer Insurance

The Division has continued to oppose cancer and other "dreaded disease" insurance because the benefits typically paid are very low in relation to its cost and because of the tactics often employed to market cancer insurance to elderly citizens. In FY 1980, we actively supported a proposed regulation of the Insurance Commissioner, now effective and printed at 211 CMR 47.07, which bans the sale of cancer insurance in the Commonwealth.

Competition Hearings (Auto Premiums)

Another major Division effort this year concerned a lengthy series of hearings dealing with the important question of whether automobile insurance premiums should be fixed by the Commissioner of Insurance or be set by competition among companies. Because of the complexity of the regulations and statutes which affect the automobile insurance market in Massachusetts, and as a result of the poor results of an experiment in competitive rate setting in the mid - 1970's, the Division proposed major streamlining of these conflicting laws so

that consumers could be assured that premiums resulting from competitive rate setting would be both affordable and reasonable. The Commissioner's decision is pending.

Cost Disclosure (Life Insurance)

The Division took part in a hearing called by the Commissioner in the spring of 1980 to review issues concerning the disclosure of policy and cost information in the sale of life insurance products. A wide variety of technical data was presented by many sources, including the Division, because the outcome has great significance within the industry and may affect various companies in differing ways. Because of the significance of insurance costs to Massachusetts residents, the Division urged the Commissioner to adopt regulations mandating "Easy to Read" policy disclosures as well as the "prospective" delivery of policy and cost information. The Commissioner's decision in this case is also pending.

AFFIRMATIVE LITIGATION

A second major area of Insurance Division activity consists of lawsuits brought on behalf of individual consumers injured by fraudulent insurance sales practices. Under G.L. c. 93A, the state Consumer Protection Act, the Division brought suits involving deceptive misrepresentations to elderly buyers about health insurance supplement plans, improper charges to motorists for dues in "motor clubs", sales activities of unlicensed auto insurance agents, and the improper collection of various "underwriting" fees.

A list of pending cases brought by Division attorneys in this area is attached.

LIST OF DEFENDANTS IN PENDING LITIGATION

1. Peter F. Scribner Insurance Agency
2. Bruce Insurance Agency
3. American Income Life Insurance Company
4. Metropolitan Life Insurance Agency
5. Kemper Insurance Company
6. Standard Indemnity Company
7. Motor Club of America
8. Marquis Insurance Agency, et al
9. Independence Insurance Agency
10. Brighton Insurance Agency
11. Allston Finance Company
12. Calianos
13. American Family Insurance
14. Miles Chrysler Plymouth
15. Pioneer Valley Insurance Agency
16. TKO Insurance Agency of Holyoke Incorporated

PUBLIC CHARITIES DIVISION

The Division of Public Charities, established by the Attorney General pursuant to G.L. c. 12, §8B, performs a number of functions which protect the public generally from misapplication of charitable funds and from fraudulent solicitations.

A major development in the past year was the legislative enactment of the Attorney General’s proposal for modernizing the Division’s governing statute. The new legislation provides administrative flexibility to the Director of the Division, confers upon the Division certain investigative powers, and increases the annual filing fee from \$15 to \$25. Most importantly it raises the level of gross support and revenue, triggering the audit requirement from \$5,000 to \$100,000 and permits the Director to exempt certain types of charities from this requirement by regulation. Such regulations were promulgated on an emergency basis so that they would be effective prior to the June 1, 1980 billing deadline.

1. LITIGATION

Major enforcement efforts have been taken in the following areas:

FAILURE TO REGISTER - CASES FILED

Defendant	Status/Disposition
Blind Education and Rehabilitation Guild, Inc.	Consent Judgment
Cape Cod Child Development Program, Inc.	Consent Judgment
Fidelity House of Cape Cod, Inc.	Consent Judgment
Mental Health Association of North Central Massachusetts, Inc.	Consent Judgment
North Central Human Services, Inc.	Consent Judgment
People’s Church Home, Inc.	Consent Judgment
Retocom Projects, Inc.	Consent Judgment
The Spanish American Center of Lowell, Inc.	Consent Judgment
Taunton Area Association for Human Services, Inc.	Consent Judgment

FAILURE TO FILE AUDITED FINANCIAL STATEMENTS

Defendant	Status/Disposition
Adolescent Counseling in Development, Inc.	Consent Judgment
Athol Y.M.C.A.	Consent Judgment
Deutsches Altenheim, Inc.	Consent Judgment
Downey Side Inc.	Consent Judgment
Elma Lewis School of Fine Arts Inc.	Consent Judgment
Expedition Training Institute	Consent Judgment
Kodaly Center of America, Inc.	Consent Judgment
New England Journal on Prison Law	Consent Judgment
Northampton Center for Children and Families, Inc.	Consent Judgment
Our House Inc.	Consent Judgment
Springfield Theatre Arts Assoc.	Consent Judgment
Stage West	Consent Judgment

DISSOLUTIONS

This year final judgment was entered in *Bellotti v. Aids to the Community, Inc. et al.*, dissolving 32 charitable corporations for failure to file annual registration statements.

In addition, organizations may dissolve voluntarily by filing an action against the Attorney General. While the division assents to most dissolutions, it is necessary in each case to be sure that there has been a proper disposition of assets. During the past year the division has been involved in the following dissolutions:

NAME	Status
Association for Better Living	Close
Berkshire Medical Center, Inc.	Open

Beth Sall & Co., Inc.	Close
Chelsea Memorial Hospital	Close
Community Housing of Forest Park Inc. of Springfield	Close
Congregational Church of Chicopee Falls	Open
Correctional Change Group, Inc.	Close
Olive, Ditson Society for the Relief of Needy Musicians	Open
Divine Light Mission, Inc.	Close
Energy Conservation Research Institution, Inc.	Open
Eye Bank Foundation	Close
First Church of Christ Scientist, Leominster	Close
First Church of Christ Scientist, Salem, MA	Open
First Iron Works Assoc., Inc.	Close
Foundation of Total Peace	Open
Frederika Home, Inc.	Close
Groupways, Inc.	Open
Haemonetics Research Institution, Inc.	Open
Health Fair of Greater New Bedford, Inc.	Open
Howard Benevolent Society of Cambridge	Close
Laymen's League (Unitarian-Universalist) f/k/a	
Unitarian Laymen's League & Unitarian Universalist Association	Close
Marlborough Laboratories	Close
Mass Bay Federated Council, B.S.A.	Close
Mass Branch of the Shut-In Society, Inc.	Close
Merrimack Valley Council on the Arts & Humanities	Open
Micah Foundation, Inc.	Open
Morning Star Foundation, The	Close
Mountain Rest, Inc.	Open
North Seekonk Volunteer Fireman's Assoc., Inc.	Close
Old Colony Assoc. for Mental Health, Inc.	Close
Opus Christi America, Inc.	Close
Periwinkle Nursery School	Open
Resource Planning Institute	Open
Rogers Home for Aged Women	Close
Taunton Animal Welfare Workers, Inc.	Close
Unitarian Universalist Association	Open
War Chest Fund Commission	Open
Wellesley Hospital Fund	Open
Worcester Academy for Girls	Open
Worcester Area Drug Coalition, Inc.	Close

PROBATE ACTIONS

The Boston Athenaeum v. Attorney General. The Athenaeum filed suit seeking permission from the probate court to sell the Gilbert Stuart portraits of George and Martha Washington. A compromise was approved by the court whereby the portraits would alternate at three-year intervals between The Museum of Fine Arts and The Smithsonian Institute.

Chase v. Pevear. Briefs were filed in a trustee's appeal from a Probate Court judgment surcharging the trustee for excessive compensation and imprudent investments.

Boston Seamen's Friend Society. A decision was entered affirming judgment of the Probate Court and confirming the Attorney General's contentions regarding the duration of the appeal period where the Commonwealth is a party.

Robert W. Fitzgerald, et al v. Attorney General and Lambi N. Adams, et al. The taxpayers sought to obtain review of the probate court's decision permitting the Worcester Free Public Library to sell a valuable collection of anatomical drawings. The Appeals Court ruled that the original case in which the Attorney General was a party could not be reopened nearly a year after judgment.

In Re Wanda Jones. This case was heard by the Supreme Judicial Court on reservation and report from the probate court. The conservator sought to have an estate plan approved for his ward which would leave the ward's entire estate of over one million dollars to Massachusetts charities. The Court upheld the authority of the probate court to approve the plan although the ward had no known heirs and although the plan was equivalent in practical effect to the making of a will.

Estate of Minor White. At the Probate Court's request this office arbitrated a dispute between competing charitable interests (Princeton University and Aperture Photographic Magazine) regarding the distribution of various photographic prints and other memorabilia. Final Judgment was entered by the Probate Court.

DECEPTIVE OR UNFAIR SOLICITATIONS

Bellotti v. Charles Manfredi and Massachusetts Jaycees Baystate Digest. A complaint was filed alleging unauthorized and deceptive solicitation. Preliminary orders were obtained.

Commonwealth of Massachusetts v. General Mass Marketing and Charles Ufland. A consent judgment was entered regarding use of illegal fund-raising methods.

Bellotti v. Stewart et al (Scituate Police Relief Association). A complaint was filed against present and former officers of the Scituate Police Relief Association for failure to register as a public charity, to maintain adequate financial records, and to file annual financial reports. The suit seeks to enjoin various unfair and deceptive fund raising practices.

Bellotti v. Rabbi Marvin Antelman and the Boston Jewish Federation. A complaint was filed to enjoin defendants from soliciting on behalf of charities without authorization and to require defendants to register. Preliminary orders were obtained.

Bellotti v. Richard Markiewicz and International Cavalcade of Stars. A suit was brought to enjoin solicitation on behalf of a charity by an unregistered solicitor being paid more than 15% of the proceeds who was illegally using paid telephone operators.

MISCELLANEOUS

Commonwealth v. Paine. The suit sought an injunction against individuals who conducted "free" seminars for the purpose of enticing customers to pay \$1500 for information on how to set up a church in one's home and thereby substantially reduce income taxes. A Superior Court order required defendants to disclose the substantial risk that the I.R.S. would disallow any attempted charitable donation deduction.

I.R.S. Freedom of Information Act Request. This was a FOIA Request seeking a listing of all charities in the Commonwealth on a fee-waived basis. I.R.S.

agreed to provide the list but not on the fee-waived basis required by law for requests in the public interest. After preparation of a complaint and extensive negotiations, fees were waived.

Bellotti v. Christian Broadcasting Network. A complaint was filed to compel defendant to file annual financial reports as a public charity. Defendant asserted it was exempt as a religious organization. The complaint was dismissed after defendant converted Massachusetts operation to a for profit non-charitable operation and filed financial disclosure for all years it operated in Massachusetts as a public charity.

Bellotti v. Slawson. A contempt action was brought against a public administrator for failure to file final accounts after entry of a court order requiring him to do so. In response to the suit, accounts were filed but checks representing escheated funds were returned for insufficient funds. The Division recovered amounts due from the bonding company and referred the matter to the Board of Bar Overseers.

Bellotti v. Paul Haskins d/b/a Potpourri Productions. A suit was brought to enjoin defendant from providing gambling events without authorization and for restitution to patrons of an event for which gambling had been advertised.

Guardianship Proceeding. A petition was brought on behalf of Shattuck Hospital to have a guardian appointed for purpose of authorizing medical treatment. After an evidentiary hearing, a temporary guardian was appointed with the purpose of getting psychiatric counseling.

Blue Cross/Blue Shield - Medex Rate Hearings. The Division intervened with the Division of Insurance in administrative proceedings before the Commissioner of Insurance concerning approval of rate increases for Medex (Medicare Gap Insurance) subscribers. The hearing officer rejected several contentions advanced by this office and the matter is currently on appeal to the Commissioner.

The Division also appeared in hearings held by the Rate Setting Commission to determine criteria for the approval of contracts between Blue Cross and Massachusetts hospitals.

Investigations. The Division has nearly completed a number of investigations and field audits. It is anticipated that many of these will result in litigation in the near future. The investigations are primarily in the areas of misuse of charitable funds and violations of the law authorizing charitable and other non-profit organizations to sponsor gambling events.

II. ROUTINE FUNCTIONS

The Division has numerous administrative and routine responsibilities including:

- 1.) Receiving annual financial statements from nearly 12,000 charities operating in Massachusetts and maintaining these as public records;
- 2.) Administering the state's charitable solicitation act (G.L. c.38, §§18-33);
- 3.) Registering and regulating professional solicitors and professional fund-raising counsel;
- 4.) Representing the Attorney General in the probate of estates in which there is a charitable interest; and
- 5.) Representing the state Treasurer in the public administration of estates escheating to the Commonwealth.

Annual Registrations under G.L. c.12, §8F

During the period from July 1, 1979 to June 30, 1980, 7435 charitable registrations were processed. Total fees for these registrations were \$138,530. Review of the registrations resulted in more than 2000 individual requests for further information or additional fees broken down approximately as follows:

Requests for Audits	212
Miscellaneous Requests for Information	917
Requests for Additional Fees	<u>904</u>
Total	2033

For use in these registrations, the Division has promulgated a new form PC. The new form is shorter and simpler to fill out, process and review. The form is designed to be used in conjunction with the new federal IRS 990 and the combination of these two forms will provide the Division and the public with adequate financial disclosure.

The computerization of registration information is now complete and the system is operational.

The division has also taken a number of steps to locate charitable organizations who are not filing with the Division. For example, a tape of 501(c) (3) organizations has been obtained from the Internal Revenue Service and will be compared with our list of charitable organizations. In addition, contact has been made with various state agencies to obtain names of non-profit organizations with which they do business. These lists were checked against our records and filings were obtained from delinquent organizations.

Regulation of Charitable Solicitations

Under G.L. c.68, §19, every charitable organization soliciting funds from the public must apply to the Division for a Certificate of Registration. Each such application must be reviewed for compliance with the statutory requirements. For the period from 7/1/79 to 6/30/80, 1442 applications were processed. Certificate fees received were \$14,420. Since a number of applications were pending at the beginning of the fiscal year, the total number of certificates issued during the period was 1791.

Registration of Professional Solicitors and Fund-Raising Counsel

Under G.L. c.68, §§21 and 23 all persons acting as solicitors or fund-raising counsel for soliciting organizations must register with the Division and file a bond. Each registration and each professional solicitation contract must be approved by the Director if it meets statutory requirements. During the fiscal year ending June 30, 1980, thirty registrations were received and approved and total fees were \$300.

Participation in Estates With Charitable Interests

The Attorney General is an interested party in the probate of any estate in which there is a charitable interest. This year 1212 new wills were received. Each of these wills was reviewed and it was determined that the Attorney General had an interest in 788 of these estates.

Probate accounts were reviewed and approved as follows:

Executor Accounts	894
Administrator Accounts	37
Trustee Accounts	<u>2920</u>
Total	3851

In addition, the Division approved 68 petitions for the sale of real estate and 37 petitions for appointment of trustees and was involved in 153 miscellaneous probate legal actions.

This year, the Division undertook a major effort to review and close out old probate matters. By June 30, 1980, 996 of these estates had been reviewed and closed.

Public Administration

The Division represents the state Treasurer in the public administration of intestate estates where the decedent had no heirs. Such estates escheat to the Commonwealth. The following table represents activity in this area.

New Estates	155
Estates Closed	206
With Escheat	80
Without Escheat	126
Total Escheats Received	\$211,930.15

UTILITIES DIVISION

Pursuant to Massachusetts General Laws, Chapter 12, Section 11E, the Attorney General is "authorized to intervene in administrative and judicial proceedings held in the Commonwealth on behalf of any group of consumers in connection with any matter involving the rates, charges, prices or tariffs of an electric, gas, telephone or telegraph company doing business in the Commonwealth and subject to the jurisdiction of the Department of Public Utilities". A statutory budget of \$250,000 is provided to fund this Section 11E activity of the Attorney General under G.L. c.6A, §9A. The Utilities Division carries out the Attorney General's Section 11E activity. Pursuant to common law authority vested in the Attorney General or authority conferred by other statutes, the Utilities Division of the Attorney General's office has participated in utility related matters held outside of Commonwealth.

As of the end of fiscal year 1980, the Utilities Division consisted of five attorneys, two utility rate analysts, three secretaries and one administrative assistant. During the course of the fiscal year, there was a net loss of two attorneys. Because of an extensive case load and staff attrition, it was necessary to employ several consultants to assist in the preparation of three electric utility rate cases, one D.P.U. rulemaking proceeding, the Pilgrim II construction case and the Seabrook financing proceeding. A summary of the cases handled by the Utilities Division is set forth below.

RATE CASES

During the fiscal year, the Utilities Division intervened in each of the 16 gas and electric company rate cases filed with or decided by the D.P.U. during the fiscal year. In the 10 matters decided during the fiscal year, \$139,778,773 was

requested and \$47,096,723 was awarded by the D.P.U. The discovery, preparation, adjudication and briefing for each case all takes place within a 4-5 month portion of the D.P.U.'s 6 month suspension period. Individual rate case hearings may take anywhere from 3 to 30 days depending upon the number or complexity of the issues involved. The following chart sets forth the status or outcome of the rates cases in which the Utilities Division was involved during the fiscal year:

RATE CASES FILED, HEARD OR DECIDED WITHIN FISCAL '80

Docket - Company	Date Filed	Rate Requested	Attorney General's Recommendation	D.P.U. Decision
D.P.U. 19830, 19980 consolidated Blackstone Gas	11/78 \$ 479	\$ 48,145	no more than \$21,060	\$8,552
D.P.U. 19841 Brockton Edison	12/78	\$ 2,100,000	— 0	Denied increase but Company appealed - upon reconsideration Company received \$375,000
D.P.U. 19920 Bay State Gas	5/79	\$11,400,000	— 0	1.4 million but Company petitioned for reconsideration and received \$39,000
D.P.U. 19991 Boston Edison	3/79	\$46,211,878	— 0	\$20,000,000
D.P.U. 20103 Cape Cod Gas	6/79	\$ 2,577,084	\$1,415,701	\$ 1,879,567
D.P.U. 20104 Cambridge Electric	6/79	\$ 2,877,000	reduction of \$1,035,000	\$ 1,324,000
D.P.U. 20105 Lowell Gas Co.	6/79	\$ 3,948,061	\$1,559,794	\$ 2,435,301
D.P.U. 20113 Manchester Electric	7/79	\$ 79,605	\$ 44,879	\$ 56,303
D.P.U. 20132 New Bedford Gas and Edison Electric	7/79	elec. \$11,218,000 gas 3,434,000 total 14,652,000	total 3.5 million	elec. \$5,641,000 gas 2,488,000 total \$8,129,000
D.P.U. 20279 Western Mass. Electric	11/79	\$27,885,000	\$8,3768,000	\$11,450,000
D.P.U. 136 Mass. Electric	2/80	\$28,000,000	— Dismissal	Case dismissed
D.P.U. 155 Haverhill Gas	3/80	\$ 1,128,000	Hearings in progress	
D.P.U. 160 Boston Edison	3/80	\$68,900,000	Hearings concluded	
D.P.U. 192 Blackstone Gas	4/80	\$ 83,550	Hearings in progress	
D.P.U. 200 Mass. Electric	4/80	\$33,000,000	Hearings in progress	
D.P.U. 243 Eastern Edison	5/80	\$ 9,550,667	Hearings in progress	

FUEL CLAUSE HEARINGS

The Utilities Division has continued to intervene in electric and gas fuel clause proceedings. The burden of rate cases, the short notice of fuel clause proceedings and the need for the D.P.U. to decide such cases expeditiously has limited the ability of the Utilities Division to seriously contest many of the fuel clause filings. We supported legislation which would have given the D.P.U. greater authority to review fuel adjustment charges.

TELECOMMUNICATIONS

During the fiscal year, the Utilities Division intervened in two major telecommunications matters. In July of 1979, the D.P.U. issued an order that New England Telephone and Telegraph Company provide separate rates for telephones and each other monthly service charge and make its telephone installation service charges more cost based. Following the Utilities Division's recommendations, the D.P.U. ordered the Company to (1) provide itemized billing of monthly charges on a semi-annual basis and (2) reduce residential monthly service charges to offset increases in telephone installation charges. The offset plan was implemented during the 1980 fiscal year. During the fiscal year, the Utilities Division also intervened in a petition filed by NET to increase the amount the deposits which it collects from new customers and to change the terms under which a deposit can be required. D.P.U. action on this petition is pending conclusion of hearings.

ELECTRIC UTILITY RATE DESIGN MATTERS

The Utilities Division has intervened in three adjudicatory proceedings before the D.P.U. which involve the question whether to adopt various ratemaking standards which must be considered by State regulatory agencies under the terms of the Public Utility Regulatory Policies Act (P.L. 78-617). These matters involve Boston Edison Company, Massachusetts Electric Company and Western Massachusetts Electric Company. The D.P.U. has commenced similar proceedings with three other electric companies in which the Division will be involved. The outcome of these proceedings will have a significant impact upon the cost of electricity to consumers, since electric rates in the near future may depend upon time of use of electricity or the way that utilities are permitted to allocate rate increases among residential, commercial and industrial customers.

ENERGY FACILITIES SITING COUNCIL MATTERS

The Division continued its intervention in E.F.S.C. proceedings reviewing electric utility company long range energy and demand forecasts. E.F.S.C. forecasts are used by electric companies to justify the need for future construction of energy facilities such as power plants, transmission lines and the like.

MISCELLANEOUS MATTERS

The Division was involved in hearings before the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission concerning the licensing of Pilgrim II nuclear power plant. It was also involved in hearings before the D.P.U. on the propriety of the construction of Pilgrim II and the propriety of purchases by Massachusetts utilities of increased shares in Seabrook I and II.

We were also involved in a U.S. Supreme Court action with seven sister states against the state of Louisiana seeking to invalidate a Louisiana tax on Outer Continental Shelf natural gas which became effective April 1, 1979. The action has been referred to a Special Master. In the meantime, the tax is costing Massachusetts gas consumers about \$8 million per year. Also at the Federal level the Division is participating in an S.E.C. proceeding concerning the reorganization of Colonial Gas Energy System, the holding company controlling Cape Cod and Lowell Gas companies. The Utilities Division has also been involved in the Attorney General's Chapter 93A action against Lowell Gas Company and his petition before the D.P.U. to obtain a discount rate structure

for residential customers of Cape Cod Gas Company. The Division has also intervened in miscellaneous financing proposals submitted by Utilities to the D.P.U. for approval.

CONCLUSION

During the fiscal year, the Utilities Division continued to serve as the major, and in most cases, only advocate of consumer interests in utility rate cases and related matters.

SPRINGFIELD OFFICE

The 1979-80 fiscal year was a period of growth and expansion for the Springfield Office. During the year, the staff was increased by one attorney and one investigator, and the offices were moved to larger quarters. Additionally, two investigators from the Medicaid Fraud Control Unit were assigned to the Springfield Office.

The increased staffing has enabled the office to perform more efficiently and to handle a greater number of matters of concern to the Attorney General in Hampden, Hampshire, Franklin, and Berkshire Counties.

In fiscal year 1979-80 the office handled division references and requests for assistance from the following divisions: Eminent Domain, Criminal, Torts, Contracts, Collections, Anti-Trust, Environmental, Violent Crimes, Consumer Protection, and Governmental. Additionally, the office supplies personnel to the Board of Appeal on Motor Vehicle Liability Policies and Bonds which meets monthly.

During the fiscal year, the Springfield Office was responsible for 16 eminent domain cases, 30 victim of violent crime compensation cases, 17 tort matters, 13 collection cases, and a number of governmental cases. The actual number of matters handled for the Governmental Bureau is difficult to determine because many of the actions taken by this office on these cases involve the filing of a particular pleading, hearings motions, and the gathering of information without actually handling the entire case.

The Springfield Office continued to actively pursue enforcement of the consumer protection statutes. In 1979-80 the office conducted 28 separate investigations of firms or individuals suspected of unfair and deceptive practices. The investigations covered a wide range of business practices including automobiles, trailer parks, health spas, career schools, land sales, swimming pool sales, and business franchise sales. These investigations resulted in 6 consent judgments, 4 assurances of discontinuance, 1 contempt citation, 1 permanent injunction, and a recovery of \$68,318.27. Additionally, the office provided assistance and information to the local consumer groups in the four western counties and aided individual consumers where no local consumer groups existed. In 1979-80, the office handled 108 such complaints resulting in savings of \$24,714.92.

One of the major areas of concern for the Springfield Office in the consumer protection area was that of health spas. During the year, three health spas closed leaving more than 1500 consumers without services. All three spas went into bankruptcy thus minimizing the chance of obtaining refunds for the consumers. Through negotiations with this office, other health spas in the area agreed to

allow the affected consumers to transfer their memberships in most instances and to obtain services for the money paid to the defunct spas.

Another major case was that of a condominium developer who failed to honor buy-back warranties for condominiums he had sold. After lengthy court proceedings, the defendant entered into a consent judgment and made restitution to consumers in the amount of \$32,000.

The Medicaid Fraud investigators have initiated investigations of a number of vendors. One investigation has resulted in a guilty plea by an oral surgeon. He was fined \$1,600, ordered to make restitution in the amount of \$3,144 and received a one year suspended sentence.

The staff consists of the administrator, three assistant attorneys general, five investigators, (two of whom are assigned to medicaid fraud) and two secretaries.

Number 1

September 4, 1979

Dean P. Amidon

Commissioner

Department of Public Works

100 Nashua Street

Boston, MA 02114

Dear Commissioner Amidon:

As Commissioner of the Department of Public Works (Department), you have requested my opinion concerning certain matters involving the issuance of commercial motor vehicle weight permits by the Department. More specifically, you have asked whether the Department had the authority on either July 1, 1956 or January 4, 1975 (the dates of enactment of the Federal-Aid Highway Act of 1956 and the Federal-Aid Highway Amendments of 1974, respectively) to issue what is referred to as "reducible load"¹ permits for the operation of commercial motor vehicles on the state highway system. For the reasons set forth below, I am of the opinion that the Department did possess that authority on the dates in question and I therefore answer your question in the affirmative. In order to answer your questions more fully, however, it is necessary to review at some length the factual and legal contexts in which your questions have arisen.

RELEVANT FEDERAL LAW

Congress enacted the Federal-Aid Highway Act of 1956, (the Act), 70 Stat. 378, *revised, reenacted and codified* by P. L. No. 85-767, 72 Stat. 885 (1958), 23 U.S.C. §101 *et seq.*, for the purpose of developing a "National System of Interstate and Defense Highways" (the Interstate System). The Act, as originally enacted and as amended, imposes certain conditions on the apportionment

¹You explain in your request that a "reducible load" is one which can be increased or decreased by varying the number of units in the load. Examples are concrete, sand and gravel, or bulk liquid or petroleum products." In contrast, you refer to "irreducible loads" as consisting of a single unit load," such as a piece of machinery.

of federal funds to the states, including restrictions on the weight of vehicles that may use the Interstate System.

The portion of the Act which is relevant to the present issues is codified at 23 U.S.C. §127. Reduced to its essentials for present purposes, that section provides a "grandfather clause" mechanism to allow vehicles to use the Interstate System even though the weight limits established by the section are exceeded. There are two components to the grandfather clause exception. First, the state must have established, by law or regulation, weight limits for the use of public highways in excess of the federal weight limits. Second, the state weight limits must have been in effect on or before July 1, 1956, or January 4, 1975, and the operation of vehicles up to the state maximum weights must have been allowed by the state on or before those two dates. A state which cannot avail itself of the grandfather clause exceptions, but which nonetheless authorizes or permits overweight vehicles to operate on Interstate highways within the state's borders, jeopardizes its right to receive apportioned federal highway funds.

RELEVANT STATE LAW

Two state statutes are particularly relevant to a determination of the question whether the Commonwealth is entitled to avail itself of the grandfather clause exceptions of 23 U.S.C. §127. These statutes are G.L. c. 85, §30 (hereinafter referred to as §30) and G.L. c. 90, §19A (hereinafter referred to as §19A), and must be examined in some detail.

The provisions of §30 can be traced to the Acts of 1913, c. 803, §§1, 3. The 1913 statute provided that no motor vehicle having a gross weight of fourteen tons or more could be operated on any highway in the state without first obtaining a permit from certain specified state authorities. *Id.*, §1. The statute stated that the permits could be of general or of limited duration, could authorize travel generally or over specific routes, and could include any special conditions or provisions which the permit authority deemed necessary for the protection of highways and bridges. *Id.*, §3.

The substance of the language of the 1913 statute was not changed until 1925, when, with regard to vehicles weighing more than fourteen tons and travelling over "a way determined by the department of public works to be a through route," the state official authorized to issue overweight permits was specified to be the commissioner of public works. St. 1925, c. 180, §2. *See* St. 1922, c. 526; St. 1918, c. 116, §§1, 3; St. 1917, c. 344, pt. 5, §§39, 41. Subsequent amendments to §30 modified the weight limit of fourteen tons. *See* St. 1935, c. 30; St. 1931, c. 138, §1; St. 1930, c. 353, §1; St. 1925, c. 342, §2.

In 1946, the Legislature enacted an exception to the weight limit provisions of §30. Chapter 397, §1 of the Acts of 1946 amended the General Laws by inserting G.L. c. 90, §19A, which authorized motor vehicles to operate on public ways at weights in excess of those prescribed in §30 and without the necessity of obtaining a §30 permit. Section 19A imposed its own restrictions on maximum permissible weights, however. As amended through 1972, §19A established a maximum gross weight of 73,000 pounds for vehicles travelling on public ways without a §30 permit. G.L. c. 90, §19A *as amended through* St. 1972, c. 126. Vehicles with a gross weight in excess of the §19A limits could still travel on public ways *if* a §30 permit had been procured.

Numerous changes were made to §30 and §19A between 1946 and July 1, 1956. At this point, it is helpful to set out in the footnote below the relevant provisions of the two statutes as they appeared on July 1, 1956.²

For the present purposes, no further significant changes were made to §30 or to §19A prior to 1974. In 1974 the Legislature, acting in response to, and substantially in conformance with the recommendations of a Special Commission on vehicle weights,³ enacted c. 851 of the Acts of 1974. Chapter 851 added four new paragraphs to §30, the principal provisions of which were as follows: Motor vehicle owners or operators could apply to the commissioner of public works for a one-year permit allowing operation of the vehicle on the public ways at any requested weight, up to the gross vehicle rating established by the manufacturer of the chassis. The statute further provided:

Such permit may be issued to allow the operation of any motor vehicle or semitrailer unit having three axles which with its load weighs not more than seventy-three thousand pounds, or any motor vehicle or semitrailer unit having four axles which with its load weighs not more than eighty-seven thousand pounds, or any motor vehicle or semitrailer unit having five or more axles which with its load weighs not more than ninety-nine thousand pounds, but not above such limits, nor in any event shall any such permit allow the operation of any motor vehicle or semitrailer unit which with its load exceeds the gross vehicle weight rating as established by the original manufacturer of the chassis; provided, however, that *the commissioner of public works may issue one way or round trip permits for the carrying of certain irreducible loads*, which may exceed the said gross vehicle weight rating, but only under such conditions and limitations as the commissioner of public works may prescribe.

²G.L. c. 85, §30, as amended through St. 1951, c. 568, provided that:

Except as provided in section nineteen A of chapter ninety, no vehicle shall . . . travel or object be moved, on any public way, which weighs more than fourteen tons, or, in the case of a vehicle equipped with pneumatic tires, more than fifteen tons, without a permit from the board or officer having charge of such way, or, in case of a state highway, or a way determined by the department of public works to be a through route, from the commissioner of public works' provided, that no such permit shall be required for the operation of a vehicle having three axles, whether or not so equipped, which does not weigh more than twenty tons. . . . Such a permit may limit the time within which it shall be in force and the ways which may be used and may contain any provisions or conditions necessary for the protection of such ways from injury.

G.L. c. 90, §19A, as amended through St. 1956, c. 61, provided that:

Any provision of section thirty of chapter eighty-five to the contrary notwithstanding, a motor vehicle having no axles, which vehicle with its load weighs not more than twenty-three tons, and a semi-trailer unit or a motor vehicle having three or more axles, which unit or vehicle with its load weighs not more than thirty tons, may travel on a public way without a permit as required by said section thirty; provided, that no such motor vehicle or semi-trailer unit, the weight on any axle of which, measured at the ground, exceeds twenty-two thousand four hundred pounds, or, in the case of axles spaced less than six feet apart, eighteen thousand pounds, shall so travel without such a permit; and provided further that the gross weight of any such vehicle together with its load expressed in pounds shall not exceed that shown on the following table without such a permit. . . .

Notwithstanding the foregoing provisions of this section, nor any contrary provision of section thirty of chapter eighty-five, a construction type motor vehicle having two axles, which vehicle with its load weighs not more than twenty-three tons, or a construction type semi-trailer unit or motor vehicle having three axles, or a semi-trailer unit or motor vehicle having three axles while carrying liquid petroleum products, which vehicle with its load weighs not more than thirty tons, may travel on a public way while engaged in hauling construction materials or liquid petroleum products without a permit as required by said section thirty of chapter eighty-five; provided, that the gross weight of such vehicle as operated does not exceed the gross vehicle weight rating as established by the original manufacturer of the chassis; and provided, further, that the vehicle is duly registered in this commonwealth for such weight.

³The Special Commission, consisting of three members of the Senate, five members of the House of Representatives, and three persons appointed by the Governor, was created in 1973 "to investigate and study the longstanding and escalating overload." House Rep. No. 6164, at 5 (May 1974). After holding thirty-four hearings at which over 3,700 pages of sworn testimony and numerous exhibits were taken in evidence, the Commission issued its Report and its suggested legislation. House Rep. No. 6164, *supra*.

St. 1974, c. 851, §3 (emphasis supplied).⁴

Chapter 851 was approved on August 14, 1974, and therefore its provisions became effective ninety days thereafter, on November 12, 1974. *See Opinion of the Justices*, 368 Mass. 889 (1975). In September, 1974, however, heavy-duty vehicle manufacturers notified the Special Commission that they could not comply with certain certification and inspection procedures required by c. 851. *See* Special Commission, Second Interim Report, House Doc. No. 5350 (Dec. 1974) at 6. Moreover, the Department of Public Works apparently decided, just prior to November 12, 1975, that it would not issue permits under the increased weight limits established by c. 851. *See id.* at 6, 7. Consequently, several motor vehicle carriers sought and obtained a temporary restraining order from the United States District Court ordering the relevant state officials from instituting any proceedings for violation of c. 851. *See id.* at 6.⁵

In response to these problems with the implementation of c. 851, the House of Representatives revived the Special Commission, *see* House Doc. No. 5292, and the Legislature eventually enacted new legislation — c. 494 of the Acts of 1975 — in response to the Commission's recommendations. *See* Appendix A to Special Commission, Second Interim Report, *supra*.

Chapter 494 deleted from §30 the four paragraphs that had been added by c. 851. However, Chapter 494 added a new section, §30A, to G.L. c. 85 which included many of the essential provisions of the earlier statute.

ANALYSIS OF THE STATE STATUTES

Having canvassed the relevant statutory provisions - with particular attention to their content on July 1, 1956 and January 4, 1975 - I now focus on your specific questions:

(1) Did General Laws Chapter 85 Section 30, Chapter 90 Sections 19A and 31A, or any other state statute or regulation as they existed on July 1, 1956 give the Department authority to issue reducible load permits on that date?

(2) Did General Laws Chapter 85 Section 30, Chapter 90 Sections 19A and 31A, or any other state statute or regulation as they existed on January 4, 1975 give the Department authority to issue reducible load permits on that date?

As a preliminary matter, I note that your questions require an analysis of state law only; they do not involve the interpretation or application of the grandfather provisions of 23 U.S.C. §127, or of any other federal law or regulation. Your questions also focus on the *authority* of the Department under state law to issue reducible load permits; whether the Department actually issued such permits, and the implications, if any, under the federal grandfather provision of the failure to exercise any such authority, are therefore considerations which are not directly relevant to your requests. *But see* 1958/1959 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 103, 104 (1959) ("right to issue"

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⁴Section 8 of c. 851 amended §19A to provide, *inter alia*, that a motor vehicle weighing up to 105 percent of the maximum gross weight allowed by the §30 permit would not be deemed to be operating in violation of §30.

⁵In the words of the Special Commission: "The principal point of the Order was that the alleged inability of those carriers to secure certification and inspection from vehicle manufacturers prevented their obtaining the permits. Accordingly, the objective of the Court was to suspend implementation of Chapter 851 until the problems presented could be resolved by legislative or judicial action." Special Commission, Second Interim Report, *supra*, at 6.

permits is controlling, rather than actual issuance of permits).

1. *The laws in effect on July 1, 1956.*

A close reading of G.L. c. 85, §30 and G.L. c. 90, §19A, as those sections appeared on July 1, 1956, fails to reveal, in clear and unambiguous terms, the legislative intent with regard to the authority of the Department to issue reducible load permits. Several observations may be made, however, which shed substantial light on the legislative intent.

First, it is abundantly clear that the Legislature had invested the Department (through its Commissioner) with the authority to issue permits for the purpose of allowing vehicles to operate at weights greater than those specifically designated in the statutes. This delegation of authority was board, circumscribed only by the instructions that "[s]uch a permit may limit the time within which it shall be in force and the ways which may be used and may contain any provisions or conditions necessary for the protection of such ways from injury." G.L. c. 85, §30, *as amended through*, St. 1951, c. 568 [lines 16-21]. Indeed, the great detail with which the Legislature addressed the specific weight limits for vehicles operating without a permit accentuates the significance of the delegation of authority to the Department to circumvent those specific weight limits consistent only with the exercise of reasonable discretion. *See* 1975/1976 Op. Atty. Gen. No 57, Rep. A.G., Pub. Doc. No 12 at 152, 153 (1976) (issuance of permits committed to discretion of Commissioner, subject to constitutional and statutory limits).

Second, there is no explicit distinction in either statute between reducible and irreducible loads; on the face of the statutes, the permit authority would appear to extend to any kind of load. The specificity and detail of the statutes with regard to such factors as weight, length, number of axles, vehicle configurations and type of tire, belie any facile conclusion that the Legislature implicitly assumed that crucial distinctions should be made on the basis of the type of load being carried. *See, e.g., Consolidated Dry Goods Co. v. United States*, 180 F. Supp. 878, 882 (D.C. Mass. 1960) ("When the statute gives no indication that any more restricted meaning was intended and the ordinary and accepted interpretation of the words is in accord with the purpose of the statute, that meaning should be given to the term used in the statute.'").

Third, the language of §19A, taken together with that of §30, provides a positive indication that reducible loads were not intended to be excluded from the statutes or afforded special treatment. *Cf. City of Boston v. Massachusetts Bay Transp. Authority*, Mass. Adv. Sh. (1977) 2588, 2593 (entire statutory scheme should be examined as a whole). Section 19A provided that:

Notwithstanding . . . any contrary provision of [G.L. c. 85, §30], a construction type motor vehicle having two axles, which vehicle with its load weighs not more than twenty-three tons, or a construction type semi-trailer unit or motor vehicle having three axles, or a semi-trailer unit or motor vehicle having three axles while carrying liquid petroleum products, which vehicle with its load weighs not more than thirty tons, *may travel on a public way while engaged in hauling construction materials or liquid petroleum products without a permit as required by [G.L. c. 85, §30] . . . [under certain conditions]*.

G.L. c. 90, §19A, *as amended through* St. 1956, c. 61 [lines 22-37] (emphasis supplied). Construction materials and liquid petroleum products are archetypical examples of reducible loads. The quoted provision of §19A therefore must be read as exempting certain reducible loads, under certain conditions, from the permit requirements that would otherwise be applicable. To conclude that reducible loads were not intended by the Legislature to be subject to the permit provisions of §30 would make the quoted provisions of §19A unintelligible, or, at the least, superfluous. It is well established that such a result must be avoided. *E.g.*, *Commonwealth v. Gove*, 366 Mass. 351, 354 (1974); *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket S.S. Authority*, 352 Mass. 617, 618 (1967).

I conclude, based on my review of the statutory language as described above, that §§30 and 19A, as they appeared on July 1, 1956, contemplate the issuance of overweight permits for reducible as well as irreducible loads. Because this conclusion is not grounded upon clear and unambiguous statutory language, however, it is appropriate to consider extrinsic statutory construction aids to determine whether the unexpressed intention of the Legislature was to exclude reducible loads from the permit provisions. *See, e.g.*, *Department of Community Affairs v. Massachusetts State College Building Authority*, Mass. Adv. Sh. (1979) 1681, 1692. *Compare* *Burke v. Chief of Police of Newton*, Mass. Adv. Sh. (1978) 425, 427.

Unfortunately, there is scant legislative history to aid in the interpretation of §30 or §19A notwithstanding the relatively frequent amendment of both sections. An opinion of one of my predecessors, issued in 1925, does, however, address issues closely akin to those now under consideration and thus bears close scrutiny.

In the course of interpreting G.L. c. 85, §30, *as amended by* St. 1922, c. 526, the Attorney General made the following observations:

The purpose of the act was manifestly to protect the highways against vehicles or objects which with their loads weighed more than fourteen tons. The Legislature, however, recognized that it would be necessary at times to move over the highways *objects* weighing more than fourteen tons, *which could not be taken apart*, and authorized the issuing of permits to move such loads. In each case, however, the problem for the board or officer granting such permits is to determine whether such a permit is necessary. This clearly involves a consideration of the facts in each case, and is not consistent with a suggestion that continuing permits may be granted generally for excessive loads for a period of time. The phrase "without *first* [emphasis in original] obtaining a permit" indicates that a permit is required for each specific load and that a general or continuing permit may not be given.

7 Op. Atty. Gen. 599, 600-601 (1925) (emphasis supplied except where indicated).

My predecessor presents no support, or basis, for his observation that the loads referred to by the statute are those "which could not be taken apart." Moreover, the remark is made in an off-hand manner, in the nature of dicta; the focus of his attention was the time period for which permits could be issued

rather than the type of load that was subject to the permit procedures.⁶ It is possible that the Attorney General's remark was based on his perception that it was the established custom of those charged with enforcing and applying the statute to issue permits only for irreducible loads. Indeed, he makes just such an "agency interpretation" argument in support of his conclusion that continuing permits could not be issued.⁷ He does not assert, however, that it had been the custom not to issue permits for reducible loads.⁸

Having carefully reviewed the extrinsic aids to statutory interpretation available to me, I do not perceive any reason to read the statutes in an artificially restrictive manner. Therefore, I conclude that the language of the statutes requires the conclusion that, on July 1, 1956, the Department had the statutory authority to issue reducible load permits.

2. *The laws in effect on January 4, 1975.*

As I have indicated, the Legislature in 1974 substantially revised the statutes, regulating weight limits on the state highways. Chapter 851 of the Acts of 1974 added four new paragraphs to G.L. c. 85, §30, which I have already described in some detail. Unlike the situation with regard to the interpretation of the 1956 version of §30 and §19A, there can be no doubt that c. 851 provides, on its face, clear authority to the Department to issue permits for reducible loads. It is unnecessary to resort to references to the legislative history of c. 851 to support my conclusion, for the statute itself states that:

the commissioner of public works may issue one way or round trip permits for the carrying of certain irreducible loads, which may exceed the said gross vehicle weight rating, but only under such conditions and limitations as the commissioner of public works may prescribe.

St. 1974, c. 851, §3. This permit authority to exceed the gross vehicle weight rating extended the general permit authority - applicable regardless of type of load - so as to allow the operation of vehicles for as long as one year at weights

⁶To the extent that my predecessor's conclusion is pertinent to the Department's authority to issue such permits for reducible loads, I would express my disagreement with his conclusion. The statutory phrase "without first obtaining 'a permit, emphasized by my predecessor, had been amended prior to 1925 to read "without a permit." G.L. c. 85, §30, as amended by St. 1922, c. 526. The very fact that my predecessor seized upon the word "first" as significant evidence of legislative intent belies the conclusion that its deletion by the Legislature can be ignored. Moreover, the plain language of the statute - as in effect in 1925 and in 1956 - establishes that the responsible official "may limit the time within which [the permit] shall be in force." Based on the normal and usual meaning of these words, it must be concluded that a permit could be issued for two days, one week, one year, or whatever period the responsible official deemed advisable.

⁷The principle of law relied upon by the Attorney General - that a court should give weight to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement - remains a firm principle of statutory construction. *E.g., Amherst-Pelham Regional School Committee v. Department of Education*, Mass. Adv. Sh. (1978) 2673, 2687, and cases cited.

⁸It would appear, however, that it may indeed have been the Department's custom prior to 1925, and until recent amendments of the statutes, not to issue permits for reducible loads. A search of Department records does not provide evidence that such permits were issued, and operators of vehicles subject to the permit provisions who have submitted briefs to me on this issue have not been able to produce any such permits. I do not view these facts as conclusive of the Department's authority to issue reducible load permits in view of the informal nature of the fact-finding involved and in view of the statutory language discussed above.

It is also pertinent to note that a judge of the Superior Court of the Commonwealth enjoined the Department from refusing to accept delivery of overweight reducible loads in the context of construction contracts. *Simeone Stone Corp., et al. v. Commonwealth of Mass. et al.*, Suffolk Superior Ct., No. 98309 (1973). That decision appears to have been grounded on the fact that the Department had established a longstanding practice - substantially predating July 1, 1956 - of allowing overweight construction vehicles to operate without a permit within certain limits, thus creating a "constructive" or informal permit procedure for reducible loads. Clear, the actions or customs of officials charged with enforcing a statute cannot effectively amend the statute or "estop" attempts to enforce the statute according to its terms. *See, e.g., Doris v. Police Commissioner of Boston*, Mass. Adv. Sh. (1978) 416, 423-424. Nonetheless, the facts of the *Simeone Stone* case lend support to one or both of the following conclusions: that the Department believed that it had authority to allow overweight reducible loads to operate on the state highways; or that the court found the practice of the Department to be inconsistent with the notion that the statute precluded the operation of overweight reducible loads.

up to the gross vehicle weight rating. The clear inference is that reducible loads fall within the general permit authority.⁹

Chapter 851 became effective on November 12, 1974.¹⁰ It would therefore inexorably follow that the Department had authority under c. 851 to issue reducible load permits on January 4, 1975, but for the unusual subsequent course of the Legislature's actions on the overload problem.

Section 15 of c. 494 of the Acts of 1975, an emergency act approved on July 15, 1975, suspended the operation of c. 851 until September 1, 1975. In addition to making substantive changes to the provisions of c. 851, as I have previously noted, c. 494 proved that the suspension was effective retroactively as of November 12, 1974 - the effective date of c. 851. It would therefore appear that the intent of the Legislature was to retrace its steps and nullify the operation of c. 851 from the period beginning November 12, 1974, through the effective date of c. 494, and until September 1, 1975.¹¹

These legislative events pose the difficult question whether c. 851 can be said to have vested "authority" in the Department to issue reducible load permits notwithstanding the subsequent action of the Legislature in retroactively suspending the effective date of c. 851. I need not decide this issue, however, in view of my conclusion that the Department had authority to issue reducible load permits on July 1, 1956. I have found no indication that the Legislature acted in any manner to restrict or revoke the Department's authority to issue permits between July 1, 1956 and January 4, 1975. It therefore follows that the Department had authority on January 4, 1975, as well as on July 1, 1956, to issue reducible load permits.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Number 2

September 11, 1979

Mr. Dean P. Amidon
Commissioner
Department of Public Works
100 Nashua Street
Boston, MA 02114

Dear Mr. Amidon:

You¹ have requested my opinion on whether the Department of Public Works (the Department) has authority to manage real property it has acquired for the

⁹If any support for this interpretation is necessary, it can be found in the Report of the Special Commission, House Rep. No. 6164 (May 1974) at 9 (references to various reducible loads, such as petroleum and concrete).

¹⁰The act provided that the effective date of certain sections of the act would be extended beyond the normal ninety-day period. St. 1974, c. 851, §12. These sections are not relevant to the present concerns, however.

¹¹The operation of portions of c. 851, as amended by c. 494, was further suspended by St. 1975, c. 593, §1, and again suspended by St. 1976, c. 5, §1. The portion of c. 851 relevant to the present issues went into effect on September 1, 1975.

¹The opinion request actually originated from your predecessor, Acting Commissioner Donadio.

new state Department of Transportation building, provided for in St. 1975, ch. 859, §7A (Section 7A) as amended by St. 1977, ch. 356, §24 (Section 24), and whether the Department may provide relocation services for persons displaced when property is acquired for this purpose. As part of both of these questions, you have also asked whether such management and relocation services may be financed by funds designated for the Department of Transportation building. It is my conclusion, for the reasons set forth below, that the Department has authority to manage the property and to provide relocation services, and that funds authorized under Section 7A may be used for these purposes.

Section 7A directs the expenditure of funds for the acquisition of property and for the planning and design of a Department of Transportation building to be located in Park Square, Boston. That building is to house, to the extent possible, the various state agencies which administer transportation programs. Apparently the Department has already begun acquisitions by eminent domain and additional acquisitions are in process. You have, however, informed me that the Comptroller of the Commonwealth has questioned the authority of the Department to expend further funds to provide relocation assistance² and to manage the property³ and has asked you to seek my opinion. In order to resolve these legal questions,⁴ cf. G.L. c. 30, §5, I shall first consider whether property management services are authorized under Section 7A.

Section 24 of Chapter 356 of the Acts of 1977 amended Section 7A of Chapter 859 of the Acts of 1975 by adding a paragraph directing the Department to acquire "and to hold, lease, otherwise deal with, sell, transfer or otherwise dispose of" property as needed to accomplish the purposes of that section. It is a fundamental principle of legislative interpretation that an enactment must be construed according to the common usage of the language. *Board of Assessors of Amherst v. State Tax Commission*, 357 Mass. 505, 507 (1970). In order to "hold, lease or otherwise deal with" the acquired property, the Department must necessarily also manage it.⁵ It is my opinion, then, that the Department is authorized to manage the property acquired for the Department of Transportation building, and to apply the funds appropriated under Section 7A to the costs of such management.

I turn now to the question of whether relocation services may be provided under Section 7A of Chapter 859 of the Acts of 1975. In my opinion the Department is authorized to provide relocation assistance and payments by G.L. c. 79A §§3, 11.

General Laws Chapter 79A, Section 3 provides:

Any public agency, or any other person authorized to take by eminent domain, . . . shall provide relocation assistance and payments

²See G.L. c. 81, §7J, and G.L. c. 79A, §3.

³This "management" function is typically performed between the time property is acquired and (until business and residential occupants are relocated) the structures are readied for demolition. See St. 1966, ch. 427, §1.

⁴The Department submitted various statutory and case citations in support of its position. Although invited to do so, the Comptroller did not submit a legal memorandum setting forth his position on the questions raised.

⁵Moreover, the Department is authorized to perform management services for property acquired in connection with the accelerated highway program, by St. 1966, ch. 427, §1. The legislature must have been aware of this authority when it enacted the amendment adding the authorization to "hold, lease or otherwise deal with" acquired property. See *Selectmen of Topsfield v. State Racing Commission*, 324 Mass. 309, 313 (1949). I believe this acquisition can be considered an acquisition in connection with the accelerated highway program for purposes of St. 1966, ch. 427, §1. See note 6 *infra*. Indeed, the Act authorizing the taking of property for the Department of Transportation building, Chapter 859 of the Acts of 1975, refers to accelerated highway improvement and maintenance in both the title and preamble.

under this act upon undertaking a project which results in displacement of occupants by the acquisition of real property or by the issuing of a written order to vacate for purposes of rehabilitation, demolition or other improvement.

Section 11 of the chapter provides:

Funds appropriated or otherwise available to any public agency for the acquisition, rehabilitation or demolition of real property or any interest therein for a particular program or project shall be available also for obligation and expenditures to carry out the provisions of this act as applied to that program or project.

Reading Sections 3 and 11 together, I conclude that funds designated for the acquisition of property for the Department of Transportation building by Section 7A of Chapter 859 of the Acts of 1975 may be used for relocation payments and services. See *Department of Community Affairs v. Massachusetts State College Building Authority*, Mass. Adv. Sh. (1979) 1681. As the Court there noted,

[t]he Legislature's primary motive in providing relocation assistance to a property owner who is forced to sell or whose property is taken from him is probably the realization that merely paying him for his real estate does not fully compensate him, even if he is paid an amount sufficient to purchase comparable new premises By enacting G.L. c. 79A, the Legislature has decided, as a matter of public policy, that a person incurring relocation expenses when displaced for the construction of a program or project undertaken by a public agency ought to be compensated therefor.

Id. at 1694-95. Accordingly, relocation benefits under Section 7A are statutorily authorized.⁶

In summary, it is my opinion that the Department of Public Works may use funds designated under Section 7A of Chapter 859 of the Acts of 1975 for management and relocation services with respect to property acquired under that Act.

Very truly yours,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

⁶An alternative source of authority is G.L. c. 81, §7J which requires the Department to provide relocation payments and services in connection with acquisitions "for highway purposes." The acquisition of property for the Department of Transportation building appears to fall within the concept of "highway purpose." Supreme Judicial Court opinions have given the term "highway" expansive scope. In *Opinion of the Justices*, 530 Mass. 713 (1953), the Court explained that the modern highway

cannot merely be constructed and opened to the public. *It must be operated*. This involves inspections, supervision and a constant preparedness to remove obstructions and make necessary repairs.

Id. at 722-23 (emphasis added). Observing that "[t]his enterprise must be envisioned as a whole in its larger aspects," *id.* the court concluded that garages, gasoline stations and restaurants serving highway travelers are included within the term "highway." *Id.* See also *Opinion of the Justices*, 370 Mass. 895 (1970) (bikeway is included in term "highway"). A building designed to house virtually all highway administration similarly fits within the broad definition of "highway." Moreover, it appears that the General Court contemplated the applicability of the relocation provisions of c. 81, §7J to this acquisition, for it authorized the Department to "exercise such powers as may be necessary under chapter[] eighty-one of the General Laws," in furtherance of the purpose of Section 7A. St. 1977, ch. 356, §24. Accordingly G.C. c. 81, §7J is another source of authority for relocation payments and services.

Number 3

October 29, 1979

Honorable Michael Joseph Connolly
Secretary of State
 State House
 Boston, MA 02133

Dear Secretary Connolly:

You have requested my opinion concerning the operation and effect of G.L. c. 51 §1F (Section 1F),¹ which provides that certain unregistered persons may vote by absentee ballot in a presidential election. Your questions arise from your statutory obligation to print ballots (G.L. c. 54, §40) and to prepare absentee voting information and instructions for the presidential election (G.L. c. 54, §102).

As a general matter, your questions require me to construe Section 1F and to determine whether it is consistent with the federal Voting Rights Act Amendments of 1970. 42 U.S.C. §1973aa-1, *et seq.* (1976). Specifically, you have posed six separate questions concerning various aspects of the statute which I will answer separately and in turn. Before providing those specific answers, my overall conclusions are as follows.

To apply under Section 1F, an individual must be absent from the city or town during the registration sessions or be unable to register in person for the presidential election, but I believe that such an applicant need not be absent or otherwise unable to vote in person at the election. It is my opinion that an application under Section 1F must be received by the local clerk on or before ten o'clock in the evening of the twenty-eighth day preceding the presidential election. Those who have applied under this section should be provided with a "short ballot" listing only the candidates for president and vice president. The ballot itself may be cast either in person at the office of the clerk or by mail. Interpreting the statutes in this manner, I am of the opinion that Massachusetts is in complete compliance with 42 U.S.C. §1973aa-1(f) (1976).

You first ask whether an individual who seeks to make application under Section 1F must be absent from the city or town or otherwise unable to register in person prior to the time registration closes for a presidential election. The terms of Section 1F do not expressly contain such a requirement. However, the election laws, as all statutes of the Commonwealth, must be viewed as a uniform and consistent body of law such that no provision is viewed as surplusage. *Commonwealth v. Mercy Hospital*, 364 Mass. 515, 521, (1974); *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 352 Mass. 617, 618 (1967). Persons who are present in a city or town during the registration sessions preceding a presidential election and who desire to vote at that election, may make application in accordance with the

¹Section 1F provides:

Any person, otherwise qualified to vote under the provisions of section one A but whose name is not included in the current annual registrar of voters of the city or town where he claims the right to vote, may qualify for voting upon application to the registrars of voters of said city or town. Any form of written communication containing the name, age, citizenship, former residence and present residence of such person shall cause the registrars to make an investigation relative to the qualifications of such person to vote and, for the purpose of such investigation, the officer in charge of the police force of each city and town shall give the registrars such assistance as they may require. Upon determining that such person is qualified to vote under the provisions of this section, the registrars shall forward an absentee ballot to him and shall include his name on a list of persons registered under this section which shall be sent to the city or town clerk. The provisions of sections ninety-four to ninety-six, inclusive, of chapter fifty-four shall apply to such ballots which shall be cast in the polling places designated under the provision of section twenty-four.

provisions of G.L. c 51, §1A (Section 1A). It is an express requirement that these applicants appear in person and make an affidavit of registration before a registrar or assistant registrar. G.L. c. 51, §42.

I believe Section 1A, which is substantially more restrictive than Section 1F, is the exclusive vehicle for the registration of those able to appear in person. If Section 1F were construed to present an alternative whereby applicants who were able to appear need not do so, as a practical matter Section 1A would be eviscerated. There would be no logical reasons for any individual seeking to register to subject himself to the more rigorous procedures of Section 1A. Because construing Section 1F as providing an alternative method of registration to that contained in Section 1A would render the latter statute ineffective, I conclude Section 1F was meant to apply only to those individuals who are absent from the city or town, or unable to register in person for reason other than physical disability,² at the time registration closes before a presidential election.³

You next ask whether an applicant under Section 1F must be absent or otherwise unable to vote in person at the polls on election day. Neither the expressed nor the implied terms and provisions of Section 1F impose such a requirement. As will be discussed more fully below, this section was enacted to allow those citizens who are absent during the registration periods to qualify to vote for president and vice president. Citizens who are absent during the registration sessions, but who will be present on election day, should not be precluded from casting a ballot. The statute sets up no such barrier.

However, a person qualified under Section 1F would only be entitled to cast an absentee ballot, since the statute specifically provides:

. . . Upon determining that such person is qualified to vote under the provision of this section, the registrars shall forward an *absentee ballot* to him G.L. c. 51, §1F. (Emphasis added.)

I therefore conclude that an applicant under Section 1F need not be absent or otherwise unable to vote in person at the polls on election day, but the applicant is only entitled to an absentee ballot which must be cast in accordance with the laws governing absentee ballots.

Your third question asks if there is any deadline for applying for a presidential ballot under Section 1F. To qualify under that section, a person must be otherwise qualified to vote under Section 1A of chapter 51, which requires a person to make an application as required and to otherwise comply "with the requirements of this chapter [G.L. c. 51]." Section 26 of that chapter governs the time when applications under Section 1A must be received by the local registrars. It requires that they be received before ten o'clock in the evening on the twenty-eighth day preceding the election. Because this is a requirement to qualify under Section 1A, it is incorporated by reference into Section 1F. I therefore answer your third question in the affirmative: an application under Section 1F must be received no later than ten o'clock in the evening of the twenty-eighth day preceding the presidential election.

²Those individuals who are unable to register in person due to physical disability, may register pursuant to the provisions of G.L. c 51, §42A.

³This conclusion is further buttressed by the legislative history of Section 1F. That history is more fully set forth at pp 7-8, *infra*

Your fourth question is whether a voter qualified under Section 1F is to receive a regular absentee ballot or a special "short ballot" listing only electors of president and vice president. To answer this question, it is necessary to briefly review the legislative history pertaining to voter qualifications for presidential elections.

General Laws chapter 51, §1A was enacted in 1962, and provides that persons who have resided within the Commonwealth for twenty-eight days are entitled to vote for presidential electors. At the time this statute was enacted, Massachusetts required that citizens reside within the Commonwealth for at least six months before they were qualified to vote in state elections. This residency requirement was subsequently abolished (St. 1972, c. 587, §2) and the election laws currently provide that:

Except as otherwise provided in section one A, every citizen eighteen years of age or older, not being a person under guardianship and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who is a resident in the city or town where he claims the right to vote at the time he registers, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town. . . . G.L. c. 51, §1.

Because voter registration ceases as of twenty-eight days before the election (G.L. c. 51, §26), there is no longer a disparity between the residency requirement for state voting and for voting at presidential elections. Before the uniform residency requirement was effected however, statutory provision was made so that those qualifying under Section 1A would receive a ballot only for presidential and vice presidential electors. G.L. c. 54, §42, as amended by St. 1962, c. 437, §38. This ballot is referred to as the "short ballot," as it does not contain the other election contests to be voted on at the election or the various questions that may be submitted to the voters. The questions that you have posed is whether this "short ballot" is to be provided to those citizens qualifying to vote under Section 1F.

The legislative history of Section 1F makes it clear that the legislature intended the statute to apply only to presidential elections. It was enacted as St. 1972, c. 637, §2, as a result of the Federal Voting Rights Act Amendments of 1970, which contain a declaration that:

[I]t is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections. 42 U.S.C. §1973aa-1(b) (1976).

Massachusetts was in complete conformity with this legislation in 1970, having provision for absentee balloting for presidential elections (G.L. c. 54, §92) and having abolished its residency requirement for voting (G.L. c. 51, §1, as amended by St. 1972, c. 587, §1). Provision had also been made for absentee registration for disabled voters (G.L. c. 51, §42A) and for those citizens who were outside the territorial limits of the nation (G.L. c. 54, §103J). However, the Massachusetts election laws made no provision for those citizens who were residents of Massachusetts, but who were absent or otherwise unable to register to vote for Presidential elections.

In response, a bill was introduced which was entitled, "An Act Relative to Conforming the Short Presidential Ballot in Massachusetts to the Voting Rights Act of 1970 and to the Attorney General's Opinion Thereon."⁴ This bill was eventually enacted as St. 1972 c. 637, with the title "An Act Expediting the Right of Certain Persons to Vote for Presidential Electors."

It is a well-settled principle that the legislative history of a law may be considered in order to ascertain its purpose and meaning, and that a statute's "title . . . may be considered in determining its construction." *Silverman v. Wedge*, 339 Mass. 244, 245 (1959). There can be little doubt that the legislation was meant to extend only to presidential elections, and I therefore conclude that you should provide those citizens qualifying under the provisions of Section 1F with the special "short ballot."

Your fifth question is whether those provisions of the absentee voting law concerning delivery by mail or voting in the office of the clerk apply to absentee ballots cast pursuant to Section 1F. A voter who requests an absentee ballot under G.L. c. 54, §§87-92, specifies whether he will return his ballot by mail or will cast his ballot at the city or town clerk's office. There are separate procedures which apply to ballots cast by mail and ballots which are cast in person. G.L. c. 54, §92.

The terms of Section 1F do not specify which method of voting is to be employed by persons who qualify under that section. The statute merely provides: ". . . such ballots . . . shall be cast in the polling places designated under the provisions of section twenty-four."⁵

This language should be contrasted with the more specific language contained in G.L. c. 54, §87, which makes specific provision for the voter to request that the ballot be mailed or to vote in person. Further comparison with the provisions of G.L. c. 54, §92, governing the method of voting by absentee ballots, is also instructive. That section differentiates between "a voter who has received by mail an official absent voting ballot" and "a voter whose ballot is delivered to him in person." G.L. c. 54, §92. Section 1F simply provides that the registrars of voters "shall forward an absentee ballot" and does not specify the manner for delivery.

It is the normal rule of statutory construction that the statute must be so construed as to provide an effective piece of legislation in harmony with common sense and sound reasoning, *Morrison v. Selectmen of Weymouth*, 279 Mass. 486, 492 (1932), and that it be interpreted in the light of pre-existing law and the main objective to be accomplished. *A. Belanger & Sons, Inc. v. Joseph M. Concannon Corp.*, 333 Mass. 22, 25 (1955). I conclude, therefore, that Section 1F contemplates casting absentee ballots, provided thereunder, either in person at the office of the clerk or by mail.⁶

⁴The Opinion of the Attorney General referred to in the title of the bill was issued on December 2, 1970, and concerned the literacy and age requirements for voter registration. 1970/71 Op. Atty. Gen. No. 23, Rep. A.G. Pub. Doc. No. 12 at 70 (1971)

⁵General laws c. 54, §24 provides for the designation of polling places where ballots provided under G.L. c. 51, §1A are to be cast

⁶Section 1F expressly provides that the provisions of G.L. c. 54, §§94-96, shall apply to ballots cast thereunder. Those statutes deal with processing absentee ballots and challenges that may be made to their validity

The final question which you posed is whether the Commonwealth is in compliance with Section 202(f) of the Voting Rights Act Amendments of 1970, 42 U.S.C. 1973aa-1(f) (1976). That section provides:

No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

As I have interpreted the provisions of Section 1F, it provides an effective manner by which every citizen of the Commonwealth, who is otherwise qualified, may vote for presidential and vice presidential electors. It is therefore my opinion that the Commonwealth is in full compliance with the Federal Voting Rights Act.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 4
Eileen Schell
Secretary
Executive Office of
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One Ashburton Place
Boston, MA 02108

November 20, 1979

Dear Secretary Schell:

You have requested my opinion whether the present executive secretary to the Board of Registration in Nursing is qualified by law to serve in that position. In order to answer your question, I have considered whether the executive secretary was qualified to be so appointed when she was named and whether she is now eligible to serve in that position. I conclude that the incumbent was not originally qualified for appointment as executive secretary and is not currently eligible to continue serving in that capacity.

General Laws chapter 13, §14 provides in relevant part:

The board [of registration in nursing] shall appoint an executive secretary who *at the time of appointment* shall hold a bachelor's degree, shall have been registered to practice as a registered nurse in the Commonwealth for at least eight years, shall have been actively engaged in such practice for at least eight years, during at least five years of which he shall have served on the teaching or administrative staff of a school of nurses duly approved in accordance with chapter one hundred and twelve, and who shall continue to be so registered so long as he shall hold the said office. He shall not be a member of the board, shall not be subject to chapter thirty-one, shall perform under the direct supervision of the board such duties

as the board shall from time to time designate, and shall receive such salary as may be fixed in accordance with chapter thirty. (Emphasis added.)

From the materials which you have forwarded, I have gleaned the following relevant facts. Marguerine Ginty, the present executive secretary, was appointed by the Board of Registration in Nursing [hereinafter, "the Board"] on October 2, 1977. Mrs. Ginty was registered as a nurse in the Commonwealth by certificate issued November 23, 1971.¹ At the time of her appointment, Mrs. Ginty had been registered to practice as a nurse in the Commonwealth for less than six years and not for the minimum of eight years as required by G.L. c. 13, §14. She was, therefore, not qualified to be appointed at that time and would not be so qualified until at least November 23, 1979.²

Because Mrs. Ginty does not meet the statutory requirements for appointment, her appointment as Executive Secretary to the Board is void. Moreover, she is not lawfully eligible to continue serving until such time as she meets those requirements and is thereafter appointed in accordance with G.L. c. 13, §14. See, e.g., *Phelon v. Inhabitants of Granville*, 140 Mass. 386, 389 (1886); *Commonwealth v. Allen*, 128 Mass. 308, 311 (1880). The fact that Mrs. Ginty at some point in the future may meet the statutory qualifications for appointment does not cure the deficiency of the original appointment. See *Commonwealth v. Swasey*, 133 Mass. 538 (1882). Until such time as she is validly appointed, her service as Executive Secretary is in a *de facto*, as opposed to a *de jure* capacity. *Ibid*.

The proper remedy in such circumstances is an action in the nature of quo warranto against Mrs. Ginty to seek her removal. Such action may be brought only by the Attorney General pursuant to G.L. c. 249, §9,³ and filing such an action is a discretionary act. *Boston Edison Co. v. Boston Redevelopment Authority*, 1977 Mass. Adv. Sh. 2676, 2720. If you or the Board are desirous of causing such an action to be filed, you should formally communicate your desires to me.

Because Mrs. Ginty's title to the office of Executive Secretary to the Board derives from an invalid appointment, I conclude that she is not now entitled to hold that office. The Board is not, however, precluded from reappointing Mrs. Ginty to the position of executive secretary at such time as she possesses the statutory prerequisites for appointment.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

¹The materials submitted to me also indicate that Mrs. Ginty was originally registered as a nurse by the Connecticut Board of Registration in 1947.

²The materials submitted to me do not reflect whether Mrs. Ginty has satisfied the other qualifications for appointment which the statute requires, including a bachelor's degree, eight years of active practice, and five years of service on the teaching or administrative staff of a duly approved school for nurses. G.L. c. 13, §14. Having concluded that Mrs. Ginty was not registered for the required eight year period. I need not consider these other factors. They make it impossible, however, for me to consider the hypothetical question whether Mrs. Ginty would be qualified to be appointed on November 23, 1979.

³An action in the nature of quo warranto by the Attorney General is one of two proper methods to try an individual's right and title to public office. Where a petitioner claims the public office, mandamus, and not quo warranto, is the proper action. See *Seigny v. Russell*, 260 Mass. 294, 295 (1927). It is clear, however, that a public officer's right and title cannot be attacked collaterally, but only directly in a proceeding to determine the validity of that title. *Boston Edison Co. v. Boston Redevelopment Authority*, 1977 Mass. Adv. Sh. 2676, 2720.

Number 5

November 21, 1979

Joel H. Goober, Esq.

Election Officer

Commonwealth of Massachusetts

Teachers' Retirement Board

One Ashburton Place

Boston, MA 02108

Dear Mr. Goober:

You have requested my opinion whether Chapter 523 of the Acts of 1978 grants to retired members of the Teachers' Retirement System the right to vote in Teachers' Retirement Board elections. I am of the opinion that Chapter 523 does not grant them that right.

Chapter 523 of the Acts of 1978 is entitled "An Act Providing Voting Rights for Retired Members of the Retirement System for Public Employees." Section 1 reads as follows:

Clause (ii) of paragraph (a) of subdivision (1) of section 3 of chapter 32 of the General Laws as appearing in section 1 of chapter 658 of the acts of 1945, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence: - *Any member in active in service* shall have full voting powers in the system as provided in section twenty. (Emphasis added.).¹

It is evident from the Act's title and provisions that its purpose is to extend the right to vote in retirement board elections to retired members of many of the municipal and state retirement systems in the Commonwealth.² I am of the opinion, however, that Chapter 523 of the Acts of 1978 does not succeed in extending the right to vote to retired members of the Teachers' Retirement System. The last sentence of this section contains an obvious error.³ The phrase "in active in service" contained in that sentence makes no sense. The sentence "Any member in active in service shall have full voting rights as provided in section twenty," is therefore so ambiguous that, even with the aid of all available tools of statutory construction, I am unable to determine an effectuate the Legislature's intent. In addition, Chapter 523 does not explicitly amend the statute covering the election of the board.

Teachers' Retirement Board Elections are currently governed by G.L. c. 15, §16. That statute provides that of the five member board, "two members . . . shall be elected by the members in service of such system. . . ." *Id.* Chapter 523 of the Acts of 1978 makes no reference to, and does not expressly amend that statute.

¹This language comes from the official version of the statute, as printed by the Secretary of State and signed by the Governor. The statute as printed in the Massachusetts Legislature Service and the 1979 pocket part of G.L. c. 32, §3, published by the West Publishing Company reads: Any member in active service shall have full voting powers in the system as provided in section twenty.

²The remainder of Chapter 523 of the Acts of 1978 makes changes in the voting rights in the various municipal and state retirement systems, primarily by extending voting rights to retired members. Section 3 of Chapter 523 extends voting rights to inactive members of city and town retirement systems; Section 4 extends voting rights to inactive members of the Massachusetts Housing Finance Agency retirement system; Section 5 accomplishes this result for the Massachusetts Turnpike Authority System; and Section 6 does so for the Massachusetts Bay Transportation Authority police retirement system. Section 2 of Chapter 523 permits retired members of county retirement systems to receive candidate nomination papers, these retired members had been granted the right to vote by Section 3 of Chapter 890 of the Acts of 1977.

³A bill to revise this language was filed in the Senate but was not enacted. This opinion was delayed in order that the Legislature might consider and act upon that bill.

Nor does the Act, in my opinion, impliedly amend G.L. c. 15, §16. Three possible sources of an implied amendment of G.L. c. 15, §16 suggest themselves. One is the change in G.L. c. 32, §3 (a) (ii), worked by Section 1 of Chapter 523. Another is the title of the Act. The third is the manifest legislative intent to extend voting rights to retired members of retirement systems. I find that none of these aspects of Chapter 523 impliedly amends the election procedures of G.L. c. 15, §16.

Section 1 of Chapter 523 deletes the sentence "No member inactive shall have any voting rights in the system," from G.L. c. 32, §3 (1) (a) (ii) and purports to substitute therefor the confusing language underscored above. The deletion of this prohibitory language does not by itself constitute a grant of voting rights to retired persons. The deletion merely avoids the inconsistency that would otherwise result between the deleted sentence's prohibition of voting rights for retired persons and the grant of such rights to retired members of various retirement systems accomplished by Sections 3 through 6 of the Act. Nor does the substitute language presented by Section 1 of the Act supply an affirmative grant of voting rights to retired members of the Teachers' Retirement System. Whatever its meaning,⁴ that substitute language addresses only "voting powers in the system as provided in section twenty." Voting powers with respect to Teachers' Retirement Board Elections, however, are provided in G.L. c. 15, §16, not in G.L. c. 32, §20.⁵ Neither the deletion nor the substitution of language in Section 1 of Chapter 523 impliedly amends G.L. c. 15, §16.

The title of Chapter 523, although arguably broader than the Act's provisions, does not enlarge their scope. The title to an act cannot control the plain provisions of the statute, although it may be a guide to resolving an ambiguity. *Breault v. Ford Motor Co.*, 364 Mass. 352, 353 n. 2 (1973). While Section 1 of Chapter 523 contains some ambiguous language, there is no ambiguity with respect to the Teachers' Retirement Board Elections. As previously observed, whatever the meaning of the confusing language of Section 1, it does not purport to effect voting rights under G.L. c. 15, §16. Accordingly, the Act's title may not be relied upon to clarify the effect of the Act's provision upon Teachers' Retirement Board elections, and therefore, does not effect an implied amendment of G.L. c. 15, §16.

Finally, the legislative intent to extend voting rights to retired members of various retirement systems does not impliedly amend G.L. c. 15, §16. The legislative intent, as expressed in the Act, is to increase the rights of retired members of the county, city and town, Massachusetts Housing Finance Agency, Massachusetts Turnpike Authority, and Massachusetts Bay Transportation Authority police retirement systems, with respect to board elections within those systems. Although it might seem reasonable to extend the same rights to retired members of the Teachers' Retirement System, the language of the Act does not manifest an intent to do so. The statutory language itself is the principal source of insight into the legislative purpose. *Hoffman v. Howmedica*,

⁴Moreover, the phrase "in active in service," used in the substitute, is nowhere defined. "Member in service" is defined in G.L. c. 32, §3 (1) (a) (i) and "member inactive" is defined in G.L. c. 32, §3 (1) (a) (ii). The phrase used in Chapter 523, in contrast, has no apparent meaning. Thus, if Chapter 523 had used the phrase "member in active", my task would be somewhat easier and I might have interpreted the space between "in" and "active" to be a typographical error. As it is, however, I am unable to determine what, if anything, the additional phrase "in service" means in this context.

⁵Although G.L. c. 32, §20 does make reference to G.L. c. 15, §16 I decline to rely upon such reference to find an implied amendment of that latter provision.

Inc., Mass. Adv. Sh. (1977) 1488, 1493; *Commonwealth v. Gove*, 366 Mass. 351, 354 (1974). The General Court took care in sections 2 through 6 of the Act to amend several individual statutory provisions relating to board elections within various different retirement systems, yet left G.L. c. 15, §16 untouched. I must, therefore, conclude that the statutory purpose did not include extending voting rights to retired members of the Teachers' Retirement System. Even if I were to conclude that the General Court intended to accomplish that result, the intent would be insufficient to alter the actual text of the law.

In summary, it is my opinion that Chapter 523 of the Acts of 1977 simply does not extend the right to vote in Teachers' Retirement Board elections to retired members of the Teachers' Retirement System.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 6

December 3, 1979

Alfred E. Frechette, M.D.
Commissioner of Public Health
600 Washington Street
Boston, Massachusetts 02111

Dear Dr. Frechette:

You have asked whether physicians who provide medical services at Department of Public Health facilities on a contractual basis and who are paid from a subsidiary account coded "03" in the expenditure code manual are "public employees" within the meaning of the Commonwealth's Claims and Indemnity Act. G.L. c. 258, §§1, *et. seq.*, inserted by St. 1978, c. 512, §15. The purpose of your question is to determine whether it is necessary for such physicians to maintain their own medical malpractice insurance, in light of statutory language in G.L. c. 258, §2, which directs that, under certain circumstances, a public employer may be held liable for the tortious conduct of an employee.

As discussed more fully below, I have concluded that, as a general matter, physicians providing services to the Department of Public Health under "03" (consultant) contracts are not immune from tort liability as a matter of law by virtue of their association with the Commonwealth. Although there may be certain instances where an "03" physician is covered by G.L. c. 258, §§1, *et. seq.*, as one whose role and function is identical to that of a physician hired under a traditional employment contract, this is not the general rule. *See*, 1976-77 Op. Atty. Gen., p. 2 (March 31, 1977); 1966-67 Op. Atty. Gen. p. 70, 71 (August 30, 1966). Thus, for the reasons discussed below, it would be advisable for physicians hired as consultants under "03" contracts to maintain their own personal malpractice insurance. My answer to your question is based both on the language of G.L. c. 258, §§1, *et. seq.*, and on the statute's common law context.

General Laws c. 258, §2 provides that "public employers" may be held liable for

. . . injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee

while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.

t further provides that where a "public employee" offers

. . . reasonable cooperation to the public employer in the defense of any action brought under this Chapter, no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment.

Although the terms "public employer" and "public employee" are explicitly defined in G.L. c. 258, §1,¹ that provision leaves unspecified the generic meaning of the term "employee." Under these circumstances, rules of statutory construction dictate that the "usual and accepted meaning" of the word shall apply, as long as that meaning is consistent with the statute's purposes. *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977). Pursuant to this approach, the term's "usual and accepted meaning" may be derived from sources presumably known to the enactors of the statute, such as its use in other legal contexts, including common law. See e.g., *Commonwealth v. Zone Book, Inc.*, *supra*; *Everett v. Revere*, 344 Mass. 585, 589 (1962), quoting from *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 17 (1908).

At common law, "the test used in this Commonwealth to determine whether an individual is . . . a servant or employee . . . is the control which may be exercised over the individual in the performance of his work." *Brigham's Case*, 348 Mass. 140, 141 (1974) 1964. An individual is considered a servant or employee if, in the performance of his duties, that individual is at all times bound to obedience and subject to direction and supervision as to details, as distinguished from a responsibility merely to accomplish an agreed result in an agreed manner. *Brigham's Case*, *supra* at 142; *Bell v. Sawyer*, 313 Mass. 250, 251 (1943); *McDermott's Case*, 283 Mass. 74, 76 (1933).

Courts have recognized that "one may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly." *Bell v. Sawyer*, *supra*, at 251-252. This holds true because the existence of the master-servant relationship depends primarily upon the *right* of the principal to control the manner in which the work is performed, rather than the actual *exercise* of that right. *Marino v. Trawler Emil C, Inc.*, 350 Mass. 88, 96 (1966); *Bell v. Sawyer*, *supra* at 252. To determine whether such a relationship exists in any particular case, courts have looked to factors which include: the method of payment, if any; the intended duration of employment; the degree of supervision required or exercised; the place of employment; and the ownership of equipment used. See, e.g., *Marino*, *supra* at 95; *Galloway's Case*, 354 Mass. 427, 430 (1968); *Bell v. Sawyer*, *supra* at 252; *McDermott's case*, *supra* at 76-78.

Pursuant to this judicial analysis, consultants have typically been viewed by the Attorney General as operating without the type of supervision and control

¹G.L. c. 258, §1, defines the term "public employee" as "elected or appointed officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated." In turn, G.L. c. 258, §1 defines the term "public employer" as "the Commonwealth, . . . and any department, office, commission, . . . institution or agency thereof [which] exercises direction and control over the public employee."

which would accord such individuals the status of "employee." 1976-77 Op. Atty. Gen. p. 2 (March 25, 1977). Indeed, one Attorney General Opinion has characterized the relationship between a consultant and an agency of the Commonwealth as one in which the agency would be the consultant's client rather than employer. 1966-67 Op. Atty. Gen. p. 70, 71 (August 30, 1966). *Accord*, 1976-77 Op. Atty. Gen., p. 2 (March 31, 1977). Accordingly I believe that where a traditional consultant relationship exists between an individual physician and the Commonwealth, the physician would not be considered a "public employee" for the purposes of the Claims and Indemnity Act.²

The inquiry, however, cannot end with a conclusion pertaining only to the traditional consultant, since you have stated that the terms under which "03" physicians provide services to the Commonwealth differ significantly from contract to contract. For example, some physicians provide services to the Commonwealth by means of a "blanket service authorization," under which (1) particular Public Health facilities have discretion to hire medical staff necessary for their operation; (2) individual physicians contract directly with the Department; and (3) certain physicians provide services to the Department by way of an "03" agreement between the Department and an institution with which the physician is affiliated. Further, you suggest that, while some physicians hired under "03" contracts genuinely play a consultant role, others are functionally indistinguishable from physicians providing services under traditional employment contracts. In the latter circumstance, you state that the only difference between the "consultant" and "employee" is the fund from which compensation is derived.

These facts are particularly relevant since the common law suggests that it is the substance of the relationship rather than the formal label attached to it which controls the determination of one's status as an employee. For example, approximately one year before the Legislature enacted G.L. c. 258, §§1, *et. seq.* in its present form, the Supreme Judicial Court decided *Whitney v. City of Worcester*, Mass. Adv. Sh. (1977) 1713. In that case, the Court expressed an intention to abolish governmental immunity, within limits, in the first appropriate case decided after the 1978 legislative session, if the legislature itself had not acted definitively by that time. *Whitney*, *supra*, at 1715. The court voiced its conclusion that "the governmental immunity doctrine and the convoluted scheme of rules and exceptions which have developed over the years are unjust and indefensible as a matter of logic and sound public policy." *Id.* at 1714. It observed that "rigid classifications. . . have served only to obscure the issue of whether a particular plaintiff should recover from a governmental entity for his injuries and to prevent the systematic and straightforward development of a rational scheme of governmental liability that is consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government." *Id.* at 1721. To inject what it considered the necessary rationality into

²It should be noted that this conclusion necessarily rests upon the nature of the physician's employment relationship with the Commonwealth, rather than the nature of the medical profession itself. Although the highly skilled and discretionary nature of medical practice has been recognized, *see, e.g.,* *McMurdo v. Getter*, 298 Mass. 363, 368 (1937) ("the position of a physician is normally not a servant of anyone"), courts have not hesitated to view physicians as "employees" of hospitals or corporations for purposes of tort liability. *See e.g.,* *Aurelio v. Laird*, 352 Mass. 1 (1967); *McMurdo v. Getter*, 298 Mass. 363, 364 (1937) *cf. McCarthy v. Boston City Hospital*, 358 Mass. 639, 643 (1971). This approach is consistent with cases decided under the Federal Tort Claims Act, 28 U.S.C. §§2671, *et seq.*, in which courts applying language similar to that found in G.L. c. 258 have held the United States answerable to malpractice of physicians providing medical services in federal facilities. *See, e.g., Ahern v. Veterans Administration*, 537 F.2d 1098, (10th Cir. 1976); *Caron v. United States*, 410 F. Supp. 378, 391 (D.R.I. 1975), *aff'd* 548 F.2d 366 (1st Cir. 1976); *Grigalaukas v. United States*, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494 (1st Cir. 1952).

this field, the Court approved the use of a functional analysis "guided by a principle of governmental liability within limits". *Id.* at 1723.

In light of these considerations, when determining whether an "03" physician is a "public employee" within the meaning of G.L. c. 258, §§1 *et seq.*, the individual's legal status as a consultant cannot, in all circumstances, be conclusive. To do so would create the pitfalls of "rigid categorization" which the Court in *Whitney* sought to avoid. It would, in some cases, render governmental liability dependent solely upon the fortuity of the physician's funding arrangement with the state.

Rather than viewing the "03" physicians as a consultant in all circumstances, the teaching of *Whitney* militates in favor of a case by case approach. Although the fact that a physician is hired as a consultant may be highly probative on the issue of that individual's relationship with the Commonwealth, the parties must be allowed to explore the issue of "direction and control."

This result recognizes the principle that, in order to maintain a rational scheme of government liability under G.L. c. 258, §§1 *et seq.*, coverage must be determined not only by the individual's technical legal status, but also by the individual's functional role. In cases where the "03" physician is in fact functionally indistinguishable from physicians hired under traditional employment contracts, coverage under G.L. c. 258, §§1 *et seq.*, should be the same.

Finally, assuming under the analysis prescribed above that a particular "03" physician is a "public employee" within the meaning of G.L. c. 258, §1, the individual must still be aware that he or she faces individual liability for tortious conduct not covered by the Claims and Indemnity Act. Under G.L. c. 258, §10, the provisions of the Act do not extend to:

(a) any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, . . . whether or not such statute, [or] regulation, . . . is valid;

(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused; [or]

(c) any claim arising out of an intentional tort.

As to these types of actions, the Commonwealth has not waived its immunity. Rather, in these situations physicians and other public employees may still be held personally responsible for their tortious conduct, subject to limited indemnification procedures set forth in G.L. c. 258, §9.

In light of these considerations, as well as the fact that in any given situation an "03" physician may not be a "public employee" for purposes of the Claims and Indemnity Act, an "03" physician cannot securely rely upon that statute as a shield from personal liability for malpractice. Accordingly, physicians providing services to the Department of Public Health under "03" contracts are well advised to maintain personal malpractice insurance policies.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 7

December 10, 1979

Honorable Barry M. Locke
*Secretary of Transportation and
 Construction*

One Ashburton Place
 Boston, MA 02108

Dear Secretary Locke:

You have requested my opinion relative to the interpretation of G.L. c. 90, §19A. Specifically, you ask whether the first paragraph of §19A, as amended by St. 1975, c. 494, allows a motor vehicle¹ to travel on public ways without a permit as prescribed by G.L. c. 85, §§30 and 30A, if the motor vehicle satisfies the bridge formula test described in the second proviso of §19A, even though it may not satisfy the axle-loading test set forth in the first proviso of §19A. The attachments to your request indicate that in recent months the District Court Department has dismissed several complaints brought by the Registry of Motor Vehicles for violations of the axle-loading weight limit. The Courts in these cases have interpreted §19A, as amended, to mean that a motor vehicle need only comply with either the bridge formula or the axle-loading test.

For the reasons stated below, it is my opinion that the statute does allow a motor vehicle to travel on public ways without a permit if it satisfies the bridge formula test only.

General Laws c. 90, §19A, ¶1 provides in pertinent part:

Any provision of sections thirty and thirty A of chapter eighty-five to the contrary notwithstanding, a motor vehicle having two axles, which vehicle with its load weighs not more than forty-six thousand pounds, and a motor vehicle, trailer, semi-trailer or semi-trailer unit having three or more axles, which unit or vehicle with its load weighs not more than eighty thousand pounds, may travel on a public way without a permit as required by sections thirty and thirty A of chapter eighty-five; provided,² that no such motor vehicle, trailer, semi-trailer or semi-trailer unit, the weight on any axle of which, measured at the ground, exceeds twenty-two thousand four hundred pounds, or, in the case of axles spaced less than six feet apart, eighteen thousand pounds, shall so travel without such a permit; provided further³ that in any event such a motor vehicle, trailer, semi-trailer or semi-trailer unit may travel on a public way without such a permit if the overall gross weight on a group of two or more consecutive axles thereof does not exceed the gross weight produced by application of the following formula:

$$W = 500 \left(\frac{LN-1}{N-1} + 12N + 36 \right)$$

¹In the context of this opinion, the term "motor vehicle," includes motor vehicles having two axles, and motor vehicles, trailers, semi-trailers, and semi-trailer units having three or more axles.

²This proviso contains what is referred to as the "axle loading" test.

³The second proviso sets forth the "bridge formula" test.

⁴The statute goes on to define the variables contained in the above equation: "... W = overall gross weight on any group of two or more consecutive axles to the nearest 500 pounds, L = distance in feet between the extreme of any group of two or more consecutive axles, and N = number of axles in group under consideration except that two consecutive sets of tandem axles may carry a gross load of 34,000 pounds each providing the overall distance between the first and last axles of such consecutive sets of tandem axles is thirty-six feet or more: *Provided*, that such overall gross weight may not exceed eighty thousand pounds.

The first paragraph of §19A is divided into three main clauses. The first clause sets forth unqualified gross weight allowances for certain motor vehicles. The second clause is a proviso which modifies the first clause by imposing several single axle weight allowances (the "axle-loading" test). The third clause, which is the focus of your question, is a second proviso which permits motor vehicles "in any event" to travel on public ways without a permit if they satisfy the so-called "bridge-formula" test.

The phrase introducing the third clause, "provided further that in any event," clearly means that regardless of the application of the axle-loading test set forth in the immediately preceding clause, a motor vehicle needs no permit to travel the public ways if it meets the requirements of the formula provided in the third clause. The result is a motor vehicle weight scheme which employs alternative tests, either of which, if satisfied, would allow the use of the road without a permit.

That the Legislature intended to incorporate alternative tests is demonstrated by comparing the language of St. 1975, c. 494, with the statutory language it replaced.⁵ There, in the phrase which introduces a weight-axle distance chart (which the amendments replaced with the bridge formula) the words "in any event" are not used. Moreover, the clause was phrased as an additional restriction ("provided further that the gross weight . . . shall not exceed that shown on the . . . table. . ."), not as a permissive exemption as the statute now reads (" . . . provided further that in any event . . . a motor vehicle . . . may travel . . . without such a permit if [it satisfies the bridge formula test] . . ."). Such a presumably intentional change in the statutory language cannot be ignored.

Further support for the view that the statute creates alternative tests comes from the elementary canon of statutory interpretation which requires that all words of a statute be given effect, if possible. See *Commonwealth v. Intoxicating Liquors*, 108 Mass. 18, 21 (1871); *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth'y*, 352 Mass. 617, 618 (1967). See also 2A C.D. Sands, *Sutherland Statutory Interpretation*, §46.06 (4th ed. 1973). An interpretation of the statute which finds both tests to be required would render the words "in any event" meaningless and superfluous and must be rejected for that reason.

While I am sensitive to the possible consequence of construing the statute as I have, I am also mindful of the teaching of the Supreme Judicial Court that where the statute is unambiguous, the statute must be interpreted according to the usual and natural meaning of its language, even if injustice or hardship results. *Rosebloom v. Kokofsky*, Mass. Adv. Sh. (1977) 2534, 2538; *Milton v. Metropolitan Dist. Comm'n*, 342 Mass. 222, 227 (1961). Accordingly, I conclude that motor vehicles may lawfully operate on the public ways if they satisfy either the axle-loading or bridge formula tests set forth in G.L. c. 90, §19A.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁵Chapter 494 of the Acts of 1975, *inter alia*, substituted the bridge-formula test for the following language.

. . . and provided further that the gross weight of any such vehicle together with its load expressed in pounds shall not exceed that shown on the following table without such a permit: [table omitted]

Number 8

December 19, 1979

Charles E. Memusi Johnson, *Secretary*
Executive Office of Educational Affairs
One Ashburton Place, 6th Floor
Boston, MA 02108

Dear Secretary Johnson:

You have requested my opinion on behalf of the Board of Library Commissioners (the Board) concerning the Board's authority to refer to its employees as the "Massachusetts Board of Library Commissioners' Office for the Development of Library Services." It is my opinion that the Board has the authority to so designate its employees.

Until the enactment of Chapter 565 of the Acts of 1977, the Board was within the Department of Education and was augmented by an administrative agency named the Bureau of Library Extension. Chapter 565 removed the Board from the Department of Education, modified its structure and deleted the section providing that the Bureau of Library Extension would be the administrative agency of the Board.¹ The Board, however, was granted the authority to appoint a director and deputy director and "such professional and sub-professional staff as the functions, powers and duties of the board shall require". St. 1977 c. 565, §4, amending G.L. c. 78, §14.

The materials which have accompanied your request indicate that members of the Board believe that the term "Board of Library Commissioners" refers exclusively to the nine members appointed by the Governor and does not refer to the Board's employees. The Board has chosen to refer to its employees as the "Office for the Development of Library Services" and seeks my opinion, through you, as to its authority to do so.

While there is no express statutory grant of authority to the Board to select a name for its employees,² there is no prohibition against such an action. The name the Board has selected to refer to its employees fairly describes the duties and functions which they perform. The Board's action in selecting the name to refer to its employees is nothing more than an administrative convenience designed to reduce confusion and make a distinction between the Commissioners and their staff.

It is a well-settled principle of law in this jurisdiction that administrative agencies have not only those powers conferred upon them by statute, but also such other powers as are reasonably necessary for their proper functioning. 1977/78 *Op. Atty. Gen.* No. 31, Rep. A.G., Pub. Doc. No. 12 at (1978). *See also, Levy v. Board of Registration and Discipline in Medicine*, Mass. Adv. Sh. (1979) 1857, 1865. It is also clear that the legislature may delegate to an administrative agency the authority to work out the details of a legislative policy. *See Commonwealth v. Diaz*, 326 Mass. 525, 527 (1950).

¹While the provision for the administrative agency was deleted, the statute specifically provided that the funds appropriated to the Bureau of Library Extension and its employees were to be transferred to the service of the Board of Library Commissioners. St. 1977, c. 565, §8.

²The Board is responsible for advising "the librarian or Trustee of any free public library, and may on request advise the librarian or other person in charge of the library of any state or county institution relative to the selection or cataloguing of books and any other matter pertaining to the maintenance or administration of such library." G.L. c. 78, §15. The Board is further empowered to "expend such sums as may be appropriated for the extension and encouragement of library services within the Commonwealth." G.L. c. 78, §19.

The designation of the Board's staff by a particular name is simply "working out of the details" of a legislative policy, and does not affect the structure, duties or responsibilities of the Board or its personnel. It is, therefore, my opinion that the Board has the inherent power to adopt such a name for its employees pursuant to its express grant of authority as contained in G.L. c. 78, §§14-19.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 9
Paul D. Gitlin, Esq.
Chairman
Health Facilities Appeals Board
60 State Street
Suite 2750
Boston, MA 02109

January 3, 1980

Dear Mr. Gitlin:

You have asked my opinion whether as a consumer member and chairman of the Health Facilities Appeals Board (hereafter, "the Board"),¹ you may perform legal services for physicians in matters not related to their role as providers of health care services.

Your question arises because General Laws Chapter 6, section 166, which establishes the Board, provides in part:

. . . The board shall consist of five persons to be appointed for terms of three years by the governor, at least three of whom shall be consumers of health care services who are not officers or employees of, *and do not bear any fiduciary relationship to a person or institution providing health care services*. One such consumer member shall be a member of the bar of the commonwealth and shall be designated by the governor to serve as chairman of the board. (Emphasis supplied.)

Your questions relate to the statutory prohibition against fiduciary relationships with health care providers by consumer members of the Board. Specifically, you have asked whether this prohibition extends to the attorney-client relationship, if that relationship is unrelated to the client's provision of health care services. Assuming that the prohibition against fiduciary relationships does not extend to the attorney-client relationship, you then ask:

- (1) does the prohibition extend to all providers of health care services;
- (2) does the prohibition extend beyond the date of one's appointment to the Board;
- (3) does the prohibition extend to other members of one's law firm; and

¹The Health Facilities Appeals Board determines appeals of decisions of the Department of Public Health regarding the need for proposed construction of health care facilities and proposed substantial changes in services of such facilities. G.L. c. 6, §166; c. 111, §§25E and 25C.

(4) may the intent of the Legislature be satisfied by disqualifying oneself in matters before the Board involving present or former clients.

For the reasons stated below, I conclude that the prohibition against fiduciary relationships contained in G.L. c. 6, §166, does include the attorney-client relationship and that a consumer member of the Board may not render legal services to a physician, even when those services are unrelated to the provision of health care services. Moreover, this prohibition does continue throughout the tenure of the Board member and may not be avoided by disqualification in matters before the Board involving the member's present or former clients.²

In interpreting this statutory prohibition against fiduciary relationships, I am guided by the principle that where the language of a statute is clear and unambiguous, that language must be interpreted according to its "usual and natural meaning." *Rosenbloom v. Kokofsky*, Mass. Adv. Sh. (1977) 2534, 2537-2538; *Commonwealth v. Gove*, 366 Mass. 351, 354 (1974). General Laws c. 6, §166, forbids consumer members from bearing "any fiduciary relationships to a person . . . providing health care services." (Emphasis added.) The fiduciary nature of the relationship between attorney and client is well established. *Hendrickson v. Sears*, 365 Mass. 83, 90 (1974); *Tarr v. Vivian*, 272 Mass. 150, 153 (1930). It is equally clear that a physician is a "person . . . providing health care services." It follows ineluctably that one who acts as attorney for a physician bears a fiduciary relationship to a person providing health care services. Thus, giving the statutory language its full effect, see *Rosenbloom, supra*, Mass. Adv. Sh. (1977) at 2537-2538, I conclude that a consumer member of the Health Facilities Appeals Boards may not provide legal services to a physician without violating G.L. c. 6, §166.

This conclusion is supported by the legislative history of the statute. The Report of the Joint Special Committee on Health Benefits and Health Services, House Document No. 5968 (June, 1972) emphasized the "central importance" of the consumer in the determination of need process. "It is for the consumer of service that the entire system should exist." *Id.* at 40. "For this reason," the Committee explained, "the consumer has been written into the majority position on the Health Facilities Appeals Boards." *Id.* To preserve the intended role of the Board's consumer members, the Joint Committee advised that three of the five members of the Board "must be consumers not associated with any provided of health care services." *Id.* at 39 (emphasis supplied). By its use of the phrase "associated with," the Report supports my conclusion that the Legislature intended a broad prohibition of fiduciary relationships with health care providers.

This conclusion is also buttressed by the fact that in addressing the same mischief of potential conflicts of interest, the General Court has at other times employed a more precisely tailored remedy. Indeed, in the very act which added G.L. c. 6, §166, the Legislature chose a narrower approach to deal with potential conflicts of interest involving members of the Public Health Council. St. 1972, c. 776, Section 2A, amending G.L. c. 17, §3.³

²Because of the clearly hypothetical nature of the questions identified above as subsidiary questions (1) & (3), I specifically decline to answer those questions. See 1966/67 Op. Atty. Gen. No. 112, Rep. A.G. Pub. Doc. No. 12 at 223 (1967); 1 Op. Atty. Gen. at 273 (1895).

³The Public Health Council, along with the Commissioner of Public Health, makes the initial determination of the need for construction of health care facilities or for substantial changes in service of such facilities. See G.L. c. 111, §25 C. The Department of Public Health consists of the Commissioner and the Public Health Council. G.L. c. 17, §1.

Similarly to the Health Facilities Appeals Board, the Public Health Council consists of providers of health care services and "nonproviders", that is, members who represent the public interest. G.L. c. 17, §3. The Legislature has chosen to prevent conflicts of interest involving non-provider members by precise restrictions:

For the purposes of this section "nonprovider" shall mean a person whose background and experience indicate that he is qualified to act in the broad public interest, who, and whose spouse, parents, siblings or children, has no financial interest in a health care facility, who, and whose spouse, has no employment relationship to a health care facility, to a nonprofit service corporation established in accordance with chapters one hundred and seventy-six A to one hundred and seventy-six E, inclusive, nor to a corporation authorized to insure the health of individuals, and who, and whose spouse, is not licensed to practice medicine. St. 1972 c. 776, §2A.

Further assurance against conflicting loyalties was afforded by section 3 of the 1972 Act, which added G.L. c. 111, §§25B-25G. The Legislature there provided, *inter alia*, that

. . . no member of the public health council who is an owner, in whole or in part, an officer or an employee of a health care facility, or who bears any other fiduciary relationship to such a facility, shall participate in any decision which would substantially affect the facility to which he is related. St. 1972, c. 776, §3.

Within one act, therefore, the Legislature has fashioned two very different statutory methods to protect against essentially the same evil. Potential conflicts of interests involving consumer members of the Health Facilities Appeals Board are addressed by a broad prohibition of fiduciary relationships with health care providers. This broad prohibition contrasts with the approach adopted concerning nonprovider members of the Public Health Council, whose conflicts are prevented primarily through a detailed list of forbidden relationships. Where the Legislature has chosen in a comprehensive statutory scheme to employ to such different approaches to a similar problem, I must conclude that the distinction was fully intended. *See, Marshal House, Inc. v. Rent Control Board of Brookline*, 358 Mass. 686, 698-699 (1971).⁴

Similarly, the Legislature's intent in prohibiting fiduciary relationships would be defeated if that prohibition did not extend beyond the date of the Board member's appointment. The statute provides that "the board shall consist of five persons," at least three of whom "do not bear any fiduciary relationships" to a health care provider. Because this language is phrased in the present tense, the proscription is a continuing one. The words of a statute must be given their ordinary meaning, considered in light of the aim the Legislature sought to accomplish. *Prudential Insurance Co. of America v. City of Boston*, 369 Mass.

⁴The Legislature has chosen yet another approach to potential conflicts of interest involving members of the Rate Setting Commission. Members of the Rate Setting Commission are forbidden to participate in activities "that would conflict with the fair, impartial, prudent and efficient full-time conduct of [their] office." G.L. c. 6A, §32. Instead of a broad prohibition of fiduciary relationships, cf. G.L. c. 6, §166, or a detailed list of forbidden relationships, cf. G.L. c. 17, §3, the Rate Setting Commission statute establishes merely a general standard of conduct, leaving the identification of conflicting activities for Commission members themselves. The Legislature's choice of varying approaches to similar problems within those agencies regulating health care services should not be defeated through statutory construction.

542, 546 (1976). Accordingly I conclude that consumer members may not bear fiduciary relationships to health care providers at any time during their period of service on the Board.

I further conclude that the consumer member may not avoid the prohibition simply by disqualification in Board cases which involve present or former clients. The Legislature provided such a curative measure in dealing with potential conflicts involving members of the Public Health Council. St. 1972, c. 766, §3, adding G.L. c. 111, §25B. The language of G.L. c. 6, §166, prohibiting fiduciary relationships with health care providers, however, is plain and unambiguous and contains no exceptions or qualifications. For the reasons discussed above, I must conclude that this distinction in treatment was fully intended.

I am mindful of the fact that the broad language of G.L. c. 6, §166, prohibits some relationships which arguably may pose no threat to consumer loyalty. Where the language of a statute is unambiguous, however, it is not susceptible to a narrowing construction designed to avoid a hardship. See *Rosenbloom supra*, Mass. Ad. Sh. (1977) at 2537-2538; *Milton v. Metropolitan District Comm'n*, 342 Mass. 222, 227 (1961).

Accordingly, I am of the opinion that General Laws Chapter 6, section 166 prevents you from serving as attorney to a physician, even with respect to a matter unrelated to the physician's role as a provider of health care.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 10

March 7, 1980

Alfred L. Frechette, M.D.
Commissioner
Department of Public Health
600 Washington Street
Boston, MA 02111

Dear Dr. Frechette:

You have requested my opinion whether certain provisions of the Commonwealth's determination of need ("DoN") statute, G.L. c. 111, §§25B-25H, are in conflict with federal regulations promulgated pursuant to the National Health Planning and Resources Development Act of 1974, P.L. 93-641 (the "Act"), governing receipt of funds from the Department of Health, Education and Welfare ("H.E.W.").

Specifically, you have asked whether section 25H of the DoN statute renders certain other provisions of that statute null and void because they conflict with federal law. The DoN provisions that you believe may conflict with federal regulations, and as to which you have requested my opinion, are: (1) that portion of G.L. c. 111, §25C which exempts from determination of need review certain research and training projects undertaken by a health care facility and (2) the provisions of section 25C which deems an application for determination of need approved if not acted upon within specified time limits.

For reasons set forth below, I have concluded that section 25H will render the cited provisions null and void if they conflict with federal regulations and if certain factual conditions are met. Since factual determinations are not within the scope of my authority to render legal opinions, I must respectfully decline to reach that issue. I find that the research and training exemption is not in conflict with the express provisions of the federal regulations, and, as noted below, I decline to undertake an interpretation of federal law which is required in order to fully review the question which you have posed. Finally, I conclude that the provision of the Massachusetts statute which requires that an application be deemed approved if not acted upon within specific time limits does conflict with express language of the federal regulations.

In general, the Act provides grants for health planning and development to state agencies designated under agreements with the Secretary of H.E.W. *See, e.g.,* 42 U.S.C. §300m-4 (1976). To receive such a designation, the state must administer a certificate of need program which conforms to federal requirements.¹ 42 U.S.C. §§30m(b) (1) and 300m-2(a) (4) (1976). The penalty for lack of compliance is loss of certain federal funds.²

The state is not required, therefore, to adopt the federal DoN standards; federal standards are binding only if the state wishes to receive federal funding. *See Townsend v. Swank*, 404 U.S. 282, 292 (1971) (Burger, C.J. concurring). Accordingly, there are two ways to resolve a conflict between state and federal rules under the Act. First, the state may withdraw (or be removed) from the federal health planning program and continue to apply the conflicting law. In the alternative, the state statute might be construed to avoid or eliminate the conflict in order that the state may remain in the program.

Determination of the appropriate resolution of such conflict will depend in each case on an analysis of legislative intent. 1978/79 Op. Atty. Gen. No. 6, Rep. A. G., Pub. Doc. No. 12 at (1979). In the absence of express language, there may be no indication that the legislature in enacting the statute had ever considered the steps to be taken in case of conflict. 1976/77 Op. Atty. Gen. No. 20, Rep. A. G., Pub. Doc. No. 12 at 126 (1977).³

The Massachusetts DoN statute, however, contains an express indication of legislative intent. General Laws c. 111, §25H states:

The provisions of sections twenty-five B to twenty-five G, inclusive, are severable and if any provision shall be in violation of any federal rule or regulation established by the Department of Health, Education and Welfare as a condition for receiving federal funds in connection with any program administered by said department, such

¹I understand that Massachusetts has entered into a full designation agreement with the Secretary of H.E.W. on July 1, 1979. As noted in your request, the designation agreement designates an agency of state government to serve as the "state health planning and development agency". 42 U.S.C. §300m (1976). As a condition of that agreement, the Department was to obtain "an acceptable authoritative assurance (preferably from the State Attorney General)" regarding the issues considered herein. I was not consulted regarding this condition before the agreement was signed, nor did your request inform me of it.

Since your request for an opinion, Congress has passed P.L. 96-79, amending the Act. In this opinion, I consider the Act and regulations as they existed at the time of execution of the designation agreement, because that is the time at which you were requested by H.E.W. to obtain an assurance of compliance.

²The Act provides that if by certain specific time limits a designation agreement with a state is not in effect, the Secretary shall not make any grant to the state under this Act, the Community Mental Health Centers Act, and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970. 42 U.S.C. §300m (d) (1976).

³When the state statute involves participation in a federally funded program, there may well be a presumption that "the state does not intend its entire participation . . . to cease simply because of one element of noncompliance" or conflict. *ABCD, Inc. v. Commissioner of Public Welfare*, Mass. Adv. Sh. (1979) 1566, 1577.

provision shall be null and void and such violation shall not affect or impair any of the remaining provisions.

This section clearly demonstrates an overriding legislative intent that the Commonwealth remain in conformity with federal law so that the state will not lose federal funding. Application of this section depends on a two-fold finding: (1) that a provision of the statute conflicts with H.E.W. rules or regulations, and (2) that compliance with the federal provision is a condition for receipt of federal funds. The likelihood of loss of federal funds is a factual determination within the ambit of your Department. As Commissioner, you are involved in funding procedures for the Department and are in a position to determine the relationship between various federal requirements and the continued receipt of federal funds.⁴ Determination of this issue is therefore more appropriately made by you, and accordingly, I offer no opinion. *Cf.* 2 Op. Atty. Gen. at 570, 572, 575-76 (1905) (noting limitations on scope of an opinion of the Attorney General).

In order to determine whether the statute conflicts with H.E.W. rules or regulations, I must analyze each of the statutory provisions cited in your request. The first provision exempts from the general DoN requirements certain expenditures and changes in services connected with health care research or training.⁵ G.L. c. 111, §25C, ¶ 1. That section provides in relevant part that:

Notwithstanding any contrary provision of law, no person or agency of the commonwealth or any political subdivision thereof shall make substantial capital expenditures for construction of a health care facility or substantially change the services of such a facility unless there is a determination by the department that there is need therefore; provided however, that no such determination shall be required whenever any such expenditure in excess of one hundred and fifty thousand dollars or any change in service (1) shall be essential to the conduct of research in the basic biomedical or health care delivery areas or to the training of health care personnel, (2) shall at no time result in any increase in the clinical bed capacity or out patient load capacity of the facility, and (3) the cost of such expenditure or change shall cause no increase in the total patient care charges of the facility to the public for health care services, supplies and accommodations. . . .

The Act requires as a condition of federal funding that states establish and maintain a "certificate of need program which applies to new institutional health services proposed to be offered or developed." 42 U.S.C. §300m-2 (a) (4) (B) (1976). As defined in regulations issued pursuant to the Act, "new institutional health services" proposed to be offered or developed and, therefore, subject to review include any capital expenditure in excess of \$150,000, by or on behalf of a health care facility or HMO. 42 C.F.R. §123.404 (a) (2). Only those new institutional health services which are granted certificates of need shall be offered or developed. 42 C.F.R. §123.405 (a).

⁴*Cf.* note 1, *supra*

⁵In the absence of such exemption, health care research and training projects would be subject to the same state approval procedures as all other health care projects. That is, the Department of Public Health must determine that there is a need for any such project involving capital expenditures in excess of \$150,000 or creating substantial changes in the services of a health care facility. See G.L. c. 111, §25C.

Neither the federal Act nor the regulations promulgated thereunder *expressly* include research and training projects as new institutional health services which must be reviewed by a state certificate of need program. I must respectfully decline to undertake an interpretation of federal law which is more appropriately made by federal authorities. Accordingly, I confine myself to noting the absence of conflict on the face of the Act and regulations. *Cf.* 1965/66 Op. Atty. Gen., Rep. A. G., Pub. Doc. No. 12 at 370, 373 (1966) (declining to interpret federal constitution in order to determine whether state statute was in conflict).⁶ I conclude, therefore, that there is presently no express conflict with the state exemption for such undertakings.⁷ See 1978/79 Op. Atty. Gen. No. 6, Rep. A. G., Pub. Doc. No. 12 at (1979).

The second provision cited in your request concerns that portion of the DoN statute which provides that "[a]ny application which has not been acted upon by the department within such [stated] time limits shall be deemed to have been approved." G.L. c. 111, §25C, ¶ 5. The federal Act and regulations expressly provide that only those new institutional health services which are found to be needed and which are granted certificates of need may be offered or developed within the state. 42 U.S.C. §300m-2 (a) (4) (B) (1976); 42 C.F.R. §123.405 (a) (2). If a determination of need is not made within the specified time period, a certificate of need is not to be issued. 42 C.F.R. §123.407 (a) (15).⁸ Because G.L. c. 111, §25C, ¶ 5 allows applications to be deemed approved in certain instances without an actual determination of need, that provision of the DoN statute conflicts with an express provision of federal law.

In summary, I find a conflict between federal regulations and the Massachusetts provision which deems an application for determination of need approved if not acted upon within specified time limits. I conclude that the Massachusetts research and training exemption does not conflict with the Act and regulations on their face. I decline to undertake the interpretation of federal law and the factual determinations necessary to answer the remainder of your request.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁶Until a conflict is found to exist, you have an obligation to carry out the procedures set forth in the state statute. See *Opinion of the Justices*, Mass. Adv. Sh. (1978) 1412, 1421-23, *Dwyer v. Commissioner of Insurance*, Mass. Adv. Sh. (1978) 1274, 1285-86, 1978/79 Op. Atty. Gen. No. 6 Rep. A. G., Pub. Doc. No. 12 at (1979).

⁷The statement of the Secretary of H.E.W. that he believes that research and training projects fall within the scope of the federal determination of need provisions, 44 Fed. Reg. 19306, 19312 (Apr. 2, 1979), clearly lacks the formality and finality of a final interpretation by H.E.W. See *Port of Boston Marine Terminal Ass'n v. Rederaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970), 1978/79 Op. Atty. Gen. No. 6 Rep. A. G., Pub. Doc. No. 12 at (1979). While the statement suggests the possibility that future interpretation or rule-making by H.E.W. may crystallize a conflict (see note 7, *infra*), I cannot say that such a conflict is now presented.

Further legislation by Congress might also crystallize a conflict. I note, however, that recent amendments to the Act (see note 1, *supra*) have changed the relevant language, but still have not addressed directly research and training projects. See P.L. 96-79 §117 (a), (Oct. 4, 1979).

⁸Federal regulations require that a state's procedures for reviewing DoN requests include "[p]rovisions that if the State Agency does not make a decision regarding a proposed new institutional health service within the period of time specified for State Agency review, a certificate of need shall not be issued." 42 C.F.R. §123.407 (a) (15)

Number 11

May 2, 1980

Gregory R. Anrig, *Commissioner*
Department of Education
182 Tremont Street
Boston, MA 02108

Edward M. Murphy, *Commissioner*
Department of Youth Services
294 Washington Street
Boston, MA 02108

Dear Commissioner Anrig and Commissioner Murphy:

You have requested my opinion whether General Laws Chapter 71, Section 46G prohibits local appointing authorities from employing school adjustment counsellors on a part time basis. G.L. c. 71, §46G permits local school committees and regional school districts (hereafter, "local appointing authorities") to employ school adjustment counsellors ("counsellors") in order to detect and prevent juvenile delinquency among school children.¹ Your request is made in light of the opinion of one of my predecessors in office that Section 46G prohibits local appointing authorities from hiring counsellors on a part time basis. *See* 1957 Op. Atty. Gen., Rep. A. G., Pub. Doc. No. 12 at 18 (1957).

That opinion was issued in response to a request by the then Director of the Division of Youth Service, who posed to my predecessor essentially the same question you now ask of me. The issued opinion relied heavily upon an inference created by that portion of Section 46G which allows local appointing authorities "not requiring the services of a school adjustment counsellor on a full time basis" to join with one or more other local appointing authorities to employ a full time counsellor. My predecessor considered this language, together with the stated purpose of Section 46G, and concluded that the General Court was reluctant "to permit the delicate problems confronting the counsellors to be handled by part-time personnel, perhaps on a more or less haphazard basis" *Id.*

While I might reach a different conclusion if yours were a question of first impression, for the reasons set forth below, I decline to reverse the opinion of my predecessor. I believe that an opinion of the Attorney General is entitled to great weight and is subject to reversal only if there has been a substantive change in the law, or if the original interpretation was clearly erroneous. Neither situation obtains in this case.

The prior opinion presents a paradigmatic example of an opinion which resists reversal. First, the interpretation by my predecessor was a virtually contemporaneous construction of a newly enacted statute.² Second, I have been

¹G.L. c. 71, §46G provides in relevant part:

To facilitate the early detection of children manifesting traits tending toward juvenile delinquency and to assist in the prevention of such children becoming juvenile delinquents, any city or town acting by its school committee and out of funds appropriated for general school purposes, and any regional school district, may employ such number of school adjustment counsellors as the school committee, with the written approval of the commissioner of youth services, shall deem necessary No person shall be employed under this section unless his professional and personal qualifications have been approved by the commissioner of education and the commissioner of youth services. If said commissioner of education or said commissioner of youth services disapproves the qualifications of such person, he shall state in writing his reasons. Any town or regional school district not requiring the services of a school adjustment counsellor on a full time basis may join with one or more other towns or regional school districts in employing a school adjustment counsellor under the limitations of this section.

²G.L. c. 71, §46G was inserted by St. 1955, c. 696, and became effective on August 22, 1955.

informed that in the twenty-three years since it was issued, my predecessor's opinion has been consistently applied by the state agencies empowered to act pursuant to G.L. c. 71, §46G. Third, although the legislature has been presumptively aware of this contemporaneous construction over this period of time, the only changes it has made in the statute have been cosmetic in nature.³

A long standing and consistently applied opinion should not be overturned by me on the sole basis that I, taking a fresh look at the subject under changed circumstances twenty-three years later, might decide the question differently. It is well settled that great weight must be given to a "consistent, long continued administrative application of an ambiguous statute, . . . especially if the interpretation is contemporaneous with the enactment." *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 343 (1964) and cases cited. *See also Devlin v. Commissioner of Correction*, 364 Mass. 435, 439 (1973); *Board of Assessors of Holyoke v. State Tax Commission*, 355 Mass. 223, 243-44 (1969).

In those instances where state agencies or officials determine that a long standing administrative interpretation of a statute merits reversal or change, the first and primary course of action is to achieve amendment of the law through legislative action. *See, e.g., Commonwealth v. Town of Andover*, Mass. Adv. Sh. (1979) 1619, 1630-31; *Whitney v. City of Worcester*, 373 Mass. 208, 212-13 (1977); *Morash & Sons v. Commonwealth*, 363 Mass. 612, 623 (1973).

In summary, I therefore decline to overturn the earlier opinion. I respectfully suggest that should you desire to alter the law as it has been consistently applied since its enactment, you attempt to seek such change by presenting your concerns and views to the General Court.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 12

May 9, 1980

William M. Shipp, *Commissioner*
Department of Labor and Industries
Saltonstall Building
100 Cambridge Street
Boston, MA 02202

Dear Commissioner Shipp:

You have requested my opinion whether Guy Carbone, the present Commissioner of the Metropolitan District Commission (MDC), may receive pay in lieu of vacation time which he accrued while employed by the Department of Labor and Industries (the Department).¹ I begin this opinion with a brief recitation of the pertinent facts.

³ *See, e.g., St. 1970, c. 426*, which made corrective changes in this one statute by substituting "commissioner of youth services" for "director of the division of youth service in the department of education". The only significant change in the law respecting school adjustment counsellors came with G.L. c. 71, §38J, added by St. 1970, c. 33. That provision, while indicating a present legislative desire to treat teachers and school adjustment counsellors equally with respect to the acquisition of tenure, does not directly address, and is not dispositive of, the question answered by my predecessor and raised by your current opinion request.

¹ I have received from the Department and from the Division of Personnel Administration memoranda addressing the legal issues raised by your request.

The Governor appointed Mr. Carbone to the position of MDC Commissioner on May 3, 1979. Prior to that appointment, Mr. Carbone was employed by the Department as a Senior Attorney and as General Counsel. Mr. Carbone took a leave of absence from his position with the Department on May 3, 1979, and terminated from that position on June 1, 1979. At issue here are some 9¾ vacation days accrued by Mr. Carbone during fiscal year 1978 and a undetermined amount of vacation time accrued during the ten months he was employed by the Department during fiscal year 1979. For the reasons set forth below, I conclude that Mr. Carbone is not currently entitled to receive a payment in lieu of accrued vacation time.

Vacation rights and procedures applicable to individuals employed by the Commonwealth are governed by the official rules and regulations of the Director of Personnel, pursuant to G.L. c. 7, §28, ¶2, with exceptions not relevant here.² Those rules and regulations are compiled for reference in the so-called "Red Book". See 1975/76 Op. Atty. Gen. No. 36, Rep. A.G., Pub. Doc. No. 12 at 120 (1975). Red Book Rule LV-1 permits state employees to accrue vacation time, and Rules LV-7 through LV-9 provide for payment in lieu of accrued vacation time in a manner consistent with guidelines set forth in G.L. c. 29, §31A.³ Read together, those provisions provide for payment in lieu of accumulated vacation days only to an individual who has "separated" from state service. Separation may be achieved by death, retirement, dismissal (without fault of the employee) or other reasons. See G.L. c. 29, §31A; Red Book Rules LV-7 through LV-9. Mr. Carbone is presently eligible for payments in lieu of accrued vacation credits only if he has separated from state service.

Any argument that Mr. Carbone is entitled to a payment in lieu of his accrued vacation credits hinges upon the proposition that by accepting his position as MDC Commissioner, Mr. Carbone has separated from state service. That underlying proposition is not tenable. As MDC Commissioner, Mr. Carbone is a "person who is in charge of or, in fact, the head of a department, division, commission or committee established by statute . . . whose appointment must have Governor and Council approval. . . ." Red Book Rule G-6; see also G.L. c. 28, §§1, 3. Mr. Carbone is thus presently an officer of the Commonwealth who is exempt from the vacation rules. This exemption does not mean, however, that he may be considered to be separated from state service on the sole basis that his position is not presently covered by the vacation rules. Movement from a position as a state employee to one as an officer of the Commonwealth does not constitute separation from state service. See 1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 153 (1962); *Mitchell v. Metropolitan District Commission*, 4 Mass. App. Ct. 484, 487-488 (1976) (MDC is a department of

²See, e.g., St. 1975, c. 689, exempting the Department of the Attorney General and the offices of the State Treasurer, State Secretary and State Auditor from the Red Book rules and allowing each constitutional officer to establish the salaries, duties and personnel regulations of all officers and employees within their respective offices.

³Rules LV-7, 8 and 9 track the language of G.L. c. 29, §31A, which provides in relevant part:

(b) Employees who are eligible for vacation under the rules of said personnel administrator and whose services are terminated by dismissal through no fault or delinquency of their own, or by retirement, shall be paid an amount equal to the vacation allowance as earned in the vacation year prior to such dismissal or retirement which had not been granted, and, in addition, that portion of the vacation allowance earned in the vacation year during which such dismissal or retirement occurred, up to the time of separation; provided, that no monetary or other allowance has already been made therefor.

(c) Employees who are eligible for vacation under the rules of said administrator and whose services were terminated for reasons other than those defined in paragraphs (a) or (b) shall be paid an amount equal to the vacation allowance credited but not granted to them as of the final date of the next preceding vacation year; provided, that no monetary or other allowance has already been made therefor.

the Commonwealth which "has at all times remained subject to the laws regulating the administration of Commonwealth agencies"). Mr. Carbone's current status simply makes him ineligible to accrue vacation credits until he returns to a non-exempt position. *See* Rules G-5 and G-6; G.L. c. 29, §31A; *see also* 1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 153 (1962).

Thus, for example, if Mr. Carbone were to return to his former position within the Department, he would be entitled to "the vacation credits he had earned and which had accrued to him and which he had not been granted at the time he left a position subject to the vacation rules and began service in an exempt position." 1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 153, 154 (1962).⁴ Moreover, Mr. Carbone's tenure of state service was not interrupted by his movement from the Department to the MDC. It was determined by one of my predecessors that an individual whose service with the Commonwealth is uninterrupted is entitled, upon return to a position subject to vacation rules and procedures, to vacation benefits accrued in the former position at the time the individual accepted appointment to a position not subject to vacation rules. 1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 153 (1962). I note, as did my predecessor, that Red Book Rule LV-20 explicitly provides for such a situation by holding that "[a] person whose employment by the Commonwealth is uninterrupted shall retain all accrued vacation credits."

The precise nature of vacation benefits to which Mr. Carbone would be entitled depends not only upon whether he continues in or separates from state service, but also on the manner in which he does so.⁵ The payments to which he may be entitled⁶ and the question whether he may receive payment in lieu of vacation credits should he separate from state service while an officer of the Commonwealth, are hypothetical questions which I must decline to answer. It is a long settled policy that the Attorney General should offer a formal legal opinion only in those circumstances which pose extant case or controversy or which concern some immediate duty. *See, e.g.*; 1 Op. Atty. Gen. at 269, 273 (1895); 1966/67 Op. Atty. Gen. No. 112 Rep. A.G., Pub. Doc. No. 12 at 223, 224 (1967).

In summary, I have concluded that Mr. Carbone is not presently entitled to payment in lieu of accrued vacation credits because he has not separated from state services. He may be eligible for such payment upon separation from state service, and the precise nature of his separation will determine the amount of payment to which he will be entitled.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁴Under the Red Book rules, Mr. Carbone would not benefit from any vacation allowances for the time he served as MDC Commissioner since that position is exempt from those vacation rules. *See* 1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 153 (1962).

⁵For example, if Mr. Carbone were to return to the department and then retire, he would be "entitled to payment for the unused vacation credits earned in the year of retirement and the unused vacation credits held in escrow from the year prior to retirement, which is construed as the vacation year during which the employee took the leave of absence." 1975/76 Op. Atty. Gen. No. 52, Rep. A.G. Pub. Doc. No. 12 at 144 (1976).

⁶I note, however, that rule LV-5 prohibits any payment for vacation credits carried over an additional year to an employee who separates from state service even though credits were held in escrow during the time the employee worked in the position exempt from vacation rules. Such credits are available for use as vacation days prior to retirement, but not for payment in lieu of vacation. 1975/76 Op. Atty. Gen. No. 52, Rep. A.G. Pub. Doc. No. 12 at 144 (1976).

Number 13

May 9, 1980

Richard Cronin, *Director*
Division of Fisheries & Wildlife
100 Cambridge Street
Boston, MA 02202

Dear Mr. Cronin:

As Director of the Division of Fisheries and Wildlife (the "Division"), you have asked my opinion whether the Division may offer for sale various publications which are presently distributed free and whether the Division may deposit the income from any such sales in the Inland Fish and Game Fund (the "Fund").

For the reasons discussed below, I must respectfully decline to answer whether the publications may be sold, since the authority to make that decision is committed by law to the state purchasing agent. I am of the opinion, however, that if the publications in question may be sold, the income from such sales is to be deposited into the Treasury of the Commonwealth and credited to the Fund.

All state printing is supervised by the state purchasing agent, and unless otherwise provided, distribution of all state publications is under the direction of the state secretary. *See* G.L. c. 5, §1. Sale of state publications is governed by G.L. c. 5, §8, which provides in relevant part:

When in the opinion of the state purchasing agent, a state publication is not of sufficient public benefit to be distributed free of charge, he may declare such publication to be an official text book, case book or technical report; provided, that the status of such publication has not already been determined by the general court. An appeal from the decision of the state purchasing agent shall lie to the committee of the executive council appointed to consider matters of finance, whose decision shall be final. Text books, case books or technical reports shall be distributed exclusively by the state secretary. . . . They may be delivered to other persons only upon receipt of a sum equal at least to the estimated cost thereof, as determined by the comptroller.

G.L. c. 5, §8 has been virtually unchanged since its adoption in 1918 (St. 1918, c. 175) and has not been extensively analyzed or discussed by the courts or by my predecessors. Its application to your questions, however, seems relatively straightforward. If you wish to sell certain publications, you must first present them to the state purchasing agent for a determination whether they meet the statutory criteria and may, therefore, properly be sold. If the purchasing agent determines that they may be sold, it is then the comptroller's responsibility to fix the price.¹

Distribution of publications for sale is the exclusive responsibility of the state secretary. G.L. c. 5, §8. There do not appear to be any provisions of law which explicitly provide the manner in which the state secretary is to carry out this responsibility. While the state secretary cannot delegate his duties to another

¹In so doing, the comptroller is, of course, free to consult with the Division and with the State Book Store as to the costs of producing and distributing the particular documents in question.

officer without express authority, *see* 1976/77 Op. Atty. Gen. No. 22, Rep. A.G., Pub. Doc. No. 12 at 132, n.1 (1977); 1974/75 Op. Atty. Gen. No. 71, Rep. A.G., Pub. Doc. No. 12 at 168, 169, (1975); 5 Op. Atty. Gen. at 628 (1920), he may nevertheless consult with the Division on the subject of distribution of Division publications.²

Assuming that sale of Division publications is proper, you then ask whether the income derived from such sales may be deposited in the Fund. I conclude that the income derived from such sales must be deposited in the Treasury, as required by Article 63 of the Amendments to the Constitution, and then must be credited to the Fund, in accordance with G.L. c. 131, §2, which provides in part:

Monies received by the commonwealth . . . from any and all sources pertaining to inland fishing, hunting and trapping . . . or other receipts on account of activities of the division, shall be credited on the books of the commonwealth to a fund to be known as the Inland Fisheries and Game Fund.

See Opinion of the Justices, 334 Mass. 716 (1956).³ The sole question then is whether income received from the sale of Division publications comes within the purview of the statute.

The publications which the Division wishes to sell are printed pursuant to the Director's authority to "conduct statewide information and promotion programs in wildlife conservation, including the utilization of wildlife compatible with good conservation principles. . . ." G.L. c. 131, §4(13). This language is sufficiently broad to permit the Director to prepare publications espousing those programs on behalf of the Division. *See Grocery Mfg. Ass'n v. Department of Public Health*, Mass. Adv. Sh. (1979) 2291, 2296; *cf.* 1966 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 144 (1966) (Registrar of Motor Vehicles has implied authority to charge a fee for providing a written reply to requests for information when preparation of the reply required examination and analysis of Registry records). Because the issuance of the publications is an appropriate activity to be undertaken by the Division, income received from sale of the publications would be "receipts on account of activities of the Division"⁴ and, therefore, must be credited to the Fund, as provided by G.L. c. 131, §2.⁵

In summary, monies derived from the sale of Division publications must be credited to the Fund. The determination whether these publications may be sold, however, is a matter committed to the state purchasing agent and is therefore not appropriately answered in an Opinion of the Attorney General.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

²The secretary could, for example, arrange to use any mailing lists the Division currently uses to distribute its publications.

³The Division's use of monies so credited to the Fund is restricted to the eleven purposes enumerated in G.L. c. 131, §2 and cannot be made without appropriation by the Legislature. *See Opinion of the Justices*, 334 Mass. 716 (1956).

⁴In addition, the sale of these publications may produce income from a source "pertaining to inland fishing, hunting and trapping" and, therefore, within G.L. c. 131, §2. Such a determination, however, involves a question of fact, which I must decline to answer. *See, e.g.,* 1962 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199, 200 (1962).

⁵This result is similar to the procedure which, I have been informed, has previously been employed by the state secretary in connection with the sale through the State Book Store of a publication compiled by the Massachusetts Historical Commission. General Laws chapter 9, section 26 provides that the state secretary may assist the Commission by publishing and disseminating information of an historic nature and that all moneys received thereunder are to be administered as a separate trust fund. Assuming that the purchasing agent determines that sale of the publications in question is proper, G.L. c. 131, §§2 and 4(13), together with G.L. c. 5, §8, are analogous to G.L. c. 9, §26. As in that provision, it would be the responsibility of the state secretary, who supervises all state publications, to ensure that income from sale of Division publications is credited to the Fund.

Number 14

May 9, 1980

Edward T. Hanley
*Commissioner of
Administration and Finance
Executive Office of
Administration and Finance*
373 State House
Boston, MA 02133

Dear Commissioner Hanley:

You have requested an opinion regarding the nature and extent of your authority under G.L. c. 30, §36 (hereinafter "Section 36") to establish and enforce regulations governing the use of motor vehicles owned by the Commonwealth. More specifically, in seeking an interpretation of Section 36, you have asked two questions: (1) whether Section 36 invests you with the power to promulgate regulations and standards governing the use of state-owned motor vehicles in all state offices, departments, boards, commissions and institutions and whether any state governmental department is to be excused from compliance with these regulations; and (2) whether the provision of Section 36 calling for enforcement of the regulations governing the use of state-owned motor vehicles empowers you to establish sanctions for violation of the regulations, and if so, what types of sanctions are legally permissible.

For the reasons discussed below, I have concluded that Section 36 provides you with specific authority to establish regulations for the use of state-owned motor vehicles. Moreover, you may employ any reasonable means to enforce such regulations consistent with the limitations described below.

The first sentence of Section 36 provides you with full authority to establish regulations governing the use of state-owned motor vehicles. "The commissioner of administration shall establish and enforce regulations governing the use and marking of motor vehicles owned by the commonwealth." The word "shall" is commonly employed as a term of imperative obligation. *Clark v. Board of Water and Sewer Commissioners of Norwood*, 353 Mass. 708, 710 (1968); *Johnson v. District Attorney for the Northern District*, 342 Mass. 212, 215 (1961). The statute grants you plenary power, therefore, to establish regulations for use of state-owned motor vehicles.

While the Legislature has expressed a firm intention that regulations governing the use of state-owned motor vehicles be established, it has not given clear guidance for determining the scope of the application of the regulations. Several factors preclude an affirmative response to your question asking whether all state government units must comply with the regulations.

Section 36 does not provide that the use of state-owned motor vehicles by all units of state government should be in accordance with the regulations you promulgate. It merely directs that every state office or department keep a record of the use of state-owned motor vehicles and make reports relating to the use of these vehicles, as may be required by the regulations. This language falls far short of a blanket requirement that the use of state-owned motor vehicles by all state government units must conform to the regulations you establish, which regulations will govern matters other than keeping records and making reports.

This conclusion is supported by the legislative history of Section 36, which

the Legislature substantially altered in 1973. St. 1973, c. 1230, §14. For the twelve years preceding this revision, each of the annual appropriations acts adopted by the Legislature contained a provision directing that "[a]ll use of state-owned motor vehicles shall be subject to regulations to be promulgated and enforced by the commissioner of administration." See, e.g., St. 1962, c. 591, §5; St. 1964, c. 337, §5; St. 1968, c. 380, §5; St. 1972, c. 514, §5. When the Legislature decided to give this provision a permanent location in the General Laws, however, it discarded the term "all use" and chose to employ the language now appearing in Section 36. Rather than indicating an intention that the motor vehicle use regulations have a comprehensive application to all state government units, the Legislature retreated from its earlier, more strongly worded directive when it created Section 36.¹

Further evidence that the state-owned motor vehicle use regulations will not govern the use of state vehicles by all state government units may be found in St. 1973, c. 1230, §31, which expressly excludes all public institutions of higher learning from compliance with the provisions of Section 36.

The organic statutes of other state agencies or departments may conceivably contain similar provisions governing the use of state-owned motor vehicles by those agencies. A determination of the full extent of your statutory authority would, therefore, require an exhaustive search of the General Laws, which I must respectfully decline to undertake.² Section 36 contains no language that would permit the regulations you promulgate to supersede authority that may exist in other offices or departments of the Commonwealth.

I conclude, therefore, that your authority to require all state government units, except public institutions of higher learning, to comply with the regulations is not clearly established. Although Section 36 empowers you to promulgate regulations for the use of state-owned motor vehicles, the scope of the application of these regulations to state agencies is beyond any firm determination. Therefore, the motor vehicle use regulations which you promulgate will not be applicable to public institutions of higher learning and may also not be enforceable against offices or departments whose organic statutes contain provisions governing the use of state-owned motor vehicles.

Your second question asks whether you may enforce the regulations you issue pursuant to G.L. c. 30, §36, by imposing sanctions upon state employees for non-complying use of state-owned motor vehicles. To resolve this issue, one need go no further than the statute itself. Section 36 provides in relevant part:

The commissioner of administration *shall* establish and *enforce* regulations governing the use and marking of motor vehicles owned by the Commonwealth. (Emphasis added.)

Section 36 goes on to expressly prohibit the use of state-owned vehicles for transportation between an employee's domicile and place of employment and the incurring of any garaging expense without prior approval and in accordance with the regulations.

Clearly, the Legislature sought to preclude the use of state-owned vehicles except where necessary for the conduct of state business. Instead of describing

¹A careful review of the early legislative history pertaining to Section 36 affords no assistance for determining the legislative rationale for employing the language used therein. See the original bill and accompanying documents, State Archives, Room 50 State House

²If conflicting authority does exist, G.L. c. 30, §5, provides an appropriate mechanism for resolving any dispute which may arise

the conditions under which state vehicles might be used and providing for the enforcement of those conditions, the Legislature imposed a dual duty upon the Commissioner to both fill in the details of the legislative policy by appropriate regulations and enforce such regulations. The ordinary meaning of "enforce" is "to compel obedience to." *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 491 (1964); *Commissioner of Public Health v. Board of Health of Tewksbury*, 350 Mass. 507, 509 (1966). Thus, under Section 36, you have a duty to compel obedience to or compliance with any regulations you may issue relative to the use of state-owned vehicles.

In general, where such a specific duty is imposed upon an administrative officer, he "in the absence of some statutory limitation [has] authority to employ all ordinary means reasonably necessary . . . for the faithful performance of the duty." *Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare*, 326 Mass. 121, 124 (1950). Because the imposition of sanctions is an ordinary and usual means of compelling compliance with regulations, I conclude that you do have authority under Section 36 to impose reasonable sanctions upon state employees for use of motor vehicles not in compliance with duly promulgated and reasonable regulations.

The only limitations on your ability to impose sanctions are those expressed or implied in the statute itself. *Id.* Thus the seriousness of the penalty must be commensurate with the seriousness of the violation, *Commonwealth v. Racine*, 372 Mass. 631, 635-39 (1977), and the sanction itself must be "reasonably related to the purposes of the enabling legislation." *Consolidated Cigar Corp. v. Department of Public Health*, 372 Mass. 844, 855 (1977). Moreover, Massachusetts courts have generally been reluctant to infer from an administrator's rulemaking authority an ability to impose criminal sanctions. Such a power is not lightly held to be delegated by the Legislature to an administrative body, although the Supreme Judicial Court has upheld such delegations where the enabling statute defines the limits of the agency's discretion to impose such penalties. *Cf., e.g., Commonwealth v. Diaz*, 326 Mass. 525, 529 (1950) (statute empowered commissioner to provide penalties for violation of regulations "not exceeding five hundred dollars for any one offence"); *Commonwealth v. Plaisted*, 148 Mass. 375, 380 (1889) (authorization to prescribe penalties "not exceeding twenty dollars for each offence" upheld); *Commonwealth v. Rice*, 262 Mass. 340, 344 (1927) (statute authorizing cities and towns to prescribe penalties not exceeding \$20 for the violation of ordinances regulating carriages and vehicles). Because Section 36 does not specifically delegate such a tightly circumscribed authority to impose punitive sanctions, I conclude that criminal penalties are beyond your rulemaking authority.

I turn now to the specific types of sanctions about which you have inquired. Your first suggestion, a charge to the employee for each unauthorized mile travelled, may be justified under analogous principles of conversion. If a state employee diverts to his personal use a state-owned motor vehicle without authorization, he is liable to the Commonwealth for the value of the use of that motor vehicle as he would be to any owner whose automobile he converted and then returned. *See George v. Coolidge Bank and Trust Co.*, 360 Mass. 635, 641 (1971) (if owner accepts converted property "he may recover as damages the difference between the value of the property when converted and when returned, plus damages for loss of use during the period of wrongful detention").

Your second suggestion would add to a charge for each unauthorized mile travelled, a "reasonable fine." The imposition of a fine, which is punitive in nature, may amount to a criminal sanction which, because Section 36 does not provide adequate guidelines, could not be upheld. If the "fine" were more in the nature of a "fee" factually related to some legitimate administrative expense incurred as a result of the unauthorized use, it would fall within the ambit of your Section 36 rulemaking authority.

Your third suggestion, imposition of disciplinary action on the employee, amounts to nothing more than deeming unauthorized use of a motor vehicle to be "just cause" for discipline under G.L. c. 31, §41 (for employees holding permanent civil service status) or a ground for discipline under the lesser standard applicable to non-tenured employees. Clearly, violation of a duly promulgated and constitutionally valid regulation governing behavior and conduct of public employees may be sufficient cause for discipline. *Board of Selectmen of Framingham v. Civil Service Commission*, Mass. App. Ct. Adv. Sh. (1979) 704, 715. Disciplinary action, however, must be initiated by the employee's appointing authority, and, as with the other sanctions discussed above, must be imposed in accordance with applicable statutory procedures and constitutional standards due of process.

In summary, I conclude that you may employ all ordinary means of enforcing the vehicle use regulations, including the imposition of non-criminal sanction, commensurate with the seriousness of the offense, and applied under procedures comporting with appropriate due process standards.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 15

May 16, 1980

Richard E. Kendall, *Commissioner*
Department of Environmental Management
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, MA 02202

Dear Commissioner Kendall:

In September, 1966, the Department of Natural Resources, the predecessor agency to the Department of Environmental Management (the Department), purchased the Otis Reservoir from the Farmington River Water Power Company. The Department made the purchase pursuant to chapter 457 of the Acts of 1966, which authorized the purchase for water conservation and recreational purposes. The Department took title to the reservoir and the immediate shoreline (the perimeter strip), a piece of land ranging in width from five to twenty feet.¹ Since taking title, the Department has issued permits to the abutting

¹The Department's title to this perimeter strip was not completely free and clear, but was taken subject to a pre-existing "easement in gross" held by several abutting property owners. The easements were granted by the Farmington River Water Power Company in 1935 and gave the abutting owners the right to "pass and repass over the perimeter strip on foot or in vehicles and to erect thereon temporary structures, boathouses, and docks, and to use the land in a general way."

property owners for the exclusive use of the perimeter strip abutting their land. The permits allow the abutting property owner to use the perimeter strip in a manner defined by the Department's regulation set forth at 304 C.M.R. 5.03. The permits are issued on an annual basis upon payment of a fee, as set forth in 304 C.M.R. 5.03 (1) and (2); are not transferrable without the prior approval of the Department, 304 C.M.R. 5.03 (3); and are revocable, 304 C.M.R. 5.03 (1), (8).

You have asked my opinion as to the effect of Article 97 of the Amendments to the Massachusetts Constitution on the issuance of these permits. Specifically, you have asked the following four questions:

1. Is the issuance of exclusive land use permits which preclude access by the general public an "other purpose" under Article 97, different from the public purpose for which the land was acquired?
2. Does the issuance of exclusive land use permits violate the public trust duties under which the Department of Environmental Management holds title to the land?
3. Are the exclusive land use permits, under their present conditions of revocability, a disposition within the meaning of Article 97?
4. Do the answers to these questions depend upon whether there were prior easements, or can the Department issue permits, irrespective of whether there were prior easements?

For the reasons set forth in the ensuing pages, I answer your questions as follows: (1) the permits are not an "other purpose" under Article 97, different from the public purpose for which the land was acquired; (2) the permits do not violate the public trust duties under which the Department holds title to the land; (3) the permits are not a disposition within the meaning of Article 97; and (4) the abutters with pre-existing easements need not be required to purchase the permits, in order to use the strip. If they do not purchase the permits, however, they may use the strip only in a manner consistent with the "pre-existing" easement. If they wish the exclusive use of the strip, they must purchase the permits.

Article 97 of the Amendments to the Constitution of Massachusetts provides:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by

laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court. (Emphasis supplied.)

Chapter 457 of the Acts of 1966 authorized the Department to purchase Otis Reservoir and the perimeter strip "for the protection of water supply, and for conservation and recreation as described in chapter one hundred and thirty-two A of the General Laws" The land was therefore acquired for the conservation-related purposes enumerated in Article 97² and any further disposition or alteration in its use will require a two-thirds vote of each branch of the Legislature.³

You have asked first whether the issuance of the permits constitutes an "other purpose," different from that for which the land was acquired. In order to properly analyze what are "other purposes," the language of Article 97 must be read in conjunction with the judicially developed doctrine of "prior public use," whereby public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that effect. *Brookline v. Metropolitan District Commission*, 357 Mass. 435, 440 (1970); *Robbins v. Department of Public Works*, 355 Mass. 328, 330 (1969), and cases cited therein; Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144-147 (1973). The relevant inquiry is whether the permits effect a change in the use of the land, which use is inconsistent with conservation and recreation.

You have indicated to me that the Department believes that there is adequate justification for granting exclusive use permits. The Department has determined that public safety requires that access to the reservoir be limited and that conservation would be enhanced if the use of the perimeter strip were exclusive.⁴ The Department has also concluded that the small and irregular size of the perimeter strip renders impractical any development of this land for recreational purposes which would be available to the general public. Moreover, the Department's regulation is designed to ensure that the use of this land does not lower the environmental quality of the reservoir and the surrounding area. See 304 C.M.R. 5.03 (1), (5), (8).

For these reasons, I am unable to conclude that the Department, by issuing exclusive permits to abutting property owners, has diverted the perimeter strip to a use inconsistent with that for which it was acquired.

You have next asked whether issuance of the permits violates the Department's public trust obligations. The answer to this question depends in part upon whether their issuance violates the Department's obligations under c. 132A.⁵ G.L. 132A, §2B, provides that all lands acquired by the Department for conservation and recreation purposes "shall in so far as practicable" be pre-

²In a prior opinion, the Attorney General has concluded that Article 97 applied to public lands acquired prior to the Amendment's effective date. Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 140 (1973). Thus, the fact that this land was purchased in September, 1966, prior to the Amendment's passage, is irrelevant.

³The fact that the land was acquired for recreational, as well as conservation purposes, does not affect the applicability of Article 97. Article 97 applies to recreation park land, as well as land acquired for purely conservation purposes. See Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 142 (1973). Since the land is to be used for both recreational and conservation purposes, however, the Department will be required to mediate the conflicts between what may be inconsistent goals.

⁴You have informed me of several reasons for your determination that the general public must be excluded from the land. For example, you have determined that it would be prohibitively expensive to post lifeguards along the entire strip and that exclusive permits relieve the Commonwealth of the burden of enforcing a ban against public access for safety reasons. It is clear that the Commonwealth may exercise the police power over property held in trust for the public, for the good of the public. *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 435 (1909).

⁵Because the Department was authorized to buy the Otis Reservoir property "for the purposes of conservation and recreation as described in chapter one hundred and thirty-two A of the General Laws," see St. 1966, c. 457, the Department holds title to the land under G.L. c. 132A.

served in their natural state.” Thus, the Department’s primary obligation is to preserve such land in its natural state or to effectuate the policy of conservation set forth in c. 132A. When land is acquired for both conservation and recreational purposes, however, the Commissioner must reconcile the conflicts which may arise between these two goals. He is responsible for the planning, maintenance, and development of whatever land he is authorized to acquire. G.L. c. 132A, §§2C and 2D. When implementing this mandate the Commissioner may utilize the assistance of private individuals. Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 335, 338 (1966). The Department may, consistent with its obligations under c. 132A, solicit aid from the perimeter strip abutters when implementing its duty to protect the water supply in the Reservoir and to establish a recreational area for the public enjoyment. The issuance of permits is a permissible means of soliciting this assistance.⁶ Thus, the issuance of the permits has not violated the public trust obligations of the Department insofar as they are set out in G.L. c. 132A.

It is within the sound discretion of the Department to determine the role which the abutters play and whether or not the permits should be exclusive. The Department may “evaluate the situations presented it on the basis of its own expertise, and . . . make appropriate decisions in conformity to the legislative policy and purpose.” Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 335, 337 (1966). Using its experience and knowledge, the Department may determine which type of permit most effectuates the legislative policy. It “must - in the first instance - make a factual determination whether [an activity] may be carried on consistently with the Commonwealth’s policy of conservation and recreation.” *Id.* Because the Department has determined that the exclusive use permits effectuate the legislative policy of conservation and recreation at Otis Reservoir, their issuance does not violate the Department’s public trust duties.

This conclusion, however, is made subject to two qualifications. If the Department fails to enforce its regulations or take action when the permittees abuse their rights, the Department will violate its statutory duty to hold land in the public trust. G.L. c. 132A. *See, e.g., Blaney v. Commissioner of Corrections*, Mass. Adv. Sh. (1978) 278, 283. Second, restricting the issuance of permits to abutters alone may be necessitated by the inability of the general public to obtain easy access to the strip. I must note my concern, however, about any policy which may discriminate among citizens of the Commonwealth, that is, between abutters and non-abutters, in the issuance of the exclusive permits. *See, e.g., Neptune City v. Avon-By-The-Sea*, 61 N.J. 296 (1972).

Your third question turns on the meaning of the word “disposition” as it is used in Article 97. That issue was addressed in a prior opinion of the Attorney General. Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139 (1973). That opinion concluded that a “. . . ‘disposition’ includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting of taking of easements.” *Id.* at 147. Thus, a disposition occurs, for purposes of Article 97, whenever there is any transfer, without limitation, of either the legal interest in the acquired land or physical control over it. The permits under

⁶The Commissioner may not, without legislative authority, however, retain this aid by transferring any legal interest in the land. *See* Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 45, 46 (1939); Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 335, 338 (1966).

discussion here do not effect such a transfer and hence do not rise to the level of a "disposition."

A permit is a written license or grant of authority to do a thing which otherwise would not be allowed. Black's LAW DICTIONARY 1026 (5th Ed. 1979). A permit to use public land, like a license to use such land, is not an interest in land and grants to the person(s) holding it only conditional use of the land. *Woodbury v. Municipal Council of Gloucester*, 318 Mass. 385, 388 (1945). See *City of Boston v. A. W. Perry, Inc.* 304 Mass. 18, 21 (1939); *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 56 (1938). Thus, the permits granted by the Department to the abutting landowners surrounding Otis Reservoir do not transfer any interest in the perimeter strip. All legal interest in the land remains in the Department. The permits, are by definition, revocable at any time. *Woodbury v. Municipal Council of Gloucester, supra*, 318 Mass. at 388. Since they transfer no legal control or interest to the person(s) holding the permits, their issuance, per se, does not violate Article 97.

A permit, however, may violate the disposition provision of Article 97 if it transfers physical control over the land to the person(s) holding it. See Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144 (1973). Any relinquishment of physical control over the land would be a disposition and would require a vote of two-thirds of both Legislative branches. The Department cannot, therefore, through these permits, surrender its duty to police, conserve, preserve, and care for the reservoir and the perimeter strip. Whether or not these exclusive land use permits transfer such control depends upon their scope.

The scope of the permits granted by the Department is found in the Department's regulation, 304 C.M.R. 5.03. The regulation prohibits any activity "which contributes to water or air pollution or to a general lowering of the environmental quality". 304 C.M.R. 5.03 (5).⁷ The permits are issued subject to the provision that "should further investigation by the Department of Environmental Management and other appropriate agencies, reveal the presence of a source of water pollution, on or adjacent to the permit area, that the permit may be terminated immediately, if there are not satisfactory corrective measures taken." 304 C.M.R. 5.03 (1). Violations of any Departmental regulation result in the immediate cancellation of the permit. See 304 C.M.R. 5.03 (8). Thus, the Department controls the land by regulating its uses and does not, through the issuance of the permits, relinquish control over it. You have brought to my attention⁸ the fact that some person(s) holding permits have attempted to expand the permits' scope and use the land as if it were their own. Acquiescence in such use of the land by the Department would constitute a relinquishment of physical control over the land in violation of Article 97. The Department must assure, through its power of revocation and through the enforcement of its regulations, that the abutters limit the scope of their activities.

Finally, you have asked what effect, if any, the prior easements have on the issuance of these exclusive use permits. You have indicated that the Department

⁷Under proposed regulations, the Director of the Department will determine what activities are detrimental to the public interest and, therefore, prohibited.

⁸In your request for an opinion, you have indicated that some permittees have built permanent structures on the land, have filled in the reservoir in order to build on the land, and have altered the shoreline to accommodate their needs. Such use may violate 304 C.M.R. 5.03. You have referred to this office for enforcement two related matters. It is appropriate that you continue to refer for enforcement action such instances of misuse of the exclusive use permits.

took title to the perimeter strip subject to a prior easement in gross granted to certain land owners by the Farmington River Water Power Company.⁹

The easement holders have the right to use the perimeter strip in a manner consistent with their easement. They may pass and repass over the land, erect temporary structures, and use the land in a general way. The Department cannot interfere with or impair these rights. *See Metropolitan District Commission v. Plotnick*, 354 Mass. 1, 3 (1968); *Lizzo v. Drukas*, 333 Mass. 242, 243 (1955). Thus, the Department may not issue permits which extinguish the rights of the easement holders, nor can it require the easement holders to purchase permits to use the land.¹⁰

In order to assure the exclusive use of the strip, however, the abutter may choose to purchase a permit. The permit would grant the land owner no greater use of the land than that enjoyed under his easement and would not, therefore, violate Article 97. It would only grant to the abutter the exclusive use of the strip for a one year period.¹¹ In this context, the permit acts as a contract between the easement holder and the Department. In consideration of the fee paid by the owner, the Department promises not to grant a permit to other individuals.¹² In these circumstances, there is no disposition or other use prohibited by Article 97.

Thus, the existence of these easements has no effect on whether the permits violate the provision of Article 97, and the permits in this context would not be a "disposition" or "other use" prohibited by Article 97.¹³

In sum, it is my opinion that the exclusive land use permits do not violate either the provisions of Article 97 or the public trust duties under which the Department holds title to the perimeter strip. Rather, the permits are a legitimate mechanism for implementing the legislative policy of protecting the recreational and conservation uses of Otis Reservoir.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁹See n. 1, *supra*.

¹⁰Of course, if any of the easements have terminated, the Department may require the land owner to purchase a permit as a precondition to use of the perimeter strip. Easements in gross are normally personal in nature and are not incidental to the land; thus they terminate with the death of, or a transfer by, the easement holder. *See* Restatement (First) of Property §454 (1944). However, the easements may run with the land if the facts demonstrate that the parties intended them so to run. *See* Restatement (First) of Property §492 (1944).

¹¹As discussed above, the exclusivity of the permit would not violate Article 97.

¹²As a practical matter, of course, the easement holder may already have exclusive use of the land which abuts his property, since the Department has indicated that it would not allow the general public access in any event.

¹³The Department may prohibit the easement holders from using the strip in a manner that is inconsistent with the scope of the easements. *See Brassard v. Flynn*, 352 Mass. 185, 190 (1967); *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 2 Mass. App. Ct. 868 (1974). The Department may also seek to enjoin any easement holder who abuses his easement rights by filling in the reservoir or building permanent structures on the perimeter strip. *See, e.g., Doody v. Spurr*, 315 Mass. 129, 133 (1944); *Swenson v. Marino*, 306 Mass. 582, 585-586 (1940); *Michaelson v. Nemetz*, 4 Mass. App. Ct. 806, 807 (1976).

Number 16

June 6, 1980

John J. Droney

District Attorney for Middlesex County

Middlesex County Courthouse

East Cambridge, Massachusetts 02141

Dear District Attorney Droney:

You have requested my opinion¹ whether General Laws chapter 12, section 15, prohibits you from receiving a fee for legal services performed prior to your becoming a full-time district attorney.²

The facts as you have informed me are as follows: In 1973, you represented a client in a civil case involving a motor vehicle accident. At that time you referred the case to a trial attorney for immediate attention and investigation, but you continued to act as co-counsel until February 6, 1976, when you relinquished your private practice and became a full-time district attorney. From February 6, 1976, until after the case was settled on or about April, 1980, you had no contact with your client or the attorney concerning this case. After the case was settled, the attorney proposed to pay you a fee for your services as co-counsel from 1973 until February 6, 1976. You have asked whether G.L. c. 12, §15, prohibits you from accepting such payment.

For the reasons discussed below, it is my opinion that your receipt of a fee for legal services performed prior to your becoming a full-time district attorney would not violate G.L. c. 12, §15.

Your request raises two questions of statutory interpretation and application:

- (1) whether the receipt of compensation for legal services constitutes "the practice of law" within the meaning of G.L. c. 12, §15; and
- (2) whether G.L. c. 12, §15 should be applied retrospectively or prospectively.

It is my opinion that "the practice of law" prohibited by G.L. c. 12, §15, does not include the receipt of compensation for legal services previously performed. This opinion is based, first, upon the common and approved meaning of the phrase "practice of law," since statutory words and phrases should be construed primarily according to their plain meaning. G.L. c. 4, §6; *Burke v. Chief of Police of Newton*, Mass. Adv. Sh. (1978) 425, 427.

The usual and accepted meaning of this phrase can be derived from dictionary definitions and from its use in other legal contexts. *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977). The phrase "to practice [law]" is defined in Webster's Third New International Dictionary (1964) as "to exercise or pursue an employment or profession (as medicine or law) *actively*." (Emphasis added). Black's Law Dictionary 1055 (5th ed. 1979) defines "practice of law" as "[t]he *rendition of services* requiring the knowledge and the application of legal principles and technique to serve the interests of another with his

¹Your opinion request is made pursuant to G.L. c. 12, §6.

²G.L. c. 12, §15, as amended by St. 1975 c. 632, §1, provides in relevant part.

District attorneys shall devote their entire time during ordinary business hours to their duties, shall neither directly nor indirectly engage in the practice of law . . .

The effective date of this provision was January 1, 1979.

consent.” (Emphasis added). The Supreme Judicial Court, construing the phrase “practice of law” in other statutory contexts, has defined it to include “maintain[ing] a legal [office] and furnish[ing] and render[ing] services requiring legal knowledge and skill,” *Matter of Lyon*, 301 Mass. 30, 33 (1938), and “giving of legal advice and office practice in general.” *Collins v. Godfrey*, 324 Mass. 574, 580 (1949).

For the foregoing reasons, I conclude that the commonly accepted meaning of the phrase “practice of law” would not include the mere receipt of compensation previously earned, without the current maintenance of a law office and the active rendering of legal services.

This construction of G.L. c. 12, §15, is also supported by its legislative history, another recognized guide to statutory interpretation. See, e.g., *Murphy v. Bohn*, Mass. Adv. Sh. (1979) 699, 703. Another bill, S.940 (1975), which was considered by the legislature along with the present statute, would have expressly prohibited district attorneys from receiving compensation from any source other than the Commonwealth. This provision was not enacted. The fact that such a provision was considered but not enacted indicates that the legislature did not intend to prohibit the receipt of compensation *per se*. See *Rea v. Alderman of Everett*, 217 Mass. 427, 431 (1914).³

The second question raised by your request is whether G.L. c. 12, §15 should be applied retrospectively to prohibit the practice of law. If it is so applied, your practice of law prior to February 6, 1976, and your receipt of compensation therefor, would be in violation of the statute. It is my opinion that this statute should not be applied retrospectively. Statutes which deal with substantive rights are to be construed as operating prospectively unless the legislature clearly intended otherwise. *Hanscom v. Malden and Melrose Gas Light Co.*, 220 Mass. 1, 3 (1914); *Austin v. Boston University Hospital*, 372 Mass. 654, 657 (1977). By prohibiting district attorneys from engaging in the private practice of law, this statute changed the then prevalent practice of such officers and clearly altered their substantive rights.

Furthermore, section 2 of St. 1975, c. 632, clearly indicates that the Legislature intended this statute to be prospective. That section provides that the act would not take effect until January 1, 1979, three years after its enactment. Given this provision, it is clear that the legislature intended to allow district attorneys sufficient time to wind down their practice of law. Retrospective application of the statute would be in conflict with that intent. Furthermore, serious constitutional questions, concerning interference with the obligations of contract, would arise if the statute were construed to prohibit the acceptance of fees previously earned.

In sum, for the reasons discussed above, it is my opinion that your acceptance of a fee for legal services performed prior to your becoming a full-time district attorney would not violate G.L. c. 12, §15.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

³I note further that Section 5.2 of the Personnel Manual for the Department of the Attorney General, prohibiting assistant attorneys general from privately practicing law, served as a prototype for G.L. c. 12, §15. I have not applied that provision to prohibit the receipt of fees previously earned.

Number 17

June 19, 1980

The Honorable Robert Q. Crane
Treasurer and Receiver General
State House, Room 227
Boston, Massachusetts 02033

Dear Treasurer Crane:

You have requested on behalf of the Massachusetts State Lottery Commission an opinion whether General Laws, chapter 8, section 10A precludes the Commonwealth from entering into a lease of premises for a term not exceeding five years when said lease contains so-called escalation clauses. Your request is precipitated by the refusal of the Commissioner of Administration and Finance to give his approval to a particular lease¹ obtained by the Massachusetts State Lottery Commission.² That refusal, you inform me, was caused by his self-imposed determination not to approve leases containing escalation clauses. You further state that the Commissioner's position is based on his belief that the use of an escalation clause violates the intent of G.L. c. 8, §10A, in that the lease would not be for a sum certain at the time the lease is executed.

For the reasons set forth below, it is my opinion that the provisions of G.L. c. 8, §10A, do not preclude the Commonwealth from entering into leases containing escalation clauses. It is also my opinion, however, that the General Court has conferred discretionary power to approve or disapprove leases on several officers of the Commonwealth, including the Commissioner of Administration and Finance; that it is within the prerogative of the Commissioner to disapprove leases containing escalation clauses; and that without the express approval of the Commissioner, any lease executed by the Commonwealth is invalid.³

The starting point of my analysis is the literal language of the statute, since the words of the statute provide the primary source of insight into the purpose of the legislature. *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977). There is nothing in G.L. c. 8, §10A, which prohibits the use of escalation clauses in leases with the Commonwealth.⁴ Furthermore, there is no explicit requirement in the statute that every lease "be for a sum certain at the time of the execution," the phrase you attribute to counsel to the Secretary of Administration and Finance. The statute does contain language which requires an appropriation "for so much of the lease as falls within the then current fiscal year." The requirement of an appropriation, however, does not necessarily carry with it the

¹The lease in question contains an escalation clause for electricity charges and a clause providing for a fixed monthly payment for operating expenses based upon operating expenses for the previous years. Although these provisions are different, their impact is the same in that they present variable cost factors. Throughout this opinion the term "escalation clause" is utilized to describe all lease clauses which permit future variable cost increases.

²The Attorney General renders legal advice and opinions to state officers on matters pertaining to their official duties. This opinion is issued to you in your capacity as chairman of the State Lottery Commission who is charged with the responsibility to negotiate leases on its behalf. G.L. c. 10, §22; G.L. c. 8, §10A.

³G.L. c. 8, §10A, as recently amended, requires that each lease of the Commonwealth be approved by the Superintendent of State Buildings, the Governor and Council, the Commissioner of Administration and Finance, and the Budget Director of the House and Senate Committee on Ways and Means. No lease is valid without all of these approvals. 1953 Op. Atty. Gen. Rep. A.G. Pub. Doc. No. 12 at 41 (1953); see also *Opinion of the Justices*, 363 Mass. 889, 893 (1973).

⁴The statute provides, in relevant part:

The commonwealth, acting through the executive or administrative head of a state department, commission or board and with the approval of the superintendent and of the governor and council and 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.

requirement that a lease be for a sum certain; an appropriation may well be sufficiently large to cover not only the fixed cost of any lease, but also the variable costs associated with that lease.⁵ For the purpose of G.L. c. 8, §10A, then, it is not necessary that the lease be for a sum certain, so long as there exists an appropriation covering the lease. G.L. c. 8, §10A, does not by its literal terms, therefore, preclude the use of escalation clauses in leases involving the Commonwealth.

This answer, of course, is only tentative because statutes are to be interpreted not solely according to their simple, literal or strict verbal meaning. One must also look at the words of the statute in connection with their development, their progression through the General Court, the history of the times and the entire body of law of which they are a part. *Murphy v. Bohn*, Mass. Adv. Sh. (1979) 703; *Tilton v. City of Haverhill*, 311 Mass. 572, 577 (1942). The purpose of this broad inquiry is to ensure that the interpretation given the statute fairly covers all "the subjects presumably within the vision of the Legislature," without being unduly constricted or expanded. *Tilton v. City of Haverhill*, *supra*, 311 Mass. at 577; *Commonwealth v. Welosky*, 276 Mass. 398, 402 (1931).

You argue that a prohibition against executing leases containing escalation clauses is inconsistent with the basic intent of G.L. c. 8, §10A, which you identify as the desire to save rental costs. See, *United States Trust Co. v. Commonwealth*, 348 Mass. 378, 382 (1965). A fair reading of the legislative history does suggest that saving Commonwealth funds was a prime factor leading to the enactment and subsequent amendment of the section.⁶ This end has been served by expanding the permissible scope of leases involving the Commonwealth and, as demonstrated below, by vesting approval power in the fiscal officials of the state. One cannot infer from this basic legislative scheme, however, that the statute was intended to flatly prohibit the execution of leases containing escalation clauses.

By concluding that G.L. c. 8, §10A, does not preclude escalation clauses in leases involving the Commonwealth, I recognize that I have not resolved the real question at hand, which is whether the Commissioner of Administration has the discretionary authority to refuse to give his approval to leases in which escalation clauses appear. On its face, the statute simply requires that any lease executed on behalf of the Commonwealth be "with the approval . . . of the Commissioner of Administration".

The word "approval" has different meanings depending upon the context in which it is used and the subject matter to which it is applied. *Springfield v. Commonwealth*, 349 Mass. 267, 271 (1965); *Brown v. Newburyport*, 209 Mass. 259, 265-266 (1911). In some instances, the word is read to imply a discretionary action⁷ on the part of the approving authority, while in others it is

⁵The very lease which gave rise to your request illustrates the point. In your request you specifically note that the Lottery "has adequate appropriated funds for so much of the lease as falls within the current fiscal year."

⁶In 1932, for instance, the Attorney General recommended to the Legislature that it give statutory authorization for the Commonwealth to enter into leases for a term, as opposed to tenancies at will, because in his opinion, it would "result in a saving to the Commonwealth of rental costs." Report of the Attorney General, Pub. Doc. No. 12 at 22 (1932). That report was followed almost immediately by passage of an emergency statute amending the section to permit leases for a term not to exceed five years. St. 1933, c. 170.

⁷See, e.g., *Chicopee Co-op Bank v. Board of Bank Incorporation*, 347 Mass. 744 (1964); *Coyne v. Alcoholic Beverages Control Commission*, 312 Mass. 224, 229 (1942); *Rooney v. County of Essex*, 292 Mass. 473, 476 (1935); *McLean v. Mayor of Holyoke*, 216 Mass. 62, 64-65 (1913).

viewed as requiring no more than a ministerial act.⁸ I have reviewed the legislative history of G.L. c. 8, §10A, concerning the role of the Commissioner of Administration in the lease approval process. Based upon that legislative history, I conclude that he does in fact have discretionary approval powers. Consequently, he is authorized to withhold his approval because a lease contains an escalation clause.

It was not until 1943, that the Commissioner of Administration was added to the list of officials required to approve leases of the Commonwealth. St. 1943, c. 440, §2. That act was the result of a Report of Financial Matters pertaining to the Commonwealth, House No. 1295, January, 1943, pp. 16-17, which concluded that:

The procuring of outside office space and the amount of space allotted to departments in the State House is mainly a question of finance. The requirements of the various state departments are better known to the chairman of Administration & Finance and should be under his control . . . This is a *budgetary matter* and *should be handled entirely by the Commission on Administration & Finance* . . .'' (Emphasis added).

This legislative history makes it clear that the General Court viewed the leasing of facilities as a budgetary matter and delegated the responsibility and control of this aspect of state leasing to the fiscal officers of the Commonwealth. If the Commissioner was expected to "handle" this budgetary matter, his approval power obviously had to be substantive rather than ministerial.

As a final point, I note that in 1972, the General Court was fully apprised of the policy of the Commissioner not to approve leases containing escalation clauses. *Report of the Legislative Research Council*, House No. 5563: Leasing of Facilities for Governmental Purpose, April, 1972, p. 9. Despite the fact that the report outlined the prohibition against escalation clauses and the theoretically adverse consequences of the policy, no remedial legislation was enacted.⁹

If you or the General Court believe that policy to be inappropriate, your recourse is to seek enactment of legislation to restrict the approval authority of the Commissioner.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁸See *Springfield v. Commonwealth*, 349 Mass. 267, 272 (1965); *Weiner v. Boston*, 342 Mass. 67, 69-70 (1961); *Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 271 (1943); *Daly v. Mayor of Medford*, 241 Mass. 336, 340 (1922).

⁹I do not base my opinion of this fact since legislative inaction is generally the most dubious of foundations for drawing positive inferences concerning legislative intent. *United States v. Price*, 361 U.S. 304, 310-11 (1960).

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