State of Iowa
1991 - 1992

FORTY-NINTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1992

BONNIE CAMPBELL

Attorney General

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Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rick	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-1991
Bonnie J. Campbell	Polk	1991-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1991-1992
ADMINISTRATIVE SERVICES

Bonnie J. Campbell, 1/91- ..... Attorney General
JD, Drake, 1984
Gordon E. Allen, 8/82- ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86- ..... Deputy Attorney General
JD, Iowa, 1971
John R. Perkins, 12/72- ..... Deputy Attorney General
JD, Iowa, 1968
Roxann M. Ryan, 9/80- ..... Deputy Attorney General
JD, Iowa, 1980
Elisabeth C. Buck, 2/91- ..... Administrator
Julie Fleming, 8/88- ..... Executive Assistant
Robert P. Brammer, 11/78- ..... Information Specialist
William C. Roach, 1/79- ..... Communications Director
Clark R. Rasmussen, 9/92- ..... Program Director
Debra E. Leonard, 2/84-2/91 ..... Budget Analyst
Karen A. Redmond, 10/80- ..... Budget Accountant
Marilyn Chiodo, 2/91- ..... Personnel Technician
Dirk Bliss, 10/90-10/91 ..... Data Process Specialist
Donald Schaefer, 11/91- ..... Data Process Specialist
Jennifer Bishop, 11/90-8/92 ..... Administrative Assistant
Jane A. McCollom, 10/76- ..... Administrative Assistant
Julie E. Stauch, 7/92- ..... Administrative Assistant
Kathryn M. Moline, 3/83-11/91 ..... Legal Secretary
Melanie L. Ritchey, 8/85-11/92 ..... Legal Secretary
Joni Klaassen, 9/85 ..... Legal Secretary
Diane Dunn, 10/88- ..... Legal Secretary
Jennifer Coolidge, 6/92- ..... Clerk

AREA PROSECUTIONS

Harold A. Young, 7/75- ..... Division Director
JD, Drake, 1967
Virginia D. Barchman, 10/86- ..... Assistant Attorney General
JD, Iowa, 1979
James E. Kivi, 2/80- ..... Assistant Attorney General
JD, Iowa 1975
Thomas H. Miller, 10/85- ..... Assistant Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89- ..... Assistant Attorney General
JD, Iowa, 1982
Charles N. Thoman, 7/84- ..... Assistant Attorney General
JD, Creighton, 1976

Michael E. Wallace, 8/84-8/91 ..... Assistant Attorney General
JD, Iowa, 1971
Richard A. Williams, 7/75- ..... Assistant Attorney General
JD, Iowa, 1971
Alfred C. Grier, 9/72-2/91 ..... Pilot
Connie L. Anderson Lee, 12/76- ..... Legal Secretary
Elizabeth Meyer, 5/89-5/91 ..... Division Director

COMMERCIAL LAW

Donald G. Senneff, 7/85- ..... Division Director
JD, Iowa, 1967
Scott M. Galenbeck, 1/84- ..... Assistant Attorney General
JD, Iowa, 1974
Fred M. Haskins, 6/72-11/91 ..... Assistant Attorney General
JD, Iowa, 1972
Anuradha Vaitheswaran, 5/88- ..... Assistant Attorney General
JD, Iowa, 1984
Debra K. West, 11/91- ..... Assistant Attorney General
JD, Drake, 1990
James S. Wisby, 10/88- ..... Assistant Attorney General
JD, Iowa, 1968

CONSUMER ADVOCATE

James R. Maret, 4/72 - ..... Consumer Advocate
LLB, University of Missouri, 1963
David R. Conn, 9-78 - ..... Attorney 3
JD, University of Iowa, 1978
Daniel J. Fay, 4-66 - ..... Attorney 3
JD, University of Iowa, 1965
William A. Haas, 10/84 - ..... Attorney 3
JD, Drake University, 1982
Alice J. Hyde, 1/81 - ..... Attorney 3
JD, University of Iowa, 1978
Ronald C. Polle, 8/81 - ..... Attorney 3
JD, Drake University, 1979
Ben A. Stead, 8/81 - ..... Attorney 3
JD, University of Kansas, 1962
Leo J. Steffen, 10/72 - ..... Commerce Solicitor
JD, University of Iowa, 1962
Gary D. Stewart, 7/72 - ..... Attorney 3
JD, University of Iowa, 1969
Alexis K. Wodtke, 6/82 - ..... Attorney 3
J.D., Drake University, 1978
Tara Ganpat-Puffett, 11/89 - ..... Utility Analyst II
Christine A. Collister, 5/88 - ..... Utility Administrator I
Mark E. Condon, 11/88 - ..... Utility Specialist
Phyllis C. Costa, 11/90 - ..... Utility Analyst II
Bethanne H. Densmore, 11/92 - ..... Utility Analyst I
Charles E. Fuhrman, 9/81 - ..... Utility Administrator I
David S. Habr, 10/87 - ..... Utility Administrator II
Joyette D. Henry, 4/88 - ..... Utility Analyst II

Fasil Kebede, 3/87 - ..... Utility Specialist
Joseph W. Murphy, 6/77 - ..... Utility Administrator I
Sheila A. Parker, 6/88 - ..... Senior Utility Analyst
Xiaochuan (Larry) Shi, 3/90 - ..... Utility Reg. Engineer II
Deborah L. Stephens, 12/92 - ..... Senior Utility Analyst
Brian W. Turner, 7/82 - ..... Utility Specialist
Gregory Vitale, 8/85 ..... Utility Specialist
Karen M. Goodrich-Finnegan, 7/76 - ..... Secretary
Ann M. Kreager, 11/84 - ..... Secretary
Sheila M. Maher, 11/81 - ..... Secretary

CONSUMER PROTECTION

Steven M. St. Clair, 5/87- ..... Division Director
JD, Iowa, 1978
Richard L. Cleland, 4/79-3/91 ..... Division Director
JD, Iowa, 1978
William L. Brauch, 7/87- ..... Assistant Attorney General
JD, Iowa, 1987
Pamela D. Griebel, 4/91- ..... Assistant Attorney General
JD, Iowa, 1977
Raymond H. Johnson, 7/87- ..... Assistant Attorney General
JD, Iowa, 1986
Peter R. Kochenburger, 8/88- ..... Assistant Attorney General
JD, Harvard, 1986
Carmel A. Benton, 9/89- ..... Investigator
Marjorie A. Leeper, 7/82- ..... Investigator
Lise D. Ludwig, 5/85- ..... Investigator
Holly G. Merz, 10/88- ..... Investigator
Debra A Moore, 12/84- ..... Investigator
Norman Norland, 1/80- ..... Investigator
John H. Pederson, 8/91- ..... Investigator
Barbara A. White, 8/90- ..... Investigator
Janice M. Bloes, 3/78- ..... Legal Secretary
Katherine Gray, 3/84- ..... Legal Secretary
Sandra J. Kearney, 7/90- ..... Legal Secretary
Marilyn W. Rand, 10/69- ..... Legal Secretary
Judy A. Fast, 7/91- ..... Secretary/Receptionist
Edith M. Omlie, 6/89- ..... Secretary/Receptionist

CORRECTIONS

Layne M. Lindebak, 7/78- ..... Division Director
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87- ..... Assistant Attorney General
JD, Drake, 1987
Kristin W. Ensign, 10/88- ..... Assistant Attorney General
JD, Drake, 1983
Robert J. Glaser, 7/86- ..... Assistant Attorney General
JD, Creighton, 1978
William A. Hill, 8/90- ..... Assistant Attorney General
JD, Drake, 1989

Robin A. Humphrey, 8/90- ..... Assistant Attorney General
JD, Drake, 1985
Kathleen A. Pitts, 5/87- ..... Legal Secretary

CRIME VICTIM ASSISTANCE

Martha J. Anderson ..... Program Director
Kelly J. Brodie, 7/89- ..... Deputy Director
Jacqueline M. McCann, 5/87-1/91 ..... Program Planner
Virginia W. Beane, 6/89- ..... Program Planner
Robin Ahnen-Cacciatore, 2/91- ..... Investigator
Alison E. Sotak, 7/92- ..... Investigator
Stephen E. Switzer, 12/89- ..... Investigator
Ruth C. Walker, 2/79- ..... Investigator
Clarence J. Weihs, 1/79-2/84, 6/89-4/91 ..... Investigator
Melissa Miller, 1/88- ..... Legal Secretary

CRIMINAL APPEALS

Ann E. Brenden, 3/85- ..... Division Director
JD, Drake, 1981
Amy M. Anderson, 7/88- ..... Assistant Attorney General
JD, Iowa, 1988
Richard J. Bennett, 6/86- ..... Assistant Attorney General
JD, Iowa, 1978
Martha E. Boesen, 7/91- ..... Assistant Attorney General
JD, Notre Dame, 1991
Bridget A. Chambers, 2/90- ..... Assistant Attorney General
JD, Iowa, 1985
Thomas G. Fisher, 4/91- ..... Assistant Attorney General
JD, Iowa, 1986
Julie A. Halligan-Brown, 7/87- ..... Assistant Attorney General
JD, Iowa, 1987
Bruce Kempkes, 9/86-11/92 ..... Assistant Attorney General
JD, Iowa, 1980
Thomas D. McGrane, 6/71- ..... Assistant Attorney General
JD, Iowa, 1971
Sheryl A. Soich, 2/88- ..... Assistant Attorney General
JD, Drake, 1987
Thomas S. Tauber, 7/89- ..... Assistant Attorney General
JD, Drake, 1989
Mark J. Zbieroski, 3/87-6/91 ..... Assistant Attorney General
JD, Drake, 1986
Christy J Fisher, 1/67- ..... Legal Secretary
Janet L. Fitzwater, 10/89-10/91 ..... Legal Secretary
Cynthia L. Jacobe, 8/82- ..... Legal Secretary
Shonna K. Davis, 5/81- ..... Legal Secretary
Grace Armstrong, 7/89- ..... Secretary/Receptionist

ENVIRONMENTAL LAW

David R. Sheridan, 5/87- ..... Division Director
JD, Iowa, 1978
Kathleen M. Deal, 5/91- ..... Assistant Attorney General
JD, Drake, 1980
David L. Dorff, 4/85- ..... Assistant Attorney General
JD, Drake, 1982
Michael H. Smith, 9/84- ..... Assistant Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Richard C. Heathcote, 9/89- ..... Investigator
Ruth Manning, 9/89- ..... Legal Secretary
Cathleen M. White, 2/89- ..... Legal Secretary

FARM

Timothy D. Benton, 7/77- ..... Division Director
JD, Iowa, 1977
Karen B. Doland, 7/90- ..... Assistant Attorney General
JD, Iowa, 1989
Lynnette A. Donner, 10/86- ..... Assistant Attorney General
JD, Drake, 1984
Stephen H. Moline, 6/86-5/89;7/90- ..... Assistant Attorney General
JD, Iowa, 1986
Stephen E. Reno, 7/89- ..... Assistant Attorney General
JD, Drake, 1981
Harry E. Crist, 7/85- ..... Investigator
Charles G. Rutenbeck, 12/74-7/91 ..... Investigator
Beverly A. Conrey, 4/85-6/91 ..... Legal Secretary
Ronda K. Tucker, 3/91- ..... Legal Secretary

LICENSING AND ADMINISTRATIVE LAW

Julie F. Pottorff, 7/79- ..... Division Director
JD, Iowa, 1978
Richard R. Autry, 9/86- ..... Assistant Attorney General
JD, Drake, 1986
Sherie Barnett, 7/83- ..... Assistant Attorney General
JD, Drake, 1981
Teresa Baustian, 4/81- ..... Assistant Attorney General
JD, Iowa, 1979
Ann M. Brick, 3/86-5/91 ..... Assistant Attorney General
JD, Loyola (Chicago), 1975
Grant K. Dugdale, 5/91- ..... Assistant Attorney General
JD, Iowa, 1987
Maureen McGuire, 7/83- ..... Assistant Attorney General
JD, Iowa, 1983

Chris T. Odell, 7/90- ..... Assistant Attorney General
JD, Gonzaga, 1978
Christie J. Scase, 7/85- ..... Assistant Attorney General
JD, Drake, 1985
Rose A. Vasquez, 9/85- ..... Assistant Attorney General
JD, Drake, 1985
Lynn M. Walding, 7/81- ..... Assistant Attorney General
MA, JD, Iowa, 1981
Theresa O. Weeg, 10/81- ..... Assistant Attorney General
JD, Iowa, 1981
Roxanna Dales, 9/89 - ..... Legal Secretary
Lauren Marriott, 8/84 - ..... Legal Secretary

PROSECUTING ATTORNEYS TRAINING COUNCIL

Donald R. Mason, 9/80-9/92 ..... Executive Director, Training Coord
JD, Iowa, 1976
Douglas E. Marek, 8/89- ..... Assistant Attorney General
JD, Drake, 1984
Kevin B. Struve, 7/86- ..... Assistant Attorney General
JD, Iowa, 1979
Edith A. Westfall, 4/92- ..... Assistant Attorney General
JD, Creighton, 1978
Diana Essy-Emehiser, 10/90-8/92 ..... Data Processing Specialist
Ann M. Clary, 1/88- ..... Legal Secretary
Jeanne Lightly, 2/92-3/92 ..... Legal Secretary
Carol H. Litke, 5/92- ..... Legal Secretary
Karen M. Snater, 11/91- ..... Legal Secretary

REGENTS AND HUMAN SERVICES

John M. Parmeter, 11/84- ..... Division Director
JD, Drake, 1982
Kathryn J. Delafield, 3/91- ..... Assistant Attorney General
JD, Iowa, 1982
Jean L. Dunkle, 10/75-3/91 ..... Assistant Attorney General
JD, Iowa, 1975
Barbara E. Galloway, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Christina F. Hansen, 3/91- ..... Assistant Attorney General
JD, Drake, 1987
Daniel W. Hart, 7/85- ..... Assistant Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78- ..... Assistant Attorney General
JD, Creighton, 1976

Patricia M. Hemphill, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92- ..... Assistant Attorney General
JD, Drake, 1991
Robert R. Huibregtse, 6/75- ..... Assistant Attorney General
LLB, Drake, 1963
Dawn E. Mastalir, 12/92- ..... Assistant Attorney General
JD, Iowa, 1991
E. Dean Metz, 5/78-8/92 .... Assistant Attorney General LLB, Drake, 1955
Kathrine Miller-Todd, 1/85- ..... Assistant Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91- ..... Assistant Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84- ..... Assistant Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91 ..... Assistant Attorney General
JD, Louisville, 1980
Richard Ee Ramsay, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73- ..... Assistant Attorney General
LLB, Drake, 1962
Beth Aa Scheetz, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89- ..... Assistant Attorney General
JD, Iowa, 1986
Kathy S. Skinner, 7/87-2/92 ..... Assistant Attorney General
JD, Drake, 1987
Mary K. Wickman, 8/89- ..... Assistant Attorney General
JD, Iowa, 1986
Steven K. Young, 7/91- ..... Assistant Attorney General
JD, Drake, 1981
Michelle Haines, 11/89-11/91 ..... Legal Secretary
Lori E. Kern, 11/91- ..... Legal Secretary
Sharon R. O'Steen, 8/89- ..... Legal Secretary

REVENUE

Harry M Griger, 1/67-8/71; 12/71- ..... Division Director
JD, Iowa, 1966
Lucille M. Hardy, 5/86- ..... Assistant Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71- ..... Assistant Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83- ..... Assistant Attorney General
JD, Iowa, 1983
Marcia E. Mason, 7/82- ..... Assistant Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86- ..... Assistant Attorney General
JD, Drake, 1977
Rebecca A. Griglione, 3/87-8/87; 1/93- ..... Legal Secretary
Colleen Alexander, 1/92- ..... Legal Secretary
Connie M. Larson, 6/89- ..... Legal Secretary

Elyse M. Smith, 7/90-12/91 ..... Legal Secretary

TORT CLAIMS

Craig A. Kelinson, 12/86- ..... Division Director
JD, Iowa, 1976
James F. Christenson, 7/90- ..... Assistant Attorney General
JD, Iowa, 1990
Greg H. Knoploh, 5/87- ..... Assistant Attorney General
JD, Iowa, 1978
Bradley Knott, 2/91-3/92 ..... Assistant Attorney General
JD, Catholic University, 1990
Charles S. Lavorato, 9/83- ..... Assistant Attorney General
JD, Drake, 1975
Joanne L. Moeller, 8/84- ..... Assistant Attorney General
JD, Iowa, 1984
Shirley A. Steffe, 9/79- ..... Assistant Attorney General
JD, Iowa, 1979
Robert D. Wilson, 12/86- ..... Assistant Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89- ..... Investigator
Karen M. Likens, 8/77- ..... Investigator
David H. Morse, 3/78- ..... Investigator
Cathleen L. Rimathe, 8/78- ..... Investigator
Marcia A. Jacobs, 8/82- ..... Legal Secretary
Sharon Quint, 11/91-3/92 ..... Legal Secretary
Mary L. Robertson, 3/92- ..... Legal Secretary
Mary L. Sebben, 4/91- ..... Legal Secretary
Lorell Squiers, 9/87- ..... Legal Secretary

TRANSPORTATION

David A. Ferree, 3/84- ..... Division Director
JD, Iowa, 1979
Kerry K. Anderson, 6/91- ..... Assistant Attorney General
JD, Drake, 1982
John W. Baty, 9/72- ..... Assistant Attorney General
JD, Drake, 1967
Robert P. Ewald, 2/81- ..... Assistant Attorney General
JD, Washburn, 1980
Robin Formaker, 4/84- ..... Assistant Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89- ..... Assistant Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82- ..... Assistant Attorney General
JD, Drake, 1981
Ardeth T. Metier, 7/86-6/91- ..... Assistant Attorney General
JD, Iowa, 1951
Richard E. Mull, 7/78- ..... Assistant Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87- ..... Assistant Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-1/86; 1/87 ..... Paralegal

Michael J Raab, 1/85- ..... Paralegal
Davette D Smith, 8/86-8/91 ..... Paralegal
James M. Strohman, 2/88- ..... Paralegal

UNDERGROUND STORAGE TANK

Dean A. Lerner, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Robert C. Galbraith, 4/91- ..... Assistant Attorney General
JD, Minnesota, 1975
Chester J. Culver, 1/91- ..... Investigator

ATTORNEY GENERAL'S OFFICE

ADMINISTRATIVE DIVISIONS

ADMINISTRATIVE SERVICES DIVISION

The Administrative Services Division performs four main functions: providing administrative management of the department, communicating with the legislature, communicating with the public through the media, and carrying out projects that advance the special priorities of the attorney general.

The administrative functions of the division include managing budget and fiscal matters, determining personnel policies and staffing, coordinating computer support, and managing office facilities.

The division's legislative liaison staff represents the attorney general before the General Assembly by advocating the office's many legislative priorities, answering questions posed by lawmakers, providing information on many matters, and coordinating the interaction between lawmakers and other members of the attorney general's staff.

The division issues news releases, brochures and other material about important matters such as consumer protection warnings or services available to crime victims. It answers wide-ranging questions posed by the media. It also undertakes special awareness projects in cooperation with the media that provide public service announcements in print, on billboards, and on TV and radio.

The administrative services division coordinates and undertakes most of the activity required by special priorities chosen by the attorney general. In 1991-92, such special projects included:

Domestic abuse awareness project. This project included educating the public about the largely-hidden problem of family violence, proposing new domestic abuse and "stalking" laws, conducting forums for clergy and others, and mounting a public service announcement campaign on the theme that "battering women is a crime."

Truth-in-sentencing project. This project involved convening a prestigious "Blue Ribbon Panel on Sentencing" that considered a wide array of issues and suggested proposals to address the problem of overcrowding in the corrections system and the disparity between public expectations and the reality of time served by convicted criminals.

Older Iowan consumer forums. The forums are based on the fact that Iowa has one of the highest percentages of older citizens in the nation, and that "con-artists" often target their schemes especially toward older persons. Forums were conducted in dozens of Iowa communities to alert older citizens about the scams they may encounter and how to avoid being cheated.

Child support awareness project. Unpaid child support is damaging to custodial parents and their children and also to state taxpayers, and delinquent

payments may total as much as half a billion dollars in Iowa. The objective of the attorney general's project was to increase public awareness of this problem, drive up voluntary payments, and improve enforcement. The project included billboards, TV ads, radio ads, and print ads placed at no charge by the media companies; a "wanted poster" to dramatize the problem; legislative proposals; and a video to educate teenagers about child support obligations they incur as parents.

Campus rape forums. This project was launched near the end of the biennium and includes on-campus forums headed by the attorney general with the cooperation of the college or university, local law enforcement officials, the county attorney, local rape center advocates, and student leaders. The forums focus campus and community attention on the problem of campus rape, and provide students and members of the community an opportunity to share solutions to the problem.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist local county attorneys in difficult, technical, or multi jurisdictional felony criminal cases and in major felony cases where a conflict of interest or the appearance of a conflict precludes the county attorney from handling a prosecution.

The division is staffed by five general trial attorneys, four specialist attorneys, one investigator and one secretary. Three of the general trial attorneys are located in Des Moines, one in eastern Iowa and the other in the western part of the state. The specialty areas each have one attorney assigned: 1) to investigate and prosecute state environmental crimes, 2) to prosecute crimes in state penal institutions, 3) to conduct state tax investigations and prosecutions, and 4) to prosecute medicaid fraud.

During the period of this report, 357 major cases from all corners of the state were referred to and handled by the division's attorneys.

The division also handles virtually all of the public official misconduct and corruption allegations throughout the state and represents the Commission on Judicial Qualifications, investigating and prosecuting complaints against Iowa judges and magistrates.

OFFICE OF CONSUMER ADVOCATE

The Office of Consumer Advocate represents all consumers and the public generally in proceedings before the Iowa Utilities Board, which implements and enforces the provisions of Iowa's public utility regulation statutes in Iowa. The OCA is also independently authorized to investigate the legality of all rates, charges, rules, regulations and practices under the jurisdiction of the board, and may institute proceedings before the board or court to correct any illegality.

Proceedings before the board in which the OCA participated during the 1991-92 biennium included annual reviews of electric and natural gas utilities' fuel purchasing practices, electric transmission line and gas pipeline certificate cases, formal complaints, investigation dockets of specific utility practices, purchased gas adjustment cases, electric utility service area disputes, rulemakings, energy efficiency program proposals, proposed utility mergers and rate cases.

Investigation of the legality of proposed rate increases filed by investor-owned utilities is the most significant area of the OCA's litigation. To carry out its investigatory duties in a rate case, the OCA uses its technical staff as well as outside consultants to analyze the information presented in the filing by the utility company, and review the utility's books and records to determine the reasonable costs of providing utility service. The OCA participates in the case by attending consumer comment hearings held at locations throughout the state, cross-examining utility witnesses at technical hearings, offering evidence through OCA sponsored expert witnesses, and filing briefs with the board. During 1991-92, the OCA represented ratepayers and the general public in the resolution of 23 proposed rate increases filed by electric, natural gas, telephone and water utilities. In addition, the OCA instituted rate reduction proceedings proposing to decrease the rates of four investor owned electric utilities which had excessive earnings during the same period.

During the 1991-92 biennium, the OCA was also involved in 90 electric transmission line certificate or renewal cases, 32 gas pipeline certificate or renewal cases and 2 generating plant certificate filings. The OCA was involved in 8 formal complaints (initiated after informal attempts to resolve the consumer complaints against utilities were unsuccessful). There were 12 purchased gas adjustments filings by utilities. The OCA participated in 35 electric utility service area disputes. In addition, the OCA was involved in 33 rulemaking proceedings and participated in 7 investigations involving various utilities. Also, during 1991 and 1992, the OCA participated in proceedings reviewing proposed utility reorganizations involving several of Iowa's major utility holding companies, including Central Telephone/Rochester Telephone, Iowa Electric/Iowa Southern Utilities, Iowa Power/Iowa Public Service Company, and Union Electric/Iowa Electric. During the 1991-92 biennium, the OCA was involved in approximately 22 judicial review proceedings in Iowa's district and appellate courts.

In 1991, the Utilities Board adopted rules implementing new legislation requiring utilities to spend a fixed percentage of their gross income on energy efficiency plans. OCA staff met several times with individual utilities during the past two years to discuss Energy Efficiency Plans (EEP's) which were being developed to satisfy the new rules. After the utilities' EEP's were filed on or about July 15, 1991, the OCA was able to negotiate changes in the plans with several utilities. In other cases, the OCA and utilities argued their respective positions to the board in contested proceedings. Final EEP's for all but one utility were approved by the board in December, 1991, and January, 1992. Litigation of the one remaining EEP proposal concluded in February, 1993.

The OCA consists of the Consumer Advocate, 9 attorneys, 14 financial, economic and accounting experts and analysts, 1 electrical engineer, 1 paralegal and 3 secretaries.

CONSUMER PROTECTION DIVISION

The Consumer Protection Division administers and enforces the Iowa Consumer Fraud Act, the Iowa Consumer Credit Code, the Iowa Campground Act, the Iowa Physical Exercise Club Regulation Act, the Charitable Organization Act, and the Cemeteries Regulation Act.

In addition, the Consumer Protection Division may bring enforcement actions for violations of the Iowa Business Opportunity Sales Act, the Iowa Trade School Act, the Iowa Door-to-Door Sales Act, the Iowa Transient Merchants Act, the Iowa Drug and Cosmetic Act, the Iowa Preneed Funeral Sales Act, the Iowa Funeral and Cemetery Services and Merchandise Act, the Iowa Lemon Law, the Iowa Motor Vehicle Services Trade Practices Act, and the Iowa Car Rental and Collision Damage Waiver Act.

The Consumer Protection consists of six attorneys, eight investigators, four secretaries, two receptionists, and the Older Iowans Project coordinator. The division, through its volunteer program, has volunteers and interns working for the division handling non-fraud consumer complaints, doing research, and performing other important tasks.

During 1991 and 1992, the Consumer Protection Division received 12,688 consumer complaints and closed 13,037 consumer complaints. There were 2,398 complaints pending at the end of 1992. During the same period, the Consumer Protection Divisionfiled 27 and closed 19 lawsuits. During 1991 and 1992, the division saved or recovered $3,049,559.46 for Iowa consumers.

The Consumer Protection Division engages in many programs of preventive consumer protection designed to deter potential schemes and inform consumers. The Consumer Protection Division's involvement in mediating consumer problems, investigating complaints of deceptive advertising and sales practices,

and filing lawsuits has a substantial deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both specific and common schemes of fraud through a variety of means including press releases, informational brochures, and public speaking engagements.

The major areas of activity during 1991 and 1992 include prosecutions of frauds against older Iowans, health and nutrition fraud, automobile sales and service practices complaints, debt collection and consumer credit, telemarketing abuses, and consumer education.

Budget constraints required merger of the Farm Division with the Consumer Protection Division in 1992. Thus, the Consumer Protection Division now includes an attorney and investigator who devote special attention to the problems of farmers as consumers. In addition, the Environmental Division of the office continues the work of the Farm Division in connection with pesticides and other environmental issues.

CORRECTIONS DIVISION

The Corrections Division performs legal services for the Department of Corrections. It is comprised of five attorneys and one full-time and one half-time legal secretary. The division advises the Department of Corrections on the legal impact of policy and defends the department and its employees in prisoner civil rights litigation in federal and state court challenges to prison disciplinary action. The division opened 234 state cases and 245 federal civil rights actions in fiscal year 1992. The division has pending 504 civil rights actions and 325 cases in state court. A total average pending caseload in 1992 of 829 is up from 762 in fiscal year 1991.

CRIME VICTIM ASSISTANCE PROGRAM

The Crime Victim Assistance Program is responsible for the administration of victim programs at the state level. Those include in the Crime Victim Assistance Program are: Crime Victim Compensation; Sexual Abuse Examination Payment; Crime VictimServices Grants; Federal Victims of Crime Act (VOCA); Federal Family Violence Prevention And Services; State Domestic Abuse; State Rape Crisis; Iowa Domestic Abuse Hotline. Funds for these programs come primarily from fines assessed on criminals both at the state and federal levels.

Crime Victim Assistance Board. The Crime Victim Assistance (CVA) Board created by the 1989 legislature and appointed by the Attorney General has statutory responsibility for the adoption of rules relating to Crime Victim Assistance program policies and procedures. The board receives and acts on appeals filed for victim compensation and victim program grants.

Crime Victim Compensation. Victims of violent crimes received more financial assistance during the past year than in any year since the Crime Victim Reparation Act was passed by the 1982 Session of the Iowa General Assembly. In FY 92, the program provided compensation to 1486 crime victims. A total of $1,915,924 was awarded for expenses incurred by those victims and their families.

No tax dollars are used to fund the Compensation Program. Funding comes from fines and penalties imposed upon criminals; the Federal Victims of Crime Act (VOCA) grant, supported entirely by federal criminal fines; perpetrator restitution monies; and recoveries from civil actions involving the offender or other third parties responsible for the crime.

Sexual Abuse Examination Payment. The sexual abuse examination program was established by the legislature to pay the cost of evidentiary examinations in sexual abuse crimes.

The state of Iowa pays for the evidentiary sexual abuse examination regardless of whether the victim has decided to report the crime. If the victim later decides to report the crime, the prosecutor and law enforcement have the benefit of evidence effectively collected in a timely manner.

Funds for sexual abuse examination payment come from the victim compensation fund through the collection of a surcharge on criminal fines paid in the state.

Crime Victim Services Grants. The Crime Victim Assistance Program administers five federal and state grant funds that provide funding to local crime victim service programs.

The Victim Service Grant Program distributed $2,083,220 of state and federal money to victim service programs in FY 92. The Victim Grants Administrator contracted with thirty-nine public and nonprofit organizations for the provision of local community based victim services.

Programs partially funded by the Crime Victim Assistance Division include twenty-nine domestic abuse programs and shelters, twenty-five rape crisis centers, two programs serving child victims of crime, two programs serving homicide victim survivors and other victims of violent crime and one program serving the victim of drunk drivers.

In addition to the local service contracts, two statewide service contracts were awarded for domestic abuse work. The Iowa Coalition Against Domestic Abuse received funds to provide technical assistance to local domestic abuse

programs. The Polk County Family Violence Center received funds to operate the Iowa Domestic Abuse Hotline.

CRIMINAL APPEALS DIVISION

The primary responsibility of the Criminal Appeals Division is to represent the state of Iowa in direct appeals of criminal cases. County attorneys prosecute the cases in district court, and the division prosecutes criminal appeals to the Iowa Supreme Court.

In 1991-92, 1223 criminal appeals were taken to the Iowa Supreme Court and 713 defendant-appellant briefs were filed by the division in those cases. The division filed 675 briefs on behalf of the state. The division consists of twelve attorneys and three and one-half support staff.

Other criminal appeal and post-conviction matters handled by the Division include: certiorari petitions to the U.S. Supreme Court related to criminal cases; appeals in post-conviction relief cases under chapter 663A; applications for discretionary review by the defendant; all criminal appellate actions initiated by the state; and federal habeas corpus cases.

The Division publishes the Criminal Law Bulletin, a periodic update on developments in criminal law in the Iowa Supreme Court and U.S. Supreme Court. It also provides training and advice to prosecutors and police officers around the state, advises the Parole Board, Board of Pharmacy and Bureau of Labor, and advises the Governor's office on extradition matters.

ENVIRONMENTAL LAW DIVISION

The Environmental Law Division represents the State of Iowa in issues affecting the environment. The division has a staff of five attorneys, one environmental specialist, and two secretaries. The majority of the division's work involves representing the Department of Natural Resources and the Department of Agriculture and Land Stewardship.

The division also represents the State Archaeologist, Grain Indemnity Fund Board, and the Iowa Agricultural Development Authority and provides legal assistance to the National Guard and the State Historical Society on real estate matters. The division also advises the Iowa Commissioner to the Midwest Interstate Low-level Radioactive Waste Commission, the Iowa Nebraska Boundary Commission, and the Energy Fund Disbursement Council.

The division prosecutes civil environmental enforcement actions involving water pollution, water supply, solid waste, air pollution, leaking underground

storage tanks, hazardous conditions, and flood plains. The division also completed work on a long-standing "Superfund" cost recovery action which resulted in payment to the State of Iowa of $886,909 for cleanup and future monitoring costs.

The division routinely advises the DNR concerning statutory and rule interpretations, administrative law questions, and enforcement strategies. The division reviews grants to cities for various environmental construction projects. The division also provides legal assistance to the DNR in matters relating to management of state-owned lands and waters and development projects on state-owned lands including National Environmental Protection Act requirements, construction contract disputes, drainage disputes, permits for special uses of public lands and waters, and regulations relating to fishing, hunting, trapping, boating and use of state parks.

The division serves as general counsel to the Department of Agriculture and Land Stewardship. In addition, the division enforces coal and mineral mining laws and assists the Mines and Minerals Bureau in collecting administrative penalties. The division handles license suspension or revocation proceedings on behalf of the Pesticide Bureau for pesticide violations. The division also represents the 100 soil and water conservation districts by enforcing administrative orders, soil loss limits, and maintenance agreements and by providing title opinions in connection with watershed projects.

LICENSING AND ADMINISTRATIVE LAW DIVISION

The Licensing and Administrative Law Division acts as general counsel for many state officials and state agencies. The division provides legal advice, prosecutes administrative hearings, drafts contracts and defends the agencies in all litigation except tort claims. In addition, the division provides advice on a wide range of legal issues, including county and municipal law, election law, open meetings, public records and gift law. The division also carries out the AttorneyGeneral's function as enforcer of charitable trusts and escheat cases.

The division advises and represents the Judicial Department, State Treasurer, Secretary of State, and the Departments of Management, Education, General Services, Human Rights, Personnel, Economic Development, Cultural Affairs, Inspections and Appeals and the State Lottery. The division represents the state in prosecuting licensee disciplinary proceedings before twenty-six professional licensing boards, including the Board of Medical Examiners, the Real Estate Commission, the Dental Examiners, the Pharmacy Examiners and the Accountancy Board.

In the 1991-92 biennium, the division wrote 40 Attorney General's opinions and responded to many other opinion requests by informal advice. The division confers with county attorneys and city attorneys concerning county and municipal law. The division also responds to many public inquiries.

In the 1991-92 biennium the division received approximately 120 new litigation cases, including petitions for judicial review of agency decisions, contract disputes, civil rights proceedings and defense of employment discrimination claims.

PROSECUTING ATTORNEYS COUNCIL

The Prosecuting Attorneys Council provides continuing education and training for Iowa prosecuting attorneys and their assistants and other support services to promote the uniform and effective execution of prosecutors' duties. Services are provided to all 99 county attorneys and more than 200 assistant county attorneys, as well as to other government attorneys and law enforcement officials.

Operating pursuant to the authority of Iowa Code chapter 13A, the Prosecuting Attorneys Council has the duty to "keep the prosecuting attorneys and assistant prosecuting attorneys of the state informed of all changes in law and matters pertaining to their office to the end that a uniform system of conduct, duty and procedure is established in each county of the state." Iowa Code 13A.8. To that end, the Prosecuting Attorneys Council provided over 450 hours of continuing legal education in 19911992, conducting more than 45 separate continuing education events, and trained more than 2,200 prosecutors and law enforcement officials. Training events included annual Spring and Fall County Attorney Conferences, New Legislation Workshops, and specialized training on the topics of Trial Advocacy, Advanced Trial Advocacy, Task Force Management, Drug Investigation and Prosecution, Asset Forfeiture, Impaired Driving Law and Domestic Violence.

In addition to continuing education, the Prosecuting Attorneys Council provides administrative support services, technical assistance, and educational publications to prosecutors and law enforcement officials. The Comprehensive Career Criminal and Drug Prosecution Support Program funds specialized prosecutors in county attorney offices across the state, and provides research assistance and training to multi-jurisdictional task forces. The OWI/Traffic Safety Specialist coordinates the efforts of prosecutors of impaired driving and related offenses through specialized publications, newsletters, and instructional programs. The Prosecuting Attorneys Council administers the Attorney General's asset forfeiture program established by Iowa Code section 809.13,

which returns the proceeds of forfeiture cases to governmental agencies to enhance law enforcement within the state.

REGENTS AND HUMAN SERVICES DIVISION

This division performs legal services for the Department of Human Services, the Board of Regents and their institutions. The Department of Human Services' institutions are the four mental health institutions, the two state hospital-schools and the Iowa Veterans' Home. The Regents' institutions are the three state universities, the Iowa School for the Deaf and the Iowa School for the Blind. The division is comprised of 18 Assistant Attorneys General, 1 Administrative Officer and 4 legal secretaries. Four of the attorneys work with the Department of Human Services on welfare issues including Medicaid, AFDC, Food Stamp and mental health commitment. Four are involved in juvenile issues including child abuse, termination of parental rights and delinquency and 9 represent the Child Support Recovery Unit. Two attorneys represent the Board of Regents and the Regents' institutions.

In the area of juvenile law, the division handles delinquency, child in need of assistance and termination of parental rights appeals before the Iowa Supreme Court and the Iowa Court of Appeals. The division also occasionally prosecutes those cases at the trial court level.

In the areas of Medicaid, Aid to Families with Dependent Children, Food Stamps and other programs, the division seeks to recoup overpayments which are made inadvertently and payments which are made as a result of fraud. Additionally, the division seeks reimbursement from third parties who are responsible for injuries sustained by an individual whose medical treatment has been paid by Medicaid. The division represents the Department of Human Services in actions for judicial review of eligibility decisions denying Medicaid, Aid to Families with Dependent Children, Food Stamps and the like.

The division represents the Board of Regents primarily in cases involving civil rights, discrimination and contract claims.

During Federal fiscal year 1992, the division assisted in the collection of $104,885,351 in child support collections, and $439,651.87 in Medicaid reimbursement.

REVENUE DIVISION

The Revenue Division advises and represents the Department of Revenue and Finance with respect to various taxes which are administered by the department, including income taxes, franchise tax imposed on financial institutions, state sales and use taxes, cigarette and tobacco taxes, drug tax, motor vehicle fuel taxes, inheritance and estate taxes, property taxes, hotel and motel local option taxes, local option sales taxes, real estate transfer tax,

and grain-handling tax. In addition, the division drafts responses to tax opinion requests made to the Attorney General.

During the 1991-1992 biennium, the division participated in the resolution of informal proceedings for 351 protests filed by audited taxpayers. The division also handled 73 contested case proceedings. In the biennium, 7 contested cases were disposed of before the State Board of Tax Review.

During the biennium, 40 Iowa district court cases and 2 federal district court cases were handled by the division.

This division was involved in 10 cases in the United States Supreme Court during the biennium either as amicus curiae, in opposition to certiorari or as a primary participant.

On the appellate Iowa court level, the division received decisions in 8 cases from the Iowa Supreme Court and in 2 cases from the Iowa Court of Appeals.

A total of 24 responses to requests for opinions of the Attorney General were issued during the biennium. The division also assisted the Department of Revenue and Finance in disposing of 30 petitions for declaratory rulings. In addition, 299 proposed rules of the Department were reviewed for content and legality at the department's request.

As a result of the division's activities on behalf of the Revenue Department during the biennium, $35,563,456 of tax revenue was directly collected or requested refund amounts were not paid.

TORT CLAIMS DIVISION

The Tort Claims Division provides the state, its agencies, officials and employees, with legal representation in personal injury and property damage litigation. The division defends state workers' compensation cases, as well as representing the Second Injury Fund. Additionally, the division is charged with the investigation of all administrative claims made to the State Appeal Board under both Iowa Code Chapter 25, general claims, and Chapter 669, tort claims. Other duties include providing advice and counsel to state agencies concerning risk management and representation of the Civil Reparations Trust Fund concerning awards of punitive damages.

Tort litigation involves claims of medical malpractice, premises liability, negligent regulation by state agencies, social service liability and civil rights violations, among others. This litigation is defended by the division's eight attorneys and four investigators/paralegals at both the trial and appellate level, in both state and federal court. Workers' compensation claims are defended on the administrative level before the Iowa Industrial Commissioner, and on appeal to the district and supreme courts.

Administrative claims are investigated and recommendations concerning the claims are made to the State Appeal Board. In 1991 and 1992 a total of 6,188 claims were received for investigation, and 5,741 claims were presented for consideration by the State Appeal Board. This was a 90 percent increase over the previous biennium.

TRANSPORTATION DIVISION

Eight assistant attorneys general, three legal assistants and eight support staff provide legal services to the Department of Transportation, including litigation representation and agency advice.

The three main areas of litigation activity are tort claims, judicial review proceedings, and condemnation appeals. The legal staff represents the department in tort claims which involve highway accidents or accidents on property owned or controlled by the DOT. During 1991 and 1992, 28 tort cases were opened and 52 were closed. The legal staff represents the department when judicial review is sought of department action involving, for example, driver's license revocation or suspension. During 1991 and 1992, 361 judicial review proceedings were opened and 276 were closed. The legal staff also represents the department in judicial condemnation actions. During 1991 and 1992, 53 condemnation appeals were filed and 47 were closed. The division also assists the DOT at the trial and appellate level in both federal and state court, in cases involving contract disputes, employment discrimination claims, constitutional challenges, environmental issues, railroad issues and certain tax matters. The legal assistants on the staff represent the DOT in contested case hearings.

The legal staff also provides non-litigation services to the department. Consultation routinely occurs with respect to statutes, court decisions, state and federal regulations, and policy matters. Department contracts, easements, and other agreements are reviewed. The legal staff is also consulted with regard to proposed legislation and administrative rules.

UNDERGROUND STORAGE TANK UNIT

In 1989, the General Assembly created the Iowa Comprehensive Petroleum Underground Storage Fund Tank Board as a state entity responsible for funding the clean-up of contamination caused by underground petroleum storage tanks, financing new tank installation and issuing insurance for tank operators. One assistant attorney general has been assigned full time to the board as general counsel since April, 1991. The program's purpose is to recover fund moneys

expended on clean-up from potentially responsible parties through litigation. The deputy supervises the assistant attorney general acting as general counsel to the board and also supervises three outside law firms, another assistant attorney general and one investigator in implementation of the cost recovery program.

State of Iowa
1991 - 1992

FORTY-NINTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1992

BONNIE CAMPBELL

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rick	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-1991
Bonnie J. Campbell	Polk	1991-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

PERSONNEL 1991-1992
ADMINISTRATIVE SERVICES

Bonnie J. Campbell, 1/91- ..... Attorney General
JD, Drake, 1984
Gordon E. Allen, 8/82- ..... Deputy Attorney General
JD, Iowa, 1972
Charles J. Krogmeier, 5/86- ..... Deputy Attorney General
JD, Iowa, 1971
John R. Perkins, 12/72- ..... Deputy Attorney General
JD, Iowa, 1968
Roxann M. Ryan, 9/80- ..... Deputy Attorney General
JD, Iowa, 1980
Elisabeth C. Buck, 2/91- ..... Administrator
Julie Fleming, 8/88- ..... Executive Assistant
Robert P. Brammer, 11/78- ..... Information Specialist
William C. Roach, 1/79- ..... Communications Director
Clark R. Rasmussen, 9/92- ..... Program Director
Debra E. Leonard, 2/84-2/91 ..... Budget Analyst
Karen A. Redmond, 10/80- ..... Budget Accountant
Marilyn Chiodo, 2/91- ..... Personnel Technician
Dirk Bliss, 10/90-10/91 ..... Data Process Specialist
Donald Schaefer, 11/91- ..... Data Process Specialist
Jennifer Bishop, 11/90-8/92 ..... Administrative Assistant
Jane A. McCollom, 10/76- ..... Administrative Assistant
Julie E. Stauch, 7/92- ..... Administrative Assistant
Kathryn M. Moline, 3/83-11/91 ..... Legal Secretary
Melanie L. Ritchey, 8/85-11/92 ..... Legal Secretary
Joni Klaassen, 9/85 ..... Legal Secretary
Diane Dunn, 10/88- ..... Legal Secretary
Jennifer Coolidge, 6/92- ..... Clerk

AREA PROSECUTIONS

Harold A. Young, 7/75- ..... Division Director
JD, Drake, 1967
Virginia D. Barchman, 10/86- ..... Assistant Attorney General
JD, Iowa, 1979
James E. Kivi, 2/80- ..... Assistant Attorney General
JD, Iowa 1975
Thomas H. Miller, 10/85- ..... Assistant Attorney General
JD, Iowa, 1975
Thomas E. Noonan, 6/89- ..... Assistant Attorney General
JD, Iowa, 1982
Charles N. Thoman, 7/84- ..... Assistant Attorney General
JD, Creighton, 1976

Michael E. Wallace, 8/84-8/91 ..... Assistant Attorney General
JD, Iowa, 1971
Richard A. Williams, 7/75- ..... Assistant Attorney General
JD, Iowa, 1971
Alfred C. Grier, 9/72-2/91 ..... Pilot
Connie L. Anderson Lee, 12/76- ..... Legal Secretary
Elizabeth Meyer, 5/89-5/91 ..... Division Director

COMMERCIAL LAW

Donald G. Senneff, 7/85- ..... Division Director
JD, Iowa, 1967
Scott M. Galenbeck, 1/84- ..... Assistant Attorney General
JD, Iowa, 1974
Fred M. Haskins, 6/72-11/91 ..... Assistant Attorney General
JD, Iowa, 1972
Anuradha Vaitheswaran, 5/88- ..... Assistant Attorney General
JD, Iowa, 1984
Debra K. West, 11/91- ..... Assistant Attorney General
JD, Drake, 1990
James S. Wisby, 10/88- ..... Assistant Attorney General
JD, Iowa, 1968

CONSUMER ADVOCATE

James R. Maret, 4/72 - ..... Consumer Advocate
LLB, University of Missouri, 1963
David R. Conn, 9-78 - ..... Attorney 3
JD, University of Iowa, 1978
Daniel J. Fay, 4-66 - ..... Attorney 3
JD, University of Iowa, 1965
William A. Haas, 10/84 - ..... Attorney 3
JD, Drake University, 1982
Alice J. Hyde, 1/81 - ..... Attorney 3
JD, University of Iowa, 1978
Ronald C. Polle, 8/81 - ..... Attorney 3
JD, Drake University, 1979
Ben A. Stead, 8/81 - ..... Attorney 3
JD, University of Kansas, 1962
Leo J. Steffen, 10/72 - ..... Commerce Solicitor
JD, University of Iowa, 1962
Gary D. Stewart, 7/72 - ..... Attorney 3
JD, University of Iowa, 1969
Alexis K. Wodtke, 6/82 - ..... Attorney 3
J.D., Drake University, 1978
Tara Ganpat-Puffett, 11/89 - ..... Utility Analyst II
Christine A. Collister, 5/88 - ..... Utility Administrator I
Mark E. Condon, 11/88 - ..... Utility Specialist
Phyllis C. Costa, 11/90 - ..... Utility Analyst II
Bethanne H. Densmore, 11/92 - ..... Utility Analyst I
Charles E. Fuhrman, 9/81 - ..... Utility Administrator I
David S. Habr, 10/87 - ..... Utility Administrator II
Joyette D. Henry, 4/88 - ..... Utility Analyst II

Fasil Kebede, 3/87 - ..... Utility Specialist
Joseph W. Murphy, 6/77 - ..... Utility Administrator I
Sheila A. Parker, 6/88 - ..... Senior Utility Analyst
Xiaochuan (Larry) Shi, 3/90 - ..... Utility Reg. Engineer II
Deborah L. Stephens, 12/92 - ..... Senior Utility Analyst
Brian W. Turner, 7/82 - ..... Utility Specialist
Gregory Vitale, 8/85 ..... Utility Specialist
Karen M. Goodrich-Finnegan, 7/76 - ..... Secretary
Ann M. Kreager, 11/84 - ..... Secretary
Sheila M. Maher, 11/81 - ..... Secretary

CONSUMER PROTECTION

Steven M. St. Clair, 5/87- ..... Division Director
JD, Iowa, 1978
Richard L. Cleland, 4/79-3/91 ..... Division Director
JD, Iowa, 1978
William L. Brauch, 7/87- ..... Assistant Attorney General
JD, Iowa, 1987
Pamela D. Griebel, 4/91- ..... Assistant Attorney General
JD, Iowa, 1977
Raymond H. Johnson, 7/87- ..... Assistant Attorney General
JD, Iowa, 1986
Peter R. Kochenburger, 8/88- ..... Assistant Attorney General
JD, Harvard, 1986
Carmel A. Benton, 9/89- ..... Investigator
Marjorie A. Leeper, 7/82- ..... Investigator
Lise D. Ludwig, 5/85- ..... Investigator
Holly G. Merz, 10/88- ..... Investigator
Debra A Moore, 12/84- ..... Investigator
Norman Norland, 1/80- ..... Investigator
John H. Pederson, 8/91- ..... Investigator
Barbara A. White, 8/90- ..... Investigator
Janice M. Bloes, 3/78- ..... Legal Secretary
Katherine Gray, 3/84- ..... Legal Secretary
Sandra J. Kearney, 7/90- ..... Legal Secretary
Marilyn W. Rand, 10/69- ..... Legal Secretary
Judy A. Fast, 7/91- ..... Secretary/Receptionist
Edith M. Omlie, 6/89- ..... Secretary/Receptionist

CORRECTIONS

Layne M. Lindebak, 7/78- ..... Division Director
JD, Iowa, 1979
Suzie Berregaard Thomas, 7/87- ..... Assistant Attorney General
JD, Drake, 1987
Kristin W. Ensign, 10/88- ..... Assistant Attorney General
JD, Drake, 1983
Robert J. Glaser, 7/86- ..... Assistant Attorney General
JD, Creighton, 1978
William A. Hill, 8/90- ..... Assistant Attorney General
JD, Drake, 1989

Robin A. Humphrey, 8/90- ..... Assistant Attorney General
JD, Drake, 1985
Kathleen A. Pitts, 5/87- ..... Legal Secretary

CRIME VICTIM ASSISTANCE

Martha J. Anderson ..... Program Director
Kelly J. Brodie, 7/89- ..... Deputy Director
Jacqueline M. McCann, 5/87-1/91 ..... Program Planner
Virginia W. Beane, 6/89- ..... Program Planner
Robin Ahnen-Cacciatore, 2/91- ..... Investigator
Alison E. Sotak, 7/92- ..... Investigator
Stephen E. Switzer, 12/89- ..... Investigator
Ruth C. Walker, 2/79- ..... Investigator
Clarence J. Weihs, 1/79-2/84, 6/89-4/91 ..... Investigator
Melissa Miller, 1/88- ..... Legal Secretary

CRIMINAL APPEALS

Ann E. Brenden, 3/85- ..... Division Director
JD, Drake, 1981
Amy M. Anderson, 7/88- ..... Assistant Attorney General
JD, Iowa, 1988
Richard J. Bennett, 6/86- ..... Assistant Attorney General
JD, Iowa, 1978
Martha E. Boesen, 7/91- ..... Assistant Attorney General
JD, Notre Dame, 1991
Bridget A. Chambers, 2/90- ..... Assistant Attorney General
JD, Iowa, 1985
Thomas G. Fisher, 4/91- ..... Assistant Attorney General
JD, Iowa, 1986
Julie A. Halligan-Brown, 7/87- ..... Assistant Attorney General
JD, Iowa, 1987
Bruce Kempkes, 9/86-11/92 ..... Assistant Attorney General
JD, Iowa, 1980
Thomas D. McGrane, 6/71- ..... Assistant Attorney General
JD, Iowa, 1971
Sheryl A. Soich, 2/88- ..... Assistant Attorney General
JD, Drake, 1987
Thomas S. Tauber, 7/89- ..... Assistant Attorney General
JD, Drake, 1989
Mark J. Zbieroski, 3/87-6/91 ..... Assistant Attorney General
JD, Drake, 1986
Christy J Fisher, 1/67- ..... Legal Secretary
Janet L. Fitzwater, 10/89-10/91 ..... Legal Secretary
Cynthia L. Jacobe, 8/82- ..... Legal Secretary
Shonna K. Davis, 5/81- ..... Legal Secretary
Grace Armstrong, 7/89- ..... Secretary/Receptionist

ENVIRONMENTAL LAW

David R. Sheridan, 5/87- ..... Division Director
JD, Iowa, 1978
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JD, Drake, 1980
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JD, Drake, 1982
Michael H. Smith, 9/84- ..... Assistant Attorney General
JD, Iowa, 1977
Michael P. Valde, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Richard C. Heathcote, 9/89- ..... Investigator
Ruth Manning, 9/89- ..... Legal Secretary
Cathleen M. White, 2/89- ..... Legal Secretary

FARM

Timothy D. Benton, 7/77- ..... Division Director
JD, Iowa, 1977
Karen B. Doland, 7/90- ..... Assistant Attorney General
JD, Iowa, 1989
Lynnette A. Donner, 10/86- ..... Assistant Attorney General
JD, Drake, 1984
Stephen H. Moline, 6/86-5/89;7/90- ..... Assistant Attorney General
JD, Iowa, 1986
Stephen E. Reno, 7/89- ..... Assistant Attorney General
JD, Drake, 1981
Harry E. Crist, 7/85- ..... Investigator
Charles G. Rutenbeck, 12/74-7/91 ..... Investigator
Beverly A. Conrey, 4/85-6/91 ..... Legal Secretary
Ronda K. Tucker, 3/91- ..... Legal Secretary

LICENSING AND ADMINISTRATIVE LAW

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JD, Iowa, 1978
Richard R. Autry, 9/86- ..... Assistant Attorney General
JD, Drake, 1986
Sherie Barnett, 7/83- ..... Assistant Attorney General
JD, Drake, 1981
Teresa Baustian, 4/81- ..... Assistant Attorney General
JD, Iowa, 1979
Ann M. Brick, 3/86-5/91 ..... Assistant Attorney General
JD, Loyola (Chicago), 1975
Grant K. Dugdale, 5/91- ..... Assistant Attorney General
JD, Iowa, 1987
Maureen McGuire, 7/83- ..... Assistant Attorney General
JD, Iowa, 1983

Chris T. Odell, 7/90- ..... Assistant Attorney General
JD, Gonzaga, 1978
Christie J. Scase, 7/85- ..... Assistant Attorney General
JD, Drake, 1985
Rose A. Vasquez, 9/85- ..... Assistant Attorney General
JD, Drake, 1985
Lynn M. Walding, 7/81- ..... Assistant Attorney General
MA, JD, Iowa, 1981
Theresa O. Weeg, 10/81- ..... Assistant Attorney General
JD, Iowa, 1981
Roxanna Dales, 9/89 - ..... Legal Secretary
Lauren Marriott, 8/84 - ..... Legal Secretary

PROSECUTING ATTORNEYS TRAINING COUNCIL

Donald R. Mason, 9/80-9/92 ..... Executive Director, Training Coord
JD, Iowa, 1976
Douglas E. Marek, 8/89- ..... Assistant Attorney General
JD, Drake, 1984
Kevin B. Struve, 7/86- ..... Assistant Attorney General
JD, Iowa, 1979
Edith A. Westfall, 4/92- ..... Assistant Attorney General
JD, Creighton, 1978
Diana Essy-Emehiser, 10/90-8/92 ..... Data Processing Specialist
Ann M. Clary, 1/88- ..... Legal Secretary
Jeanne Lightly, 2/92-3/92 ..... Legal Secretary
Carol H. Litke, 5/92- ..... Legal Secretary
Karen M. Snater, 11/91- ..... Legal Secretary

REGENTS AND HUMAN SERVICES

John M. Parmeter, 11/84- ..... Division Director
JD, Drake, 1982
Kathryn J. Delafield, 3/91- ..... Assistant Attorney General
JD, Iowa, 1982
Jean L. Dunkle, 10/75-3/91 ..... Assistant Attorney General
JD, Iowa, 1975
Barbara E. Galloway, 3/91- ..... Assistant Attorney General
JD, Iowa, 1976
Christina F. Hansen, 3/91- ..... Assistant Attorney General
JD, Drake, 1987
Daniel W. Hart, 7/85- ..... Assistant Attorney General
JD, Iowa, 1983
Mark A. Haverkamp, 6/78- ..... Assistant Attorney General
JD, Creighton, 1976

Patricia M. Hemphill, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Debora L. Hewitt, 12/92- ..... Assistant Attorney General
JD, Drake, 1991
Robert R. Huibregtse, 6/75- ..... Assistant Attorney General
LLB, Drake, 1963
Dawn E. Mastalir, 12/92- ..... Assistant Attorney General
JD, Iowa, 1991
E. Dean Metz, 5/78-8/92 .... Assistant Attorney General LLB, Drake, 1955
Kathrine Miller-Todd, 1/85- ..... Assistant Attorney General
JD, Wake Forest, 1974
Michael J. Parker, 7/91- ..... Assistant Attorney General
JD, Drake, 1989
Charles K. Phillips, 8/84- ..... Assistant Attorney General
JD, Columbia (NY), 1982
M. Elise Pippin, 3/91-10/91 ..... Assistant Attorney General
JD, Louisville, 1980
Richard Ee Ramsay, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Stephen C. Robinson, 8/73- ..... Assistant Attorney General
LLB, Drake, 1962
Beth Aa Scheetz, 12/91- ..... Assistant Attorney General
JD, Drake, 1990
Judy A. Sheirbon, 7/89- ..... Assistant Attorney General
JD, Iowa, 1986
Kathy S. Skinner, 7/87-2/92 ..... Assistant Attorney General
JD, Drake, 1987
Mary K. Wickman, 8/89- ..... Assistant Attorney General
JD, Iowa, 1986
Steven K. Young, 7/91- ..... Assistant Attorney General
JD, Drake, 1981
Michelle Haines, 11/89-11/91 ..... Legal Secretary
Lori E. Kern, 11/91- ..... Legal Secretary
Sharon R. O'Steen, 8/89- ..... Legal Secretary

REVENUE

Harry M Griger, 1/67-8/71; 12/71- ..... Division Director
JD, Iowa, 1966
Lucille M. Hardy, 5/86- ..... Assistant Attorney General
JD, Iowa, 1985
Gerald A. Kuehn, 9/71- ..... Assistant Attorney General
JD, Drake, 1967
Valencia V. McCown, 6/83- ..... Assistant Attorney General
JD, Iowa, 1983
Marcia E. Mason, 7/82- ..... Assistant Attorney General
JD, Iowa, 1982
James D. Miller, 12/79-4/82;10/86- ..... Assistant Attorney General
JD, Drake, 1977
Rebecca A. Griglione, 3/87-8/87; 1/93- ..... Legal Secretary
Colleen Alexander, 1/92- ..... Legal Secretary
Connie M. Larson, 6/89- ..... Legal Secretary

Elyse M. Smith, 7/90-12/91 ..... Legal Secretary

TORT CLAIMS

Craig A. Kelinson, 12/86- ..... Division Director
JD, Iowa, 1976
James F. Christenson, 7/90- ..... Assistant Attorney General
JD, Iowa, 1990
Greg H. Knoploh, 5/87- ..... Assistant Attorney General
JD, Iowa, 1978
Bradley Knott, 2/91-3/92 ..... Assistant Attorney General
JD, Catholic University, 1990
Charles S. Lavorato, 9/83- ..... Assistant Attorney General
JD, Drake, 1975
Joanne L. Moeller, 8/84- ..... Assistant Attorney General
JD, Iowa, 1984
Shirley A. Steffe, 9/79- ..... Assistant Attorney General
JD, Iowa, 1979
Robert D. Wilson, 12/86- ..... Assistant Attorney General
JD, Iowa, 1981
Connie D. Hadaway, 9/89- ..... Investigator
Karen M. Likens, 8/77- ..... Investigator
David H. Morse, 3/78- ..... Investigator
Cathleen L. Rimathe, 8/78- ..... Investigator
Marcia A. Jacobs, 8/82- ..... Legal Secretary
Sharon Quint, 11/91-3/92 ..... Legal Secretary
Mary L. Robertson, 3/92- ..... Legal Secretary
Mary L. Sebben, 4/91- ..... Legal Secretary
Lorell Squiers, 9/87- ..... Legal Secretary

TRANSPORTATION

David A. Ferree, 3/84- ..... Division Director
JD, Iowa, 1979
Kerry K. Anderson, 6/91- ..... Assistant Attorney General
JD, Drake, 1982
John W. Baty, 9/72- ..... Assistant Attorney General
JD, Drake, 1967
Robert P. Ewald, 2/81- ..... Assistant Attorney General
JD, Washburn, 1980
Robin Formaker, 4/84- ..... Assistant Attorney General
JD, Iowa, 1979
Noel C. Hindt, 7/89- ..... Assistant Attorney General
JD, Iowa, 1983
Mark Hunacek, 7/82- ..... Assistant Attorney General
JD, Drake, 1981
Ardeth T. Metier, 7/86-6/91- ..... Assistant Attorney General
JD, Iowa, 1951
Richard E. Mull, 7/78- ..... Assistant Attorney General
JD, Iowa, 1977
Carolyn J. Olson, 8/87- ..... Assistant Attorney General
JD, Drake, 1984
Carmen C. Mills, 7/82-1/86; 1/87 ..... Paralegal

Michael J Raab, 1/85- ..... Paralegal
Davette D Smith, 8/86-8/91 ..... Paralegal
James M. Strohman, 2/88- ..... Paralegal

UNDERGROUND STORAGE TANK

Dean A. Lerner, 2/83- ..... Assistant Attorney General
JD, Drake, 1981
Robert C. Galbraith, 4/91- ..... Assistant Attorney General
JD, Minnesota, 1975
Chester J. Culver, 1/91- ..... Investigator

FEBRUARY 1991

February 7, 1991

SCHOOLS: Merged Area Schools; Iowa Communications Network (ICN); Private Colleges and Universities; Iowa Code §§ 18.133; 18.134; 303.77 (1991). The responsibility for site selection for the ICN's educational origination classroom sites in each area's county belongs to the merged area school. Access to the network on an equal basis offered to public and private agencies under section 18.136(8) means that private agencies shall be able to use the network on an equal basis with public agencies as long as the private agency contributes an amount toward the merged area's match requirement proportionate to the private agency's share of use of the network after it pays 100% of the cost of the connection between the private agency and the county origination site. (Brick to Carpenter, 2-7-91) #91-2-1(L)

February 18,1991

TAXATION: Non-confidential status of tax protests, including relevant attachments; non-confidential status of contested case record. Iowa Code §§ 17A.12; 17A.23; 22.1; 22.2; 422.20 and 422.72 (1989). Protests filed pursuant to 701 Iowa Admin. Code § 7.8, including all relevant attached documents, are open to inspection and copying by the public from the date filed subject only to the limitations found in § 17A.3(1)(d) (Hardy to Bair, Director of Revenue and Finance, 2-18-91) #91-2-2

Gerald Bair, Director, Iowa Department of Revenue and Finance: You have requested an opinion of the Attorney General concerning the right of the public, under Iowa Code chapters 22 and 17A (1989), to inspect tax protests filed by Iowa taxpayers pursuant to 701 Iowa Admin. Code § 7.8. You have posed three specific questions in this regard which we are responding to separately as follows:

1. Your first question is based on the following detailed factual scenario and assumptions as set forth in your request:

> In response to an assessment issued by the Department, or a denial of a refund claim, a taxpayer files a protest objecting to some or all of the assessed taxes or the full or partial denial of the refund claim. In accordance with rule 701-7.8, (17A) IAC . . . the taxpayer sets forth the information required by the rule. This includes the name of the taxpayer, the type of tax, the tax periods involved, and a brief detailed statement of why the tax should not be owing. Please assume that the taxpayer has not filed a request under rule 701-7.9 (17A) IAC to delete any of the identifying details contained in the protest. In addition to the information required to be included in the protest, the taxpayer sometimes voluntarily attaches to the protest additional documentation which is not expressly required by the rule. Examples of this type of information supplied as an integral part of the protest are: copies of the assessment notice, copies of complete tax returns or tax return schedules, schedules setting forth financial information about the taxpayer, and occasionally copies of the auditor's report. Assume for the purposes of your Opinion,

> that the information, on its face, bears some reasonable relationship to the issues presented in the protest and was attached by the taxpayer in support of the protest. Assume further that no distress warrants have been issued nor liens filed of public record concerning this assessment.
>
> Finally, assume that a member of the Iowa public, a newspaper reporter, desires to inspect the protest described above.

Based on the above, you ask whether the protest, both with and without the attachments, is open to inspection by the public. This question requires statutory construction and harmonization, if possible, of several interrelated code provisions.

The general public record inspection provision is found at Iowa Code § 22.2(1) (1989) and states, in relevant part, that "Every person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein. . . ." A "public record" is defined in § 22.1, in pertinent part, as "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state . . . or any branch, department, ..." Clearly, protests which are filed with the Iowa Department of Revenue and Finance (hereinafter referred to as the "Department") and which are, thereafter, maintained in the Department's records (including all attachments thereto) are public records within the plain broad language of section 22.1. *City of Dubuque v. Dubuque Racing Ass'n., Ltd.* 420 N.W.2d 450, 452 (Iowa 1988). Thus, as a broad general proposition, public access to those documents would be required pursuant to section 22.2 absent some statutory provision to the contrary.

In the case of Iowa tax returns, return information and information obtained in a tax investigation, Iowa Code §§ 422.20 and 422.72 (1989) do provide limited exceptions to the statutory provisions requiring public access. Section 422.20(1), which pertains only to the Iowa income tax, states:

> It shall be unlawful for any present or former officer or employee of the state to divulge or to make known in any manner whatever *not provided by law* to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law*. . . .

(Emphasis added). Further, § 422.72(1), which pertains to Iowa income, sales, use and franchise taxes, states:

> It is unlawful for the director, or any person having an administrative duty under this chapter, or any present or former officer or other employee of the state authorized by the director to examine returns, to divulge in any manner whatever, the business affairs, operations or information obtained by an investigation under this chapter of records and equipment

> of any person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy of a return or any book containing any abstract or particulars thereof to be seen or examined by any person *except as provided by law. . . . This subsection prevails over any general law of this state relating to public records.*

(Emphasis added)

It is important to recognize at this point that disclosure of the documents and information enumerated in the above-quoted provisions is not prohibited in every situation. Confidentiality does not apply when disclosure is "provided by law." In this regard, the answer to your question lies in the statutory construction of the above-quoted provisions in §§ 422.20 and 422.72 in conjunction with the applicable contested case open hearing provisions found in Iowa Code ch. 17A (1989). We note that, in construing all statutes governing the examination of public records, disclosure of the records "is favored over nondisclosure, and exemptions from disclosure are to be strictly construed and granted sparingly." *Board of Directors of Davenport Community School District v. Quad City Times*, 382 N.W.2d 80, 82 (Iowa 1986).

In 1976, this office issued a formal opinion in which it was concluded that, since protests are not tax "returns" under a narrow interpretation of §§ 422.20 and 422.72, tax

> protests must be disclosed in their entirety as public records pursuant to § 68A.2[1] unless such disclosure would constitute an unwarranted invasion of personal privacy or trade secrets. If the protest does contain such information, the department must delete identifying details.

1976 Op.Att'yGen. 569, 574. We are aware of no contrary court decisions directly on point or which indirectly denigrate the 1976 opinion. Further, the Iowa legislature is presumed to know how its statutes are being interpreted and the fact that the legislature has not directly negated that opinion by subsequent legislation strongly indicates acquiescence by the legislature. *Matter of Estate of Van Duzer*, 369 N.W.2d 407 (Iowa 1985). Thus, we cannot conclude that the 1976 opinion was clearly erroneous. We, therefore, reaffirm the 1976 opinion and conclude that the Iowa legislature has never intended tax protests to be confidential. Accordingly, the protests themselves are public records open to examination and copying from the date filed pursuant to § 22.2 subject only to the exceptions found in § 17A.3(1)(d).

As to any actual Iowa tax returns, investigative information, records, or any other documents which are relevant to and may be attached to a protest, answer,

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[1]The statutory provisions dealing with examination of public records were transferred, in Code 1985, from chapter 68A to chapter 22 of the Iowa Code. Subsequent citations in this opinion will be to the relevant sections of chapter 22 when appropriate.

or other pleading or which are otherwise entered into the record in a § 17A contested case tax proceeding, we conclude that public disclosure of these documents in the context of such proceedings once a protest is filed clearly falls within the "except as provided by law" provisions of §§ 422.20 and 422.72 as quoted above. Disclosure in that context is, therefore, not prohibited. It is, rather, mandated by the open hearing provisions of ch. 17A. The basis for this conclusion is that tax protests filed pursuant to 701 Iowa Admin. Code § 7.8 culminate in ch. 17A contested case proceedings and pursuant to § 17A.12, contested case proceedings and the record made before the hearing officer or administrative law judge in such hearings are required to be public. *Vander Zyl v. Iowa Professional Teaching Practices Commission*, 397 N.W.2d 751, 753 (Iowa 1986). Further, the "record" in a contested case includes all pleadings, evidence received or considered, and all other submissions. Iowa Code § 17A.12(6) (1989). The only applicable exception to the contested case open record rule which is found in ch. 17A itself is § 17A.3(1)(d) which provides that every agency shall:

> d. Make available for public inspection and index by name and subject all final orders, decisions and opinions:[2] *Provided that to the extent required to prevent a clearly unwarranted invasion of personal privacy or trade secrets, an agency shall delete identifying details* when it makes available for public inspection any final order, decision or opinion; however, in each case the justification for the deletion shall be explained fully in writing.

(Emphasis added). As applied to tax protest proceedings, requests for confidentiality pursuant to § 17A.3(1)(d) may be made at any time beginning with the filing of the protest. 701 Iowa Admin. Code §§ 7.1 and 7.9.

Finally, there exists one last independent statutory basis for our conclusions. The controlling language is found in § 17A.23 which states, in relevant part, that:

> If any other statute now in existence or hereinafter enacted diminishes any right conferred upon a person by this chapter or diminishes any requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.

According to the Iowa Supreme Court, § 17A.12 specifically gives members of the public access to contested case proceedings and the entire record in such proceedings. *Board of Directors of Davenport Community School District v. Quad City Times*, 382 N.W.2d at 83; *Vander Zyl v. Iowa Professional Teaching Practices Commission*, 397 N.W.2d at 753. Further, nowhere in §§ 422.20 and

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[2] It should be noted that although we conclude that the entire record in a tax protest contested case proceeding is to be made available for public inspection while held by the Department, subject to § 17A.3(1)(d), only final orders, decisions, and opinions need to be kept and indexed by name and subject matter, according to the plain language of § 17A3(1)(d).

422.72 is ch. 17A specifically mentioned. Therefore, even if we were to conclude that contested case proceedings and the records in such proceedings are not within the "except as provided by law" language of §§ 422.20 and 422.72, the resulting conflict between the § 17A.12 mandate of disclosure and the §§ 422.20 and 422.72 mandates of confidentiality would have to be resolved in favor of disclosure pursuant to § 17A.23.

For all of the above-stated reasons, we conclude that, while Iowa tax returns and information therefrom, investigative information, and certain other records or other documents relating to tax returns are to be held confidential in most circumstances pursuant to §§ 422.20 and 422.72, any such documents or information which specifically pertain to a dispute between the taxpayer and the Department and are attached to the protest or otherwise become part of the record in the contested case proceeding are public records and are open to public inspection and copying (§ 22.2) subject only to the exceptions found in § 17A.3(1)(d). Such right to public inspection and copying accrues to newspaper reporters by virtue of their status as members of the public.

2. Your second question is whether certain enumerated statutory changes in Iowa law which were enacted subsequent to the above-cited 1976 opinion alter the conclusion reached therein that protests are public records subject to public inspection pursuant to ch. 22. After careful review, we conclude that of the fifteen sections which you cited, the majority involve only nonsubstantive changes, language updates, additions and changes relating to disclosure to very specific persons (such as the Internal Revenue Service, other states, the legislative service bureau, and the state auditor), and, finally, penalty changes. These provisions clearly have no effect on the disclosable status of tax protests, attachments, or other documents as part of a contested case record. Three of the cited sections, however, do merit specific comment.

The amendment to § 68A.7 found in 1984 Iowa Acts, ch. 1185, § 6 states that certain documents will be held confidential including:

> Communications *not required* by law, rule, or procedure that are made to a government body or to any of its employees by identified persons outside of government, *to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination*. . . .

(Emphasis added). While it could be argued that tax protests are "communications not required by law, rule, or procedure that are made to a governmental body or any of its employees" under the broad interpretation given that statutory language by the Iowa Supreme Court in *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988), the Director would still be required to make a preliminary finding that persons filing tax protests would be discouraged from doing so if the protests and related documents and information were available for general public examination. Pursuant to § 22.10(2), the burden of going forward to demonstrate the rational

basis for this determination would be on the Director. Clearly, under the narrow interpretation rule for exemptions, this decision would have to be made either on a case-by-case basis or for very specific narrow classes of cases based on the unique facts presented to the Director in each request for confidentiality. Therefore, no blanket conclusion concerning the applicability of §22.7(18) as a matter of law to tax protests in general can be reached.

Finally, §§422.20 and 422.72 were amended in pertinent part, in 1987 Iowa Acts, ch. 199, §§6 and 9, by the addition of the following provision to each:

> 3. *Unless otherwise expressly permitted by* section 421.17, subsections 21, 22, 23, 25, and 29, sections 252B.9, 324.63, 421.19, 421.28, and 422.20, and this section, a tax return, return information, or investigative or audit information shall not be divulged to any person or entity, other than the taxpayer, the department, or internal revenue service for use in a matter unrelated to tax administration.
>
> This prohibition precludes persons or entities other than the taxpayer, the department, or the internal revenue service from obtaining such information from the department, and a subpoena, order, or process which requires the department to produce such information to a person or entity, other than the taxpayer, the department, or internal revenue service for use in a nontax proceeding is void.

(Emphasis added). We conclude for a number of reasons that sections 422.20(3) and 422.72(3) do not alter the mandate of public access to tax returns, return information, and investigative and audit information once a ch. 17A protest is filed in which those documents or information are relevant.

First, the above-emphasized language, "Unless otherwise expressly permitted by . . . this section . . . ," indicates that the new subsections in each statute were not intended to directly negate the duty of the Department found in §§422.20(1) and 422.72(1) to allow the public to inspect and copy the documents covered by those subsections when such public access is "provided by law." Thus, the language "except as provided by law" found in those subsections remains unchanged by the added provisions.

Further, reading both paragraphs of the new subsections together, since they are obviously in pari materia, it appears that the purpose of the second paragraph was simply to further explain and clearly delineate the breadth of confidentiality the legislature intended to create in the first paragraph. The only clear intent of the legislature, as set forth in the language of the second paragraph, was to insulate returns, return information, and investigative or audit information in the general files of the Department from any subpoenas, orders, or process for use in any *non-tax proceeding*, thus specifically overruling cases such as *State v. Schomaker*, 338 N.W.2d 874, 878 (Iowa 1983), a case in which an Iowa district court ordered the Department to produce the Defendant's tax returns for use against him by the county attorney in his own non-tax related criminal prosecution.

In addition, in *Schomaker*, the court's decision was based on the fact that "the Iowa sections do not contain an express provision prohibiting judicial divulgence." *Supra.* Sections 422.20(3) and 422.72(3) now provide that express provision prohibiting non-tax judicial divulgence. However, employing the *Schomaker* "express provision" test, we find no clear language in the new subsections which expressly states that the legislature also intended to prevent disclosure to the public once a *tax dispute* involving those documents and information arises between the Department and the taxpayer and a tax protest is filed.

Finally, to the extent the above-cited language could be read to prohibit public disclosure even after those documents are filed of record with a ch. 17A protest or thereafter as part of the record in a contested case proceeding, those provisions would be in direct conflict with the open record provisions of § 17A.12. As the above provisions do not specifically mention ch. 17A by name, any conflict must be resolved in favor of public access to the records under § 17A.23 as well as the rule of strict construction favoring disclosure whenever any ambiguities exist. Thus, we conclude that §§ 422.20(3) and 422.72(3) do not alter the requirement of public access to tax returns, return information, and investigative and audit information once a ch. 17A protest is filed.

3. Your last question is: "If it is your Opinion that the filed protest is not open for public inspection, please state the procedural juncture in the administrative process at which the information contained in the protest would be come open to public inspection?"

Given our conclusions in section one (1) above that tax protests and attached documents are open to public inspection when filed, no further comment is necessary as to your last question.

In conclusion, it is the opinion of this office that tax protests filed pursuant to 701 Iowa Admin. Code § 7.8, including all relevant attached documents, are subject to inspection and copying by the public from the date filed subject only to the limitations found in § 17A.3(1)(d).

February 18, 1991

OPEN MEETINGS; SCHOOLS; Human Growth and Development Resource Committees. Iowa Code §§ 21.2(1), 279.50 (1991). A committee appointed by a board of directors of a school district pursuant to Iowa Code section 279.50 is not a governing body subject to chapter 21 pertaining to open meetings because such a committee possesses no more than advisory authority. In addition, Human Growth and Development Resource Committees do not advise the governor or general assembly and, therefore, are not subject to chapter 21 pursuant to Iowa Code section 21.2(e). (Brauch to Lepley, Director of Education, 2-18-91), 91-2-3(L)

February 18, 1991

SCHOOLS: Calculation of special education support services district cost per pupil. Iowa Code §257.10(4) (1991). 1990 Iowa Acts (73 G.A.) ch. 1272, §44 (codified as Iowa Code §257.10(4) (1991)), is reasonably construed by the department of education as setting the special education support services district cost per pupil for AEA 14 for the 1991-92 budget year at $147. Special education allowable growth, as calculated by the department of management, is to be added to the $147 base cost per pupil for the 1992-93 budget year. (Scase to Boswell, State Senator, and Beaman and Daggett, State Representatives, 2-18-91) #91-2-4(L).

MARCH 1991

March 14, 1991

ELECTIONS; MUNICIPALITIES: Political Signs. Iowa Const. art. III, §38A; Iowa Code ch. 306C; Iowa Code §§306C.10(20), 306C.22, 364.2(2) and 364.2(3); 1975 Iowa Acts, ch. 81, §144. A municipal ordinance restricting the size of election period political signs, as defined in section 306C.10(20), in residential areas based on the street frontage would be invalid as irreconcilable with the laws of the General Assembly as provided in section 306C.22. A municipality, however, may restrict the placement of any political sign if the sign is a traffic hazard or a detriment to traffic safety. (Walding to Rod Halvorson, State Representative, 3-14-91) #91-3-1(L)

March 27, 1991

APPROPRIATIONS; STATE OFFICERS AND DEPARTMENTS: Transfer of Special Funds to General Fund. Iowa Constitution, Art. III, §16; Art. VII, §7; Art. VII, §8; Iowa Code §§8.2(4), 200.9, 206.12, 307B.23, 312.2(13), 444.21, 476.10, 505.7, 524.207, 533.67, 546.10(6); 1991 Iowa Acts, ch. 260, §§1101, 1222 (H,F. 173). House File 173 provides for the transfer of 28 special funds to the State General Fund effective June 30, 1991. The Governor asserted item veto authority over language in section 1101, which required that the transferred monies be used only for the purposes for which the special funds were created. This item veto would likely be found to be beyond the Governor's item veto authority, as it seeks to void a condition on the transfer of funds.

Iowa Constitution, Article VII, section 7, requiring laws imposing taxes to state the purpose, applies only to property taxes. The legislature may not transfer special funds to the General Fund in violation of a specific constitutional provision such as the Road Use Tax Amendment. If bonds had been issued in reliance on the Special Railroad Facility Fund provisions of Iowa Code section 307B.23, the legislature could not transfer those funds in violation of a binding contractual obligation of the State. Even if the item veto were valid, the transfer language should not be read to repeal by implication the statutes limiting the expenditure of funds collected for seven of the transferred funds. Absent constitutional or statutory restriction,

special funds are subject to legislative power to transfer the funds and to change their intended use.

State agencies may spend federal funds only pursuant to state legislative authority and in accordance with any federal conditions for the receipt of the funds. If legislation eliminates the State's ability to comply with federal grant conditions, the State would lose the federal funds involved. Arguably, the legislature could not transfer funds in violation of current valid federal grant agreements and to that extent a court would likely void a transfer. (Brick and Krogmeier to Black, Boswell and Cochran, 3-27-91) #91-3-2

Dennis Black, State Representative, Lenoard L. Boswell, State Senator, Dale M. Cochran, Secretary of Agriculture: You have requested an opinion of the Attorney General concerning certain aspects of House File 173 approved by the Governor on February 15, 1991. House File 173 is entitled: "An Act Relating to Reductions in Appropriations Made For the Fiscal Year Ending June 30, 1991, to Departments and Agencies of State Government and to Other Public Purposes, a Supplemental Appropriation, and *Transferring Monies From the Iowa Plan Fund and Other Funds to the General Fund of the State...* (emphasis added). Since your separate opinion requests relate to this same legislation, we answer them in this consolidated opinion.

Section 1101 of Division XI provides that the "cash balances remaining on June 30, 1991, that are not needed to pay expenses of the fiscal year ending June 30, 1991, in the following designated accounts shall revert or be transferred to the General Fund of the State." Thereafter, 28 separate funds are listed by name and statutory reference.[3] Unnumbered paragraph 4 of section 1101 provides that "moneys transferred pursuant to this section from the funds and accounts designated in this section shall only be used for the purposes for which the moneys were collected." This section was vetoed by Governor Branstad who stated: "This language is overly restrictive as it relates to the cash balances being transferred, although it is very appropriate for fiscal year 1992 and succeeding years. This item would also reduce our efforts to move toward generally accepted accounting principles." This item veto, if valid, would remove this restriction on the use of funds transferred to the General Fund.

Our office has been asked to address the following: (1) Does the transfer of fees to purposes other than those for which they were originally collected violate Article VII, section 7, of the Iowa Constitution? (2) Where fees are collected by the State pursuant to a statute designating a specific purpose for which the sums so collected may be spent, may the legislature thereafter apply a portion of the sums so collected to another purpose? (3) Does the transfer of any of the 28 funds contained within House File 173 endanger the receipt or use of federal funds presently received for the purposes for which the funds were established?

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[3]The original committee bill provided for 33 separate funds. Among those dropped from the final version of the bill is the Brucellosis and Tuberculosis Eradication Fund created in aa 165.18, which is one of the funds involved in Secretary Cochran's opinion request.

ITEM VETO

As a preliminary matter, we address the item veto of unnumbered paragraph four of section 1101 by Governor Branstad. The language in that unnumbered paragraph four is as follows:

> Moneys transferred pursuant to this section from the funds and accounts designated in this section shall only be used for the purposes for which the moneys were collected.

None of the requestors has asked our opinion on the validity of this item veto. However, the validity of the item veto affects the purpose for which the transferred funds may be used and thereby impacts our analysis of the transfers of funds.

The Iowa Supreme Court has ruled that a condition on an appropriation cannot be item vetoed without veto of the underlying appropriation itself. *Colton v. Branstad*, 372 N.W.2d 184, 189 (Iowa 1985); *Welden v. Ray*, 229 N.W.2d 706, 713 (Iowa 1975). A "condition," in turn, restricts or qualifies expenditure of appropriated funds. *Colton v. Branstad*, 372 N.W.2d at 189; *Welden v. Ray*, 229 N.W.2d at 710. A prohibition on the transfer of surplus funds pursuant to section 8.39 and direction to revert unencumbered or unobligated balances has been determined by the Court to constitute a "condition" under this functional definition. *Rush v. Ray*, 362 N.W.2d 479, 482 (Iowa 1985). Addressing the item veto of language which prohibited the transfer of funds between departments, the Court observed that an item veto of the prohibition on transfers had "the effect" of making "money from the treasury available for purposes not authorized by the legislation as it was originally written." The vetoed language, therefore, was a condition not subject to item veto. Id. at 482-83. Our opinions have taken the same position on this issue. See 1980 Op.Att'yGen. 527, 530; 1982 Op.Att'yGen. 520 (#82-9-17(L)).

Applying these precedents to the language item vetoed in House File 173, it appears that the language constitutes a condition not subject to item veto. The vetoed language restricts the purpose for which the funds can be used by limiting the purpose to the use for which the funds were originally collected. This item veto, like the item veto in *Rush*, has the "effect" of making "money from the treasury available for purposes not authorized by the legislation as it was originally written."

A related issue is pending in *Welsh v. Branstad*, 470 N.W.2d 644 (Iowa 1991), a case involving the constitutionality of item vetoes which was argued in the Iowa Supreme Court last month. Definitive advice on the veto question should be sought following the issuance of that decision. We will therefore turn to the issues posed in your opinion requests.

ARTICLE VII, SECTION 7

Representative Black's opinion request specifically asks whether Article VII, section 7, of the Iowa Constitution prevents the use of taxes for purposes other than those specified in the taxing legislation. Article VII, section 7, provides

that "[e]very law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it shall be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." This provision has long been held to apply only to property taxes. *Lee Enterprises, Inc. v. Iowa State Tax Comm.*, 162 N.W.2d 730, 739 (Iowa 1968); *Solberg v. Davenport*, 211 Iowa 612, 623, 232 N.W. 477, 483 (1930); *but see Kartridg Pak Co. v. Dept. of Revenue*, 362 N.W.2d 557, 560 (Iowa 1985) (assumed without deciding that a use tax statute met the requirements of Art. VII, §7). Therefore, it is not applicable to House File 173.

LEGISLATIVE AUTHORITY TO TRANSFER FUNDS

Iowa Code section 444.21 (1991) establishes and defines the "General Fund" as follows:

> The amount derived from taxes, levied for state general revenue purposes, and all other sources which are available for appropriations for general state purposes, and all other money in the state treasury which is not by law otherwise segregated shall be established as a General Fund of this state.

In contrast a "special fund" is defined to include "any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no General Fund appropriation is made by the state." Iowa Code §8.2(4) (1991).Special funds are created by constitution (*see, e.g.*, Article IX, sections 2, 3 and 4: and the 1942 amendment to Article VII, section 8 from which the authority for section 312.2(13) is derived). Other special funds are created by statute. No Iowa case was found which discusses the ability of the legislature to transfer portions of statutorily created special funds into the General Fund of the State.[4] However, a Michigan case discussing a similar situation lends some guidance. *Michigan Sheriffs' Association v. Michigan Department of Treasury*, 255 N.W.2d 666 (Mich. 1977), quotes two paragraphs from Corpus Juris Secundum which the court found directly on point:

> *Disposition of special funds.* Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose, or transferred from such authorized fund to any other fund.
>
> The legislature has power, however, to transfer to another fund or appropriate to another purpose any surplus which may remain in a special fund after the accomplishment of the purpose for which it was established, and, in general, whether or not the purpose for which a special fund was created has been accomplished, such fund may be diverted by statute to another and different purpose as long as it remains subject to legislative

[4] Two Attorney General Opinions discuss restrictions on the use of special funds which prevent reimbursement of the General Fund for other costs by the Special Fund. 1974 Op.Att'yGen. 565; 1974 Op.Att'yGen. 107.

> control; but the legislature cannot authorize the diversion of a special fund where such diversion would conflict with a provision of the constitution controlling such fund, or would impair the obligation of a contract or constitute a breach of trust, although a surplus in a trust fund may be diverted therefrom. *Citing* 82 C.J.S. *States* § 158, pp. 1199-1200.

The Michigan court also cites with approval *Department of Public Welfare v. Haas*, 15 Ill.2d 204, 154 N.E.2d 265 (1958), where the Illinois Supreme Court stated:

> The fact that the legislature may provide that amounts, when collected, shall be placed in a certain fund does not ordinarily preclude a later General Assembly from ordering it paid into another fund or from abolishing the fund altogether.

255 N.W.2d at 671.

The court then found that the fund in question was not so "special" or "restricted" that the legislature was precluded from appropriating some of its moneys to another purpose. The court specifically stated that the fund in question was not earmarked by the addition of words such as "and for no other purpose" which the legislature had used in creating other funds. The court then stated that "in our opinion a fund is not made 'special' merely by designating a purpose for which it may be expended. A fund becomes 'special' and immune from diversion by a subsequent legislative transfer only when the diversion would conflict with a constitutional provision or impair a contractual relationship such as arises where the state holds trust or retirement funds, holds funds obtained to repay a specific indebtedness such as revenue bonds, or holds funds *obtained for a specific and no other purpose.*" 255 N.W.2d at 672. (emphasis added).

We believe the criteria developed by the court in *Michigan Sheriff's Association* provide an appropriate test for the transferability of the funds at issue in House File 173. Therefore, we will examine each transfer in light of the guidelines enunciated in that case. The criteria are: (1) Would the transfer conflict with a constitutional provision? (2) Would the transfer impair a contractual relationship such as where the funds are held in trust to repay revenue bonds or retirement accounts? or (3) Is there statutory language that specifies that the funds are to be used for a specific and no other purpose? *Id.*

The first criterion, the existence of a constitutional limitation, applies to prevent the transfer of the Motor Vehicle Fraud Fund established in section 312.2(13). The pertinent constitutional provision is section 8, Article VII, Constitution of Iowa, as follows:

> All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively

> for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.

Section 312.2(13) creates a special fund "from the Road Use Tax Fund . . . for motor vehicle fraud law enforcement and prosecution purposes including, but not limited to, the enforcement of state and federal odometer laws." *Id.* As such, the allocation of revenues resulting from this fund must be used for some highway related purpose.[5] Further, the commingling of this fund with the General Fund has previously been determined to be unconstitutional. *See Frost v. State*, 172 N.W.2d 575, 586 (Iowa 1969). Thus, based upon *Frost* and our previous opinions concerning the Road Use Tax Fund, the fund created in section 312.2(13) cannot be transferred to the General Fund.

The second of the criteria discussed as part of the "transferability test" in *Michigan Sheriff's Assoc.* is whether the transfer would impair a contractual relationship such as where the funds are held in trust to repay revenue bonds or retirement accounts.

This criterion could well apply to the fund created by section 307B.23 referred to as the Special Railroad Facility Fund. This fund is established to repay any bond obligations incurred by the Iowa railway finance authority created by Chapter 307B. These funds "shall not be considered as part of the General Fund of the state, are not subject to appropriation for any other purpose by the General Assembly, and in determining a General Fund balance shall not be included in the General Fund of the state. . ." § 307B.23. Section 1222 amends section 307B.23 by adding new subsection three which limits the use of these funds for the purposes of section 307B.23(2).[6] However, if bonds have been issued under the prior statutory language and if the special fund language were a condition of issuance, then transfer of the fund may constitute a breach of those conditions even with the restrictions on use of the funds. We have been advised that no bonds or other financial obligations have been issued in reliance on the previous language. If true, we would conclude that the Special Railroad Facility Fund created by section 307B.23 can be transferred under House File 173.

The third criterion set forth in *Michigan Sheriff's Assoc.* can be found regarding 7 of the 28 funds. The statutes creating these seven funds contain

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[5] For a more complete discussion of the Road Use Tax Fund, see 1970 Op.Att'yGen. 500; 1988 Op.Att'yGen. 82; and 1988 Op.Att'yGen. 92.

[6] Section 1222 of House File 173 states: Notwithstanding the provisions of section 307B.7, subsection 14, and section 307B.26 and other provisions of law directing that moneys be deposited into the special railroad facility fund and directing that moneys in the fund be appropriated for purposes of the authority, for the fiscal period beginning on July 1, 1991, and ending June 30, 1993, all moneys directed to be deposited in the fund shall be deposited into the General Fund of the state and during that period moneys received under subsection 2 are appropriated to the authority for purposes of subsection 2 and other moneys appropriated to the authority may be used for purposes of this section.

language indicating legislative restriction on the use of said funds. Four of the funds, the Utilities Trust Fund created in section 476.10, the Insurance Revolving Fund created in section 505.7, the Banking Revolving Fund created in section 524.207 and the Credit Union Revolving Fund created in section 533.67, all contain identical restrictive language: "No part of the funds held by the treasurer of state for the account of the superintendent shall be transferred to the General Fund of the state or any other fund . . .."[7] This language appears to limit the use of these "special funds" to the purposes to which they are committed and to no other. House File 173 contains no language that repeals these restrictions.

The other three funds each have individual restrictions. The Professional Licensing Revolving Fund created in section 546.10(6) unequivocally states that "fees collected by the division shall not be transferred to the General Fund." The Pesticide Fund created in section 206.12 states in subsection 3 that "Fifty dollars of each fee collected shall be deposited in the treasury to the credit of the Pesticide Fund *to be used only* for the purpose of enforcing the provisions of this chapter and the remainder of each fee collected shall be placed in the agriculture management account of the Ground Water Protection Fund." (emphasis added). And finally, the Fertilizer Fund created in section 200.9 states that fees (except fees collected for deposit in the Ground Water Protection Fund) "shall be deposited in the treasury to the credit of the Fertilizer Fund *to be used only* by the department for the purpose of inspection, sampling, analysis, preparation, and publishing of reports and other expenses necessary for administration of this chapter." (emphasis added). Again, House File 173 contains no language repealing any of these restrictions.

We believe a court would find that the restrictive statutory language appearing in the seven statutues just discussed prohibits transfer of the moneys collected subject to such restrictions under the third criterion of the *Michigan Sheriff's Assoc.* case.[8]

It appears then that the transfer of these seven fund balances mandated in section 1101 of House File 173 clearly contradicts the special restrictions listed above. House File 173 does not explicitly repeal the special restrictions. Does House File 173 then implicitly repeal these restrictions? To do so would be to repeal the restrictions of those seven statutes in spite of expressed legislative intent in the existing statutes to the contrary. We do not believe a court would uphold such a result.

Courts have created a presumption against the repeal of prior laws by implication. *Lemon v. City of Muscatine*, 272 N.W.2d 429 (Iowa 1978). This

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[7]There is an exception for Banking and Credit Union Funds which allow transfers to the General Fund in the amounts of $160,000 and $30,000 respectively per fiscal year.

[8]The Utilities Trust Fund created in § 476.10; the Insurance Revolving Fund created in § 505.7; the Banking Revolving Fund created in § 524.207; the Credit Union Revolving Fund created in § 533.67; the Professional Licensing Revolving Fund created in § 546.10(6); the Pesticide Fund created in § 206.12; and the Fertilizer Fund created in § 200.9.

presumption is based upon the doctrine that the legislature is presumed to intend to achieve a consistent body of law and that all laws are to have some effect. Accordingly, subsequent legislation is not presumed to repeal the existing law in the absence of expressed intent. *Board of Park Com'rs. v. Marshalltown*, 244 Iowa 844, 58 N.W.2d 394 (1953); *Grant v. Norris*, 249 Iowa 236, 85 N.W.2d 261 (1957); *Taschner v. Iowa Elec. Light & Power Co.*, 249 Iowa 673, 86 N.W.2d 915 (1957); *Town of Mechanicsville v. State Appeal Board*, 253 Iowa 517, 111 N.W.2d 317 (1961); *Iowa Power & Light Co. v. Iowa State Highway Commission*, 254 Iowa 534, 117 N.W.2d 425 (1962).

This is not to say that one legislature may bind a successor legislature. *Iowa-Nebraska Light & Power Co. v. City of Villisca*, 220 Iowa 238, 261 N.W. 423 (1935); *Talbott v. Ind. School Dist. of Des Moines*, 230 Iowa 949, 299 N.W. 556 (1941); *Graham v. Worthington*, 146 N.W.2d 626 (Iowa 1966). Indeed, the legislature has the power to permanently divert all future moneys collected under these seven statutes to the General Fund to be used for General Fund purposes. However, the present restrictions on the use of these funds indicate the legislative intention that these funds be collected and used "for no other purpose." *See Michigan Sheriff's Assoc., supra* at 672.

We are bound to attempt to reconcile the transfer of these seven funds attempted in House File 173 with the restrictive statutory language contained in the statutes creating each of these funds and providing for their restricted use. We attempt to give meaning to every statute and act of the legislature and to interpret them in a compatible manner. As there is no constitutional prohibition of such a transfer or commingling of funds, we conclude that the transfers into the General Fund may occur, but that the transfer does not affect the use of the funds in question. The funds that are dedicated for specific use must be spent for the purpose for which they are restricted in each of their individual statutes. The transfer to the General Fund can then only be considered to be an accounting transaction for purposes of including the balances in the General Fund. However, the funds must be used for the specific restricted purpose set forth in each of the seven statutes referred to above.

We have discovered no statutory or constitutional restriction which exists in regard to the remaining 19 funds transferred in House File 173. In the absence of such restriction on the use of the moneys collected in these funds, the balances in these 19 funds can be transferred to the General Fund on June 30, 1991.

Therefore, we conclude that there is a constitutional prohibition on the transfer of the Motor Vehicle Fraud Fund contained in Iowa Code section 312.2(13) into the General Fund. We conclude that there are seven special restrictions concerning the Utilities Trust Fund, Insurance Revolving Fund, Banking Revolving Fund, Credit Union Revolving Fund, Professional Licensing Revolving Fund, Pesticide Fund, and Fertilizer Fund which, while not prohibiting their transfer to the General Fund for accounting purposes, restricts the use of these funds for the specific purposes for which they are dedicated. The language in section 1222 of House File 173 restricts the use of the Special Railroad Facility Fund but allows it to be transferred to the General Fund.

As to the other 19 funds transferred in House File 173, there does not appear to be any restriction on their transfer to the General Fund.

TRANSFER OF FEDERAL FUNDS

Your third question asks whether there is any adverse impact on the receipt and use of federal funds if these funds are transferred as part of the other fund transfers.

The general rule is that if federal funds are received by state officers or agencies subject to the condition that they be used *only* for objects specified by federal statutes or regulations, the money is impressed with a trust and not subject to contrary appropriation by the legislature. *See Opinion of the Justices to the Senate*, 378 N.E.2d 433, 436 (Mass. 1978). Congress frequently uses its spending power to induce states to comply with its wishes as a condition for the receipt of federal funds. The state is then bound to those conditions if it wishes to spend the federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Thus, the state may not divert federal funds for use in a manner inconsistent with the valid conditions for receipt of those funds.

However, a state agency cannot agree to comply with federal conditions or spend federal moneys without statutory authority; even federal funds must be appropriated by the general assembly. 1967 Op.Att'yGen. 132. The state may choose not to comply with federal conditions for the receipt of funds, but the result is loss of the federal funds. Thus, if House File 173 prevents state agencies from using funds in accordance with federal grant requirements, this would likely result in loss of the federal funds

Whether House File 173 will do so cannot be determined on the face of the statute. Each state agency which has had federal grant money transferred under this bill should examine the federal conditions involved. It may be that some federal programs require that the moneys be kept in a separate account. In that case, House File 173 would likely violate that condition, and further legislation to correct the problem would be needed to prevent loss of the federal funds. If the federal conditions simply limit the use of the funds to a particular purpose, the State may not spend the funds in a manner inconsistent with those agreed conditions, despite passage of House File 173. To determine whether the State can still meet those federal conditions and spend the federal funds in light of House File 173 would require examination of the relevant statutory authority to enter into the grant and examination of any other legislation arguably appropriating the federal funds.

We would additionally note that the State may have entered into binding federal agreements which it may no longer elect to forego. If so, the argument would exist that this would void the transfer to the extent of current obligations under the authority of the Michigan case cited above.

If it has not done so already, we recommend that the legislature or the Department of Management require each affected agency to review any federal grants affected by the transfer and determine immediately if further legislation is necessary to permit the State's continued use of the federal funds.

CONCLUSION

House File 173 provides for the transfer of 28 special funds to the State General Fund effective June 30, 1991. The Governor asserted item veto authority over language in section 1101, which required that the transferred monies be used only for the purposes for which the special funds were created. This item veto would likely be found to be beyond the Governor's item veto authority as it seeks to void a condition on the transfer of funds.

Iowa Constitution, Art. VII, section 7, requiring laws imposing taxes to state the purpose, applies only to property taxes. The legislature may not transfer special funds to the General Fund in violation of a specific constitutional provision such as the Road Use Tax Amendment. If bonds had been issued in reliance on the Special Railroad Facility Fund provisions of Iowa Code section 307B.23, the legislature could not transfer those funds in violation of a binding contractual obligation of the State. Even if the item veto were valid, the transfer language should not be read to repeal by implication the statutes limiting the expenditure of funds collected for seven of the transferred funds. Absent constitutional or statutory restriction, special funds are subject to legislative power to transfer the funds and to change their intended use.

State agencies may spend federal funds only pursuant to state legislative authority and in accordance with any federal conditions for the receipt of the funds. If legislation eliminates the State's ability to comply with federal grant conditions, the State would lose the federal funds involved. Arguably, the legislature could not transfer funds in violation of current valid federal grant agreements and to that extent a court would likely void a transfer.

APRIL 1991

April 11, 1991

COLLECTIVE BARGAINING; STATE EMPLOYEES; APPROPRIATIONS: Iowa Code §§ 20.10, 20.17, 20.22. When a collective bargaining agreement with state employees is arrived at by negotiation or arbitration, the Governor has a statutory and contractual obligation to submit to the General Assembly a request for sufficient funds to implement that agreement. (Hunacek to Arnould and Hutchins, Speaker of the House and Senate Majority Leader, 4-11-91) #91-4-1

The Honorable Bob Arnould, Speaker of the House, and The Honorable Bill Hutchins, Senate Majority Leader: You have requested an opinion of the Attorney

General concerning the responsibility of the governor to implement binding arbitration between the State and its employees. You note in your request that several arbitrators have announced decisions in collective bargaining agreements between the State and various state employee unions, but the governor has not yet submitted a funding recommendation to the legislature. You then ask whether the governor is statutorily required to submit to the General Assembly a plan to fully fund an arbitrated or negotiated settlement between the State of Iowa and labor organizations representing state workers. For the reasons expressed below, we believe that the answer to your question is yes.

A.

Because your question involves consideration of Iowa Code chapter 20, the statute involving collective bargaining for public employees, we think it appropriate to begin our analysis by briefly reviewing the pertinent provisions of this statute.

Chapter 20 was enacted at a time when public employees in various states were disregarding prohibitions against strikes, thus causing disruptions in governmental services. *City of Des Moines v. Public Employment Relations Board*, 275 N.W.2d 753, 761 (Iowa 1979). This fact has led the Iowa Supreme Court to conclude that one of the primary purposes of the Act was to assure continued effective and orderly government operations. *Id.* The statute prohibits strikes by public employees, Iowa Code section 20.12, and replaces this "economic weapon" with a three-step statutory impasse procedure consisting of mediation, fact-finding, and binding arbitration. *City of Des Moines*, 275 N.W.2d at 756. These impasse procedures "are not the ends of the Act. Instead they are merely the means by which the ends, labor peace and resulting efficient delivery of government services, are to be achieved." *Id.* at 761. *See also* Iowa Code § 20.1 ("it is the public policy of the state to promote harmonious and co-operative relationships between governments and its employees by permitting public employees to organize and bargain collectively. . . .")

A party who has proposed bargaining on a topic of mandatory bargaining triggers an obligation on the part of the other party to bargain in good faith on that subject. *Iowa State Education Association v. Public Employment Relations Board*, 369 N.W.2d 793, 797 (Iowa 1985); Iowa Code § 20.10(1). Failing agreement, the impasse procedures are designed to assure the fruition, by operation of law, of a contractual provision on all areas of mandatory bargaining which remain in dispute. *Id.*; Iowa Code § 20.22(12). In particular, in cases of arbitration, the arbitrator's decision defines, as a matter of law, a collective bargaining agreement. *Iowa State Education Association*, 369 N.W.2d at 798. This agreement functions as a contract between the state employees and the State of Iowa. Both parties have a statutory obligation to participate in good faith in these impasse procedures. Iowa Code § 20.10(2)(g). The one statutory limitation on the validity of a collective bargaining agreement or arbitrators' decision is that it cannot "be inconsistent with any statutory limitation on the public employer's funds, spending or budget" and may not "substantially impair or limit the performance of any statutory duty by the public employer." Iowa Code § 20.17(6).

B.

The precise question posed by your opinion request has never been decided by the Iowa Supreme Court and has not been presented to this office for consideration. Ten years ago, however, in 1982 Op.Att'y.Gen. 63, we considered the question of whether the General Assembly was legally bound to appropriate funds sufficient to support a collective bargaining agreement or arbitrators' decision. We concluded that it was not, though we noted that the legislative intent expressed in Iowa Code section 20.1 would be furthered by such funding, *id.* at 68, and that therefore the General Assembly "has at least an equitable obligation" to fund the agreement or decision. *Id.* at 69.

While a superficial review of the conclusion expressed in the preceding opinion might suggest the conclusion that the governor has no legal obligation to present a request for funding to the legislature, we do not believe that the opinion can be read that broadly. The governor and the General Assembly are in different positions in this situation. The office of the governor negotiates the collective bargaining agreement with state employees and functions as the representative of the employer, the State of Iowa. 1982 Op.Att'y.Gen. at 67. As such, the governor is one of the parties to the collective bargaining agreement formed either by negotiation or by operation of law as a result of the arbitrators' decision. The governor thus incurs certain contractual obligations which the General Assembly does not. As a party to the collective bargaining, the governor also has the statutory obligation to bargain in good faith, Iowa Code section 20.10(1), and to be bound by the resulting arbitration in the event of impasse. Iowa Code §§ 20.10(2)(g); 20.22. The General Assembly incurs neither of these obligations

Our previous opinion appears to support an affirmative answer to your question. We noted in that opinion, 1982 Op.Att'y.Gen. at 68, that the legislative intent underpinning chapter 20 "is unquestionably furthered when both public employers and public employees can engage in bargaining negotiations with the assurance that their efforts are not in vain." We appeared, in that opinion, to implicitly assume a statutory responsibility on the part of the governor to present the agreement to the legislature for funding. Id. at 67 ("After a bargaining agreement or arbitrators' decision is established between the state as a public employer and an employee organization, the amount of the agreement or decision must be presented to the legislature for funding pursuant to Article III, § 24.").

We think it important to clarify what is meant by the term "fully fund" in your request. For the reasons stated herein, we believe that chapter 20 requires the governor to seek implementation of the provisions of an agreement. We recognize that this may be done in a variety of ways. The validity of any particular plan must, of course, be determined on a case-by-case basis.

C.

Application of a number of well-settled principles of statutory construction also compel the conclusion that the governor, after negotiating a collective bargaining agreement or proceeding to binding arbitration, must at least submit to the legislature a request for sufficient funds to implement the agreement.

Of course, the cardinal principle of statutory construction is to ascertain and give effect to legislative intent. *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 283 (Iowa 1983). Towards this end, a court will not, by judicial construction, depart from clear and unambiguous statutory language. *State v. Tuitjer*, 385 N.W.2d 246, 247 (Iowa 1986). Also, a court should construe a statute so as not to render any part of it superfluous. *Casteel v. Iowa Department of Transportation*, 395 N.W.2d 896, 898 (Iowa 1986).

If the governor could simply refuse to submit a collective bargaining agreement (whether arrived at by agreement or arbitration) to the legislature for implementation, legislative intent would be frustrated in several ways. First, such action would, for obvious reasons, fail to "promote harmonious and co-operative relationships between government and its employees". Public employees are unlikely to feel "harmonious and co-operative" when an agreement that they either bargained for in good faith, or won in an arbitration decision, is simply ignored by the other party to that agreement.

Moreover, it should be recalled that the legislature inserted the impasse resolution procedures in exchange for depriving public employees of the right to strike. The legislature obviously did not intend to place all of the bargaining power on one side of the bargaining table. Allowing the governor, in his discretion, to simply choose to ignore an agreement or arbitration decision effectively gives the governor complete control over the bargaining process. Allowing one party the authority to simply disregard any offers of the other party, and then disregard a subsequent arbitration decision, obviously gives that party no incentive whatsoever to bargain in good faith. The obvious legislative intent to give both parties incentive to engage in reasonable bargaining would be completely nullified.

A negative answer to your question would frustrate the specific language of the statute as well. Arbitration is not "binding" if one party to it can avoid it at will. Therefore, if the governor, by the simple expedient of not submitting to the legislature a request for funding, could unilaterally avoid the arbitration decision, the entire statutory provision for binding arbitration would be rendered a nullity, contrary to the principles of statutory construction referred to earlier.

We also believe that the statutory duties imposed on the public employer (represented by the office of the governor) to negotiate in good faith, Iowa Code section 20.10(1), and to participate in good faith in impasse procedures, Iowa Code section 20.10(2)(g), imply a duty to take reasonable steps to effectuate the terms of a collective bargaining agreement. Under federal law, for example, an employer commits an unfair labor practice if it refuses to sign a collective bargaining agreement that has been negotiated. See, e.g., *NLRB v. Strong*, 393 U.S. 357, 21 L.Ed.2d 546, 89 S.Ct. 541 (1969). We do not believe that the statutory "good faith negotiation" provision would have any effect at all if the end result of that negotiation—the collective bargaining agreement—could be unilaterally evaded by one of the parties purportedly bound by it. "An employer's duty to bargain under section 8 (a) (5) would be empty, indeed, if after reaching agreement the employer could treat the contract as a scrap of paper. The

disavowal of the entire contract by respondent. . . made the prior bargaining worse than useless." *NLRB v. M & M Oldsmobile, Inc.*, 377 F.2d 712, 715)16 (2nd Cir. 1967). Relying on this case, the Massachusetts Supreme Court held in *Mendes v. Taunton*, 366 Mass. 109, 315 N.E.2d 865, 873 (1974) that the refusal of a mayor to submit an appropriate request for appropriations in order to implement a collective bargaining agreement negotiated between the city and the police and fireman's union constituted a prohibited labor practice.

We have not ignored the fact that Iowa Code sections 20.17(6) and 20.28 render a collective bargaining agreement unenforceable under certain circumstances. However, at this time this office is unaware of any statutory limitation on the State's funds that would be inconsistent with the submission of a request for funding to the legislature. Nor have we identified any manner in which submission of such a request would impair the performance of any statutory duty by the employer. We therefore see nothing in this section which would prevent the governor from sending to the legislature a request for funding identifying the necessary revenue.

D.

For all of the preceding reasons, we believe that the governor, as the chief negotiator for the state of Iowa in the collective bargaining process, is under both a statutory and contractual duty to request the legislature to fund a collective bargaining agreement that has been arrived at by either negotiation or arbitration.

April 16, 1991

TAXATION: Use Tax Exemptions For Motor Vehicles. Iowa Code §§422.45, 423.4(4) (1991). If a motor vehicle satisfies the provisions of a sales tax exemption set forth in §422.45, other than subsection 4 or 6 (or one which expressly excludes vehicles, such as §422.45(18)), it is exempt from use tax pursuant to §423.4(4). (Mason to Bair, Director of Revenue and Finance, 4-16-91) #91-4-2(L)

April 22, 1991

COUNTIES: Required readings of proposed ordinances. Iowa Code §331.302(5) (1991). Iowa Code section 331.302(5) allows a county board of supervisors to suspend the multiple reading requirements therein and finally approve an ordinance or amendment by affirmative vote at a single meeting. (Scase to Parker, Warren County Attorney, 4-22-91) #91-4-3 (L)

April 22, 1991

COUNTIES: County fair society; Conflict of interest. Iowa Code §174.2 (1991). No statute or conflict of interest exists to preclude a fair board director from being employed by the fair society, but a fair board director so employed should not participate in the determination of compensation for fair society employees. A fair board director should not contract to provide goods or services to the fair society unless the contract is awarded through a public and competitive bid procedure. (Scase to Connolly, State Senator, 4-22-91) #91-4-4(L)

April 22, 1991

STATUTORY CONSTRUCTION: Public Safety Peace Officers' Retirement, Accident and Disability System. Iowa Code §§ 4.6, 79.1, 97A.8, 411.8 (1991). Increased pension deductions authorized in section 97A.8(1)(h)(1) (1991) can be deducted from compensation paid to system members for work performed during the last week of June. (Barnett to Lundby, State Representative, 4-22-91) #91-4-5(L)

April 22, 1991

JUVENILE LAW: Restraint of juveniles in shelter care. Iowa Code §§ 232.2(38), (46), (47), 232.19(1)(c), 232.21(3) (1991); 42 U.S.C. 5603(1)(10)(12)(13), 5633(a)(12)(A)(B). Staff may use physical force to prevent juveniles from fleeing shelter care facilities. (Phillips to Lind, State Senator, 4-22-91) #91-4-6(L)

April 30, 1991

COMPATIBILITY; COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES: County and City Attorney. Iowa Code §§ 331.756, 331.903 (1991). The office of county attorney is not incompatible with the offices of city council member and city mayor. A county attorney has discretion to enforce a county ordinance violation which replicates a state law crime. (Bennett to Bruner, Carroll County Attorney, 4-30-91) #91-4-7(L)

April 30, 1991

TAXATION: Constitutionality of Local Option Sales and Services Tax Contiguous Cities Classification. U.S. Const. amend. XIV; Iowa Const. art. I, §6 and art. III, §30; Iowa Code §§ 422B.1(2) and 422B.8. Statutory requirement whereby contiguous cities are combined into one incorporated area for purposes of determining voter approval and territorial application of the county local option sales and services tax is rationally related to a legitimate state purpose and does not violate the equal protection clauses in the Fourteenth Amendment or in art. I, §6 and art. III, §30 of the Iowa Constitution. (Griger to Teaford, State Representative, 4-30-91) #91-4-8(L)

April 30, 1991

NEWSPAPERS: Publication Fee. Iowa Code §§ 331.302, 331.302(10), 349.16, 349.17 and 349.18; 1989 Iowa Acts, ch. 214, §2; 1981 Iowa Acts, ch. 117, §301. The full fee structure of section 349.17 applies to publication of all proceedings of a board of supervisors in official county newspapers unless the publication is specifically identified and set forth in section 331.302, in which case the three-fourths fee provision of section 331.302(10) applies. (Walding to Shearer, State Representative, 4-30-91) #91-4-9(L)

MAY 1991

COUNTIES; REAL PROPERTY: Division and subdivision platting requirements. Iowa Code §§409A.1-409A.4, 409A.6, 409A.13 (1991). Iowa Code section 409A.4 requires a plat of survey for a real estate conveyance which creates a parcel bounded by a road or watercourse. Iowa Code sections 409A.4 and 409A.6 do not apply to a real estate conveyance which does not create a new parcel. (Smith to Frisk, Harrison County Attorney, 5-1-91) #91-5-1.

Judson Frisk, Harrison County Attorney: You have requested an opinion concerning 1990 Iowa Acts, ch. 1236, which established new thresholds for requiring plats when real estate is divided or subdivided into parcels with metes and bounds descriptions. Chapter 1236 repealed Iowa Code ch. 409 and created chapter 409A, effective July 1, 1990.

Preliminarily, we note that the new statute expands the scope of the term "metes and bounds description." This is important because the requirement of surveying and platting a division or subdivision of land is triggered by creation of a parcel that has a metes and bounds description. Iowa Code §§409A.4, 409A.6 (1991).

The commonly accepted dictionary definition of the term "metes and bounds" refers to a property description which includes directions and distances. For example, *Blacks Law Dictionary* (6th ed. 1990) at 991 defines the term "metes and bounds" as follows:

> The boundary lines of land, with their terminal points and angles. A way of describing land by listing the compass directions and distances of the boundaries . . . .

In contrast, new Iowa Code section 409A.2(10) defines the term "metes and bounds description" as follows:

> a description of land that uses distances and angles, uses distances and bearings, *or describes the boundaries of the parcel by reference to physical features of the land.*

(Emphasis added.)

A question implied in your opinion request is whether roads, creeks and drainage ditches are "physical features" within the meaning of the new definition of "metes and bounds description." It has long been a common practice to divide rural land in Iowa by reference to roads and watercourses. They are obvious physical features of the land which form barriers to agricultural uses and make convenient boundaries. Thus, a legal description referring to a road or watercourse as a boundary clearly is a "metes and bounds description" as defined in section 409A.2(10).

Your first two questions concern the requirement that a plat of survey be made for a "division" of real estate using a metes and bounds description. Iowa Code section 409A.4(1) states the following:

> The grantor of land which has been divided using a metes and bounds description shall have a plat of survey made of the division. . . . The grantor or the surveyor shall contact the county auditor who, for the purpose of assessment and taxation, shall review the division to determine whether the survey shall include only the parcel being conveyed or both the parcel being conveyed and the remaining parcel . . . .

The term "division" is defined in section 409A.2 to mean dividing a tract or parcel of land into two parcels of land by conveyance or for tax purposes.

Also relevant are the provisions in sections 409A.3 and 409A.13 for enforcing the requirements of plats of surveys and subdivision plats. The second paragraph of section 409A.3 states the following:

> A recorded conveyance in violation of this chapter may be entered on the transfer books of the auditor's office. The auditor shall notify the grantor and the grantee that the conveyance is in violation of this chapter and demand compliance as provided for in section 409A.13.

Iowa Code section 409A.13 states the following:

> If a tract is divided or subdivided in violation of section 409A.4 or 409A.6 or the descriptions of one or more parcels within a tract are not sufficiently certain and accurate for the purpose of assessment and taxation under the guidelines of section 409A.3, the auditor shall notify the proprietors of the parcels within the tract for which no plat has been recorded as required by this chapter, and demand that a plat of survey or a subdivision plat be recorded as required by this chapter . . . .

Your first question is whether a plat of survey is required for division of a parcel after June 30, 1990, if the legal description in the transfer instrument refers to a road or water course as a boundary. The new statute clearly requires that such a division be accompanied by a plat of survey because the reference to a road or watercourse is a metes and bounds description as defined in section 409A.2.[9]

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[9] Although the legislature undoubtedly had the power to require platting of stream boundaries, the value of such platting may be limited. Precise acreage calculation for assessment and taxation purposes based on a surveyed stream boundary will not remain accurate in most instances because of the natural tendency of stream channels to wander. Surveys of stream boundaries often quickly grow stale. Iowa property law recognizes the dynamic nature of stream boundaries. The common boundary between a sovereign meandered river or lake and adjoining land is not the meander line of the original government survey; rather it is the ordinary high-water mark. *McManus v. Carmichael*, 3 Iowa (Clarke) 1 (1856). Similarly, reference to a creek or non-meandered river as a property boundary is presumed to intend that the centerline of the stream be the boundary. *Holmes v. Haines*, 231 Iowa 634, 639-640, 1 N.W.2d 746 (1942). Gradual changes in the course of a stream by erosion and accretion result in movement of riparian property boundaries. *Id.*

Your second question is whether a plat of survey is required for conveyance of an existing parcel after June 30, 1990, if the parcel is described by metes and bounds and had been conveyed prior to July 1, 1990, by the same description without a plat of survey. Analysis of this question necessitates consideration of the platting requirement in section 409A.4 and the platting enforcement provisions in sections 409A.3 and 409A.13.

We first consider whether the platting requirement in section 409A.4 should be applied retrospectively. A statute is presumed to be prospective in its operation unless expressly made retrospective. Iowa Code § 4.5. Although section 409A.4 employs past tense in the reference to "land which has been divided," it then employs present tense in the reference to "the parcel being conveyed and the remaining parcel." The use of present tense supports an inference that the platting requirement is intended to apply when an instrument dividing land is filed with the county recorder. Such language does not expressly make the platting requirement retrospective.

Additionally, retrospective application of the platting requirement would not serve the statutory purposes for requiring plats of survey, namely, the prevention of land boundary disputes, prevention of real estate title problems and assistance to county officials in calculating acreage for assessment and taxation of partitioned real estate. Iowa Code §§ 409A.1, 409A.3 and 409A.13. Conveyance of a parcel created by a past division would not tend to create a boundary problem or other real estate title problem. Similarly, it is not apparent why recalculation of assessable acreage would be needed upon mere reconveyance of a parcel created by a division made before July 1, 1990.

Your last two questions concern the subdivision platting threshold in Iowa Code section 409A.6. Subsection one states the following:

> A subdivision plat shall be made when a tract of land is subdivided by repeated divisions or simultaneous division into three or more parcels, any of which are described by metes and bounds description for which no plat of survey is recorded . . . .

The new threshold in section 409A.6 replaced the threshold in former section 409.1 (1989), which stated:

> . . . A proprietor of a parcel of land of any size who divides the property into three or more parts, any of which are described by a metes and bounds description and are ten acres or less, shall have a plat made of the subdivision.

A previous opinion of this office implied the former threshold applied to repeated divisions as well as two or more simultaneous divisions. Op.Att'yGen. #80-12-17(L). The new threshold expressly applies to repeated divisions which result in subdivision of a 40-acre tract (or government lot) into three or more parcels any of which is described by metes and bounds.

Your third question is whether a subdivision plat is required for conveyance of a parcel which is described by metes and bounds and is one of three parcels that were created by dividing a 40-acre tract before July 1, 1990 without a survey. A subdivision plat could not be required for such a conveyance unless the subdivision platting requirement were construed retrospectively to apply to past conveyances. The reasons prohibiting retrospective application of the platting requirement in section 409A.4 also prohibit retrospective application of section 409A.6.[10]

Finally, you ask whether a subdivision plat is required for division of a parcel which is one of three parcels with metes and bounds descriptions that were created by dividing a tract before July 1, 1990, without a survey. Section 409A.6 would impose a duty to file a subdivision plat because the new division would create an additional parcel and one or more of the parcels would be described by metes and bounds. Section 409A.13 imposes the subdivision platting duty on the proprietors of the parcels in the tract.

In summary, Iowa Code section 409A.4 requires a plat of survey for a real estate conveyance which creates a parcel bounded by a road or watercourse. Sections 409A.4 and 409A.6 do not apply to a conveyance which does not create a new parcel.

May 6, 1991

JUVENILE LAW: Juveniles who receive emergency shelter care without parental consent. Iowa Code §§ 232.1, 232.2(6), 232.20, 232.21(1)(6), 232.35(4), 232.39, 232.44, 232.87, 232.95, 232.125, 232.141, 234.35(2), 235.35(3) and (4), 237.1(4) and 237.4(5), 1984 Op.Atty'yGen. 94 (#83-11-2(L)). (Sheirbon to Lietzow, Department of Human Rights, 5-6-91) #91-5-2(L)

JUNE 1991

June 21, 1991

BANKS; REAL PROPERTY: Right of First Refusal. Iowa Code §§ 524.910(2), 654.16A, 654.19; 1990 Iowa Acts, Chapter 1245. The amendment to section 524.910(2) deleting the right of first refusal is not retroactive as to deeds given in lieu of foreclosure. A state bank is required to give the prior owner

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[10] If any of the three parcels in your third hypothetical contained less than ten acres, the division which created the third parcel may have been in violation of the above-quoted predecessor to § 409A.6. However, the county auditor should have given notice when the violation occurred. Iowa Code § 441.65 (1989). A subdivision plat should not be required because of mere reconveyance of a parcel created by a subdivision which a previous proprietor had failed to plat. *See Oakes Const. Co. v. City of Iowa City*, 304 N.W.2d 797, 803-804 (1981) (city could not base disapproval of proposed subdivision plat of parcel on failure of previous proprietor to plat the subdivision which created the parcel).

notice of the right of first refusal for deeds in lieu of foreclosure executed prior to the effective date of the amendment. A state bank may sell acquired agricultural land through public auction to satisfy the right of first refusal, but should give the prior owner notice of the auction. (Benton to Vande Hoef, State Senator, 6-21-92) #91-6-1(L)

June 21, 1991

COUNTIES: Courts. Iowa Code §§ 331.361(4), 602.1303. The county board of supervisors has the statutory authority to provide suitable district court facilities, however, if a court determines that a courtroom modification is necessary for the immediate, necessary, efficient and basic functioning of the court then that item must be paid from county funds. The grounds for invoking the court's inherent power to secure indispensable goods, facilities and services must be clearly communicated. If the district court judge cannot find that the lock was necessary for the immediate, necessary, efficient and basic functioning of the court, the court system should stand the expense. (Skinner to Vander Hart, 6-21-91) #91-6-2(L)

June 21, 1991

LABOR: Minimum-wage law: 15 U.S.C. §§ 1673(a); Iowa Code § 642.21 (1991). Under Iowa Code section 642.21, the disposable earnings of an individual are exempt from garnishment to the extent provided in the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677. Under 15 U.S.C. § 1673(a), the federal minimum wage is used to calculate garnishment limitations. Therefore, the federal minimum wage is used to calculate garnishment limitations under Iowa Code section 642.21. (Brauch to Bruner, Carroll County Attorney, 6-21-91) #91-6-3(L)

June 25, 1991

RAILROADS; REAL PROPERTY: Sections 327G.76, 327G.77, 434.20, and 614.22-614.28, Iowa Code 1991. Railroad easements affected by sections 327G.76 and 327G.77 are those acquired by prescription, condemnation, or by deed of easement. Railway property no longer used in the operation of any railway is taxable to the railway company under section 434.20 unless a change of title occurs. Except for some spur tracks, abandonment for railroad purposes can occur only upon application for abandonment to the Interstate Commerce Commission. (Olson to Running, State Senator, 6-25-91) #91-6-4(L)

June 28, 1991

INSURANCE: Continuation of health coverage after retirement. Iowa Code §§ 509A.13, 509B.3 (1991). If a retired employee of a publicly funded governing body had family coverage prior to retirement before age 65, coverage must be offered on that basis, i.e., for the employee's dependents, after retirement, at the employee's expense. (Haskins to Siegrist, State Representative, 6-28-91) #91-6-5(L)

June 28, 1991

PRIVATE CLUBS: Designation of smoking areas. Iowa Code §§ 98A.1, 98A.2, 601A.2 (1991). A "public place" subject to chapter 98A means any enclosed

indoor area either used by the general public or serving as a place of work containing two hundred fifty or more square feet of floor space. Whether a particular private club constitutes an enclosed indoor area serving as a place of work containing two hundred fifty or more square feet of floor space is a factual question. A private club is not used by the general public. A bar is the only public place that may be designated as a smoking area in its entirety. (Vasquez to Tyrrell, State Representative, 6-28-91) #91-6-6(L)

June 28, 1991

CITIES; COUNTIES; SCHOOLS; INSURANCE: Iowa Code chapter 22; Iowa Code § 509A.12 (1991). Governing bodies may not limit the number of authorized insurance companies from which its employees may select annuity contracts. The governing body may not encourage or discourage employee participation in annuity programs, but must make such programs available upon employee request. Lists of employees — but not lists of employees participating in annuity programs — must be made available to the public. (Galenbeck to Barry, 6-28-91) #91-6-7(L)

June 28, 1991

COUNTY AND COUNTY OFFICERS: Board of Supervisors; Public Records. 42 C.F.R. 483.10; Iowa Code §§ 21.5(1)(a), 135C.14, 135C.14(8), 227.4, 253.8; 441 IAC 37, §§ 37.7, 57.40, 57.49, 58.44, 58.53, 62.18, 62.24, 63.38, 63.48, 64.59. The board of supervisors may receive a report from the auditor's office which contains the names of each person residing at the care facility, and the amount of money the individual has paid during a reporting period. The reports should remain confidential. (McCown to Dieleman, State Senator 6-28-91) #91-6-8(L)

JULY 1991

July 12, 1991

PHYSICIANS AND SURGEONS; LICENSING: Corporate employment of doctors. Iowa Code §§ 147.2, 148.1, 148.3 (1991). Iowa courts will consider elements of control and direction of practitioners in determining whether the common-law prohibition against corporate employment of practitioners is applicable, therefore 1954 Op.Att'yGen. 122 is so modified. The determination whether employment by a non-profit corporation is permissible must be made after consideration of all elements of the employment relationship. (Donner to Szymoniak, State Senator, 7-12-91) #91-7-1

Elaine Szymoniak, State Senator: We are in receipt of your request for an opinion of the Attorney General on the following question:

> May a non-profit hospital corporation provide medical services to the general public in its emergency room and clinics through employed

> physicians, where the contract of hire expressly prohibits lay control of the physician's medical judgment?

You note that in 1954 this office issued an opinion which prohibited physicians from employment by non-profit corporations. *See* 1954 Op.Att'yGen. 122. We conclude that the 1954 opinion should be modified insofar as the opinion fails to apply the criteria of dominion and control in analyzing the relationship between the corporation and the physician. A determination whether a particular relationship between a corporation and a physician gives rise to the unauthorized practice of medicine by the corporation must be resolved on a case-by-case basis.

The general prohibition against corporate practice of a "learned profession" has evolved through the common law. However, an analysis of this issue and the underlying rationale must begin with the statutory provisions which govern licensure of the practice of medicine and surgery. We note that corporate employment of professionals is statutorily permitted to a class of corporations, Professional Corporations (P.C.'s), under Iowa Code chapter 496C. However, ownership of those corporations is strictly restricted to members of the specific profession being practiced. Iowa Code §§ 496C.4, 496C.6 (1991). Practice of a profession "by or through" a corporation organized under other provisions depends on whether that practice is "lawful under any other statute or rule of law of this state." Iowa Code § 496C.22 (1991). Your question relates to non-professional corporations, requiring review of those statutes and rules of law.

Chapter 147 prohibits a "person" from the practice of certain professions without a license:

> *A person shall not engage in the practice of medicine and surgery,* podiatry, *osteopathy, osteopathic medicine and surgery,* psychology, chiropractic, physical therapy, nursing, dentistry, dental hygiene, optometry, speech pathology, audiology, occupational therapy, pharmacy, cosmetology, barbering, dietetics, mortuary science, or shall not practice as a physician assistant *as defined in the following chapters of this title, unless the person has obtained from the department a license for that purpose.*

Iowa Code § 147.2 (1991) (emphasis added). The practice of medicine and surgery, in turn, is functionally defined to include the following acts:

> 1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery;
>
> 2. Persons who prescribe or prescribe and furnish medicine for human ailments or treat the same by surgery;
>
> 3. Persons who act as representatives of any person in doing any of the things mentioned in this section.

Iowa Code § 148.1(1)-(3) (1991).

Notably the requirements for licensure involve education and training which a corporation could not satisfy:

> Each applicant for a license to practice medicine shall:
>
> 1. Present a diploma issued by a medical college approved by the medical examiners, or present other evidence of equivalent medical education approved by the medical examiners.
>
> . . .
>
> 2. Pass an examination prescribed by the medical examiners . . .
>
> 3. Present to the Iowa department of public health satisfactory evidence that the applicant has successfully completed one year of internship or resident training in a hospital approved for such training by the medical examiners.

Iowa Code § 148.3 (1991). Clearly a corporation could not obtain a diploma, pass the necessary examinations, or complete the required training.

A series of Iowa Supreme Court decisions from 1931 to 1973 analyzed the relationship between corporations and the individuals who are licensed to practice various professions, including medicine. In *State v. Bailey Dental Co.*, 211 Iowa 781, 234 N.W. 260 (1931), the Court held a corporation was unlawfully practicing dentistry where a corporation directed by unlicensed officers equipped and maintained offices and employed licensed dentists to treat patients. The corporation maintained that the relationship divided into two distinct functions: the corporation owned and operated the offices; the licensees practiced dentistry on the patients. Rejecting this distinction, the court observed that "ownership and control of the entire equipment is in the corporation and its officers, and not in the employees. Its unlicensed officials necessarily determine all its policies whether they be deemed professional or commercial." 211 Iowa at 784, 234 N.W. at 262

The Court further explained the public policy underlying the prohibition on this relationship:

> There are . . . reasons of public policy why mere corporations might be barred from entering this field. There are certain fields of occupation, which are universally recognized as learned professions. Proficiency in these occupations requires long years of special study and of special research and training and of learning in the broad field of general education. Without such preparation proficiency in these professions is impossible. The law recognizes them as a part of the public weal and protects them against debasement and encourages the maintenance therein of high standards of education, of ethics and of ideals. It is for this purpose that rigid examinations are required and conducted as

> preliminary to the granting of a license. The statutes could be completely avoided and rendered nugatory, if one or more persons, who failed to have the requisite learning to pass the examination, might nevertheless incorporate themselves formally into a corporation in whose name they could practice lawfully the profession which was forbidden to them as individuals. A corporation, as such, has neither education, nor skill, nor ethics. These are sine qua non to a learned profession.

211 Iowa at 785, 234 N.W. at 262.

The following month the court issued *State v. Baker*, 212 Iowa 571, 235 N.W. 313 (1931), which upheld an injunction against the owner of a corporation practicing medicine without a license. The defendant in *Baker* was owner and proprietor of the Baker Institute which treated certain diseases, particularly cancer, with a secret formula. Licensed physicians were employed by the Baker Institute, but only for the purpose of diagnosis. Prescription and administration of the secret formula to patients was carried out directly by unlicensed "treaters." The Court upheld the injunction against the owner for prescribing and administering the formula without further mention of the employment of physicians for diagnosis. 212 Iowa at 580-582, 235 N.W. at 317-18.

Two years later the Court upheld an injunction against a corporation itself for practicing optometry in *State v. Kindy Optical Co.*, 216 Iowa 1157, 248 N.W. 332 (1933). Kindy Optical Company, like the Bailey Dental Company, was owned and operated by a corporation. The corporation, in turn, employed a licensed optometrist to conduct eye examinations and prescribe lenses. Under the employment arrangement the optometrist, Jensen, leased the business premises from the corporation under terms which purported to grant control of the eye examination to the optometrist. The optometrist, however, also executed a contract of employment for salary which provided that the "second party" - Jensen - "shall in all things be subject to the control and direction of the proper officers of the first part." *Kindy Optical Company*, 216 Iowa at 1159, 248 N.W. at 333-34.

Analyzing the relationship between the corporation and the optometrist, the Court rejected the contention that only the optometrist actually practiced optometry and observed:

> The execution of the so-called lease between the defendant and its employee . . . in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to. . . . The defendant company controlled the conduct and policies of the business. Jensen was simply its employee on a stipulated salary. The so-called lease between Jensen and the defendant, under the terms of which the defendant, as lessor, was to pay Jensen, as lessee, $281 per month, was only a clever attempt to change the character of Jensen from an employee to a lessee, and does not change the fact that Jensen was an employee of the defendant company.

> The defendant company could not conduct a business without a license. It could not obtain a license, and we can conceive of no reason why it should be permitted to continue to conduct a business under the license of an optometrist. We hold therefore that the defendant company was and is engaged in the practice of optometry and that it is so engaged in violation of the statutes of this state.

216 Iowa at 1162-1163, 248 N.W. at 335.

A few years later in *State v. Ritholz*, 226 Iowa 70, 283 N.W. 268 (1939), the Court reversed the entry of a permanent injunction against the practice of optometry by unlicensed persons. In *Ritholz* opticians, whose business was selling lenses upon authorized prescriptions, rented office space to physicians. The physicians conducted eye examinations and retained all patient fees, although the opticians guaranteed the physicians a minimum weekly income which the opticians paid if patient fees were insufficient. Implicit in the arrangement was the understanding that the physicians referred patients who had been prescribed lenses to the opticians to fill their prescriptions. 226 Iowa at 73, 283 N.W. at 269.

Although the Court reaffirmed *Kindy Optical Co.*, it refused to apply the decision to require a permanent injunction against the opticians. Emphasizing the independence of the physicians the Court explained:

> Plaintiff failed to establish its contention that the relationship of employer and employee existed between the defendants and the physicians. No witness testified for the plaintiff that the defendants under the arrangement had the right to control or influence a physician in making the examination. . . . All of these witnesses testified that defendants did not influence or coerce the physicians in making prescriptions or in refracting.
>
> This court has repeatedly held that the test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. We find that the defendants under the arrangement did not have the right to control or seek to control examinations of eyes by the physicians. The physicians, all of whom had practiced optometry prior to the arrangement, were not performing the business of defendants but were carrying on their own business of optometry under a reciprocal arrangement with the defendants for the mutual financial benefit of both parties. When a patient came to consult one of these physicians there was the personal relationship of patient and physician between them. The physicians, in making the refraction, represented the patient and not the defendants.

226 Iowa 75-76, 283 N.W. at 271.

Finally, in *State v. Plymouth Optical Co.*, 211 N.W.2d 278 (Iowa 1973), nearly twenty-five years later, the Court revisited the issue of corporate practice. In

Plymouth Optical a corporation leased office spaces and equipment to a licensed optometrist under a five-year lease. The "lease," however, included specific conditions, the occurrence of which would terminate the agreement: 1) a drop of ten percent or more in business volume; 2) the absence of a licensed professional in a lease location for 30 or more days; 3) a breach of a separate agreement to escrow assignments of any employment contracts between the optometrist and personnel at the leased offices to the benefit of the corporation. In addition, the optometrist was required to execute in blank and escrow new signature cards for any bank accounts connected with the business, retain the services of a specific advertising agency and spend a minimum percentage of the gross volume for advertising, and utilize a bookkeeper recommended by the corporation. *Id.* at 280. Significantly, an optometrist purportedly hired by the lessee to work at one of the leased sites testified he, in fact, had never met the lessee but was hired directly by the vice president of Plymouth Optical Company. *Id.* at 282.

Reviewing these facts, the Court concluded that the injunction should be affirmed:

> We feel the trial court was amply justified in relying upon the evidence in this area when considered in the light of the entire record in reaching the conclusion the corporate defendants exercised improper dominion and control over the defendant doctors. The State has seen fit to regulate the practice of optometry, as it has the practice of medicine and dentistry under the aegis that it directly affects the public health and is a proper subject of legislative regulation and control. Inferentially, then, the practice acts . . . require the relation of the optometrist to his patients to be personal.

The Court declined to modify the injunction to remove all elements of corporate control. Rather, the Court let stand a prohibition against practicing optometry as an employee of the corporation. *Id.* at 283.

Synthesizing these cases, it is evident that the common thread underlying the corporate practice prohibition is the vesting of improper dominion and control over the practice of a profession in a corporate entity. Where the corporation exerts undue dominion and control over the licensed professional, the corporation in essence becomes the "practitioner," which is not permitted under statute. However, not all relationships between a corporation and a licensed professional are prohibited. Where, as in *Ritholz*, the licensed professional retains control over the relationship with the patient, the Court has declined to intervene by injunction.

A review of other states reveals that this is and has been an issue of contention across the nation. Declining the opportunity to obviate the corporate employment prohibition, the California Supreme Court noted in 1939 that "[what] we have before us is the proof of a controversy, which has raged for years, between medical men, sociologists and others, as to the future course of medical practice." *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429 at 431 (1938), *cert. denied*, 306 U.S. 633 (1939) (implicitly stating that non-profit corporations do

not exert the type of control and dominion which underlie the corporate employment prohibition).

The course of analysis in many jurisdictions has been to examine the details of the relationship but to halt the analysis upon determining that a "prohibited employer-employee relationship exists." *Sears Roebuck & Co. v. State Board of Optometry*, 213 Miss. 710, 57 So.2d 726 at 733, (1952). *See also, State v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263; *generally*, Annot., 82 ALR4th 816, 833 *et seq.*, §§3, 5(a), 6(a) and 7(a) (1990). However, as the Iowa cases have implicitly recognized, simply asking the question as to whether or not there is an employer-employee relationship begs the question — the factual question of dominion and control determines whether a prohibited employer-employee relationship exists, not the designation given that relationship in the parties' contractual arrangement.

Other states have explicitly analyzed the issue to examine the doctrine's origins and purpose, concluding that an examination of the elements of dominion and control is necessary to determine whether, in any particular situation, there is prohibited corporate employment. *See generally*, Annot., 82 ALR4th 816, 835 *et seq.*, §§4, 5(b), 6(b), 7(b) (1990). In *Wyoming State Board of Examiners of Optometry v. Pearle Vision Center, Inc.*, 767 P.2d 969, 978, 82 ALR4th 781, 798-799 (Wyo. 1989), the court stated:

> A finding that Pearle is engaged in the practice of optometry because of a contractual relationship or employment of a licensed optometrist could only be premised upon facts demonstrating that Pearle exercised control over the optometrist in his practice of optometry. It is incumbent upon the Board to demonstrate facts that constitute a violation of the statute rather than only to assert a theory that the franchise arrangement could function in a way that would violate the statutes.
>
> An examination of the franchise agreement persuades us, as it did the district court, that Pearle does not exercise control over [the optometrist] in his practice of optometry. It does not set the fees he charges to his patients; it does not purport to control the manner in which he performs his optometric functions; it does not address his work schedule in the practice of optometry; it does not say anything about the patients whom he may or may not see; it does send statements to [the optometrist's] patients; it does not receive payments made for [his] optometric service from either the patients or [the optometrist]; nor does it purport to direct or control the conduct of [his] practice of optometry in any other way. We conclude that *the significant concern is control over the optometrist in his practice of optometry that might inhibit the freedom necessary for the optometrist to practice in a manner which assures that the interests of the patient are given primary consideration.* That is the reason that the legislature may restrict the practice of optometry from corporate influence under its police power.

(Emphasis added.) *See also, Albany Medical College v. McShane*, 481 N.Y.S.2d 917, 104 A.D.2d 119, 21 Ed.Law Rep. 958 (1984).

A number of Attorneys General have been faced with the issue, and have issued opinions with varying outcomes. *See* Minn. Op.Att'yGen. 92-B-11, Oct. 5, 1955 (excluding non-profit corporations as a class from prohibition under public policy rationale, based on assumption that as a class, these corporations do not exhibit the abuses and negative consequences associated with corporate control and dominion); SC-AG Sept. 3, 1982 (applied test of corporate direction and control in determining that certain corporation would probably occupy position of master/employer over licensee who would be servant/employee, and would be improper); Wisc. OAG 39-86 (implicitly excluding non-profit corporations from prohibition without distinguishing rationale); Tenn. Op.Att'yGen. 88-152 (physician providing services to patients acting on behalf of a general corporation would violate prohibition, without discussion of control); Tex. Op.Att'yGen. JM-1042, April 24, 1989 (drug permit may not be issued to corporations employing physicians, discussion of control criteria justifying prohibition); VA-AG June 28, 1989 (nonstock, nonprofit foundation of medical college may permissibly "employ" physicians, as there is no exercise of any control over the professional judgment of physicians, with discussion of contractual arrangement); NM-AG Opinion No. 87-39 (see below).

The New Mexico Attorney General considered the issue specifically in the context of the health care environment of today, and observed that:

> These market forces may redound to the benefit of consumers of health care, and restraints on the commercial practice of physicians that inhibit their "affiliating with non-physicians or engaging in other novel arrangements which may provide more convenient or accessible health care service to the public" may invite the scrutiny of the Federal Trade Commission. *See* Remarks of Acting F.T.C. Chairman, Terry Calvani, 5 Trade Reg. Rep. (CCH), p. 50,479 at 56,279 (Feb. 20, 1986).
>
> In the absence of an express statutory answer to the question posed, we conclude that, unless prohibited by statute or by public policy considerations against *lay control of medical judgment and lay exploitation of the practice of medicine*, corporations organized and controlled by non-physicians, may provide medical services to the public through employed physicians.

NM-AG Opinion No. 87-39 at p. 11. (Emphasis added.)

Notably, an explicit exemption to the corporate employment prohibition exists in regard to radiologists and pathologists. *See* Iowa Code § 135B.26 (1991). The legislature has determined that in regard to those two classes, corporate control and dominion are not relevant to protecting the public health, safety, and welfare — in both instances, there is essentially no "physician-patient" relationship which could be compromised.

In conclusion, the Iowa court employs an in-depth evaluation of the particular facts at hand; the mere classification of the profit or non-profit status of the corporation or a mere recitation of the corporation's intent regarding the

independence of the employed licensed professions, or the mere denomination as an "employee" would be only elements of the entire picture which would be examined. Any finding of a violation of the corporate practice/employment prohibition would be based on a detailed factual review of the corporate-physician relationship at issue. However, 1954 Op.Att'yGen. 122 fails to apply this case-by-case evaluation of dominion and control in analyzing the relationship between the corporation and the physician. It is therefore modified to that extent.

July 25, 1991

COUNTIES AND COUNTY OFFICERS, SCHOOLS, INCOMPATIBILITY: Iowa Code §§ 331.751, 331.756(7), 331.757. Assistant county attorney is public employee, not public officer. Therefore, incompatibility doctrine is inapplicable and assistant county attorney may serve on school board, overruling 1972 Op.Att'yGen. 35. (Ewald to Davis, 7-25-91) #91-7-2

William E. Davis, Scott County Attorney: This is in response to your request for an opinion of the Attorney General in which you ask whether it would be incompatible for an assistant county attorney to serve as a member of a local school board. You note that all of the school districts in your county have retained independent counsel and do not ask the county attorney's opinion on any matters. *See* Iowa Code §§ 279.37 (school corporation may employ private legal counsel), 331.756(7) (school officers may request legal advice from county attorney).

The issue of incompatibility arises only if it is determined that both of the positions in question are "public offices." *State v. Anderson*, 155 Iowa 271, 136 N.W. 128 (1912); *State v. White*, 257 Iowa 606, 133 N.W.2d 903 (1965); 1982 Op.Att'yGen. 220, 224 (county attorney is "office" but city attorney is not "office"). The incompatibility doctrine does not apply where the person holds one office and is merely employed by another public body. 1982 Op.Att'yGen. 220, 224; 1968 Op.Att'yGen. 257.

The Iowa Supreme Court has addressed the employee/officer distinction in *State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289 (1966). Five essential elements are required to make public employment a public office: (1) the position must be created by the constitution or legislature or through authority conferred by the legislature; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity, and not be only temporary or occasional. *Taylor*, 144 N.W.2d 289, 292.

There is no question that elected members of a school board and county attorneys are public officers. *See* Iowa Code ch. 277, 279; § 331.751. However, the same cannot be said of the position of *assistant* county attorney, which, unlike the position of county attorney is not an elective office. Iowa Code § 331.757. Applying the analysis in *Taylor* to the position of *assistant* county attorney, we note that the position is one of employment within the office of

county attorney. *Id.* An assistant county attorney is thus subject to the superior power of that office and has little or no authority to act independently. We conclude that the position of assistant county attorney is not a public office. *See* Op.Att'yGen. #91-4-7(L) at 4-5, n.1. (office of county attorney not incompatible with offices of city council member and city mayor; implication that assistant county attorney is not "officer"); 1982 Op.Att'yGen. 220, 224-226 (city attorney is "employee" not "officer"); Op.Att'yGen. #79-6-5(L) (incompatibility doctrine does not prevent assistant county attorney from representing school district).

In reaching this conclusion we are not precedentially bound by our 1971 opinion which stated that the offices of assistant county attorney and school board member are incompatible. 1972 Op.Att'yGen. 35. First of all, that opinion presupposed that the position of assistant county attorney was an office without specifically addressing, analyzing or deciding that issue. *State v. Foster*, 356 N.W.2d 548 (Iowa 1984) (no binding precedent where question not necessarily decided in previous case). Secondly, we believe the conclusion reached in the 1971 opinion to be clearly erroneous. 1988 Op.Att'yGen. 82. When considering the *Taylor* analysis, the 1979, 1982, and 1991 opinions cited above and their logical extension to this question, we are compelled to overrule our 1971 opinion.

CONCLUSION

The position of assistant county attorney is one of employment and is not a "public office." Therefore, the incompatibility doctrine does not apply and a person employed as assistant county attorney may hold the office of school board member. Our prior opinion, 1972 Op.Att'yGen. 35, is overruled.

July 26, 1991

COUNTIES AND COUNTY OFFICERS; NEPOTISM; COUNTY HOME RULE: Removal of deputy assessor initially exempted from nepotism prohibition. Iowa Code §§64.8, 64.19, 71.1, 331.301, 331.903, 441.10, and 441.15 (1991). The county board of supervisors is the entity which may approve an exemption to the prohibition against nepotism in section 71.1, but a deputy assessor who has received an exemption under section 71.1 may only be removed as provided in section 441.10. The board of supervisors may not reconsider and revoke previously granted approval of an exemption under section 71.1. (Donner to Nielsen, 7-26-91) #91-7-3(L)

July 26, 1991

CITIES; COUNTIES; LAW ENFORCEMENT: Criminal investigation costs. Iowa Code §§331.653(2), 804.31, 815.13. Legislative scheme places responsibility for costs incurred in a criminal case with the initiating governmental subdivision unless expressly excepted by statute. City is responsible for investigation costs which result in state criminal charge due to lack of statutory authority for recoupment. (Odell to Folkers, 7-26-91) #91-7-4

Jerry H. Folkers, Mitchell County Attorney: You have requested an opinion of the Attorney General concerning the recoupment of costs by a city police department which investigates an offense resulting in a state criminal charge and prosecution. Your letter poses the following specific questions:

1. The city claims that it should not pay the costs of investigating a case since a state charge has been filed. The county refuses to pay because the responsibility for the investigation was the city's. Who pays the costs?

2. Does it make a difference if the County Attorney arranges for, or orders the work done?

3. Does it make a difference if a County Attorney's information or indictment has not been filed at the time the cost is incurred?

I.

The initial inquiry is whether a city has a duty to provide police protection to its community and whether investigation of criminal offenses is a necessary or required function of the police. In 1987, this office concluded in Op.Att'yGen. #87-10-4(L) that the legislature mandated cities to furnish police protection:

> (W)e construe Iowa Code ch. 372 (1987) as imposing a responsibility on all cities to provide police protection either by appointing, at a minimum, a chief of police or marshal, or by contracting with the county or with another city for such protection.

Further, the role of police in investigating violations of the law is a necessary aspect of a city's generalized duty to "preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code § 364.1 (1991). It is difficult to envision how a municipal police department could provide effective law enforcement to the community without investigating suspected criminal activity or other breaches of the peace. The contrary view leads to an absurd and unworkable situation: police could arrest a suspect but decline interrogation or other investigative steps, thereby risking loss of valuable evidence and jeopardizing any possible prosecution. Crime investigation is therefore an inherent facet of the police protection a city is mandated to provide. *See* Iowa Code section 80.11 (1991), which details the course of instruction for "peace officers."[11]

> 80.11 Course of instruction. The course or courses of instruction for peace officers shall include instruction in the following subjects and such others as shall be deemed advisable by the college of law and the commissioner of public safety:
>
> . . .
>
> 3. *Methods of criminal investigation.*
>
> (emphasis supplied)
>
> . . .

[11] "Peace officer" and "law enforcement officer" are statutorily defined to include city police officers. Iowa Code §§ 80B.3(3), 801.4.

II.

Neither legislation nor case law speaks specifically to the questions you raise. There are, however, many provisions in the Code for the allocation and recoupment of costs involved in the initiation and prosecution of criminal cases. The statutory scheme posits the financial responsibility for costs on the initiating governmental subdivision unless otherwise excepted. Iowa Code section 331.653(2), for example, directs a county board of supervisors to reimburse the local sheriff for special investigation costs on presentation of an itemized account of expenses:

. . .

> The sheriff shall: Upon written order of the county attorney, make a special investigation of any alleged infraction of the law within the county and report the findings to the county attorney within a reasonable time. Upon completion of the investigation, the sheriff shall file with the auditor a detailed, sworn statement of the expenses of the investigation accompanied by the written order of the county attorney. The board shall audit and pay the reasonable and necessary expenses of the investigation.

Similarly, Iowa Code section 815.13 requires discovery and court costs in criminal casees to be borne by the entity responsible for the prosecution:

> The county or city which has the duty to prosecute a criminal action shall pay the costs of depositions taken on behalf of the prosecution, the costs of transcripts requested by the prosecution, and in criminal actions prosecuted by the county or city under county or city ordinance the fees that are payable to the clerk of the district court for services rendered and the court costs taxed in connection with the trial of the action or appeals from the judgment. The county or city shall pay witness fees and mileage in trials of criminal actions prosecuted by the county or city under county or city ordinances. These fees and costs are recoverable by the county or city from the defendant unless the defendant is found not guilty or the action is dismissed, in which case the state shall pay the witness fees and mileage in cases prosecuted under state law.

A city or county is entitled to reimbursement of witness fees if they are collected from a defendant. Iowa Code § 622.75 (1991). *See* also Iowa Code § 232.141 (allocating costs of juvenile justice proceedings between county and state); § 815.1 (costs payable by state in parole revocation proceedings or criminal prosecutions against inmates in state institutions); § 906.17 (state to reimburse the county for temporary confinement of accused parole violators); §§ 356.15, 820.24 and 903.4 (expenses of confinement in state institutions or county jails).

Iowa Code section 804.31 is of particular interest to your question. That statute establishes the right to an interpreter by a hearing impaired person who is either "detained for questioning or arrested for an alleged violation of a law or ordinance." The officer effecting either the arrest or detention must first determine if the detainee is hearing-impaired and, if so, furnish a qualified interpreter prior to conducting an interrogation. Fees for the interpreter would, in this context, be part of the investigation costs of the case, and the statute

requires the originating agency to pay them:

> An interpreter procured under this section shall be paid a reasonable fee and expenses by the governmental subdivision funding the law enforcement agency that procured the interpreter.

Familiar principles of statutory construction are of aid on this issue. When statutory language is clear and plain, no construction is needed, *Welp v. Iowa Department of Revenue*, 333 N.W.2d 481, 483 (Iowa 1983). Statutes are given a logical, sensible construction which harmonizes related sections and promotes the legislative intent. *Barkema v. Clement Auto and Truck, Inc.*, 449 N.W.2d 348 (Iowa 1989). This intent is expressed by omission as well as inclusion, and when the legislature delineates exceptions, it is presumed no others are intended. *Matter of Estate of Mills*, 374 N.W.2d 675, 677 (Iowa 1985); *Crees v. Chiles*, 437 N.W.2d 249, 252 (Ia. App. 1988). A statute will not be extended by construction to cover a legislation ommission. *Rural Independent School District #3 v. McCracken*, 233 N.W.2d 147, 153, 212 Iowa 1114 (Iowa 1930). The extant Code provisions dealing with recoupment of various criminal justice costs evidence the legislature's intent to require the agency that incurred the fees to assume responsibility for their payment unless expressly excepted by statute. Since there is no statutory exception for reimbursement to a city for investigation costs which lead to state criminal charges, one cannot be supplied by construction. This conclusion is buttressed by Op.Att'yGen. #89-7-1, in which we found specific statutory authority for allocating meal expenses of "any person arrested on state charges, regardless of who the arresting agency is." That statute, Iowa Code section 356.15, required the county to pay for all prisoner expenses, with exceptions only for federal prisoners or those "committed for violation of a city ordinance," in which case the city pays.

A city's responsibility for criminal investigation costs is based on the police department's duty to investigate suspected criminal activity. It is therefore irrelevant, under this reasoning, whether a trial information or indictment is filed when the cost arises. The city peace officers would remain in charge of the investigation and would be the witnesses at trial. If a County Attorney requests investigation in a pending case, a city may be entitled to reimbursement only under existing statutory provisions for, *inter alia*, witness fees pursuant to Iowa Code section 622.75. Other costs of prosecution would be, according to Iowa Code section 815.13, the initial responsibility of the prosecuting agency, obviating the necessity for reimbursement.

SEPTEMBER 1991

September 5, 1991

JUVENILE LAW: Disclosure of information by a law enforcement agency as to identity of juveniles who have been taken into custody, arrested, or issued citations. Iowa Code §§22.7(5), 232.51, 232.149(2) (1991). Law enforcement officials may not release the name of juveniles who have been taken into custody or issued citations for offenses within the juvenile court's jurisdiction until they have been formally charged. They can disclose the nature of the offense. (Phillips to Lepley, Director, Department of Education, 9-5-91) #91-9-1(L)

September 5, 1991

COUNTIES AND COUNTY OFFICERS: Chapter 28E Agreements; Sheriff; Law Enforcement Agreements. Iowa Code ch. 28E; §§28E.1, 28E.12, 28E.21 - .30 (1991). Iowa Code sections 28E.21 through 28E.30 establish an alternative, rather than exclusive, means for organizing and funding a co-operative local law enforcement system. The general provisions of Iowa Code chapter 28E allow a county to agree to provide law enforcement services to a city without creating a unified law enforcement district pursuant to the specific provisions of Code sections 28E.21 through 28E.30. (Scase to Wilder-Tomlinson, Marshall County Attorney, 9-5-91) 91-9-2(L)

September 5, 1991

MENTAL HEALTH; SUBSTANCE ABUSE: Court Appointed Attorney's Fees. Iowa Code chs. 125, 229, 230. Iowa Code §§125.43, 125.78, 125.94, 229.8, 229.40, 230.1, 453.1(2)(b), 815.7, 815.10, 815.10(1), 815.11 (1989). Attorney's fees incurred in the representation of indigent litigants in chapters 125 and 229 involuntary commitment proceedings are not costs of indigent defense pursuant to section 815.7. These commitment costs, when incurred, are to be determined and fixed under the criteria established in section 815.7. Indigent attorney fees incurred both in mental health commitment proceedings and in substance abuse commitment proceedings are generally paid by the counties. (McCown to O'Brien, State Court Administrator, 9-5-91) #91-9-3

William J. O'Brien, State Court Administrator: You have requested an opinion concerning which funding authority has the responsibility for payment of attorney's fees for indigent litigants in proceedings brought under the substance abuse and the mental health chapters of the Iowa Code, chapters 125 and 229 respectively. Specifically you ask whether the counties are responsible for these costs or whether these fees are part of "indigent defense" costs now paid by the State.

In reviewing these statutory provisions, we apply familiar rules of statutory construction. The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In doing so, one must look to what the legislature said, rather than what it might have said or should have said. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976); *Steinbeck v. Iowa District Court*, 224 N.W.2d 469 (Iowa 1976). Application

of these principles to specific language used in chapters 125 and 229 as it relates to section 815.7 reveals a distinction in the manner in which court appointed counsel are compensated.

Iowa Code §125.78 and §229.8 require the court to assign an attorney to the respondent in both the involuntary commitment or treatment of substance abusers and involuntary hospitalization of mentally ill persons, under circumstances there described. Both sections provide that "[t]he attorney shall be compensated in *substantially* the same manner as provided by section 815.7 . . . ." (Emphasis supplied.)

Section 815.7 reads in part that "[A]n attorney appointed by the court to represent any person charged with a crime in this state shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a judge of the district court. . . ." Section 815.11 provides that "[c]osts incurred under sections . . . 815.7 . . . shall be paid from funds appropriated by the General Assembly to the Supreme Court for those purposes."

The issue then is whether the statutes providing for compensation in "substantially the same manner as provided by §815.7" means that these fees are costs "incurred under" §815.7. The Iowa Supreme Court defined the term "substantially the same" in the context of jury instructions. In *Cain v. Osler*, 168 Iowa 59, 65, 150 N.W. 17, 20 (1914), the court stated that "when we speak of a phrase being substantially the same as another, of necessity we mean that it conveys the same thought or is the same, or substantially the same, in meaning. The word 'substantially' means in the matter of substance, rather than mere form." Similarly, other jurisdictions have found that the word "substantially" has been equated to the words such as "about", "essentially" "practically" and "nearly"; intended to be close approximations. *Janzen v. Phillips*, 437 P.2d 189, 191 (Wash. 1968); *American Federation of Government Employees, AFL-CIO v. Rosen*, 418 F.Supp. 205, 206 (D.C. Ill. 1976); *St. Louis-Southwestern Ry. Co. v. Cooper*, 496 S.W.2d 836, 842 (Mo. 1973). While compensation is determined "in the same manner" as those under §815.7, the question here is whether these are paid from the same fund as in §815.7.

The use of section 815.7 as it relates to chapter 229 proceedings has been addressed in two opinions of this office. See 1978 Op.Att'yGen. 126, 1980 Op.Att'yGen. 177. In 1978 Op.Att'yGen. 126, we opined:

> The initial discussion concerning from which fund the cost of commitment hearings should be paid arises with Section 230.1, Code of Iowa 1977, which sets forth the liability of the county.
>
> . . .
>
> This would encompass the area of attorney's fees. Section 229.8, Code of Iowa 1977, states that the manner in which attorneys are to be

compensated is to follow Sections 775.5 and 775.6, Code of Iowa 1977 [presently 815.7], but not the fund[12] from which fees are to be paid.

In the 1977 opinion, it was determined that while § 229.8 required that a court appointed attorney in involuntary commitments be compensated "in substantially the same manner" as provided by § 815.7, it was not determined who was responsible for payment of these costs. Therefore, consistent with our previous opinions, this office interprets § 815.7 to be a standard or guide by which attorneys fees are to be calculated without regard to whom or from what fund the fees are to be paid.

A question remains, however, as to who is responsible for those costs. Each chapter must be viewed separately in determining the funding responsibility for attorneys' fees incurred in the representation of indigent litigants in chapters 125 and 229 involuntary commitment proceedings. While chapters 125 and chapter 229 share similar statutory language, financial responsibilities related to the commitments differ.

The 1977 opinion referred to above determined that, pursuant to Iowa Code § 230.1, legal expenses incurred in the involuntary commitment of a mentally ill person to a state hospital are to be paid by the counties. Section 230.1 provides that legal costs be paid by the county of legal settlement and by the state when there is no county of legal settlement or when settlement is unknown. Iowa statutes are silent concerning liability for legal costs incurred in the involuntary commitment of a substance abuser to a state mental hospital or a mentally ill person to a private institution. Chapter 230 only makes counties liable for legal costs when a mentally ill individual is involuntarily committed to a state hospital. While chapter 125 does not explicitly state who is liable for costs of commitment, previous attorney general opinions have interpreted chapter 125 to put the cost of commitment on the county. *See* Iowa Code § 125.43; 1988 Op.Att'yGen. 29 (87-3-4 (L)).

However, without regard to where an individual is committed, the Iowa Court Rules address liability for attorneys' fees incurred in chapter 125 and chapter 229 involuntary commitments. Iowa Code chapter 125 and chapter 229 proceedings are subject to the rules prescribed by the Iowa Supreme Court. Iowa Code §§ 125.94 and 229.40. Rule 3(a) of The Rules of Involuntary Hospitalization of Mentally Ill provides that such counsel shall be compensated "at county expense." Rule 3(a) of the Rules for the Involuntary Commitment or Treatment of Substance Abusers provides that compensation shall be "at public expense."

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[12] It was determined that the fund from which all expenses for the commitment of the mentally ill are to be paid is the county mental health and institutions fund pursuant to Iowa Code section 441.12 (1977). This section, which has since been repealed, established a fund which paid all expenses required to be paid by counties for the care, admission, commitment, and transportation of mentally ill patients in state hospitals. Presently, this obligation is covered by Iowa Code section 331.424(1)(f) (1991) which authorizes supplemental levies to pay for statutorily imposed charges for the care and treatment of patients by a state mental health institute.

The Iowa court rules for involuntary hospitalization of mentally ill specifically place the responsibility for attorneys' fees on the committing county. As indicated above, if the commitment is to a state hospital, responsibility is placed on the county of legal settlement or the state. Therefore, in most instances the responsibility is clearly placed on the counties for compensating court appointed attorneys in mental commitment proceedings.

The rules for involuntary commitment or treatment of substance abusers state that such counsel shall be compensated at public expense. Applying the same statutory rules indicated above, public funds can mean the monies of the state or the monies of a county under Iowa Code §§ 453.1(2)(b). Prior to 1991, Iowa Code §§ 815.10(1) stated that in any action in which the indigent person is entitled to legal assistance at public expense, the court may appoint counsel. Costs incurred under section 815.10 are paid from funds appropriated by the general assembly for those purposes to the department of inspections and appeals. Arguably, this language in §§ 815.10(1) could have shifted responsibility for these costs, as well as costs for involuntary hospitalization of the mentally ill, to the State. 1990 Iowa Acts, ch. 1233, § 45. In 1991, however, §§ 815.10(1) was amended to apply only to appointment of counsel for indigents in criminal or juvenile proceedings. Senate File 529, 74th G.A., 1st Sess. § 436 (Iowa 1991).

In a previous opinion, we concluded that counties were liable for an indigent's attorney's fees in substance abuse commitments. 1988 Op.Att'yGen. 29 (#87-3-4(L)). We also opined that although there had been a transfer of administration and costs of "county" courts to the state, the counties remained responsible for the costs related to the detention and commitment of substance abusers." 1986 Op.Att'yGen. 10, 14. In light of the recent amendment to § 815.10(1), this responsibility continues to lie with the counties.

In conclusion, it is the opinion of this office that substance abuse and mental health commitment costs are not incurred under Iowa Code § 815.7. Rather, they are incurred under their individual chapters. These costs, when incurred, are to be determined and fixed under the criteria established in § 815.7. Indigent attorney fees incurred both in mental health commitment proceedings and in substance abuse commitment hearings are generally paid by the counties.

Spetember 11, 1991

TAXATION: Deeds By and Between Heirs or Devisees Transferring Inherited Property. Iowa Code § 428A.2(20) (1991). Deeds executed by the administrator of an estate or executor under a will are exempt from the transfer tax imposed under Iowa Code §§ 428A.1 (1991) while deeds executed by heirs at law or devisees under a will to each other to partition and/or convey property interests among themselves are not exempt. (Kuehn to Dull, Plymouth County Attorney, 9-11-91) #91-9-4(L)

September 11, 1991

PROFESSIONAL LICENSING BOARDS: Board of Educational Examiners. Iowa Code § 258A.1 and ch. 260 (1991). The Board of Educational Examiners was in existence as a professional licensing board prior to January 1, 1978

but is not included in the Code section 258A.1 list of boards to which chapter 258A is applicable; therefore, Iowa Code chapter 258A is not applicable to this board. (Scase to Nearhoof, 9-11-91) #91-9-5(L)

September 11, 1991

ELECTIONS: Absentee voting. Iowa Code § 4.1(17), ch. 53, §§ 53.2, 53.8(1), and 53.15 (1991). A commissioner of elections may not refuse to honor an application for an absentee ballot that is regular on its face and contains the information required by Code section 53.2; a qualified voter who is unable to sign an application for an absentee ballot may ask another person to sign the application on his or her behalf pursuant to Code section 4.1(17); and the commissioner of elections has no statutory authority to verify signatures on applications for absentee ballots, voter registration forms, or change of address forms. (Scase to Representatives Brown and Corbett, 9-11-91) #91-9-6

Joel W. Brown and Ron J. Corbett, State Representatives: You have each requested opinions of the attorney general addressing issues concerning absentee voting. Because of the related subject matter of these requests, we have combined your inquiries for purposes of response. Representative Brown inquires whether a county auditor, acting as county commissioner of elections, may refuse to issue absentee ballots to several students who had applied to have the ballots sent to the same address. Representative Corbett presents a series of inquiries regarding whether a spouse or other interested caretaker may request an absentee ballot for a physically disabled voter.

Iowa statutes governing absentee voting appear in Iowa Code chapter 53. Any qualified elector who expects to be absent from his or her precinct on election day during the time the polls are to be open, expects to be prevented from going to the polls and voting on election day due to illness or physical disability, or "expects to be unable to go to the polls and vote on election day" may vote at any election by absentee ballot. Iowa Code § 53.1 (1991). The procedure for applying for an absentee ballot is set forth in detail in Code section 53.2 (1991). Unnumbered paragraphs one and three of this section provide as follows:

> Any qualified elector, under the circumstances specified in section 53.1, may on any day, except election day, and not more than seventy days prior to the date of the election, apply in person for an absentee ballot at the commissioner's office or at any location designated by the commissioner, or make written application to the commissioner for an absentee ballot. The state commissioner shall prescribe the form for absentee ballot applications. However, if an elector submits an application that includes all of the information required in this section, the prescribed form is not required.

. . . . .

> Each application shall contain the name and signature of the qualified elector, the address at which the elector is qualified to vote, and the name or date of the election for which the absentee ballot is requested, and such other information as may be necessary to determine the correct absentee ballot to be sent to the qualified elector. If insufficient information has been provided, the commissioner shall, by the best means available, obtain the additional necessary information.

Iowa Code § 53.2, as amended by House File 420, 74th G.A., 1st Sess. § 17 (Iowa 1991). "Upon receipt of an application for an absentee ballot and immediately after the absentee ballots are printed, the commissioner shall mail an absentee ballot to the applicant within twenty-four hours . . . ." Iowa Code § 53.8(1) (1991). Requirements for the marking and return of absentee ballots are set forth in Code sections 53.15, 53.16, and 53.17 (1991).

With this general overview of the absentee voting process in mind, we will address the questions presented. Representative Brown describes a situation in which a number of community college students completed absentee ballot applications requesting to have ballots sent to a single address. He notes that a county auditor, acting as commissioner of elections pursuant to Iowa Code section 331.505(1) (1991), refused to honor the students' requests and asks us to address this situation.

While this office does not, through the opinion process, act as an adjudicator to resolve factual issues, we can provide some general guidance regarding the rejection of absentee ballot requests. Neither Iowa Code chapter 53 nor any of the remaining election provisions in the Code grant the commissioner of elections the power to reject an application for absentee ballot which is regular on its face and contains the information required by Code section 53.2. Nor do we believe that such authority may be implied from the provisions of chapter 53. To the contrary, Code section 53.8(1), quoted above, requires a commissioner of elections to mail absentee ballots to individuals who have requested the ballots and unnumbered paragraph five of Code section 53.2 requires a commissioner to provide an absentee ballot to an applicant even if the applicant is not registered to vote (a voter registration form is to be sent with the ballot).

In 1962 this office issued an opinion addressing the question of whether a county auditor, as election commissioner, could refuse applications for absentee ballots or the ballots themselves if the procedure followed in delivering the documents failed to conform with the procedure prescribed by Code chapter 53. 1962 Op.Att'yGen. 198. We concluded in this opinion as follows:

> There appears to be no statutory power or duty conferred on the auditor arising out of any variance between the statutory directions to him respecting the delivery and receipt of either applications for absentee ballots or of the ballots themselves and actual fact situations known to him in that connection. It appears that such variances are the subject of challenge at the time the absent vote is cast.

Id. at p. 199; *see also* 1972 Op.Att'yGen. 222, 225 ("[I]t appears that the county auditor has no authority to refuse the unauthorized absentee ballot. The ballot must be challenged."). Iowa Code section 53.31 (1991) provides that "[t]he vote of any absent voter may be challenged for cause and the precinct election officials of election shall determine the legality of such ballot as in other cases." We find no significant statutory amendments to chapter 53 leading us to reconsider our 1962 and 1972 opinions. Therefore, it is our continuing view that a commissioner of elections lacks authority to refuse to issue an absentee ballot following receipt of a completed application.[13]

Representative Corbett presents the following inquiries for our consideration:

1) Can a husband/wife legally sign a request for an absentee ballot for his/her spouse if they are physically unable to sign for themselves?

a) Is proof of disability required?

b) What if the husband/wife has power of attorney or has conservatorship for his/her spouse?

2) Can anyone, other than a voter or a voter's spouse, (a care provider, family member) legally sign a request for an absentee ballot for someone who is physically unable to do so for themselves?

3) Does the Commissioner of Elections have any authority or responsibility to question or check the authenticity of a signature on a request for an absentee ballot, a voter registration form or a change of address form?

Iowa Code section 53.15 (1991) provides that "[q]ualified electors who are blind, cannot read, or because of any other physical disability, are unable to mark their own absentee ballot, may have the assistance of any person they may select" in marking their ballot. While this section directly allows a disabled voter to procure assistance in completing an absentee ballot, Code chapter 53 contains no provision addressing whether a disabled voter may have assistance in obtaining or completing an application for an absentee ballot. A review of prior opinions of this office reveals several opinions addressing procedures for obtaining and returning absentee ballot applications and ballots.

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[13] Also relevant to this inquiry is the fact that Code chapter 53 places no significant restrictions or limitations upon the address to which an absentee ballot may be sent. We have previously recognized that an individual may qualify to vote by absentee ballot while temporarily residing elsewhere. 1982 Op.Att'yGen. 549, 553. In this 1982 opinion we noted, as an example, the fact that "[a] college student may 'reside' on campus during the academic year without declaring campus his or her home and [may], thereby, retain his or her parental home as a residence for voting purposes." *Id.* It does not appear that the fact that several college students request the mailing of their absentee ballots to the same address would, in itself, disqualify the students from receiving absentee ballots.

Prior to a 1934 amendment, a section of Iowa's absentee voters law provided as follows: "If the voter is absent from the county and requests [an application for absentee ballot] by letter, or someone makes the request for him, after the ballots have been printed, then the auditor may send him both the application and ballot at the same time." 1931 Iowa Code §936. The phrase "or someone makes the request for him" was stricken from section 936 in 1934. 1934 Iowa Acts, ch. 13, §4. A 1934 opinion of the Attorney General interpreting this legislative change concluded that "[u]nder this section as now amended, it is not permissible for someone else to request the application for the voter, even though he is absent from the county. The voter must request it himself . . . ." 1934 Op.Att'yGen. 533. As to obtaining absentee ballots themselves, this opinion emphasized that voters had "no right to send someone to the Auditor's office to obtain a ballot for them." *Id.* at 534.

We next addressed similar questions in 1958 Op.Att'yGen. 113, concluding as follows:

> [An absentee] ballot issued in response to [a voter's] application cannot be delivered to an agent for the voter but must be mailed to the voter by the Auditor.
>
> . . . [T]he ballot and application therefor may not be returned to the Auditor by personal agent of the voter to the office of the County Auditor but must be mailed by the voter to the office of the Auditor and must reach the Auditor prior to election day or the vote will not be counted.

Id. at p. 114. More recently, in 1972 Op.Att'yGen. 222, we relied upon both the 1934 and 1958 opinions in opining "that a person cannot request an absentee ballot to be voted by a person (except servicemen) other than the one making the request." *Id.* at 225.

This series of opinions clearly establishes that an application for an absentee ballot must be personally made by the voter and personally delivered or mailed to the auditor by the voter. An agent may not make application for or receive an absentee ballot in the voter's stead.

We do not believe, however, that either these opinions or the provisions of Code chapter 53 preclude a voter from seeking assistance to complete an application for absentee ballot. As set forth above, Code section 53.2 provides that an application for absentee ballot must contain, at a minimum, "the name and signature of the qualified elector, the address at which the elector is entitled to vote, and the name or date of the election for which the absentee ballot is requested . . . ." Iowa Code section 4.1(17) provides the following definition of the term "signature," as it is used in Iowa statutes:

> A signature, when required by law, must be made by the writing or markings of the person whose signature is required. *If a person is unable due to physical handicap to make a written signature or mark, that person may substitute the following in lieu of a signature required by law:*

a. *The handicapped person's name written by another upon the request and in the presence of the handicapped person*; or

b. A rubber stamp reproduction of the handicapped person's name or facsimile of the actual signature when adopted by the handicapped person for all purposes requiring a signature and then only when affixed by that person or another upon request and in the handicapped person's presence.

(Emphasis added.)

Applying the section 4.1(17) definition of signature to the section 53.2 requirements for an application for absentee ballot, it would appear that Representative Corbett's first two questions may be answered affirmatively. As long as an absentee ballot application is made at the personal direction of the voter, a physically disabled voter may request that another person complete the application and write the voter's name on it as a signature. Section 4.1(17) does not require a power of attorney to allow assistance with signing or place limits on who may sign for a disabled individual.

Having arrived at this conclusion, we feel compelled to emphasize that an individual should not complete an absentee voter application form and sign it for a disabled voter unless the voter personally requests such assistance and is present when the form is signed. Code section 4.1(17) requires both a personal authorization for a substitute signature and that the individual requesting assistance be present when a document is signed. In addition, many of the safeguards included in chapter 53, such as the requirements for personal delivery or mailing of absentee ballots and applications are intended to reduce fraudulent procurement and submission of such ballots. *Cf. Luse v. Wray*, 254 N.W.2d 324, 331 (Iowa 1977). Unless the requirement of a personal request for absentee ballot is maintained, the danger of abuse of the absentee voting system exists.

Moving to Representative Corbett's final question, we find no statutory provision requiring or allowing the commissioner of elections to verify the authenticity of a signature on an application for absentee ballot, voter registration form or change of address form. Nor can we recommend adoption of a policy allowing a commissioner of elections to selectively seek verification of signatures on some but not all official filings. *See* 1982 Op.Att'yGen. 549, 554-55 (in which we caution against selective updating or correction of voter registrations, noting that this process "may impact disproportionately among registered voters and generate claims that the county commissioner of elections is discriminating among different classes of registered voters in violation of the doctrine of equal protection."). As we noted previously, the vote of any absentee voter may be challenged for cause. Iowa Code § 53.31 (1991). In addition, specific statutory provisions exist allowing challenges to and cancellation of voter registrations. Iowa Code §§ 48.15 and 48.31 (1991); 1982 Op.Att'yGen. 549.

In summary, it is our opinion that a commissioner of elections may not refuse to honor an application for an absentee ballot that is regular on its face and contains the information required by Code section 53.2; a qualified voter who is unable to sign an application for an absentee ballot may ask another person to sign the application on his or her behalf pursuant to Code section 4.1(17); and the commissioner of elections has no statutory authority to verify signatures on applications for absentee ballots, voter registration forms, or change of address forms.

September 11, 1991

MUNICIPALITIES: Civil Service; Coverage. Iowa Code §400.6 (1991); 1986 Iowa Acts, ch. 1138, §3. The 1986 amendment to Iowa Code section 400.6, which altered civil service coverage, is applicable to municipal employees who had previously been included in that coverage. Municipal employees who held civil service positions prior to the 1986 amendment, but whose positions were excepted from civil service by that amendment, do not retain civil service status. (Walding to Tinsman, State Senator, 9-11-91) #91-9-7(L)

OCTOBER 1991

October 18, 1991

COUNTIES; TOWNSHIPS; CEMETERIES: Responsibility for burial sites not otherwise provided for. Iowa Code §§ 331.402(2)(c), 359.28, 359.29, 359.30, 359.33, 359.34, 566.31, 566.32, 566.33 (1991). Notification and care responsibilities are imposed upon governmental subdivisions regarding burial sites not otherwise provided for by Iowa law. Landowner notification responsibilities for marked burial sites and preservation and protection responsibilities for marked or unmarked burial sites are, as between counties and townships, township responsibilities. Counties must exercise such oversight responsibilities as are necessary to assure the township cemetery tax fund is sufficient to protect and preserve the physical integrity of these burial sites. (Wisby to Schroeder, Keokuk County Attorney, 10-18-91) # 91-10-1(L)

NOVEMBER 1991

November 4, 1991

TAXATION: Binding Effect of Local Option Ballot Proposition. Iowa Code §422B.1(4) (1991). The tax expenditure purposes expressed in the ballot proposition are binding upon the governing body after local option tax imposition is approved by the voters. (Griger to Appel, Wapello County Attorney, 11-4-91) #91-11-1

William H. Appel, Wapello County Attorney: You have requested an opinion of the Attorney General with respect to the local option tax law in Iowa Code chapter 422B. Specifically, you ask whether the tax expenditure purposes expressed in the ballot proposition can be changed by the governing body after voter approval.

A county may impose a local option tax. Iowa Code § 422B.1. There are two types of local option taxes authorized by chapter 422B. These are the local vehicle tax (Iowa Code § 422B.2) and the local sales and services tax (Iowa Code § 422B.8). The local vehicle tax has not been imposed by any county and all counties which have imposed a local option chapter 422B tax have opted to impose the local sales and services tax. The tenor of your opinion request suggests that Wapello County has for consideration the question of whether to impose the local sales and services tax.

Before the tax can be imposed, it must be approved by the voters. Iowa Code § 422B.1(2). The ballot proposition must "specify the approximate amount of local option tax revenues that will be used for property tax relief and shall contain a statement as to the specific purpose or purposes for which the revenues shall otherwise be expended." Iowa Code § 422B.1(4). You noted in your opinion request that Iowa Code section 422B.10(5) provides that the local sales and services tax "may be expended for any lawful purpose of the city or county."

The question posed boils down to whether the ballot proposition's expression of specific purposes for which the tax revenue will be expended are binding as a result of voter approval. In our opinion, such designated expenditure purposes are binding.

Chapter 422B was originally enacted in 1985. 1985 Iowa Acts, ch. 32, §§ 89-98. The original act contained the exact language quoted above in sections 422B.1(4) and 422B.10(5). Chapter 32, §§ 89 and 98. The reasonable interpretation of these provisions is that the ballot proposition must state the specific purposes for which the tax revenue will be expended and the range of such possible purposes are property tax relief and any other lawful purpose of a city or county in which the tax, if approved by the voters, will be imposed. It cannot be assumed that the legislature required, in §§ 422B.1(4), that the voters be informed of the purposes for which the tax revenue will be spent and, in §§ 422B.10(5), the same legislature negated any effect of that requirement by allowing the governing body of a city or county to then expend the tax for any other purpose as long as the purpose would not otherwise be illegal. Construction of a statute should be reasonable, sensible and fairly made so as to carry out the obvious intent of the legislature and a construction resulting in unreasonable or absurd consequences should be avoided. *American Home Products Corporation v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 142-3 (Iowa 1981); *Isaacson v. Iowa State Tax Commission*, 183 N.W.2d 693, 695 (Iowa 1971). Construction of a statute should harmonize all portions, if possible, and should avoid rendering any portion superfluous or unworkable. *Goergen v. Iowa State Tax Commission*, 165 N.W.2d 782, 786 (Iowa 1969).

In construing a statute authorizing tax imposition by the voters, it is appropriate to consider whether a particular interpretation would circumvent the voter approval process. *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wash. 2d 413, 662 P.2d 845 (1983). If the expenditure purposes listed in the ballot proposition could be changed by the governing body, after voter approval, the voter approval process would be circumvented because the ballot proposition's statement of proposed expenditures informs the voters of the purposes for expending the tax and induces voter approval. Such an interpretation could make the voter approval process, after the tax was approved, irrelevant.

Moreover, the legislature has indicated that the purposes expressed in the ballot proposition are binding on the governing body. In 1989 Iowa Acts, ch. 276, §4, the legislature enacted a temporary provision which provided:

> A city with a population under six hundred located in a county with a population between ninety-five thousand and one hundred ten thousand, which has imposed a local option tax for more than one year and seeks to change the specific purpose for which the local option tax revenues are expended notwithstanding any other provisions of this chapter, shall by resolution change the specific purpose for which the local option tax revenues are expended. The resolution shall not be effective before the expiration of sixty days following the enactment of the resolution. Within thirty days of the enactment of the resolution, a referendum on the change of the specific purpose for which the local option tax revenues are expended may be requested by five percent of the citizens who voted in the last state general election.

This statute was repealed as of January 1, 1990. 1989 Iowa Acts, ch. 276, §6.

This 1989 legislation was the only statutory authority to make the tax expenditure purposes listed in the ballot proposition nonbinding and to allow a governing body to change those purposes. Generally, the legislature can modify or repeal a local option tax law, after voters approve imposition of the tax, unless such legislation would be offensive to a "particular constitutional limitation." *Fleur de Lis Motor Inns, Inc. v. Bair*, 301 N.W.2d 685, 687 (Iowa 1981). A reading of this 1989 statute strongly suggests that the legislature only intended for the ballot proposition tax expenditure purposes to be nonbinding under very limited circumstances. The express mention of the conditions for which a ballot proposition's statements of tax expenditure purposes are nonbinding and changeable implies exclusion of others. *Barnes v. Iowa Department of Transportation, Motor Vehicle Division*, 385 N.W.2d 260, 263 (Iowa 1986). If the ballot proposition's statements were generally nonbinding, it would have made no sense for the legislature to have adopted chapter 276, §4 and its limited circumstances as a temporary measure of less than seven months duration.

It is the opinion of this office that the tax expenditure purposes expressed in the ballot proposition are binding upon the governing body after tax imposition is approved. There is no statutory authority that would allow the governing body to change those purposes and continue the tax imposition.

November 19, 1991

TAXATION. County Agricultural Extension, Education Tax. Iowa Code § 176A.10; 1991 Iowa Acts, ch. 156 (House File 691), 74th G.A., 1st Sess. (1991). The maximum amount of taxes that Extension Councils may assess under Iowa Code section 176A.10 is pegged to a fiscal year of collection of the revenue rather than to the year of adoption of the referendum. (Doland to DeGroot, State Representative, 11-19-91) #91-11-2(L)

DECEMBER 1991

December 10, 1991

COUNTY ATTORNEY; Qualification for office: Iowa Code §§ 63.8, 331.751(2) (1991). A county board of supervisors may lawfully appoint an individual to fill a vacancy in the office of county attorney even though the individual does not meet the requirements of section 331.751(2) at the time of his or her selection and appointment by the supervisors. Iowa Code section 63.8 requires a person so appointed to qualify for the office within ten days of the time of his or her appointment. (Scase to Schrader, State Representative, 12-10-91) #91-12-1

David Schrader, State Representative: As a follow-up to advice issued in September of this year, you have requested a formal opinion of the Attorney General addressing the legality of appointment of an attorney who is not a county resident to fill a vacancy in the office of county attorney. Noting the county residency requirement of Code section 331.751(2) (1991), you ask: "Is the appointment of a county attorney a lawful act if the qualifications called for in Iowa Code section 331.751 have not yet been met at the time of the appointment?"

Qualifications for the office of county attorney are set forth in Iowa Code section 331.751(2), as follows:

> A person elected or appointed to the office of county attorney shall be a qualified elector of the county, be admitted to the practice of law in the courts of this state as provided by law, qualify by taking the oath of office as provided in section 63.10, and give bond as provided in section 64.8. A person is not qualified for the office of county attorney while the person's license to practice law in this or any other state is suspended or revoked.

A qualified elector, as that term is defined in Iowa Code section 39.3(2), is "a person who is registered to vote pursuant to [Code] chapter 48." "Every citizen of the United States of the age of eighteen or older who is a resident of this state is an eligible elector." Iowa Code § 47.4(1)(a) (1991). The term "residence" is defined, for voting purposes only, as "the place which the person declares is the person's home with the intent to remain there permanently

or for a definite or indefinite or undeterminable length of time." Iowa Code §47.4(1)(d) (1991). "Any person who is an eligible elector may register to vote by personally submitting a completed voter registration form to the commissioner of registration or a deputy commissioner of registration in the elector's county of residence." Iowa Code §48.2 (1991). Therefore, implicit in the qualified elector requirement of section 331.751(2) is a county residency requirement.

Your inquiry focuses on this county residency requirement and its application in the case of a board of supervisors' appointment to fill a vacancy in the office of county attorney. It does not appear that either the Iowa courts or this office have previously examined this issue.

Our office has, on at least two occasions, offered opinions as to whether a law student, who is not yet licensed to practice law, may become a candidate for the office of county attorney. *See* 1934 Op.Att'yGen. 511 and 1928 Op.Att'yGen. 294 (copies enclosed). In each of these opinions we concluded that a law student may become a candidate and be elected to the office of county attorney but must be admitted to the bar prior to presenting himself or herself to take the oath of office. *Id.*

Similarly, we now conclude that an individual appointed to fill a vacancy in the office of county attorney is eligible to assume that office so long as he or she is licensed to practice law in this state, establishes a residence in the county of appointment, and registers to vote before taking the oath and assuming the duties of the office. This conclusion is based both upon what Code section 331.751 says and what the section does not say. We note that this Code section contains four distinct elements of qualification for the office of county attorney. A person elected or appointed to this office must: (1) be a qualified elector of the county, (2) be admitted to the practice of law in Iowa, (3) qualify by taking the oath of office, and (4) give bond. Clearly the third and fourth of these requirements may not be met prior to the time of election or appointment. We see no reason to read section 331.751(2) as requiring the first two requirements to be met at a time when the remaining requirements cannot be satisfied.[14]

In addition, we note that Iowa Code chapter 63, governing time and manner of qualifying for office, contains a provision directly addressing the time allowed to qualify for office when a vacancy is being filled. On this point, Iowa Code section 63.8 provides as follows:

> Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in chapter 69, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in

[14] We note that when the legislature has desired to make residency a prerequisite to candidacy for an office it has explicitly done so. Cf. Iowa Code §376.4 (1991) ("An eligible elector of a city may become a candidate for an elective city office . . . .").

the same manner as those originally elected or appointed to such office, as follows:

Based upon the provisions of Iowa Code sections 63.8 and 331.751(2), we conclude that a county board of supervisors may lawfully appoint an individual to fill a vacancy in the office of county attorney even though the individual does not meet the requirements of section 331.751(2) at the time of his or her selection and appointment by the supervisors. Iowa Code section 63.8 requires a person so appointed to qualify for the office within ten days of the time of his or her appointment.

December 10, 1991

ELECTIONS; Cities, Counties: 1991 Iowa Acts, ch. 226, § 7 (74th G.A.) (S.F. 476), to be codified as Iowa Code § 56.12A. The use of public funds to support or oppose a ballot issue is an improper expenditure by a political subdivision, whether done by a school district, city or county. It would, therefore, have been improper for Iowa cities or counties to expend public funds to support or oppose a ballot issue prior the July 1, 1991 effective date of new Iowa Code section 56.12A, which directly precludes such expenditures. (Scase to Williams, Campaign Finance Disclosure Commission, 12-10-91) #91-12-2(L)

December 3, 1991

CCONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: State budget accounting. Iowa Const., art. III, § 18; art. VII, § 2; Iowa Code §§ 8.3, 8.4, 8.6, 8.22, 8.24, 8.31, 14.10(5), 421.31(5) (1991). The State may use the accrual method of accounting for calculating State revenues and expenses attributable to a budget year, so long as the method used has a reasonable basis. National governmental accounting standards would likely meet this standard, but the State is not constitutionally required to adopt them. The Governor and the Department of Management have the statutory duties to prepare the budget and to avoid budget deficits through the allotment process. The legislature is responsible for assuring that revenues are sufficient to meet appropriations. The Department of Revenue and Finance executes the General Assembly's constitutional duty to publish an accurate statement of expenditures and receipts. The judicial branch ultimately decides whether there has been a violation of statute or of constitutional debt limitations. (Osenbaugh to Johnson, Auditor, 12-23-91) #91-12-3

Richard D. Johnson, Auditor of State: We have received your request for an opinion concerning calculation of the State budget. You ask whether the State may rely on an accrual method of accounting and, if so, who determines the appropriate accrual principles to be used for budgetary purposes. As your request notes, this office has previously opined that the Governor may rely on the accrual method of accounting to determine whether estimated budget resources are sufficient to pay all appropriations in full. 1984 Op.Att'yGen. 108. We conclude that this opinion is not clearly erroneous and remains the opinion of this office. The Governor and the Departments of Management and Revenue and Finance initially determine the calculation of the budget. The legislature is responsible for appropriations and assuring that these are within

estimated revenues. The Governor and the Department of Management must also determine whether a failure in appropriations exists. This determination is, however, ultimately a judicial question.

A budget deficit would violate Article VII, section 2, only if it resulted in the creation of State "debt" in excess of $250,000.[15] The word "debt" is a term of art.

> As commonly and ordinarily understood, a debt includes every obligation by which one person is bound to pay money to another. Buena Vista County v. Marathon Sav. Bank, 198 Iowa 692, 196 N.W. 729, 200 N.W. 199. When used in the constitutional sense, it is given a meaning much less broad and comprehensive than it bears in general use. Swanson v. City of Ottumwa, 118 Iowa 161, 91 N.W. 1048, 59 L. R. A. 620; Barnes v. Lehi City, 74 Utah 321, 279 P. 878.

Hubbell v. Herring, 216 Iowa 728, 735-736, 249 N.W. 430, 434(1933). As a matter of law, some borrowing is excluded from the definition of "debt" -- as, for example, bonds payable only out of specified revenues, *Farrell v. State Board of Regents*, 179 N.W.2d 533 (Iowa 1970); bonds payable by autonomous public authorities out of special funds, *Train Unlimited Corp. v. Iowa Railway Finance Authority*, 362 N.W.2d 489, 493-94 (Iowa 1985); *John R. Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 97-98 (Iowa 1977); and tort judgments, *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966).

Short-term obligations to be paid from taxes collected for that fiscal year are legally the same as cash transactions; these are not debt.

> Warrants issued in anticipation of taxes are held not to constitute a debt on the theory that moneys, the receipt of which is certain from the collection of taxes, are regarded as for all practical purposes already in the treasury and the contracts made upon the strength thereof are treated as cash transactions.

Rowley v. Clarke, 162 Iowa 732, 741, 144 N.W. 908, 912 (1913). Revenues provided for by taxes and in the process of collection are regarded as constructively within the State treasury. *Rowley*, 162 Iowa at 742, 144 N.W. at 913; *In re State Warrants*, 6 S.D. 518, 62 N.W. 101, 104 (S.D. 1895). This is a recognition that the legislature has power to appropriate funds for the entire biennium.

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[15] Article VII, section 2, of the Iowa Constitution states:

> The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other propose whatever.

The total of these appropriations will far exceed the amount of cash actually in the treasury at any single point in time. *Id.*

Article III, section 18, of the Iowa Constitution requires that "[a]n accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws, at every regular session of the general assembly." This constitutional duty to disclose accurately the State's revenues and expenses has been delegated to the Director of the Department of Revenue and Finance by statute. Iowa Code § 14.10(5). By statute as well the Department of Management and the Governor are required to provide the legislature with financial statements setting forth the anticipated revenues of the State and anticipated expenses in creating a State budget. Iowa Code §§ 8.22, 8.25.

While the legislature has ultimate control of appropriations, the statutory responsibility for preparation of a budget and for execution of the budget to prevent deficits is placed on the Governor and the Department of Management. Iowa Code §§ 8.21-8.52. The Governor is to initiate and prepare "a balanced budget of any and all revenues and expenditures for each regular session of the legislature." Iowa Code § 8.3. The State Reorganization Act created a Department of Management, directly attached to the office of Governor, and placed the responsibilities for the budget in that agency. Iowa Code §§ 8.4, 8.6, 8.24. These include the responsibility to estimate revenues available for expenditure. Iowa Code § 8.6(9). The Governor's budget message is required to include recommendations as to how any deficit is to be met, whether through new taxes or otherwise. Iowa Code § 8.22.

Because the legislature would not be in session when most allotments are made, it also delegated authority to the Governor to prevent a deficit by making across-the-board budget cuts.[16] Iowa Code section 8.31 delegates authority to the Governor to make uniform reductions in expenditures when necessary to avoid a deficit. "The purpose of the delegation, to reduce allotments of funds in order to prevent overdrafts or deficits, is well defined and reflects a reasonable legislative judgment that the executive branch of government is best suited to accomplish this purpose." 1980 Op.Att'yGen. 786, 796. Ultimately, if revenues are inadequate to pay appropriations and the legislature is not in session, it is the Governor who has the practical ability to prevent a deficit.

The legislature and the Governor must comply with constitutional requirements in carrying out their duties. The Governor and executive agencies also have budgetary responsibilities by statute. The General Assembly must publish an *accurate* statement of receipts and expenditures. Both the Governor and the General Assembly must comply with the constitutional debt limitation. Whether each governmental entity has carried out its obligations is ultimately a judicial question.

> The members of the General Assembly which enacts and the Governor who approves, a statute have sworn quite as solemnly to support the

[16] The State Reorganization Act, 1986 Iowa Acts, ch. 1245, § 1972, deleted the requirement of Executive Council concurrence.

> Constitution as the members of this court and are to be assumed to have intended to conform their conduct with such obligation.

Rowley, 162 Iowa 732, 754, 144 N.W. 908, 917 (1913).

All branches of government have a duty to know and meet this constitutional requirement.

> Each of the other departments, legislative and executive, are under precisely the same obligation to know these and obey, and it ought not be said that such obligation rests more lightly on the one than the other. All are representatives of the people with different functions to perform, and though the courts are by the Constitution itself made the final arbitrators, in construing its terms and interpreting its meaning, it is never to be lost sight of that, until the contrary appears beyond reasonable doubt, the courts will proceed on the theory that the legislative and executive departments have obeyed its commands and will yield to its injunctions.

Rowley, 162 Iowa at 756-757, 144 N.W. at 917.

Because the legislative and executive branches have a duty to comply with the Constitution, the courts will initially assume they have done so. Thus, one challenging their actions has the burden of establishing a violation of constitutional debt limitations. *See Trindle v. Consolidated Independent School District*, 200 Iowa 370, 373, 202 N.W. 377, 379 (1925) (municipal debt limitation case). However, it is clear that the ultimate arbiter is the judicial branch. The legislature does not have the ultimate power to define the scope of constitutional provisions as that is a judicial function. *Frost v. State*, 172 N.W.2d 575, 587 (Iowa 1969) (Becker, J. dissenting); *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755 (1962); *Carlton v. Grimes*, 237 Iowa 912, 23 N.W.2d 883 (1946). It is ultimately a judicial question whether the legislature and the executive branch have created "debt" in violation of the constitutional maximum.

You ask whether the Governor and the General Assembly may use the accrual basis of accounting when determining what a deficit is and when a deficit of over $250,000 occurs. In 1984 Op.Att'yGen. 108 this office opined that the Governor was not authorized to determine whether a constitutional deficit existed but that the Governor could rely on "standard accounting methods, including the accrual method of accounting" to determine whether estimated budget revenues were sufficient to permit allotments in full or whether to make an across-the-board reduction in allotments. In *State Bond Commission v. All Taxpayers, Etc.*, 525 So.2d 521, 525 (La. 1988), the Louisiana Supreme Court similarly stated, "There is no constitutional prohibition against use of recognized accounting procedures which reasonably attribute revenues to the appropriate fiscal year in which the revenues either accrue or are actually received."[17]

[17] Although this case discussed accrual of revenues, our 1984 opinion should not be construed as approving the accrual of revenues without also consistently accounting for expenses.

Since 1984, when our opinion was issued, a Government Accounting Standards Board has issued some standards which are called "Governmental Accounting and Financial Reporting Standards." These standards reflect what this national board perceives to be appropriate accounting standards to reflect the financial affairs of state or local government. These GASB standards do not purport to define the constitutional term "debt." The standards recognize that states have differing legal requirements, which may differ from GASB pronouncements. *See* GASB standard 1200.108.

These standards did not exist in 1857 when the Iowa Constitution was drafted, and the standards change as the views of the accounting community evolve. Further, it is unlikely that a national advisory board, such as the Governmental Accounting Standards Board, could be delegated ultimate authority to define state constitutional law. *See Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555, 559-560 (Iowa 1972). Thus, we cannot say that the GASB standards, nor any accounting standard, conclusively determine whether "debt" in the constitutional sense exists.[18]

Nonetheless, compliance with generally accepted accounting principles, and particularly GASB standards, would provide a strong basis for asserting that the State is appropriately anticipating the revenues available to offset expenditures and appropriately charging expenses to the correct fiscal year. Some rational basis must be presented for the State's method of reporting revenues and expenses and attributing these to a particular fiscal year.

Further, in meeting the constitutional requirement for accurate disclosure of receipts and expenditures, which is an accounting function, the State might be hard pressed to justify deviations from accepted accounting principles. A primary function of GAAP is to provide a uniform national standard for disclosure of governmental finances. This purpose is in part met by the State's preparation of a comprehensive annual financial report on a GAAP basis. This report includes a section reconciling the differences between the State's budget and GAAP. See GASB statement 2400.

This office can only render an opinion on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1972

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[18] Iowa Code section 421.31(5) requires the Department of Revenue and Finance to "keep the central budget and proprietary control accounts of the state government in accordance with generally acceptable accounting principles." This requirement, however, does not take effect until the fiscal year beginning July 1, 1992. Implementation of GAAP is to be phased in, beginning July 1, 1987. 1986 Iowa Acts, ch. 1245, 2046; 1986 Iowa Acts, ch. 1238, 59. This legislative recognition that the State could not immediately move to GAAP is an additional factor illustrating the impracticability of construing GAAP as the only method by which a "deficit" can be measured.

The statute requiring the State to move toward consistency with GAAP does not affect the validity of a subsequent appropriations bill. One legislature cannot bind or limit the authority of a future legislature. *Frost v. State*, 172 N.W.2d 575, 583 (Iowa 1969). The legislature unquestionably has ultimate control over the public treasury. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975).

Op.Att'yGen. 686. If resolution of a question is dependent on factors other than legal issues, it must be resolved by other entities as provided by law. The State Auditor has the duty to determine and report whether state agencies are following unbusinesslike practices. Iowa Code §11.4(3). This office cannot resolve accounting issues as a matter of law.

CONCLUSION

In conclusion, although we cannot say as a matter of law that the State budget must be prepared in accordance with GASB standards, a strong cautionary note must be added. In 1984, this office opined that the Governor could adopt the accrual method of accounting to calculate whether a deficit existed, so long as this was consistent with standard accounting principles. It appears that you, as the State Auditor, have concluded that the State has not utilized standard accounting principles in calculating the existence of a deficit but has instead followed an inconsistent accounting approach. We are aware of nothing in our prior opinion, case law, or accounting standards which would authorize the State to use only those aspects of an accounting system which improved the financial picture of the State and ignore those aspects which resulted in a deficit. If you are correct, as a matter of fact, it may be very difficult to defend a broad-based challenge to the State's financial practices. We strongly encourage the Governor and the General Assembly to make a good faith effort to correct any such errors in the budget so that the State's legitimate efforts to improve cash flow and to develop capital projects will not be impaired.

December 23, 1991

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Deficit in Liquor Control Fund. Iowa Const., Art. VII, §2; Iowa Code §§123.22, 123.53, 123.97. The Department of Revenue and Finance may transfer to the general fund beer and liquor control fund monies in excess of those needed to pay invoices on a reasonable payment schedule. The fund need not retain monies equal to all outstanding invoices. However, the use by the general fund of monies attributable to FY 1991 liquor sales may result in the creation of an impermissible State debt if there are no offsetting balances in the State treasury equal to the outstanding liabilities attributable to those sales. (Osenbaugh to Johnson, Auditor, 12-23-91) #91-12-4

Richard D. Johnson, Auditor of State: We have received your request for an opinion concerning the legality of certain transfers to the general fund from other State funds.

I. TRANSFERS

We first address whether the transfer of funds from the beer and liquor control fund violates Iowa Code section 123.53(2). That subsection states:

> The director of revenue and finance shall periodically transfer from the beer and liquor control fund to the general fund of the state those revenues of the [alcoholic beverages] division which are not necessary for the purchase of liquor for resale by the division, or for remittances to local

> authorities or other sources as required by this chapter, or for other obligations and expenses of the division which are paid from such fund.
>
> All monies received by the division from the issuance of vintner's certificates of compliance and wine permits shall be transferred by the director of revenue and finance to the general fund of the state.

It appears that, historically, the beer and liquor control fund pays for liquor from sixty to ninety days after it sells the liquor. The availability of funds for transfer to the general fund has been determined by projecting the amount of cash necessary to make these payments on a sixty or ninety-day schedule. Monies are transferred periodically, and future revenues are used to pay the liquor accounts. As a result of transfers, the beer and liquor control fund had deficits of over seven million dollars on June 30, 1990, and over twelve million dollars on June 30, 1991. You now ask whether Iowa Code section 123.53(2) requires that monies sufficient to cover all liquor payables be retained in the beer and liquor fund.

Iowa Code section 123.53(2) permits the transfer of "those revenues . . . which are not necessary for the purchase of liquor for resale . . . or for other obligations and expenses of the division . . .". This Code section does not specify whether "necessary" revenues are equal to the amount of outstanding obligations or only those funds needed to pay the bills on a timely basis.[19] The Department of Management and the Alcoholic Beverages Division of the Department of Commerce have concluded that the transferred funds are not necessary for the purchase of liquor or payment of obligations, based on projections as to the cash flow needs to pay off the liquor purchases within the sixty to ninety-day payment schedule.

This administrative construction would likely be upheld by a court. First, we are told this practice has been followed since at least the 1970's. Long-standing administrative construction would be given weight in construction of the statute because the legislature is presumably aware of it and has not amended the statute to change that result. *Hennessey v. Cedar Rapids Community School Dist.*, 375 N.W.2d 270 (Iowa 1985) (interpretation of an agency, charged with responsibility for implementing a statute is entitled to considerable weight especially if it is long standing, without legislative intervention); *Churchill Truck Lines, Inc. v. Transportation Regulation Bd. of Iowa Dept. of Transp.*, 274 N.W.2d 295 (Iowa 1979).

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[19] The phrase "not necessary for the purchase of liquor for resale by the division" in 123.53(2) has not been amended since the Alcoholic Beverages Division adopted a bailment system in 1988. *See* 1988 Iowa Acts, ch. 1241, §4. Technically, now the division purchases the liquor at the moment it resells it and subsequently pays the distiller. We do not construe this language as requiring the beer and liquor control fund to retain cash equal to the purchase price of all liquor. Instead, the question is what amount is "necessary" for the purchase of the liquor; because the division does not pay in advance, this is the same question as what amount is "necessary" for the payment of obligations and expenses.

We are also informed that generally accepted accounting principles permit the assumption that an entity will continue as a going concern unless there is reason to believe that the enterprise will cease in the immediate future. *See* American Institute of Certified Public Accountants, Statement of Auditing Standards 59 (April, 1988). This assumption supports the use of projections of income to meet the payment schedule, so long as the projections are reasonable.

Finally, we think a court would defer to the judgment of the administrative agency or agencies charged with administering the statute and the relevant fund. Statutory construction is ultimately a judicial function, though the court will give weight to an agency's construction of a statute so long as the agency does not purport to make law or change the meaning of the law. *Loftis v. Iowa Department of Agriculture*, 460 N.W.2d 868 (Iowa 1990); *Norland v. Iowa Department of Job Service*, 412 N.W.2d 904 (Iowa 1987); *Iowa Southern Utilities v. Iowa State Commerce Comm'n*, 372 N.W.2d 274 (Iowa 1985).

This still leaves the question whether the projections used, and the transfers made, are reasonable — i.e., is the agency retaining sufficient funds to have the cash "necessary" to meet its expenses. This is an issue of fact involving accounting expertise. This office can only render an opinion on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1972 Op.Att'yGen. 686. If resolution of a question is dependent on factors other than legal issues, it must be resolved by other entities as provided by law. The State Auditor has the duty to determine and report whether state agencies are following unbusinesslike practices. Iowa Code § 11.4(3). This office cannot resolve accounting issues as a matter of law.

We would note that section 123.53(2) requires the Department of Revenue and Finance to transfer the funds which are not necessary for the payment of expenses. That department must determine whether there is a surplus of funds in excess of that required to be maintained in the beer and liquor control fund.

In conclusion, section 123.53(2) does not mandate that cash balances equal to the amount of unpaid vender invoices and other liabilities be maintained in the beer and liquor control fund. A court would likely uphold the administrative practice of transferring funds in excess of that necessary to pay expenses and invoices on an established payment schedule, at least if it finds that the payment schedule and level of transfers is reasonable. The wisdom of this practice is a matter for the legislature or the responsible executive branch agencies to decide.

II. STATE DEBT

Resolution of the issue of statutory authority to transfer funds does not conclusively resolve the issue whether the fund deficit may generate a prohibited "debt" under the Iowa Constitution, Article VII, § 2.

Based on conversations with executive officers we make the following assumptions. There was no surplus in the general fund on June 30, 1991,

sufficient in amount to offset the deficit in the beer and liquor fund resulting from the transfer of funds. The monies transferred included receipts for liquor the division sold in 1991. A large portion of the deficit is owed to distillers for payment of liquor the division had already sold in 1991. Due to the bailment system created in 1988 Iowa Acts, ch. 1241, § 4 (Iowa Code § 123.22), the division pays for inventory *after* it receives the profit from re-sale. The anticipated revenues by which these invoices will be paid derive from future liquor sales. Had there been no transfer to the general fund, the invoices attributable to 1991 could have been paid from 1991 receipts.

Obligations payable only out of a "special fund" do not generally constitute "debt" if the State is not itself under a legally enforceable obligation. *See Train Unlimited Corporation v. Iowa Railway Finance*, 362 N.W.2d 489, 492-494 (Iowa 1985), and cases cited therein. "[A] 'debt,' in the context of [Article VII, section 5], arises only where the state itself is under a legally enforceable obligation." *John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89, 97 (Iowa 1977). The obligation to pay for liquors sold by the division is not limited by statute. Should the division fail to pay, the State would presumably be liable for breach of contract. *See Kersten Co., Inc. v. Department of Social Services*, 207 N.W.2d 117 (Iowa 1973). Indeed, section 123.97 states, "All revenues, except the portion of license fees remitted to the local authorities, arising under the operation of the provisions of this chapter shall become part of the state general fund." Thus, there is not sufficient segregation of the liquor control fund from general state appropriations to except this deficit from the constitutional debt limitation under the rationale of the "special fund" cases.

A fund deficit is not debt when the liquor invoices are "ordinary expenses" of the State payable out of current revenue. *See Grant v. City of Davenport*, 36 Iowa 396, 401-404 (1873); *City of Cedar Rapids v. Bechtel*, 110 Iowa 196, 81 N.W. 468 (1900). In our view, however, the "ordinary expenses" rationale does not apply here. The rationale of these cases is that the payment of current expenses out of current revenue is treated as a cash transaction. But here, the bills are for liquor sales which the State has already made, and the revenues from those very sales were deliberately transferred to pay other State obligations. Further, the general rule is that the State can anticipate revenues only during the current biennium or fiscal year. *See Hubbell v. Herring*, 216 Iowa 728, 738-739, 249 N.W. 430, 435 (1933); *Rowley v. Clarke*, 162 Iowa 732, 144 N.W. 908, 912 (1913). These cases indicate that government can only anticipate those tax revenues during the fiscal year because those are the only tax revenues available as a legal certainty. While the rule might be different for ordinary expenses of an on-going proprietary fund operating on a pay-as-you-go basis in other circumstances, we believe a court would find that the ordinary expenses exception to the constitutional debt limitation is inapplicable where receipts from a bailment system are transferred to cover inadequate revenues in the general fund.

CONCLUSION

In conclusion, while beer and liquor control fund expenses can be transferred to the general fund, use of the transferred liquor funds to pay other liabilities

could result in impermissible "debt" if there are not adequate off-setting balances in the state treasury at the end of the fiscal year.

December 30, 1991

CONSTITUTIONAL LAW; GOVERNOR; STATE OFFICERS AND DEPARTMENTS: IPERS investments in State notes. Iowa Const., art. III, §§1, 24; art. IV, §§1, 9; Iowa Code §§8.3, 97B.7, 97B.8. The Investment Board of the Iowa Public Employees' Retirement System (IPERS) must invest the IPERS trust fund solely for the benefit of the pension plan beneficiaries. The Governor may not loan money from the IPERS fund to the state treasury because the Governor has no constitutional or statutory authority to do so. Such an act would frustrate legislative enactments specifying how IPERS fund assets are to be used and how IPERS funds may be invested and by whom. A court would likely find that the Investment Board of IPERS may not loan money from the IPERS fund to the state treasury. IPERS investment in State notes would likely be inconsistent with legislative criteria and would likely create an impermissible conflict of interest between the Investment Board members' duties as trustees for the pensioners and the State's general fund financing goals. (Osenbaugh to Rosenberg, State Senator, 12-30-91) #91-12-5

The Honorable Ralph Rosenberg, State Senator: You have requested an opinion of the Attorney General concerning whether either the Governor or the Iowa Public Employees' Retirement System (IPERS) Investment Board may loan IPERS trust funds to the state treasury without legislative approval.

STATUTORY PROVISIONS

The IPERS fund consists of all moneys collected under Iowa Code chapter 97B together with interest and other income. Iowa Code §97B.7(1) (1991). The moneys collected under chapter 97B come from two sources - contributions by member employees and contributions from the governmental employers. Iowa Code §§97B.11, 97B.41 (1991). Membership in IPERS is mandatory for covered employees and officials. Iowa Code §97B.42 (1991).

The investment policy for IPERS trust funds is controlled by the IPERS Investment Board. Iowa Code §97B.8 (1991). The legislature vested the Investment Board of IPERS, the Department of Personnel, and the State Treasurer with authority to make IPERS fund investment decisions. IPERS is a "**special fund**, separate and apart from all other public moneys or funds of [the] state." Iowa Code §97B.7(1) (1991) (emphasis added).

The use of IPERS fund assets is strictly limited by statute. The fund is "to be used **only** for the purposes herein provided: (a) . . . for the payment of retirement claims for benefits under this chapter, or such other purposes as may be authorized by the general assembly. (b) . . . to pay refunds provided for in this chapter." Iowa Code §97B.7(3) (1991) (emphasis added). Legislative restriction of the use of funds is consistent with the statutory investment criteria, which are maximization of return and security. Iowa Code §§97B.7(2)(b). *See* 1988 Op.Att'yGen. 27, 28.

INVESTMENT IN STATE NOTES

In making investment decisions, the Department of Personnel and the Investment Board are charged with the responsibility of exercising "the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not for the purpose of speculation, but with regard to the permanent disposition of the funds, considering the probable income, as well as the probable safety, of their capital." Within the limitations of this standard, a fiduciary is authorized to utilize investments "which persons of prudence, discretion, and intelligence acquire or retain for their own account." Iowa Code § 97B.7(2)(b) (1991).

It is unlikely that State notes would qualify for IPERS investment under these criteria. State tax and revenue anticipation notes are attractive to private investors because of their tax-exempt status. As the IPERS fund does not pay federal or state income taxes on its earnings, tax exemption is no benefit. We are informed that it is unlikely that State short-term notes would generate a level of income sufficient to maximize income and thus satisfy IPERS investment goals.

Even if a loan to the State treasury could factually meet the investment criteria and arguably meet the purposes of chapter 97B, it would be difficult to establish that a loan to the State by the IPERS board was *solely* for the benefit of the pension plan beneficiaries. This statutory requirement is consistent with the general rule that a trust fund must be invested solely for the benefit of the beneficiaries, and not in the interest of third parties at the expense of the beneficiaries. Restatement (Second) of Trusts, § 170, comment q (1959); Op.Idaho Att'yGen. 82-7. Federal law recognizes the dangers posed by loans to employers by expressly prohibiting the loan of private pension funds to an employer whose employees are covered by the pension plan. 29 U.S.C. §§ 1104, 1106. *See also* 26 U.S.C. § 4975(c)(1)-(B). Although this *per se* prohibition does not apply to governmental plans, the courts would nonetheless carefully scrutinize an investment by the IPERS Board in State notes because of the potential conflicts of interest. *See Withers v. Teachers Retirement System of the City of New York*, 447 F.Supp. 1248 (S.D. N.Y. 1978) (upholding purchase of city notes under circumstances). The statutory goal of the Board as trustee for the pensioners is to maximize return on the investment while the goal of the state treasury is to borrow at the lowest possible rate. These goals are generally inconsistent. "A trustee must act in good faith for the benefit of the trust estate. He is bound not to do anything which would place him in a position inconsistent with the interests of the trust." *In re Skinner's Estate*, 215 Iowa 1021, 1028, 247 N.W. 484, 487 (1933). There need not be personal advantage to create an impermissible conflict of interest; a competing public interest can create an impermissible conflict of interest in the discharge of public duty. *See Wilson v. City of Iowa City*, 165 N.W.2d 813, 822-23 (Iowa 1969) (state university employment created impermissible conflict in city council member's vote on urban renewal). As fiduciaries to the pension fund, the Board members are statutorily obligated to protect the fund and must, therefore, avoid any conflict of interests.

There would be serious adverse consequences if the statute were construed to permit use of the IPERS pension funds for other state purposes. Under the Internal Revenue Code, an employee pension plan is a "qualified trust" only if it meets specific requirements. One requirement is that it is "impossible . . . for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of . . . employees or their beneficiaries. . ." 26 U.S.C. §401(a)(2). If IPERS were not a qualified plan, employees would be required to pay taxes on the accrued income of the fund. The legislature presumably was aware of these consequences and deliberately imposed statutory criteria to assure that the IPERS pension fund could be used only for the benefit of employees. Investments of the pension fund under the criteria of section 97B.7(2)(b) must be consistent with the statutory directive to use the IPERS fund solely for the benefit of the fund participants as set forth in section 97B.7(3).

GUBERNATORIAL POWERS

The Iowa Supreme Court has never addressed the issue whether the governor can direct a state agency to invest its funds in a certain way when the legislature has vested the agency with the statutory authority to make investment decisions. However, the general rule is that a governor has only the powers vested in the office of governor by constitution or statutes. 1991 Op.Wash.Att'yGen. No. 21, p. 9; *Pagano v. Pennsylvania State Horse Racing Comm'n*, 50 Pa. Commw. 499, 502, 413 A.2d 44, 45 (1980), *aff'd*, 499 Pa. 214, 452 A.2d 1015 (1982); *Shapp v. Butera*, 22 Pa. Commw. 229, 235, 348 A.2d 910, 913 (1975); *Martin v. Chandler*, 318 S.W.2d 40, 44 (Ky. 1958); 81A C.J.S. States §130 (1977); *Gubernatorial Executive Orders As Devices For Administrative Direction and Control*, 50 Iowa L. Rev. 78 (1964). We have applied this rule in prior opinions. 1982 Op.Att'yGen. 87-88; 1968 Op.Att'yGen. 132, 138;

The office of Governor receives its authority from both the Iowa Constitution and statutes. The Constitution vests the Governor with the "Supreme Executive power of this state" and the duty to "take care that the laws are faithfully executed." Iowa Const., art. IV, §§1, 9. Furthermore, the Constitution states in Article III, section 1:

> The powers of the government of Iowa shall be divided into three separate departments — the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

The Governor's statutory authority over agency funds is under Iowa Code section 8.3 (1991) which provides:

> The Governor of the state shall have:
>
> 1. Direct and effective financial supervision over all departments and establishments, and every state agency....

2. The efficient and economical administration of all departments and establishments of the government.

. . .

A governor may not act in areas that are reserved for the legislature; a governor may execute but not create laws; and in no case can a governor's executive order "be contrary to any constitutional or statutory provision, nor may it reverse countermand, interfere with, or be contrary to any final decision or order of any court." *Shapp v. Butera*, 22 Pa. Commw. 229, 235, 348 A.2d 910, 913 (1975). *See also* 1982 Op.Att'yGen. 87; 1968 Op.Att'yGen. 166; 1968 Op.Att'yGen. 132; *Monier v. Gallen*, 120 N.H. 333, 336, 414 A.2d 1297, 1299 (N.H. 1980); *Chang v. Univ. of Rhode Island*, 118 R.I. 631, 639-40, 375 A.2d 925, 928-29 (1977); *Wiseman v. Boren*, 545 P.2d 753, 759 (Okla. 1976); *Martin v. Chandler*, 318 S.W.2d 40, 44 (Ky. 1958). The Governor is "obliged to execute the law as it has emerged from the legislative process." 1980 Op.Att'yGen. 786, 790.

A prior Attorney General's opinion noted that section 8.3 authorizes the Governor to make recommendations to a state agency concerning a proprietary matter which is statutorily entrusted to the agency, but did not address whether the Governor could mandate a particular purchasing policy. 1988 Op.Att'yGen. 66 (#88-1-5(L)) (use of ethanol in state vehicles). Other opinions hold that the Governor cannot thwart legislative appropriations by mandating an impoundment of funds. 1980 Op.Att'yGen. 786; *see also* 1990 Op.Att'yGen. 30 [#89-6-10(L)].

The power to appropriate funds for the operation of state agencies is entrusted to the legislature by Iowa Constitution, article III, section 24. The power to appropriate money is essentially a legislative function. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). Inherent in this power is the authority to specify how the money shall be spent. 229 N.W.2d at 710. In the exercise of these powers the legislature may limit and qualify the uses of funds. *See Rush v. Ray*, 362 N.W.2d 479, 483 (Iowa 1985).

The legislature vested the Investment Board of IPERS with authority to make IPERS fund investment decisions and designated IPERS as a "**special fund**, separate and apart from all other public moneys or funds of [the] state." Iowa Code § 97B.7(1) (1991) (emphasis added). The legislature further stated that the fund's assets are "to be used **only** for the purposes herein provided: (a) . . . for the payment of retirement claims for benefits under this chapter, or such other purposes as may be authorized by the general assembly. (b) . . . to pay refunds provided for in this chapter." Iowa Code § 97B.7(3) (1991) (emphasis added). The legislature further specified the criteria for investment decisions by the Board. Iowa Code § 97B.7(2)(b).

By delegating to the Investment Board the sole power to make IPERS fund investment decisions and by designating this fund"to be used **only** for the purposes herein provided," the legislature has expressly provided exclusive

and specific purposes for the appropriation. Therefore, a gubernatorial order to loan money from the IPERS fund to the state treasury would be an attempt to exercise power the legislature specifically granted the IPERS Investment Board — to make IPERS fund investment decisions. Furthermore, such a loan would most likely not be consistent with the specific and exclusive purposes established by the legislature for those assets. Iowa Code §§97B.7(3), 97B.8 (1991).

In conclusion, the Governor has no authority to order that money from the IPERS fund be loaned to the state treasury without legislative approval. Nor could the Governor authorize the Board to take action inconsistent with its duties as set forth above.

CONCLUSION

In summary, the Governor may not loan money from the IPERS fund to the state treasury because the Governor has no constitutional or statutory authority to do so. Such an act would frustrate legislative enactments specifying how IPERS fund assets are to be used and how IPERS funds may be invested and by whom. A court would likely find that the Investment Board of IPERS may not loan money from the IPERS fund to the state treasury. IPERS investment in State notes would likely be inconsistent with legislative criteria and would likely create an impermissible conflict of interest between the Investment Board members' duties as trustees for the pensioners and the State's general fund financing goals.

December 31, 1991

HIGHWAYS; SCHOOLS: Minors' school licenses. Iowa Code §321.194 (1991); 761 IAC 602.17. A student holding a minor's school license may carry passengers who are fellow students, so long as they meet at the licensee's residence and accompany the driver to the same school. (Olson to Seeberger, Benton County Attorney, 12-31-91) #91-12-6(L)

JANUARY 1992

January 15, 1992

MUNICIPALITIES; COUNTIES; ENVIRONMENTAL LAW: Pesticide regulation. Iowa Const. art. III, §§38A, 39A; Iowa Code §§206.5, 206.6, 206.8, 206.11, 206.12, 206.13, 206.20, 206.22, 331.301, 364.1, 364.3 (1991); 21 IAC 45.22, 45.26. The Iowa Pesticide Act, Iowa Code ch. 206, and its implementing regulations are so comprehensive and detailed in the areas of pesticide registration, and the licensing and certification of pesticide dealers and applicators, as to likely preempt local regulation in these areas. However, other aspects of pesticide use not addressed in state law could be regulated by local governments under their home rule powers. (Benton to Shoultz, State Representative, 1-15-92) #92-1-1

The Honorable Don Shoultz, State Representative: You have asked for an Attorney General's opinion on the question whether Iowa law preempts cities and counties from enacting pesticide regulations. Last year you asked our opinion on whether the Iowa Groundwater Protection Act, Iowa Code ch. 455E (1991), preempted this type of local regulation. Our opinion held that while chapter 455E did not preempt local pesticide regulation, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136, et seq., and the Iowa Pesticide Act, Iowa Code ch. 206 (1991), preempted local governments in Iowa from regulating pesticides through local ordinances. 1990 Op.Att'yGen. 75.

However in June of 1991, the United States Supreme Court decided *Wisconsin Public Intervenor, et al. v. Mortier, et al.*, 501 U.S. _____ , 111 S.Ct. 2476, 115 L. Ed. 2d 532 (1991). In that case, the Court held that FIFRA does not preempt local ordinances regulating the use of pesticides. The Court's decision in *Mortier* has prompted your request that we re-examine the issue of local pesticide regulation under Iowa law.

Cities and counties in Iowa exercise home rule powers under parallel provisions in the Iowa Constitution, Iowa Const. art. III, §§ 38A, 39A. The former provision provides in part:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.

Counties are granted similar powers in Iowa Const. art. III, § 39A.

The statutes implementing home rule for cities and counties are also parallel. For example, Iowa Code section 364.1 states in part:

> A city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Under Iowa Code section 364.3(3):

> A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

Counties are granted like powers in Iowa Code section 331.301.

The Iowa Supreme Court has laid down several principles to guide the determination of whether a local ordinance is authorized by home rule.

Under home rule, a city has the power to enact an ordinance on a matter which is also the subject of a statute if the ordinance and statute can be harmonized and reconciled. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983). A city or county may set standards "more stringent than those imposed by state law, unless a state law provides otherwise," and any limitation on their powers by state law must be expressly imposed. *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1987). Limitations on a municipality's power over local affairs are not implied; they must be imposed by the legislature. *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990).

Both of the constitutional provisions granting home rule powers to cities and counties provide that local governments may not enact ordinances "inconsistent" with the laws of the general assembly. When an ordinance is inconsistent with state law, it has been preempted. In Iowa the test as to whether an ordinance is inconsistent is whether the ordinance prohibits an act permitted by statute, or permits an act prohibited by statute. *City of Council Bluffs v. Cain*, 382 N.W.2d at 812. A municipal ordinance also is preempted by state law when the ordinance invades an area of law reserved by the legislature to itself. *City of Des Moines v. Gruen*, 457 N.W.2d at 342.

We do not have the benefit of a specific ordinance to weigh against state law concerning pesticides. In responding to your question we can only examine state law governing pesticides and speculate as to whether a local ordinance might be permissible under the principles governing home rule.

The Pesticide Act of Iowa is found at Iowa Code ch. 206 (1991). The regulations implementing this statute are at 21 IAC 44 and 45. Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136, et seq., there is joint federal and state enforcement of the statutes. The Iowa Department of Agriculture and Land Stewardship (Department) has a cooperative agreement with the Environmental Protection Agency (E.P.A.) for purposes of enforcement. This enforcement responsibility, as well as enforcement of chapter 206 and its implementing regulations, is carried out by the Pesticide Bureau of the Department.

The Iowa Pesticide Act covers the registration of pesticides used in Iowa, and the licensing and certification for businesses and individuals who sell or apply pesticides in Iowa. It also provides for sanctions for the misuse of pesticides. For example, Iowa Code section 206.12(1) provides in part that, "Every pesticide which is distributed, sold or offered for sale or use within this state . . . shall be registered with the department of agriculture and land stewardship." Pesticides are registered as either restricted use or general use pesticides. Under Iowa Code section 206.20 the secretary adopts the E.P.A.'s classification of restricted use pesticides.

The statute contains extensive provisions governing the licensing of pesticide dealers and commercial applicators. Under Iowa Code section 206.8 an entity that engages in the business of selling pesticides must obtain a pesticide dealer's license. An entity that engages in the business of applying pesticides on the property of another must obtain a commercial pesticide applicator's license. Iowa Code § 206.6. Pesticide dealers are required to file annual reports with the department listing the total gross retail pesticide sales during the previous year. Iowa Code § 206.12(7)(a)(1) and (2). Pesticide dealers are also required to keep detailed records for each sale involving a restricted use pesticide. 21 IAC 45.26(2).

Persons applying for a commercial applicator's license must pass an examination before obtaining a license. Iowa Code § 206.6(3). The statute also requires that persons applying for a commercial applicator's license must file evidence of financial responsibility consisting of either a surety bond or a liability insurance policy. Iowa Code § 206.13. Like pesticide dealers, commercial applicators are subject to reporting requirements intended to provide information as to how a particular application was made. 21 IAC 45.26(3).

In addition to licensing pesticide dealers and commercial applicators, the Act requires that all persons applying restricted use pesticides must be certified. The statute and regulations governing certification are also extensive. All certified applicators are required to pass an initial examination to be certified, and are required to obtain four hours of continuing education for each calendar year. Iowa Code § 206.5; 21 IAC 45.22(1) and (5).

The statute sets forth detailed requirements for commercial, private and public certifications. Iowa Code § 206.6. The commercial applicator examination consists of a general test on pesticide applications and more specific tests concerning different types of applications which the commercial applicator may use. For example, specific topics include "Agricultural Weed Control" and "General and Household Pest Control". 21 IAC 45.22(2)(c). Certified public applicators are subject to the same requirements as commercial applicators. Certified private applicators, including farmers who apply restricted use pesticides, must also pass examinations. 21 IAC 45.22(3).

In enforcing the Pesticide Act, the department may seek to suspend or revoke a license or certification. Iowa Code § 206.11(4). The statute specifies several grounds upon which this administrative action may be based, including pesticide application inconsistent with the pesticide's label and operation in a faulty, careless or negligent manner. Iowa Code § 206.11(4)(a) and (d). The department may also seek to have a violation of the chapter prosecuted as a serious misdemeanor under Iowa Code section 206.22.

The Pesticide Act and its implementing regulations are comprehensive and detailed in providing for the registration of pesticides, and the licensing and certification of dealers and applicators. The General Assembly may cover a subject in such a manner as to manifest an intention that the field has been occupied. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983), Op.Att'yGen. #90-4-1(L). While we have no specific ordinance to measure against

this regulatory framework, we can advise that it is likely a court would find that as to these areas, a local ordinance would be preempted. In its regulation of registration, licensing and certification, the statute is a broad and detailed scheme which would exclude local regulation in this area. *Pesticide Public Policy Foundation v. Village of Wauconda*, 510 N.E.2d 858, 862 (Ill. 1987). *See*, 1982 Op.Att'yGen. 27, 30.

However, we do not believe that this conclusion precludes *all* regulation of pesticide use in Iowa by local governments. While registration, licensing and certification may be preempted, this does not suggest that ordinances governing other aspects of pesticide use enacted by local governments pursuant to their home rule powers would be prohibited.

For example, there are no provisions within chapter 206 or its implementing rules which restrict the aerial application of specific pesticides. Further, there is no provision in state law expressly prohibiting local governments from enacting ordinances of this type.

A hypothetical ordinance prohibiting the aerial application of specific pesticides within 100 feet of a school, park or other place of public assembly could be found within the home rule powers of local governments. The test again is whether the ordinance prohibits an act permitted by statute, or permits an act prohibited by statute. *City of Council Bluffs*, 342 N.W.2d at 812.

The ordinance and state law may be clearly reconciled; there continue to be aerial application of these herbicides but not within a certain distance from the protected areas. *See City of Des Moines v. Gruen*, 457 N.W.2d at 343.

It may be argued that an ordinance of this nature is inconsistent with the licensing and certification requirements of state law. However, licensing regulates an activity based on qualifications. The General Assembly has not directed that licensed/certified applicators be permitted to use specific chemicals or otherwise provided that specified chemicals may be used. *People Ex Rel. Deukmejian v. City of Mendocino*, 683 P.2d 1150, 1155 (Cal. 1984). Local regulation in areas not addressed by the statutory scheme set forth in chapter 206 could be appropriate. *Central Maine Power Company v. Town of Lebanon*, 571 A.2d 1189, 1194 (Me. 1990) (deciding that the Maine Pest Control Act left open areas for municipal regulation).

The consideration of whether and to what extent local governments in Iowa may regulate pesticides and their use will become increasingly important in light of the *Mortier* case. As we have suggested, a more definitive answer to that question must await legislation or review of a specific local ordinance whose terms can be measured under the legal tests described. As a preliminary matter, we conclude that ordinances touching on registration, licensing or certification would likely be preempted. However, other ordinances in areas not addressed in state law could be within the powers of local governments under home rule.

January 30, 1992

AUDITOR; STATE OFFICERS AND DEPARTMENTS; Iowa Code § 11.6 (1991). Auditor possesses discretion to conduct a complete or partial reaudit once statutory prerequisites are met. Auditor determines extent of audit and means or methods used pursuant to Iowa Code section 11.6(4). Costs of reaudit and reasonable related activities are to be drawn from a "segregated account" established pursuant to Iowa Code section 11.6(10). (Galenbeck to Boswell, State Senator, 1-30-92) #92-1-2(L)

January 30, 1992

TAXATION: Income of Nonresidents; Reciprocity Exemption. Iowa Code § 422.8(2). Section 422.8(2) exempts certain Iowa income of nonresidents from Iowa taxation even though no formal agreement exists between Iowa and another state. Section 422.8(2) also allows the Director of the Iowa Department of Revenue and Finance to enter into formal reciprocal agreements with other states which do not have statutory exclusions for Iowa residents' income attributable to those states. (Mason to Bair, Director of Revenue and Finance, 1-30-92) #92-1-3(L)

FEBRUARY 1992

February 13, 1992

MOTOR VEHICLES: Issuance of specially marked license plates to three-time OWI offenders; consent to stop vehicle at any time. Fourth Amendment, United States Constitution; Iowa Code § 321J.4A. While the legislature may revoke the driving privileges of a person who has been convicted three times of OWI, it may not constitutionally condition the privilege of driving on that person's consent to being stopped at any time. (Hunacek to Murphy, 2-13-92) #92-2-1

The Honorable Larry Murphy, State Senator: You have requested an opinion of the Attorney General concerning the recently enacted Iowa Code section 321J.4A, a statute which requires the impoundment of the registration certificate and registration plates of any person who has been convicted three times of the crime of operating while intoxicated (OWI). The statute provides for the issuance of new, specially marked, registration plates, subject to the condition that application and receipt of these plates "constitutes implied consent for law enforcement officers to stop the vehicle bearing special plates at any time." Iowa Code § 321J.4A(4)(a). The statute also states that a registered owner shall not sell a motor vehicle during the time its registration plates and registration certificate have been ordered surrendered, unless the registered owner applies to the Department of Transportation (DOT) for consent to transfer title. Iowa Code § 321J.4A(5). With this as background, you pose the following two (slightly paraphrased) questions:

1. Is it constitutional to stop a person's vehicle without probable cause? What happens if a person borrows the car without signing a consent form, consenting to being stopped at any time?

2. The law allows the DOT to adopt rules to implement this section. It allows broad regulatory authority with regards to the transfer of title. Does this broad regulatory authority lead to the possibility of coercion in the transfer of title?

We will address these questions in the order posed.

A.

It is well established that the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, generally requires a police officer to have "reasonable cause to believe a crime may have occurred" before that officer can stop a motor vehicle for investigatory purposes. *State v. Rosenstiel*, 473 N.W.2d 59, 61 (Iowa 1991). The test of reasonable cause for an investigatory stop does not depend upon the officer's subjective belief, but whether "articulable objective facts" were available to the officer to justify the stop. *State v. Scott*, 409 N.W.2d 465, 468 (Iowa 1987). Mere suspicion is not enough. *Id.* By the same token, the evidence justifying the stop need not rise to the level of probable cause. *Id.*

In the absence of any such articulable facts, a police officer may still constitutionally conduct a search or seizure of a person if that person voluntarily consents to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The statute in question here, by its reference to "implied consent", evidently is intended to make the stop of any person driving a vehicle with special OWI plates a "consent stop", and therefore constitutional. However, for reasons that are explained more fully below, we believe that more than "implied consent" is constitutionally required.

At first thought, there would appear to be no problem with such a statutory scheme. It is established, after all, that there is no inherent constitutional right to drive in the first place. *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989); *Veach v. Iowa DOT*, 374 N.W.2d 248, 249 (Iowa 1985). This being the case, it would seem at least plausible that the legislature, in offering a person who has been convicted three times of OWI a privilege to which he has no independent constitutional right, may condition that privilege on his agreement to submit to stops without the otherwise-required level of reasonable suspicion.

However, the problem with this reasoning is that the United States Supreme Court has made clear on a number of occasions that even if an individual has no independent constitutional right to a governmental benefit, the government may nonetheless not condition the granting of that benefit on the relinquishment of other constitutional rights. A clear statement of this "unconstitutional conditions" doctrine appears in *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) as follows:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." . . . Such interference with constitutional rights is impermissible.

Id. at 597, 33 L.Ed.2d at 577. Other cases illustrating this principle include *Rutan v. Republican Party of Illinois*, 497 U.S. _____, 111 L.Ed.2d 52 (1990) (promotion, transfer, recall, and hiring decisions involving low-level public employees may not be constitutionally based on party affiliation and support); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (public employees may not be discharged or threatened with discharge solely because of their political affiliation; expressly noting that the "denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (entitlement to unemployment benefits may not be made constitutionally dependent upon conduct infringing freedom of religion; expressly noting that it "is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege."); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968) (public employment cannot be conditioned upon waiver of constitutional rights).

Closer to home, this doctrine has been applied in a case involving an alleged consent to searches. In *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1986), the Eighth Circuit Court of Appeals rejected the State of Iowa's argument that prison guards, by signing a form as a condition of employment which evidenced their consent to random urinalysis had "consented" to such tests. The court, noting that the public employment could not be conditioned upon the relinquishment of a constitutional right (here, the Fourth Amendment), held that a public employer cannot force consent to an unreasonable search as a condition of employment.

There are cases which hold that a sentencing judge, as a condition of probation, may impose conditions which otherwise could not be imposed. For example, in *United States v. Williams*, 787 F.2d 1182, 1185 (7th Cir. 1986), the court upheld urinalysis testing as a condition of probation. Probation, however, is "a penal alternative to incarceration", *id.* at 1185, and therefore certain searches are reasonable in that context simply because they could constitutionally take place if the arrestee had been incarcerated. Significantly, the search requirement in *Williams* was upheld as reasonable rather than as justified by any form of consent. We therefore believe that such cases would likely be

found by a court to be inapposite, and that a court would likely find that Iowa Code section 321J.4A cannot constitutionally be read to legitimize a search that would otherwise be unconstitutional. Were our conclusion otherwise, a state legislature could, by the simple expedient of passing a statute which made consent to random vehicle stops a prerequisite to the attainment of any driver's license, use a statute to nullify a constitutional provision.

We believe that a few final comments on this issue are appropriate. First, we are not by this opinion suggesting that the statute is unconstitutional on its face. The statute is certainly capable of constitutional application, providing that a resulting search is independently supported by the requisite "reasonable grounds." We are only suggesting the statute cannot constitutionally convert an otherwise unconstitutional search into a legitimate one.

Second, it should be noted that our analysis does not depend on the identity of the driver of the car. However, the possibility of a vehicle with specially marked plates being driven by an "innocent" person (one who has never been convicted of OWI) gives additional cause for concern about the constitutional application of the statute. Whatever reasons the state may have for wanting to condition the privilege of driving for three-time OWI offenders on a consent to search, are simply not present when the state seeks to impose this "implied consent" on people who have not been convicted of alcohol-related crimes.

Third, we note that the presence of these special plates can alert an officer to the possibility that the vehicle is being driven by a person who may not have the legal authority to do so. If the officer who has been so alerted can then independently determine that the driver of the car does not have this legal authority, that officer will of course have a constitutionally sufficient basis for the stop of the vehicle.

Finally, our opinion should not be read as suggesting any insensitivity to the real and dangerous problem caused by drunk drivers. The damage to health and property caused by such drivers has been so extensively documented in the literature, judicial and otherwise, that extended discussion here is unnecessary. *See, e.g., State v. Knous*, 313 N.W.2d 510, 511-12 (Iowa 1981); *Burg v. Municipal Court*, 673 P.2d 732, 738 (Cal. 1983). We do not doubt, for example, that a legislature may, consistent with the Constitution, bar any person who has been convicted three times of OWI from driving forever. Statutes authorizing such a lifetime revocation exist elsewhere and have been constitutionally applied. *See, e.g., State v. Groethe*, 439 N.W.2d 554, 557 (S.D. 1989); *State v. Myers*, 411 N.W.2d 402, 404 (S.D. 1987). However, it is our opinion that if the legislature chooses to extend to such people the privilege of driving at all, it may not condition that privilege upon the relinquishment of other, independently secured, constitutional rights.

B.

Your next question is whether the statute may "lead to the possibility of coercion" in the transfer of title. We must, with respect, decline to answer this question. Determination of whether a statute "may lead" to a particular situation requires speculation as to the way in which the statute will be applied,

rather than resolution of any specific legal issue posed by the statute. As such, the question as posed is inappropriate for resolution by an attorney general opinion. *See* 61 IAC 1.5(3)(c) (issuance of an opinion appropriately declined when the "question calls for resolution of a question of fact or policy rather than determination of a question of law, or the legal question is dependent upon the facts of specific cases."). Whether coercion occurs in a particular case would also require a factual determination, and, for the same reasons, would be an inappropriate subject of an attorney general opinion.

February 13, 1992

TAXATION: Property Taxes; Tax Sale Redemption, 120-Day Affidavit, and Personal Judgment Remedy. Iowa Code Supplement §§ 446.20, 447.9, and 448.15 (1991). All those entitled to notice of expiration of right of redemption under section 447.9 are eligible to redeem from tax sale. The 120-day affidavit may be filed immediately upon the effective date of section 448.15, as amended by 1991 Iowa Acts, ch. 191, § 113. The personal judgment remedy created by 1991 Iowa Acts, ch. 191, § 72, only applies prospectively to taxes becoming delinquent on and after April 1, 1992. (Griger to Ferguson, Black Hawk County Attorney, 2-13-92) #92-2-2(L)

February 13, 1992

HIGHWAYS; MOBILE HOMES; LAW ENFORCEMENT: Speed limits in mobile home parks. Iowa Code Supp. § 321.251 (1991), Iowa Code §§ 321.235, 321.290 (1991). Peace officers may enforce speed limits on private roads in mobile home parks which are lower than public road speed limits if the property owner has filed the required notice with local officials and has erected appropriate signs. Statutory or local speed limits are also enforceable on mobile home park roads under the same preconditions. (Ewald to Welsh, State Senator, 2-13-92) #92-2-3(L)

February 13, 1992

SCHOOLS: School boards; Conflicts of interest; Agents for school textbook and supply companies. Iowa Code §§ 279.7A, 301.28 (1991). While Iowa Code section 279.7A does not preclude an agent for school textbooks or supplies from serving as a member of a school board of directors, Code section 301.28 does create such a prohibition. Pursuant to Code section 301.28, a school textbook or school supply salesperson is prohibited from serving as a school board member regardless of whether the salesperson sells books or supplies to the district upon whose board he or she serves. (Scase to Fuhrman, State Senator, and Ritchie, Buena Vista County Attorney, 2-13-92) #92-2-4(L)

February 13, 1992

MUNICIPALITIES: Conflicts of Interest. Iowa Code §§ 362.6 and 363.5 (1991). A lien document executed between a federal grant recipient and a city probably is not a contract within the meaning of section 362.5. A city council member who is also the executive director of a grant applicant should refrain from voting on issues concerning the lien agreement between his employer and the city. Other potential conflicts of interest related to the grant program should be evaluated by local officials on a case by case basis. (Barnett to Hatch, State Representative, 2-13-92) #92-2-5(L)

February 13, 1992

PUBLIC EMPLOYEES; LABOR ORGANIZATIONS; CONSUMER FRAUD: Iowa Code §§ 20.26, 714.16 (1991). Public employee organizations' use of a "reverse check-off" system for soliciting PAC contributions from their members does not necessarily violate Iowa Code section 20.26, which requires that all such funds be contributed on a voluntary basis. Iowa Code section 20.26 does not impose or preclude any particular method of solicitation. Iowa Code section 714.16, the Consumer Fraud Act, may apply to the solicitation of funds to be used for political purposes. (Kochenburger to Taylor, State Senator, 2-13-92) #92-2-6

The Honorable Ray Taylor, State Senator: You requested an opinion regarding the legality of a public employee organization employing a "reverse PAC check-off" as a method of soliciting financial contributions from its members to support the organization's lobbying and political activities. It is our opinion that contributions solicited through a reverse check-off may be considered voluntary donations permissible under Iowa Code section 20.26 (1991) and that the Iowa Consumer Fraud Act applies to solicitations for political contributions, including PAC contributions.

Your letter also questioned whether a reverse check-off system for soliciting political contributions constitutes a bad practice. Please note we cannot address this point as our office cannot issue a legal opinion on the desirability or suitability of particular business or labor practices, but can only determine whether they are permissible under Iowa law. Therefore, we neither endorse nor condemn the use of a reverse check-off procedure. In addition, this letter does not address the legality of reverse check-off procedures utilized by private employee unions, an area extensively regulated by federal law.[20]

We have divided our answer into two parts. First, we consider whether a reverse check-off violates chapter 20, the Public Employment Relations Act; specifically, Iowa Code section 20.26, which requires that funds from employee members used to support political activities be obtained only from voluntary donations. Second, we review the application of Iowa Code section 714.16, the Iowa Consumer Fraud Act, to reverse check-off programs. This office recently used the Consumer Fraud Act to terminate an attempt by cable television companies to institute a negative billing procedure, an enforcement effort you referred to in your opinion request.

For purposes of this opinion we assume that a reverse PAC check-off plan may include the following features:

1. An employee organization adds a specific dollar amount (the PAC contribution) to total membership payments. The organization indicates that the PAC contribution will be used to support candidates for public office supportive of the organization's views.

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[20] For example, see *Teamsters Local 358 v. Des Moines Register*, 438 N.W.2d 598 (Iowa 1989).

2. Members are told they may initially refuse to pay the PAC contribution and their contribution will be adjusted accordingly, or if they do pay and later change their minds, they may receive a refund of their PAC contribution.

3. The membership enrollment form includes the contribution to the organization's PAC as part of the total amount owed by employees. Unless the employee affirmatively acts to decline participation, an automatic contribution will be made to the PAC. For example, the member may decline by checking an appropriate box on a reply card provided by the organization and return it to them. The membership fees will then be adjusted to eliminate the PAC contribution.

I. The Public Employment Relations Act

The solicitation by employee organizations of contributions from their members for political candidates or causes is primarily governed by the Public Employment Relations Act. Iowa Code section 20.26 prohibits employee organizations from using organizational funds to support any "political party or organization" or in "support of any candidate for elective public office." This provision also states that "[n]othing in this section shall be construed to prohibit voluntary contributions by individuals to political parties or candidates." Therefore, under Iowa law, mandatory dues collected from public employee members may not be used for these purposes; contributions to a candidate or political action committee must be solicited and contributed solely on a voluntary basis.

At issue is whether members who make PAC contributions under the reverse check-off method are considered to have done so "voluntarily," as required by Iowa Code section 20.26.

The legality of a reverse check-off for PAC contributions was addressed by the United States Court of Appeals for the Sixth Circuit in *Kentucky Educators, etc. v. Kentucky Registry, etc.*, 677 F.2d 1125 (6th Cir. 1982). Kentucky law contained similar restrictions to those in Iowa Code section 20.26 and prohibited the use of "coercion" in obtaining contributions for political purposes from state or federal employees. The Kentucky Education Association (KEA) established a separate political arm, KEPAC, which solicited donations from KEA members for use in national, state and local political campaigns. These donations were solicited through a reverse check-off containing the same features as that assumed above, i.e., PAC contributions were automatically included with membership dues unless a KEA member affirmatively checked off a form declining to contribute to KEPAC. Refunds were also available for those members who initially contributed to KEPAC and later changed their mind.

The Sixth Circuit determined that the use of a reverse check-off for PAC contributions did not violate Kentucky law. The Court noted:

> The reverse check-off procedure utilized by KEPAC includes a number of safe-guards that protect the dissenting member. In the first place,

> membership in the KEA is not a prerequisite to employment in any of the public education systems of the Commonwealth of Kentucky. Secondly, an educator joining KEA can actively attempt to influence the political and ideological positions of KEA and the political contributions of KEPAC. Thirdly, a KEA member can check-off on the appropriate KEA form to indicate that he or she does not agree to make any contribution to KEPAC for political purposes. Lastly, a KEA member who does not check-off, can ask for a refund.

Kentucky Educators, 677 F.2d at 1132.

We find this reasoning applicable to the issue before us. As in Kentucky, membership in an employee organization is not required for public employees in Iowa, nor can employees be required to contribute financially to any employee organization. Iowa Code § 20.8(4) (1991). Those members who voluntarily join an employee organization may participate in decisions involving the use of PAC funds and are therefore able to help determine how their contributions are used. The reverse check-off plan assumed for purposes of this opinion allows employee members to reduce initially their membership dues by the PAC contribution and therefore avoid even the temporary use of their funds for political purposes they may not support. Finally, the refund system returns PAC contributions to members who later decide not to contribute to the PAC.

The issue under Iowa Code section 20.26 is whether donations to organization PAC's are made on a voluntary basis. This requirement does not impose or preclude any particular method of solicitation provided that employee members are clearly notified that such contributions are noncompulsory and are able to opt-out of participating in the program through a simple procedure and without fear of reprisal. Although not binding on interpretations of state statutes, the opinion of the United States Supreme Court in interpreting similar federal laws helps summarize the concerns that union PAC solicitations be voluntary:

> [A]lthough solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power . . . Whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is, therefore, determinative.

Pipefitter's Local 562 v. United States, 407 U.S. 385, 414-415 (1972).

We believe that in theory the assumed reverse check-off program for PAC contributions offers sufficient protections to its members so that the solicitation of funds for a public employee organization PAC can still be deemed voluntary. The fact that a reverse check-off program is a more efficient method of raising PAC funds than a system relying on a member's initiative to provide a financial

contribution does not demonstrate that contributions have been obtained in violation of Code section 20.26.

Our opinion should not be interpreted as approving a particular reverse check-off program. To determine the voluntary nature of any PAC program a number of factual considerations should be examined, such as: (1) how the check-off program is described to public employee members, (2) whether it is clearly communicated to members that contributions to a PAC are voluntary and will have no effect on employment or union opportunities or activities, (3) whether members may prevent an initial PAC deduction altogether rather than simply receiving a refund, (4) the ease and clarity of procedures for withholding PAC contributions, and (5) the behavior of organization members and officers.[21] For example, if an officer implied that full participation in an employee organization, such as the ability to run for office, depended on contributing to the organization's PAC, then such an action must be considered in determining the voluntary nature of contributions.

Since these considerations pose factual questions, an Attorney General's opinion is not the proper forum to review individual reverse check-off programs. *See* 1990 Op.Att'yGen. 94 [#90-12-2(L) (Scase to TeKippe)]; 1972 Op.Att'yGen. 686. Our administrative rule, 61 IAC 1.5(3)(c) states:

> The attorney general may decline to issue an opinion where appropriate, as in the following examples: *c.* The question calls for resolution of a question of fact or policy rather than determination of a question of law, or the legal question is dependent upon the facts of specific cases.

Therefore we do not decide whether the particular reverse check-off method used by the Iowa State Education Association is voluntary. However, we do conclude that a properly run reverse check-off program is not per se inconsistent with Iowa Code section 20.26 and is not facially invalid.

II. The Iowa Consumer Fraud Act

You also asked us to compare a reverse check-off program for PAC contributions to a negative billing scheme of the type recently contemplated by several cable television companies. That negative billing program was deemed prohibited by the Iowa Consumer Fraud Act, Iowa Code section 714.16. Initially, it is necessary to consider whether the Consumer Fraud Act applies to the solicitation of contributions which will be used for political purposes, such as to fund a PAC.

The Consumer Fraud Act states:

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[21] The fact that a particular check-off plan conforms with Iowa Code 20.26 does not imply that the plan would necessarily comply with the prohibitions against deceptive and unfair practices under the Iowa Consumer Fraud Act. The standards applied to determine whether a solicitation program is deceptive or unfair differ from those applied in determining compliance with Iowa Code 20.26.

> The act, use or employment *by a person* of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise *or the solicitation of contributions for charitable purposes*, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

Iowa Code § 714.16(2)(a) (emphasis added).[22] We must first determine if a PAC is a "person" under the Act and whether solicitations for PAC contributions are activities encompassed by the Act.

The definition of "person" in the Consumer Fraud Act is extremely broad and includes natural persons, partnerships, corporations, companies and business entities and associations. Iowa Code § 714.16(1)(c) (1991). If a PAC does not formally organize as an entity under Iowa law then PAC members would be covered under the Consumer Fraud Act as natural persons. If it does organize, then in most circumstances the organizational form (such as a corporation) would be encompassed within the definition of "person". Therefore, a PAC is considered a "person" for purposes of Iowa Code section 714.16.

Although the term "charitable purposes" is not defined in the Consumer Fraud Act, the term would have at least the breadth of the definition contained in chapter 122, "Organizations Soliciting Public Donations." Iowa Code section 122.1(2) defines "charitable purposes" as activities with a "benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental, conservation, civic, or other charitable objective." (Emphasis added.)

While a political organization is excluded from the definition of "charitable organization" in Iowa Code section 122.1(1), the Consumer Fraud Act specifically references the term "charitable purpose" rather than "charitable organization", demonstrating the legislative intent that the Act be applied broadly to a range of charitable solicitation programs and not be limited to those run by entities defined as "charitable organizations" in chapter 122. Since PAC's generally apply their funds for "social welfare or advocacy," solicitations for charitable purposes may, in many instances, include solicitations for PAC contributions. Accordingly, soliciting funds to be used in political campaigns or in the political process may be regulated by the Iowa Consumer Fraud Act, as well as by campaign finance laws.

To determine whether a specific reverse check-off program violates the Consumer Fraud Act would require a detailed examination of numerous factual issues, such as the nature and structure of the organization, the methods used to solicit contributions and the disclosures made to participants. As stated above,

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[22] In the cable television litigation you referred to, the Attorney General's Office adopted the position that the proposed negative billing plan was deceptive and an unfair practice.

we cannot use the opinion process to examine whether specific programs comply with Iowa Code section 20.26 or the Consumer Fraud Act and therefore we are unable to determine whether any particular reverse check-off program complies with Iowa law.

However, it may be useful to note certain fundamental differences between the use of a negative billing option in commercial transactions and a reverse check-off program for political contributions within labor organizations. A negative option program such as the one addressed in our office's cable television litigation is premised on a commercial relationship between a business and consumers. Consumers purchase goods or services in the marketplace from companies with which they have no relationship other than as purchasers. Such transactions are governed by the traditional contract law assumption that, except in limited circumstances, a merchant cannot make an offer and consider silence on the part of the offeree (here, the consumer) as an agreement to purchase specific goods or services. *See* Restatement, Second, Contracts §69 (1979). As an analogy, under Iowa law, unsolicited goods may be considered a "gift" and the recipient may keep them without owing any remuneration to the sender. Iowa Code chapter 556A.

The relationship between a seller and its customers is distinct from the relationship between a labor organization and its members. For example, other than by refusing cable service altogether, customers had little ability to determine corporate strategy or the form and delivery of services. These customers never had the opportunity to vote on or consent to the imposition of a negative billing option; instead the program was unilaterally imposed on them. In a labor organization, employee members may participate in the organization, help determine the methods used to solicit voluntary PAC contributions from members and have avenues open to them if they believe a chosen method is inappropriate or unsuitable. The ability to participate in the decision-making process is not available to consumers in the commercial marketplace and this factor would play a significant role in determining whether a public employee organization's reverse check-off program complied with the Consumer Fraud Act.

Another concern with a negative option billing plan in the commercial context is the ease with which consumers may disregard or be confused by notices purporting to explain the billing plan. Consumers pay numerous bills each month and the notice of a negative option plan is as easy to ignore as irrelevant junk mail. Indeed, sellers depend on consumer indifference or apathy to generate substantial revenues through a negative option plan, which is precisely the reason such plans are either strictly regulated or prohibited altogether under state and federal law. While individuals enter into myriad commercial transactions each month, they usually belong to only one labor organization and are more likely to be aware of and scrutinize their financial obligations to the organization than they would in their routine commercial affairs. Members may have personally voted on the imposition of such a plan and therefore be particularly cognizant of its existence and the procedures required to decline participation in the organizational PAC.

Further, members may have joined an employee organization with the initial understanding that PAC contributions will be solicited through a reverse check-off, in a manner similar to consumers who initially consent to a negative option plan for a book or record club. [23] In the cable television context, the previous practice was for consumers to affirmatively consent to the addition of an extra service (and fee); the imposition of a negative billing option was therefore a complete reversal of consumer expectation and experience on how they would be billed.

This discussion should not be construed as approving any specific negative option plan or suggesting any limitation of the Consumer Fraud Act, which must be interpreted broadly to realize the legislative intent of protecting Iowans from deceptive or unfair practices that can arise in many types of transactions. We simply note that while the Consumer Fraud Act applies to the solicitation of PAC contributions, the considerations relevant to determining whether a specific program violates the Act differ from those applied in the cable television litigation or in the commercial context in general. As indicated, we believe the protections available to labor organization members through the ability to participate in the organization must be taken into consideration in evaluating a reverse check-off program.

In summary, the use of a reverse check-off for PAC contributions in the manner described above does not per se violate the voluntary contribution requirement in Iowa Code section 20.26. Further, it appears that the Consumer Fraud Act does govern the solicitation of PAC contributions. In both instances, particular programs must be evaluated individually to determine if contributions to employee organization PAC's were made in compliance with Iowa Code sections 20.26 and 714.16.

February 20, 1992

COUNTIES: Budget for Joint Disaster Services Administration. Iowa Code §§ 24.2(3), 24.17, 29C.9, 331.401(1)(k). A city may not withdraw from a statutorily mandated joint disaster services administration. In the event that other funds are not available by voluntary contributions from participating cities and the county, the joint administration has the authority to adopt a budget and certify that budget to the county board of supervisors which will levy sufficient taxes to satisfy the certified budget. (Robinson to Wilson, Jasper County Attorney, 2-20-92) #92-2-7

James R. Wilson, Jasper County Attorney: You have requested an opinion of the Attorney General regarding the authority of a participating municipality to withdraw from a joint disaster services administration created pursuant to Iowa Code § 29C.9 (1991). You have also asked, in the event that a city withdraws from such a joint administration, does the city have any responsibility for the payment for its respective share of the operating expenses of the joint administration. You pose the assumed factual situation where a member city

[23] Such plans may be authorized under Federal Trade Commission rules if the purchase rules are clearly spelled out and specific disclosures made to consumers in advance. *See* 16 C.F.R. 425.

of a joint administration created in accordance with § 29C.9 elects to withdraw from the joint administration during a fiscal year, after a point in time that the fiscal year budget has been certified by the board of the joint disaster services administration to the county board of supervisors.

In our opinion, a city may not withdraw from the statutorily mandated administration. Section 29C.9(1), in part, states:

> 1. The county board of supervisors, city councils and boards of directors of school districts *shall* cooperate with the disaster services division of the department of public defense to carry out the provisions of this chapter. Boards of supervisors and city councils *shall* form a joint county-municipal disaster services and emergency planning administration. Such joint administration *shall* be composed of a member of the county board of supervisors and the mayor or the mayor's representative of the city governments within the county and the sheriff of the county. . . .

(Emphasis added.) The word "shall" imposes a duty. Iowa Code § 4.1(36)(a). When the meaning of the statute is clear and unambiguous, we do not need to resort to statutory construction or interpretation to ascertain the intent of the legislature. *In the Matter of R.L.D.*, 456 N.W.2d 919, 920 (Iowa 1990); *State v. Koplin*, 402 N.W.2d 423, 425 (Iowa 1987); *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). The language in section 29C.9(1) is clear and unambiguous that city councils and boards of supervisors "shall" form joint county-municipal disaster services and emergency planning administrations. The statute also provides for membership in the administration. No provision is made in chapter 29C for withdrawal from such an administration.

With respect to the expenses of the administration, section 29C.9(2) provides for the operating budget, personnel, salaries and compensation and other costs for operating a joint administration. It requires that the joint administration adopt an annual budget. It also provides that "[a]ll expenditures shall be subject to the provision of chapter 24, and the chairperson or vice chairperson of the joint administration are declared to be the certifying officials." Iowa Code § 29C.9(2)(c).

In lieu of the certification of a budget as provided for in section 29C.9(2)(c), the Code also authorizes voluntary contributions to the costs of operating the joint administration by each participating county and city. *See* Iowa Code § 29C.9(1). However, it is our opinion that in the event a city or county does not voluntarily "deposit moneys in the fund" to be used for purposes of paying expenses relating to disaster services and joint administration matters, the joint administration has the authority to adopt a budget and certify that budget to the county board of supervisors according to the provisions contained in section 29C.9(2)(c) and chapter 24. Pursuant to the local budget authority in chapter 24, the board of supervisors of the county then "lev[ies] taxes certified to it by tax certifying bodies in the county . . . ." Iowa Code § 331.401(1)(k); see also Iowa Code § 24.17.

The joint administration is a "certifying board" as defined by section 24.2(3). Thus, the joint administration, in the event that other funds are not available by voluntary contributions from the participating cities and counties, has the authority to adopt a budget and certify that budget to the county board of supervisors pursuant to section 29C.9(2)(c). The board of supervisors, pursuant to chapter 24 and section 331.401(1)(k), then levies sufficient taxes to satisfy the budget certified to it by the joint administration. These taxes, as with other county-wide taxes, would be levied against all property within the county, including the property located within the participating cities in the joint administration.

In summary, a city may not withdraw from a statutorily mandated joint disaster services administration. In the event that other funds are not available by voluntary contributions from participating cities and the county, the joint administration has the authority to adopt a budget and certify that budget to the county board of supervisors which will levy sufficient taxes to satisfy the certified budget.

February 20, 1992

COUNTIES; JUVENILE LAW: Costs for juvenile shelter care. Iowa Code §§ 232.20, 232.21(1)(c), 232.21(4), 232.142, 234.35, 234.38, 234.39, 331.441(2)(b)(5), 331.441(2)(c)-(9) (1991); Op.Att'yGen. 91-5-2(L). The county is not required by law to continue providing emergency shelter care pursuant to a contract which benefits the city police officers. (Sheirbon to Crowl, Pottawattamie County Attorney, 2-20-92) #92-2-8(L)

MARCH 1992

March 5, 1992

COUNTIES: Investment of Public Funds. Iowa Const. art. III, §39A; Iowa Code §§331.401(1)(n), 331.555(5), 331.555(6) and 453.1 (1991); Iowa Code Supp. §452.10 (1991). The exclusive authority for investment of idle county public funds, pursuant to Iowa Code section 453.1, is vested in the county treasurer. A board of supervisors, under chapters 452 and 453, possesses limited investment authority, but does have certain management responsibilities for county investments and is authorized to designate the depositories for funds on hand. An investment advisory committee, established by a board of supervisors to develop an investment policy binding on the county treasurer, would be "irreconcilable with state law." Of course, a county treasurer could seek advice from such an advisory body, at the treasurer's discretion. (Walding to De Groot, State Representative, 3-5-92) #92-3-1

Kenneth De Groot, State Representative: I am writing in response to your request of January 8, 1992, for an opinion of the Attorney General regarding the investment of county funds. Specifically, you have asked:

1. Since Iowa Code §§ 331.555(5), 331.555(6) and 452.10 empower county treasurers with investment duties, what responsibility over those investments does § 331.401(1)(n) give to the county board of supervisors?

2. If the foregoing sections are contradictory and the board has no authority over the investments made by the county treasurer, does any other Code section or county home rule allow the board to appoint itself or other persons as an investment advisory committee to the treasurer while maintaining final investment authority with the treasurer? This question is brought about by the phrase 'unless otherwise provided' as used in § 452.10.

The issues are presented, you indicate, because of the recent investment troubles associated with Iowa Trust, an investment pool created by agreement of various public entities, pursuant to Iowa Code ch. 28E, for the purpose of jointly investing public funds. "Public funds" is a defined term. *See* Iowa Code § 453.1(2)(b) (1991).

I. INVESTMENT AUTHORITY.

The general provisions regarding the deposit and investment of public funds in Iowa are set forth in Iowa Code chapters 452 and 453. Iowa Code section 453.1 (1991) provides, in relevant part, as follows:

> *All funds held in the hands of the following officers or institutions shall be deposited in one or more depositories first approved by the appropriate governing body as indicated*: For the treasurer of state, by the executive council; for judicial officers and court employees, by the supreme court; *for the county treasurer, recorder, auditor, and sheriff, by the board of supervisors*; for the city treasurer or other designated financial officer of a city, by the city council; for the county public hospital or merged area hospital, by the board of hospital trustees; for a memorial hospital, by the memorial hospital commission; for a school corporation, by the board of school directors; for a city utility or combined utility system established under chapter 388, by the utility board; for a regional library established under chapter 303B, by the regional board of library trustees; and for an electric power agency as defined in section 28F.2, by the governing body of the electric power agency. *However, the treasurer of state and the treasurer of each political subdivision or the designated financial officer of a city shall invest all funds not needed for current operating expenses in time certificates of deposit in approved depositories pursuant to this chapter or in investments permitted by section 452.10.*
> . . .

(Emphasis added). Iowa Code Supp. section 452.10 (1991) contains an extensive "laundry list" of permissible investments for idle public funds as "funds not currently needed for operating expenses." The investments permitted by section 452.10 have previously been identified and set out in an opinion of the Attorney General. *See* 1988 Op.Att'yGen. 87, 88-90.

The investment authority for idle county public funds, as indicated in prior opinions, is statutorily vested in the county treasurer. In 1978 Op.Att'yGen. 152, we concluded that "all funds not needed for current operating expenses are to be invested by the treasurer of the political subdivision." Similarly, in 1974 Op.Att'yGen. 737, 738, we observed that section 453.1 "designates the county treasurer [as] the officer having responsibility for the investment of county funds not needed for current operating expenses." *See also* 1986 Op.Att'yGen. 3 (#85-1-12(L)); 1980 Op.Att'yGen. 311, 312; 1980 Op.Att'yGen. 50 (#79-4-2(L)). Furthermore, we have concluded that investment authority is an *exclusive* legislative grant. *See* 1974 Op.Att'yGen. 737, 738 (concluding that a clerk of court lacks authority to invest funds). Accordingly, the county treasurer is vested with exclusive investment authority for idle county public funds.

Consistent with these prior opinions of our office is another statutory provision pertaining to financial management of county public funds. Iowa Code section 331.555 provides, in relevant part:

. . .

> 5. The [county] treasurer shall maintain custody of all public moneys in the treasurer's possession and deposit or invest the moneys as provided in section 452.10 and chapter 453.
>
> 6. The [county] treasurer shall keep all funds invested to the extent practicable and may invest the funds jointly with one or more counties, judicial district departments of correctional services, cities, or city utilities pursuant to a joint agreement.

Iowa Code § 331.555(5) and (6) (1991).

The question remains, however, as to what investment authority is preserved for a county board of supervisors by section 331.401. Pursuant to that section:

> 1. The [county] board [of supervisors] shall:
>
> . . .
>
> n. Comply with chapters 452 and 453 in the management of public funds.
>
> . . .

Iowa Code § 331.401(1)(n) (1991). The narrow issue, therefore, is what investment management authority for county public funds is preserved for a board of supervisors by chapters 452 and 453.

Chapters 452 and 453 impose on a board of supervisors several requirements pertaining to the management of county public funds. *See* Iowa Code § 452.1 (county responsibility for state tax levies); § 452.8 (report to state auditor); § 452.9 (verification of treasurer's books); § 452.14 (false statement or report penalties); § 452.15 (penalties for official delinquency); § 453.2 (resolution or order approving depositories); and § 453.4 (restrictions on selection of depositories). A board of supervisors also has authority found in chapters 452 and 453 for the designation of depositories for funds on hand.[24] *See* Iowa Code § 453.1; Iowa Code Supp. § 452.10. *See also Pugh v. Polk County*, 220 Iowa 794, 799, 263 N.W. 315, 318 (1935); 1936 Op.Att'yGen. 409, 409-410. Because a board of supervisors is authorized to designate the proper depositories, a board does possess limited investment power. Pursuant to Iowa Code section 453.9 (1991), a board may:

> direct the treasurer or other designated financial officer to invest any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest on which is used for the same purpose, in local certificates or warrants issued by any municipality or school district within the county, in municipal or school district bonds which constitute a general liability, and in investments authorized in section 452.10.

A board of supervisors, therefore, does possess investment authority for sinking funds. A "sinking fund," as defined in an earlier opinion, is "a sum set apart out of current net revenue to meet an existing obligation which has not yet matured but which will mature at some stated future date." 1986 Op.Att'yGen. 3 (#85-1-12(L)) (footnotes omitted). Nevertheless, a board of supervisors may delegate that investment authority to the county treasurer, and thereby transfer responsibility for handling investment transactions until the delegation is revoked. Iowa Code § 453.11 (1991). Accordingly, a board of supervisors, under chapters 452 and 453, has certain management authority for county investments, designates the depositories for funds on hand and possesses limited investment authority.

II. INVESTMENT ADVISORY COMMITTEE.

Your next question concerns the authority of a board of supervisors to establish an investment advisory committee to the treasurer. Under the arrangement, as framed, you indicated that the treasurer would maintain "final investment authority." While you do not explain the precise function of the committee, it is presumed for purposes of this opinion that the committee would assist in the development of an investment policy for the county.

Analysis of this issue requires interpretation of constitutional and statutory provisions. In 1978, counties in Iowa attained home rule status, a decade after municipalities, by constitutional amendment. *See* Iowa Const. art. III, § 39A. *See also* Iowa Code § 331.301(1) (1991). The county Home Rule Amendment

[24] An investment alternative for a county treasurer, pursuant to 453.1, as highlighted above, is to invest idle county public funds in board-approved depositories.

grants counties home rule power to enact ordinances "not inconsistent with the laws of the general assembly." Iowa Const. art. III, § 39A. *See also Smith v. Board of Supervisors of Des Moines County*, 320 N.W.2d 589, 592 (Iowa 1982) (upheld constitutionality of the county Home Rule Amendment). A county ordinance is valid unless it pertains to a matter preempted from the county or it is "irreconcilable with state law."[25] *Kent v. Polk County Board of Supervisors*, 391 N.W.2d 220, 222-224 (Iowa 1986) (held that a county ordinance regulating "dangerous animals" was not "irreconcilable with state law" permitting unlicensed possession of fur-bearing animals). *See also Chelsea Theatre Corp. v. City of Burlington*, 258 N.W.2d 372, 373 (Iowa 1977); *Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975) (distinguishing between inconsistent and irreconcilable).[26] Finally, in regard to that Home Rule limitation, we have previously opined that "the question of preemption turns on discerning the legislative intent, and that any law purporting to limit [Home Rule powers] must be expressly imposed." 1980 Op.Att'yGen. 631, 633 (citing *Chelsea Theatre Corp.*, 258 N.W.2d at 374, for the requirement that legislative intent be examined to determine limitations on the exercise of Home Rule, and *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978), for the requirement that a limitation on Home Rule be expressly imposed).

Applying the foregoing principles of Home Rule to the pertinent provisions, we again rely on prior advice of this office. In a 1988 review of whether a particular form of investment, mutual funds, was permissible, the Attorney General wrote:

> The question is whether the investments would be inconsistent with state law. The legislature has preempted cities and counties by express statutory restrictions and by a long-standing state scheme restricting the investment authority of all political subdivisions.

1988 Op.Att'yGen. 87, 88 (footnotes omitted). The 1988 opinion relied on an earlier opinion which had concluded that, while it is constitutionally permissible for political subdivisions to purchase stock in private corporations, cities and counties had been prohibited from such investments by the legislature. According to that opinion:

> Because the home rule amendments expressly repudiated the Dillon rule, we are of the opinion that their enactment eliminates for cities and counties the need to obtain express statutory approval in order to purchase stock in private corporation, as the . . . [Iowa Supreme] court had earlier concluded. However, we are also of the opinion that the legislature has

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[25] The preemption doctrine prohibits a county from legislating in an area reserved by the legislature for itself, while county legislation is considered "irreconcilable" with state statutes if the county legislation prohibits acts permitted by statute or, alternatively, permits acts prohibited by statute.

[26] Supreme Court discussions on municipal Home Rule are looked to for guidance in county Home Rule issues as the provisions of the two constitutional amendments are quite similar, and the preemption doctrine and the limitation on taxing authority are applicable in both instances. *See, e.g.*, 1986 Op.Att'y Gen. 10, 12.

> moved to preempt cities and counties from making such purchases both by express statutory restrictions and by a long-standing state scheme restricting the investment of all political subdivisions.

1986 Op.Att'yGen. 10, 12. Thus, the area of investment authority of all political subdivisions in Iowa, according to prior opinions, is reserved to the legislature based on expressed statutory restrictions and a long-standing state scheme restricting the investments. That conclusion is consistent with a legal treatise on the subject:

> Besides the general power of the legislature over municipal funds and debts, the legislature may regulate the mode of collecting, receiving and holding municipal funds, and such a regulation cannot be changed by ordinance.

(Footnotes omitted). McQuillin, Municipal Corporations § 39.47 (3rd ed.), p. 169.

Consistent with that view, we believe the efforts of a board of supervisors to restrict a county treasurer's exclusive investment authority would be "irreconcilable with state law." In support of that conclusion, we note that the legislature has expressly mandated that a city council, in the investment of idle municipal public funds, "implement appropriate investment policies to be followed by the city treasurer". § 452.10. No similar express statutory authority is provided for a board of supervisors. A familiar principle of statutory construction is that the express mention of one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. *See In Re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). *See also* 1982 Op.Att'yGen. 353, 355. *Expressio Unis Est Exclusio Alterius* is the legal maxim. The legislature, by omitting counties from the express authorization for establishment of an investment policy, is interpreted as not intending to include a board of supervisors in that statute. To the contrary, the omission suggests that the legislature specifically intended to exclude a board of supervisors from that express authority and, more importantly, that no control of a county treasurer's investment authority be exercised by a board. A possible explanation for the disparate treatment is the fact that county treasurers are elected, § 331.551, while the position of city treasurer tends to be appointive. *See* Iowa Code § 372.5. As such, an investment committee, established by a board of supervisors to develop an investment policy for the county binding on the treasurer, would be "irreconcilable with state law," as prescribed in section 452.10.

That conclusion, however, does not prohibit a county treasurer for seeking advice from an advisory body, at the treasurer's discretion. An investment advisory committee created by a county treasurer, as well as the authority of a treasurer to consult with other individuals or organizations for investment advice, would not infringe on a county treasurer's exclusive investment authority, nor would it be "irreconcilable with state law." Accordingly, a county treasurer could seek advice from an advisory body, at the treasurer's discretion.

Finally, you indicated that your second question was posed because of uncertainty as to the meaning of language contained in section 452.10. In part, that section provides:

> However, the treasurer of state and the treasurer of each political subdivision shall invest, *unless otherwise provided*, any of the public funds not currently needed for operating expenses . . . .

(Emphasis added.) It is our view that the phrase "unless otherwise provided" is a reference to other investment authority expressed in the Code by the legislature, and is not intended to suggest an exception whereby a board of supervisors is permitted to alter or condition the investment decisions of the county treasurer. For example, that phrase would apply to investments authorized by section 453.9 (investment of a sinking fund) which authorizes investments in addition to section 452.10 investments.

In summary, it is our view that the exclusive authority for investment of idle county public funds, pursuant to Iowa Code section 453.1, is vested in the county treasurer. A board of supervisors, under chapters 452 and 453, possesses limited investment authority, but does have certain management responsibilities for county investments and is authorized to designate the depositories for funds on hand. An investment advisory committee, established by a board of supervisors to develop an investment policy binding on the county treasurer, would be "irreconcilable with state law." Of course, a county treasurer could seek advice from such an advisory body, at the treasurer's discretion.

March 6, 1992

JUVENILE LAW: Confidentiality of Complaints Alleging Delinquency. Iowa Code §§ 232.2(34), 232.28(10), 232.147(2)(5) (1991); 1982 Iowa Acts ch. 1209, §§ 7, 16. All delinquency complaints remain public records under Iowa Code section 232.147 (1991). (Phillips to Vander Hart, Buchanan County Attorney, 3-6-92) #92-3-2(L)

March 12, 1992

CRIME VICTIMS; CONFIDENTIALITY: Identity information at a crime victim center. Iowa Code §§ 236A.1(1), 236A.1(2), 236A.1(7), 236A.1(8) (1991). The identity of a crime victim at a crime victim center is a confidential communication as defined in Iowa Code ch. 236A and can only be disclosed with the consent of the victim or upon a court order issued pursuant to section 236A.1(7). Such an order can be issued in a civil or criminal proceeding, including commitment proceedings under chapter 229. (Ramsay to Schultz, Clinton County Attorney, 3/12/92) #92-3-3

Lawrence H. Schultz, Clinton County Attorney: You have requested an opinion of the Attorney General on five questions concerning the disclosure of information from crime victim centers.

> I. Does the term "confidential communication" as defined in Iowa Code § 236A.1(1)(d) include information as to whether a "victim" as defined

in Iowa Code § 236.1(1)(a) is temporarily residing or otherwise physically present or participating in victim counseling at a "crime victim center' as defined in Iowa Code § 236A.1(1)(c)?

Iowa Code chapter 236A was enacted in 1985 and complements chapter 236, "Domestic Abuse." Chapter 236A is designed to protect against the disclosure of confidential communications by counselors of victims in cases of domestic abuse and violent crimes. Your initial question inquires as to whether identity information is a confidential communication under chapter 236A.

Pursuant to chapter 236A, a victim is defined as:

> . . . a person who *consults* a victim counselor for the purpose of *securing advice, counseling, or assistance* concerning a mental, physical, or emotional condition caused by a violent crime committed against the person.

Iowa Code § 236A.1(1)(a) (1991) (emphasis added). A victim counselor is:

> . . . a person who is engaged in a crime victim center, is certified as a counselor by the crime victim center, and is under the control of a direct services supervisor of a crime victim center, whose primary purpose is the *rendering* of *advice*, counseling, and *assistance* to the victim of crime.

Iowa Code § 236A.1(1)(b) (1991) (emphasis added). A crime victim center:

> . . . means any office, institution, agency, or crisis center *offering assistance* to victims of crime and their families through crisis intervention, accompaniment during medical and legal proceedings, and follow-up counseling.

Iowa Code § 236A.1(1)(c) (1991) (emphasis added).

Chapter 236A defines a confidential communication as:

> . . . information shared between a crime victim and a victim counselor *within the counseling relationship*, and includes *all information received by the counselor* and any advice, report, or working paper given to or prepared by the counselor in the course of the counseling relationship with the victim.

Iowa Code § 236A.1(1)(d) (1991) (emphasis added). A confidential communication includes *all* communications from the crime victim to the victim counselor. Identity information is a communication which is a confidential communication. The confidential communication cannot be disclosed when it is made to those present at the crime victim center. *See* Iowa Code § 236A.1(1)(d) (1991).

Chapter 236A was intended to implement Public Law 98457, 42 U.S.C. § 10401 et seq. and entitled the "Family Violence Prevention and Services Act". The Act's express purpose is to:

> [D]emonstrate the effectiveness of assisting States in efforts to prevent family violence and provide immediate shelter and related assistance for victims of family violence and their dependents. . . .

42 U.S.C. § 10401 (1991).

For funding, Public Law 98-457 requires that crime victim programs and staff meet certain requirements. *See* 42 U.S.C. § 10401 et seq. (1991). The records of persons using the centers, and the addresses and locations of the centers are all protected from disclosure. 42 U.S.C. § 10402(a)(2)(E) (1991). Other states have specifically addressed identity confidentiality in response to the federal legislation.[27] The Iowa legislature was concerned with confidentiality and placed no limits on the "communication" between crime victim and crime victim counselor that is protected from disclosure.

While Iowa law does not specifically mention the confidentiality of identity information, the breadth of the statutory language requires non-disclosure. To allow any person to inquire as to whether a person is temporarily residing or otherwise physically present or participating in victim counseling would frustrate the legislative intent to provide a safe haven. In essence, no victim would be safe from any potential violence if identity information were subject to disclosure under all circumstances. Neither the location of the center nor the counselor would be secure from disclosure if identity information were readily available.

Identity information is not specifically listed as confidential information within chapter 236A. However, statutory interpretation of chapter 236A, the express intent of federal legislation, and public policy requires non-disclosure. It is the opinion of this office that whether a victim is physically present, whether a victim is participating in victim counseling at a crime center, and even whether a victim is temporarily residing at a crime victim center is a confidential communication and cannot be disclosed except under the circumstances discussed below.

> II. Must a "crime victim center" or its employees or "crime victim counselor" disclose a "crime victim's" presence in order to allow an authorized person to serve or execute a writ or criminal process or order of court?

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[27] *See* Ala. Code 30-6-8 (1991); Ariz. Rev. Stat. Ann. 36-3005(A)(3) (1991); Fla. Stat. Ann. 415.608 (1991); Idaho Code 39-5211(4) (1991); Miss. Code Ann. 93-21-107 (1991); Mo. Rev. Stat. 455.220 (1991); Nev. Rev. Stat. 217.420(5); N.J. Rev. Stat. 30:14-13; and Or. Rev. Stat. 108.610.

We have above concluded that identity information is a confidential communication under chapter 236A. Therefore, identity information shared by the crime victim, within the counseling relationship with the crime victim counselor, is confidential except for statutorily created exceptions.

Section 236A.1(2) allows confidential communications to be disclosed in any civil or criminal proceeding only when the victim waives the confidential privilege or when a court compels disclosure pursuant to Iowa Code section 236A.1(7). *See* Iowa Code §§ 236A.1(2) & 236A.1(7) (1991). However, even if confidential communications are disclosed pursuant to section 236A.1(2) and section 236A.1(7), the location of the crime victim center and the identity of the victim counselor are protected from disclosure in all criminal and civil proceedings. *See* Iowa Code § 236A.1(2) (1991).

When disclosure of confidential information is sought pursuant to court order, the court must make a finding that *all* the following are present before disclosure is required:

> a. The information sought is relevant and material evidence of the facts and circumstances involved in an alleged criminal act which is the subject of a criminal proceeding.
>
> b. The probative value of the information outweighs the harmful effect, if any, of disclosure on the victim, the counseling relationship, and the treatment of services.
>
> c. The information cannot be obtained by reasonable means from any other source.

Iowa Code § 236A.1(7) (1991).

It is the opinion of this office that only when a court orders disclosure of information pursuant to Iowa Code section 236A.1(7), must identity information be disclosed. This does not, however, preclude the issuance of a search warrant, supported by probable cause, for law enforcement authorities to enter a crime victim center to search for a person, because such a search does not require disclosure of a communication by the crime victim center personnel.

> III. Is refusal by a "crime victim center" or its employees or "crime victim counselors" to disclose the presence of a "crime victim" in order to allow an authorized person to serve or execute a civil or criminal process or order a violation of Chapter 719 or any other provision of the Iowa Code?

In 1984 the Iowa Court of Appeals addressed obstruction of justice. *State v. Hauan*, 361 N.W.2d 336 (Iowa Ct. App. 1984). The court concluded that the initial question as to whether a violation of section 719.1 occurred was

". . . whether [the] . . . acts, although possibly included within the statute, constitute a hindrance of the official duties." 361 N.W.2d at 339. The acts, obstructing or resisting, were also addressed by the *Hauan* decision. Prior to *Hauan*, "resist" was defined strictly: to "oppose" and "obstruct." *Id.*, citing *State v. Donner*, 243 N.W.2d 850 (Iowa 1976). The *Donner* court held that the person charged with resisting an officer must engage in ". . . actual opposition to the officer through the use of actual or constructive force making it reasonably necessary for the officer to use force to carry out his duty." 243 N.W.2d at 854. *Hauan*, applying the new criminal code, modifies the *Donner* decision by making a mere hindrance of official duties a possible violation of section 719.1. 361 N.W.2d at 339.

Your question asks us to determine whether the refusal to abide by a civil or criminal process or court order is a violation of chapter 719, a criminal law chapter, or "any other provision of the Iowa Code?" We cannot address in our opinion process whether a speculative act by an individual would amount to a violation of a criminal law provision. The question you pose would require us to determine whether the individual who allegedly failed to comply with the order or process was familiar with any court proceedings that resulted in the process or order, as well as other factual determinations that would be specific to a particular case. We do not ordinarily utilize our opinion process to determine specific violations of statute or speculate on violations of criminal law. *See* 1982 Op.Att'yGen. 162. We are also reluctant to utilize the opinion process for this purpose when the statute in question, like chapter 719, is penal in nature. *See* 1972 Op.Att'yGen. 564, 565. *See also* 61 IAC 1.5(3)(c). For these reasons, we decline to opine on this question.

> IV. Must a "crime victim center", or its employees or "crime victim counselors" disclose the presence of a "crime victim" in order to serve any notice permitted or required or to implement an order for custody pursuant to hospitalization proceedings under Chapter 229 of the Code of Iowa?
>
> V. Do Iowa Code §§ 236A.1(7) and 236A.1(8) permit the court to order disclosure of "confidential information" in civil as well as criminal cases?

Questions IV and V can be answered together. Both questions address court orders releasing information.

As was opined in question II, a crime victim center must disclose identity information only upon a court order. Pursuant to chapter 236A, a court can only order disclosure pursuant to section 236A.1(7). Further, *all* the conditions of section 236A.1(7) must be met. Finally, section 236A.1(7) requires that the information sought must be involved in an alleged criminal act which is the subject of a criminal proceeding. *Id.* Section 236A.1(8) requires that if a matter is to be tried to the court rather than a jury, a different judge must make the section 236A.1(7) analysis. Iowa Code § 236A.1(8) (1991).

Based upon the above references to chapter 236A, it would appear that the information sought must be the subject of a criminal proceeding. A court order issued under section 236A.1(7) need not be in a criminal proceeding. However, the order must seek relevant information and material evidence of facts and circumstances involved in an alleged criminal act which is the subject of a criminal proceeding. *See* Iowa Code §236A.1(7)(a) (1991). It is also clear that the crime victim center need not disclose the location of a crime victim, as we have said above, and the disclosure of such information could only be pursuant to a court order issued pursuant to that chapter. We again note that the location of the crime victim center cannot be disclosed in any civil or criminal proceeding. *See* Iowa Code §236A.1(2) (1991). It is conceivable that an order for custody pursuant to hospitalization proceedings under chapter 229 may contain the appropriate findings and conclusions required by chapter 236A. Such an order could be valid and binding upon the crime victim counselor or individual upon whom it was served. Whether a particular court order contained the statutorily mandated findings under section 236A.1(7) is not an issue we can resolve in this opinion.

In conclusion, we are of the opinion that the identity of a crime victim at a crime victim center is a confidential communication as defined in Iowa Code chapter 236A and can only be disclosed with the consent of the victim or upon a court order issued pursuant to section 236A.1(7). Further, we conclude that such an order may be issued in a civil or criminal proceeding. We decline to opine on the question of whether a refusal to comply with such a court order violates chapter 719.

March 16, 1992

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Consequences of State budget deficit or debt. Iowa Const. art. VII, §§2, 5; Iowa Code §§8.31, 8.38, 8.40, 11.4, 11.15, 11.27, 11.28, 444.22, 444.23, 721.2 (1991). Whether there is a violation of constitutional debt limitations is a mixed question of law and fact, which is ultimately determined by the courts. The Governor and the General Assembly are constitutionally required to prevent violation of the constitional debt limitation. The General Assembly must provide for revenues sufficient to pay appropriated expenses. The Governor, through the Department of Management or the Department of Revenue and Finance, prevents deficit spending by across-the-board budget cuts or a statewide property tax. The Auditor's duty is to report matters which, in the Auditor's reasoned judgment, constitute illegal or unbusinesslike practices.

An obligation which constitutes an unconstitutional "debt" is void. If a court were to find that State officers illegally spent funds in violation of the debt limitation or the deficit prohibition in chapter 8, potential remedies include recovery of funds, forfeiture of bonds, and removal from employment. By statute, violation of chapter 8 by an elected officer is also grounds for impeachment. Action taken in knowing violation of legal limitations could also result in criminal penalties under section 721.2 in an appropriate case. (Osenbaugh to Johnson, State Auditor, 3-16-92) #92-3-4

Richard D. Johnson, Auditor of State: We have received your request for an opinion concerning the consequences of a State budget deficit. You have noted in a recent report in the State's certified annual financial report (CAFR) your opinion that the State general fund ended the most recent fiscal year in a deficit. You then ask a series of questions concerning the consequences or remedies available as a result of that deficit.

As we have previously noted, the existence of a deficit in the general fund does not necessarily constitute "debt" in violation of Article VII, section 5, of the Iowa Constitution. The constitutional term "debt" ". . . is given a meaning much less broad and comprehensive than it bears in general use." *Hubbell v. Herring*, 216 Iowa 728, 735-736, 249 N.W. 430, 434 (1933). The Iowa Supreme Court has not directly addressed the issue whether the expenditure of funds in excess of general fund revenues creates an impermissible debt.

For purposes of this opinion, we will assume that a deficit existed in the general fund on June 30, 1991. Whether your determination is correct is a mixed question of law and fact, not capable of resolution by an Attorney General's opinion. 1972 Op.Att'yGen. 686. Your request basically asks us to describe the potential legal consequences if the courts conclude that a general fund deficit did exist at the end of the fiscal year.

1) You first ask whether you must report your finding of a general fund deficit in any manner other than in the report issued in the CAFR. The only statutory requirement is that your audit findings concerning state departments be filed in the reports provided in Iowa Code sections 11.4, 11.27, and 11.28 (1991). Assuming that your report in the CAFR is your official report of the audit of the State as a whole, we are not aware of any other action you are required to take.

2) You indicate concern regarding how to initiate action to eliminate a deficit. The Auditor provides reports which disclose the condition of the State. Chapter 11 does not, however, provide a direct remedy for correction of illegal or unbusinesslike practices, other than as provided in section 11.15. (See discussion in section 8 below.) Generally speaking, one must look to the law concerning the irregularity in question to determine whether there is a judicial remedy and, if so, who has standing to seek correction.

Once your report of a deficit is filed it is for others to act to take corrective action. As we have previously opined, the responsibility for correction of a budget deficit is placed in the Governor and the General Assembly. Ultimately, however, if they fail to take corrective action, the courts would determine whether there is a violation of the constitution or statutes. Op.Att'yGen. #91-12-3, citing *Rowley v. Clarke*, 162 Iowa 732, 754, 756-57, 144 N.W. 908, 917 (1913).

3) You ask whether the General Assembly is required to eliminate the deficit by June 30, 1992, by either raising revenue or cutting expenditures. The General Assembly cannot fund appropriations through deficit. 1982 Op.Att'yGen. 68,

70. The General Assembly is as responsible for assuring compliance with constitutional limitations as are the courts. *Rowley v. Clarke*, 162 Iowa 732, 754, 144 N.W. 908, 917 (1913). If the court found that a budget deficit resulted in a violation of the debt limitation, then the general assembly would be bound to correct that through raising revenue, cutting expenditures, or incurring debt under the constitutionally mandated procedure. Art. VII, §5. The constitution does not require any specific timetable for eliminating budget deficits or retiring debt. Article VII, section 5 prohibits debt, not deficits. Likewise chapter 8 contemplates the avoidance of deficits by across-the-board cuts or a state property tax levy. Neither the constitution nor chapter 8 anticipate the actual creation of an illegal debt or deficit. Therefore, a court faced with such a situation may well have to craft its own debt or deficit elimination plan or order the legislature to do so. As the appropriation and raising of revenue is a legislative function, a court would likely defer to a good faith legislative plan to eliminate the deficit even though it did not achieve elimination of the budget deficit by the end of this fiscal year.

4) Appropriations cannot be spent until they are allotted under Iowa Code section 8.31. The director of the Department of Management, subject to review by the Governor, has authority through the allotment process to prevent overdrafts or deficits in State funds. Section 8.31 describes this authority in part as follows:

. . .

> The director of the department of management shall approve the allotments subject to review by the governor, unless it is found that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event such allotments may be modified to the extent the governor may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of the fiscal year, and the director shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, who shall set up such allotments on the books and be governed accordingly in the control of expenditures.
>
> . . .
>
> If the governor determines that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, the reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations.

"The purpose of the delegation, to reduce allotments of funds in order to prevent overdrafts or deficits, is well defined and reflects a reasonable legislative judgment that the executive branch of government is best suited to accomplish this purpose." 1980 Op.Att'yGen. 786, 796.

Section 8.31 provides that allotments "may be modified to the extent the governor may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of the fiscal year . . .". You question whether the reduction of allotments is mandatory.

In a pending suit, the Governor has taken the position that he has a duty to implement and maintain a balanced budget. *AFSCME et al. v. State of Iowa and Governor Terry E. Branstad.* It is not appropriate to use the opinion process to address an issue pending before the Iowa Supreme Court as to do so could be perceived as interfering with its jurisdiction. 1968 Op.Att'yGen. 544; 61 IAC 1.5. Further, a definitive ruling may be rendered soon, obviating the need for an answer to this question. Thus, unless the Court rules to the contrary, the Governor's position is that he has a duty to maintain a balanced budget under chapter 8. Our prior opinions have held that the Governor cannot balance the budget by impoundment of specific funds but instead must do so by the across-the-board cuts provided in section 8.31. 1980 Op.Att'yGen. 786, 793-797.

5) You ask whether a statewide property tax is required in order to eliminate a deficit. To answer this question, we will assume that the Governor has the duty to maintain a balanced budget and that enacted revenue raising measures are inadequate to pay for all appropriations. The Governor has two means to balance the budget — by across-the-board cuts under section 8.38 and by raising a general statewide property tax under Iowa Code Supp. section 444.22 (1992). That section, as amended by 1991 Iowa Acts, ch. 258, § 52, states:

> In each year the director of revenue and finance shall fix the rate in percentage to be levied upon the assessed valuation of the taxable property of the state necessary to raise the amount for general state purposes as shall be designated by the department of management.

We would note that the legislature repealed section 8.6(5), which made it mandatory for the director of the Department of Management to certify to the Department of Revenue and Finance the amount of money to be levied for general state taxes. 1990 Iowa Acts, ch. 1266, § 29. However, the subsequent re-enactment of amended section 444.22 makes it clear that authority for the statewide property tax still exists. 1991 Iowa Acts, ch. 258, § 52. Also, section 8.6(9)(i) sets out several statements that are to be included by the Department of Management in the budget report submitted to the legislature each year. These items include:

> (1) The condition of the treasury at the end of the last fiscal year.
>
> (2) The estimated condition of the treasury at the end of the current fiscal year.
>
> (3) The estimated condition of the treasury at the end of the next fiscal year, if the director's recommendations are adopted.

(4) An estimate of the taxable value of all the property within the state.

(5) The estimated aggregate amount necessary to be raised by a state levy.

(6) The amount per thousand dollars of taxable value necessary to produce such amount.

Thus, harmonizing these provisions with the prohibition on deficits in chapter 8, and assuming across-the-board cuts per section 8.38 have not been sufficient to reduce a deficit to zero, it would appear that the budget report submitted by the Department of Management would include a property tax levy per section 8.6(9)(i)(6).

6) You ask by whom and by what time must a statewide property tax be ordered. Section 444.22 tells who imposes the tax — the director of the Department of Revenue and Finance after notification by the director of the Department of Management. The more difficult question is one of timing, now that section 8.6(5) is repealed.

Iowa Code section 444.23 requires the director to certify the rate of property taxation, which will be a uniform statewide rate, to the county auditors. The only real purpose for such certification would be for purposes of preparation of the tax list required by Iowa Code ch. 443. The tax list, after preparation by the county auditor, is then given to the county treasurer and is the treasurer's authority to collect the property taxes. Iowa Code § 443.4.

The tax list is to be delivered by the county auditor to the county treasurer on or before June 30. Iowa Code § 443.4. Therefore, in order to avoid any delay in the collection of property taxes, the amount should be designated by the Department of Management and the rate fixed by the director of Revenue and Finance in sufficient time for the various county auditors to have an opportunity to complete the tax list for delivery to the county treasurers by June 30.

7) You ask whether there is a specific date by which the deficit must be eliminated if not done by June 30, 1992. We would refer you to our discussion in paragraphs three and four.

8) You next ask whether a budget deficit would constitute an "irregularity," requiring report to the county attorney or Attorney General under Iowa Code section 11.15. That section provides:

> If said examination discloses any irregularity in the collection or disbursement of public funds or in the abatement of taxes a copy of said report shall be filed with the county attorney and it shall be the county attorney's duty to co-operate with the state auditor, and, in proper

> cases, with the attorney general, to secure the correction of the irregularity.

We are aware of no cases or opinions construing the term "irregularity" in section 11.15. The term "irregularity" is generally defined as:

> 1: the quality or state of being irregular
> 2: something that is irregular; lack of proper and honest conduct (as in respect to a position of trust).

Webster's Third New International Dictionary Unabridged 1196 (G & C Merriam Co., 1967).

Section 11.4(2)(3) requires reports of audits of state agencies to "set out in detail . . . [a]ll illegal or unbusinesslike practices." This was defined in 1936 Op.Att'yGen. 499, 505, as follows:

> The matter of illegal practices can be very accurately determined by an examination of the statutes of the State of Iowa and the Supreme Court decisions. It is difficult to lay down a hard and fast rule as to what constitutes unbusinesslike practices. Each case could only be determined upon the particular facts surrounding the same, but in passing judgment upon such practices, we again point out that the Auditor must exercise a legal discretion and not an arbitrary one.

The term "irregularity" would similarly provide for the exercise of judgment by the Auditor concerning whether the practice in question was one which the county attorney should be called upon to seek correction. Assuming that section 11.15 applies to audits of State agencies, a significant factor in the exercise of the State Auditor's judgment should be whether the county attorney has jurisdiction to take action to correct the act in question. In other words, the county attorney has jurisdiction to bring criminal prosecutions if the Auditor discovers evidence of a crime. However, the county attorney does not generally have jurisdiction to compel state agencies to comply with civil law requirements. The Attorney General can sue on behalf of the State to recover funds owing the State or prosecute any action in which "the state . . . may be interested, when, in the attorney general's judgment, the interests of the state require such action . . . ". Iowa Code § 13.2. No corresponding authority exists for county attorneys.

9) Finally, you ask whether there are any other consequences if the existence of a deficit is determined by judicial proceedings to constitute a violation of constitutional or statutory provisions.

If an obligation is found to be a "debt" in violation of Article VII, section 2, that obligation is void as a matter of law. Its validity, however, will be determined at the time the contract is made. *City of Cedar Rapids v. Bechtel*, 110 Iowa 196198, 81 N.W. 468, 469 (1900). If the Court applied the rationale

of the municipal debt limitation cases,[28] the burden is on the plaintiff to show that at the time the obligation was incurred there could have been no good faith belief that the contract was within the revenues the government intended to levy. *Id.* Should the Court find the absence of good faith and determine that the debt limitation was violated, other potential consequences flow.

If the court were to find that the allotment statute, section 8.31, is a mandatory legislative cap on appropriations, authorization of expenditures resulting in a budget deficit could be found to violate Code section 8.38. That section authorizes the Attorney General to bring action to recover funds spent in excess of appropriations.

Violation of the requirements of chapter 8, concerning the State budget, subjects the offender to a penalty of $250 in an action brought by the Attorney General under Iowa Code section 8.40. That section also provides that a "refusal to perform any requirements" of that chapter is "sufficient cause for removal from office or dismissal from employment by the governor" and is "sufficient cause to subject [an elected officer] to impeachment."[29] Iowa Code §8.40. In 1980 Op.Att'yGen. 506, 508, we noted that there is no case law construing this section. If there were an alleged violation of chapter 8, we would need to address the meaning of "refusal to perform any requirements of this chapter" and determine whether it imposes strict liability. We further noted, "[I]n any event, in the normal process of determining an appropriate remedy to seek, this office would consider such familiar criteria as whether the alleged violation was flagrant or technical and whether it was deliberate or inadvertent."

A knowing violation of chapter 8 or the debt limitation could result in criminal penalties for nonfelonious misconduct in office, Iowa Code section 721.2. 1980 Op.Att'yGen. 506; *see also* 1980 Op.Att'yGen. 405. That section provides in part:

> Makes any contract which contemplates an expenditure known by the person to be in excess of that authorized by law.
>
> . . .

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[28] The municipal debt limitation encompasses a broader category of obligations than does the State debt limitation. Article XI, section 3, states, "No county, or other political or municipal corporation shall be allowed *to become indebted in any manner, or for any purpose*, to an amount . . .". By contrast, Article VII, section 2, and section 5 prohibit the "contracting" of debt. Based on similar provisions, the Arizona Supreme Court has stated that the municipal debt cases do not apply in determining whether there is a state debt. *Rochlin v. State*, 540 P.2d 643, 648 (Ariz. 1975). If the Court, nonetheless, concluded that expenditures in excess of revenues constituted State debt, it would not likely impose a more stringent burden on the State than it has in the municipal debt cases.

[29] An issue we do not address is the nature of the violation which might be required to comply with Article III, section 20, providing liability of state officers for impeachment for "any misdemeanor or malfeasance in office . . . ." We do not mean to suggest that a trivial violation of chapter 8 would be grounds for impeachment.

> By color of the person's office and in excess of the authority conferred on the person by that office, requires any person to do anything or to refrain from doing any lawful thing.
>
> . . .
>
> Fails to perform any duty required of the person by law.

A violation of the debt limitation resulting from action of a particular public official could also conceivably result in an action against the officer's bond. For example, the director of the Department of Management is required to take the constitutional oath of office and post a bond payable to the State "conditioned upon the faithful discharge of the director's duties . . .". § 8.4.

In conclusion, whether there is a violation of the constitutional debt limitations is a mixed question of law or fact, which is ultimately determined by the courts. The Governor and the General Assembly are constitutionally required to assure that there is no violation of the constitutional debt limitation. The General Assembly is to prevent a deficit by providing for revenues sufficient to pay for expenses. The Governor, through the Department of Management or the Department of Revenue and Finance, is to prevent deficit spending by across-the-board budget cuts or a statewide property tax. The Auditor's duty is to report matters which, in the Auditor's reasoned judgment, constitute illegal or unbusinesslike practices.

An obligation which constitutes an unconstitutional "debt" is void. If a court were to find that State officers illegally spent funds in violation of the debt limitation or the deficit prohibitions of chapter 8, potential remedies include recovery of funds, forfeiture of bonds, and removal from employment. By statute, violation of chapter 8 by an elected officer is grounds for impeachment. Action taken in knowing violation of legal limitations could also result in criminal penalties under section 721.2.

APRIL 1992

April 8, 1992

STATE OFFICERS AND DEPARTMENTS: Delegation of Statutory Duties to Private Entities. Iowa Code ch. 28E, §§ 137A.5, 137B.6, 137C.6, 137D.2, 137E.3, ch. 808 (1991). Regulation, licensing and inspection of food service establishments is a governmental, rather than a proprietary function. A state agency, the Department of Inspections and Appeals, with the statutory responsibility of conducting inspections of food service establishments may contract with a private entity for conducting such inspections pursuant to sufficiently narrow standards and guidelines established by that agency. The department may not delegate to a private party its authority to utilize

administrative warrants under chapter 808. (Krogmeier to Sweeney, Director, Department of Inspections and Appeals, 4-8-92) #92-4-1

Charles H. Sweeney, Director, Iowa Department of Inspections and Appeals: You have requested an opinion of the Attorney General concerning the ability of the Iowa Department of Inspections and Appeals (DIA) to enter into contracts with private parties for the performance of certain statutorily mandated duties. Specifically, you inquire whether the DIA may enter into an agreement with private persons or corporations for the performance of inspections of certain food establishments, hotels and beverage vending machines. We believe that, as long as the private entities involved perform these inspections pursuant to criteria promulgated by the DIA or another appropriate state agency, the answer to your question is yes.

In recent years state and local governments across the country increasingly have explored entering into agreements under which governmental responsibilities are turned over to the private sector. The impetus for exploring agreements with the private sector is often explained as a need to fulfill public functions more efficiently and cheaply than they have been fulfilled by the government in the past. *See* Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 Iowa L. Rev. 277, 280-81 (1990). Before policy issues of efficiency and thrift can be considered, however, it is necessary to determine the extent to which governmental responsibilities can legally be turned over to the private sector.

We begin by noting that Iowa law imposes on the Department of Inspections and Appeals the authority and responsibility to conduct investigations of a variety of enterprises dispensing food. *See* Iowa Code chapters 137A - 137E inclusive. While these statutory provisions do not contain an explicit grant of authority to delegate this responsibility to private enterprise, Iowa Code chapter 28E talks generally about the ability of state agencies to enter into contracts with other entities, both public and private. For example, Iowa Code section 28E.12 allows a public agency to contract with any other public agency to provide "any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform . . . ." Another provision of that chapter, Iowa Code § 28E.4, allows any public agency of the state to enter into an agreement with any public or private agency "for joint or cooperative action pursuant to provisions of this chapter." Additionally, section 10A.104(7) authorizes the DIA to contract for services to carry out its duties. However, sections 28E.4 and 10A.104(7) do not authorize a complete delegation of DIA's statutory authority.

We believe that this arrangement is not coincidental, but instead reflects a legislative concern that governmental services not be completely delegated to private enterprise. This is a concern which both the Iowa Supreme Court and our office have previously noted. For example, in *Bunger v. Iowa State High School Athletic Association*, 197 N.W.2d 555 (Iowa 1972), the Court held that it would be an improper delegation of authority for local school boards to agree to operate their school athletic programs in accord with the bylaws of the Iowa High School Athletic Association. The Court stated:

> It is a general principle of law, expressed in the maxum "delegatus non potest delegare" that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied.

Id. at 560. Relying on *Bunger*, our office has previously expressed the opinion that municipalities may not, by contract or otherwise, delegate the selection, appointment and retention of police officers, nor the operation of police departments, to private concerns. *See* 1984 Op.Att'yGen. 53.

It would seem that one of the principal problems involved in delegating governmental discretion to private enterprises is the potential for uncontrolled exercises of discretion by people who have not been appointed, by the democratic process, to exercise such discretion. Thus, when asked to decide whether the provision in section 28E.4 for the creation of a separate entity to carry out joint agreements was an unconstitutional delegation of authority, the Iowa Supreme Court in *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449 (Iowa 1970), held that it was not, precisely because the chapter "supplies sufficient guidelines for the purposes necessary to the chapter." *Id.* at 456. The units created by section 28E.4 "are authorized to handle what might be called the mechanical details of implementing the joint project . . . ." *Id. See also State Farm Mutual Auto Insurance Co. v. City of Lakewood*, 788 P.2d 808, 815 (Colo. 1990) (when analyzing the validity of delegations of legislative power, court should examine whether there are sufficient statutory standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of discretionary power).

In analyzing the validity of a contract entered into by a governmental unit, courts have inquired into whether the subject of the contract is a governmental or proprietary function. This distinction is discussed in *Marco Development Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 42-43 (Iowa 1991), a case which invalidated a contract entered into by the city which allegedly obligated it to widen a street. The court, noting that the proposed street widening was a governmental function, held the contract to be unenforceable. In *Wausau Joint Venture v. Redevelopment Authority*, 118 Wis.2d 50, 347 N.W.2d 604 (1984), the court also considered the governmental/proprietary distinction in connection with a contract that set parking rates for two shopping mall parking structures. The court determined that the contract was for a proprietary function and approved its validity. 118 Wis.2d at 55, 347 N.W.2d at 608-09.

Both of the cases cited above are distinguishable from the situation you have asked us to discuss because they involve contracts that limit a governmental function rather than contract to perform the function. Nevertheless, the distinction between governmental and proprietary functions that is discussed in these cases provides a useful method of analysis that is, we believe, consistent

with our preceding discussion and reenforces the conclusion that a state agency cannot contract away its governmental functions.

These concerns demonstrate that any contract which delegates the powers and responsibilities of a state agency to a private actor must be scrutinized with some care. A contract which has the effect of delegating governmental powers may very well be invalidated as an improper delegation of authority. Factors to consider in any case will include, at a minimum, the existence and specificity of any relevant statutes, and the extent to which the delegation surrenders governmental discretion. Courts are likely to more closely scrutinize delegations of traditional governmental functions and powers than delegations of function that are of a business or proprietary nature. *See* 20 Op.Att'yGen.Wis. 88 (April 29, 1988). Indeed, some jurisdictions have prohibited contracts by governmental entities of those public duties which by law are required to be performed by public officers or employees. *See* 3 McQuillin, *Municipal Corporations* §§ 12.126, 12.127 (1982); 10 McQuillin, *Municipal Corporations* § 29.08 (1981); and 2 *McQuillin, Municipal Corporations*, § 10.38 (1979). For example, in 1990 Op.Att'yGen. 66, we opined that an Iowa school corporation could, consistent with specific statutory authority and by means of a chapter 28E agreement, jointly exercise control with a South Dakota school district, but could not delegate obligations statutorily imposed upon its governing board.

From the foregoing it would seem that, for example, the DIA could not contract with a private individual or corporation to determine, in its discretion, what individual food establishments are sufficiently sanitary. We are also aware that in some jurisdictions proposals have been made that private enterprise take over the running of a state's prison system. These are true "privatization" questions, and are to be distinguished from the situation contemplated in your opinion request. Pursuant to the preceding analysis, the former situation is suspect, and several Attorney General's opinions in other jurisdictions have pointed this out. *See, e.g.*, Va.Att'yGen. (May 31, 1988) (regional jail board may not contract with a private agency to house and care for prisoners); Wyo.Att'yGen. # 90-005 (August 20, 1990) (counties may not contract with a private agency for maintenance and supervision of misdemeanants). We would have similar concerns if your question was whether the DIA could contract away all its authority to a private company because there is no statute which would allow some private agency to unilaterally perform the functions of the DIA. However, the situation is different when the private enterprise is simply implementing standards that have already been promulgated by the agency with statutory authority to do so. In such a case, the private agency acts jointly with DIA pursuant to section 28E.4 or is contracting to provide services pursuant to section 10A.104(7).

In concluding that contracts of the sort described in your letter may validly be entered into, we have not ignored statutory language which vests the director of DIA with "sole and exclusive" authority to inspect food establishments, Iowa Code § 137A.5, or other statutes which give to the DIA jurisdiction over food inspections. *See, e.g.*, Iowa Code §§ 137B.6, 137C.6, 137E.3. We do not believe, however, that these statutes should be interpreted as prohibiting the director of the DIA from entering into contracts of the sort described in your opinion

request. In construing these statutes, we must seek to ascertain and effectuate legislative intent. *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 283 (Iowa 1983). Strained and illogical interpretations should be avoided in favor of sensible, logical ones. *Id.* Under these standards, we believe that none of the foregoing statutes demands the conclusion that DIA cannot contract with private agencies for food inspections. We believe the statutes simply provide that DIA, as opposed to any other state or municipal agency, has jurisdiction over such inspections. Simply because the DIA has this original authority to the exclusion of other bodies does not mean that it cannot discharge this authority by contracting with others — subject, of course, to the constraints described previously in this opinion. Given, then, that the director may name a designee for engaging in such circumstances, we see no reason why the statute requires that that designee be an employee of DIA — as long as the director does not contract away his discretion. In fact, explicit statutory authority for DIA to enter into "contracts for the receipt and provision of services as deemed necessary" is found in Iowa Code section 10A.104(7).

By pointing out that chapter 28E authorizes the kind of contract that is the subject of your request, we in no sense intimate that all contracts with private agencies must be pursuant to a chapter 28E agreement. We recognize that any state agency must as a matter of course deal with private enterprise in a variety of ways, such as for the receipt of services necessary for the functioning of the agency. An agency need not enter into a chapter 28E agreement every time it enters into such contracts. The problem area occurs when an agency seeks to delegate responsibilities and duties which the legislature has conferred on the agency.

We further note that some enforcement mechanisms available to the director may not be transferred through agreements to private parties. When access to an inspector is denied by the owner of the facility, for example, a state agency may be able to obtain an administrative warrant under Iowa law. Iowa Code § 808.14. This option, however, is not available to a private party carrying out inspections under agreement with the director because the warrants are expressly available only to "an officer or employee" of the agency. *Id.*

We cannot, of course, formulate all-inclusive guidelines for the determination of whether a delegation of authority is valid or invalid. As a general proposition, the fewer guidelines and standards that are available for the exercise of discretion by the private party, the more likely it is that the delegation of authority will be found to be invalid.

In summary, the Department of Inspections and Appeals may contract with a private entity for conducting food service establishment inspections so long as the private entity is acting within narrow guidelines prescribed by the agency. The department may not contract away its statutory discretion and remains responsible for assuring that its duties are being performed. As such inspections involve the exercise of a governmental function, any such contracts will be closely scrutinized by a court to assure that the discretion and authority of the department has not been improperly delegated. The department may not delegate to a private party its administrative search warrant authority.

April 8, 1992

CRIMINAL PROCEDURE: Deferred Judgments; License Suspension. Iowa Code §§ 321.210A, 907.1(1), 907.9 (1991). The clerk of the district court must notify the Department of Transportation of unpaid court costs in criminal actions involving the operation of a motor vehicle even though the defendant has received a deferred judgment, has been discharged from probation, and has had his or her deferred judgment expunged and the department may institute administrative license suspension proceedings. (Anderson to Martin, Cerro Gordo County Attorney, 4-8-92) #92-4-2(L)

GOVERNOR; Special funds; Impoundment: Iowa Const., art. IV, § 9; Iowa Code §§ 8.2(9), 8.31 (1991). The Governor has no authority to impound special funds by imposing a mandatory hiring freeze to prevent spending of available special funds by State agencies. The Governor may, however, suggest agency spending reductions through voluntary hiring reductions as a means to eliminate waste and unnecessary spending in State government. (Scase to Osterberg, State Representative, 4-8-92) #92-4-3

David Osterberg, State Representative: You and eleven other members of the Iowa House of Representatives have requested an opinion of the Attorney General addressing the following issue:

> [W]hether the Governor of Iowa has the authority not to spend money from special trust funds, when sufficient money exists in the fund and these funds are designated for specific programs as mandataed by the law. For example, does the Governor have the authority to prevent the Department of Natural Resources from fulfilling its legal obligations, by prohibiting the filling of employee positions, when the funding dedicated to pay for those programs and positions is available, and authorizing these expenditures would not affect the General Fund balance?

In essence, your inquiry concerns the legality of a hiring freeze imposed by the Governor as applied to prevent the filling of positions funded from a special fund. We find that such a limitation on hiring would, if mandatory, constitute an improper impoundment of special funds.

You have provided us with an illustration relating to the Waste Management Authority within the Department of Natural Resources. This illustration includes the following assertions which, for purposes of this opinion, we assume are correct: (1) the Authority is charged with specific statutory functions; (2) special funds, including a portion of the Groundwater Protection Fund and the Air Contaminant Source Fund, are dedicated to the Authority; (3) the Authority also receives federal funds; (4) funds from these sources are available to finance Authority programs; and (5) the Authority currently has 10 of 18 positions vacant and has been unable to fill these vacancies because of the Governor's hiring freeze. We note that, while no general fund appropriation was made to the Waste Management Authority for fiscal year 1992 [FY92], standing appropriations to the authority are found in 1991 Iowa Acts, ch. 255,

§ 17 (air contaminant source fund)[30] and Iowa Code Supp. § 455E.11(2)(a)(8)(iv) (1991) (groundwater protection fund). Included within the Department of Natural Resources appropriation bill for FY92 is a line item authorizing not more than 18.75 full time equivalent positions within the Waste Management Authority. 1991 Iowa Acts, ch. 268,§ 207 (item 9).

This office has, on many occasions, issued opinions regarding various aspects of the state budget process and the roles of the general assembly and Governor in this process. A review of these opinions provides a general overview of the state budget process. *See e.g.* 1990 Op.Att'yGen. 30 (#89-6-10(L)) (finding that imposition of mandatory reversion targets by the Governor would constitute illegal impoundment of appropriated funds); 1982 Op.Att'yGen. 70 (addressing Governor's authority, under Iowa Code section 8.31, to order reduction in appropriation allotments); 1980 Op.Att'yGen. 805 (concluding that section 8.31 allotment reductions should be done on a line-item basis); 1980 Op.Att'yGen. 786 (includes at length discussion of the roles of legislature and Governor in the appropriation process). While we recently addressed the validity of transfers of special funds to the general fund (Op.Att'yGen. # 91-3-2 (Brick and Krogmeier to Black)), it does not appear that we have previously examined the issue you raise.

"Special funds" are defined within Iowa Code section 8.2(9) (1991) as "any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general fund appropriation is made by the state." While the distinction between special funds and the state general fund is critical to determining the uses to which funds can be devoted (*see* Op.Att'yGen. # 91-3-2), this distinction does not appear to impact the fund allotment process. Article III, section 24 of the Iowa Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." All appropriations, including standing appropriations, whether from the general fund or a special fund, are subject to the allotment procedure set forth in Iowa Code sections 8.30 and 8.31. "[A]ppropriations made are not available for expenditure until allotted as provided for in section 8.31." Iowa Code § 8.30 (1991). Similarly, all appropriations are subject to an across-the-board reduction in allotments ordered by the Governor pursuant to Iowa Code section 8.31. *Cf.* 1980 Op.Att'yGen. 882, 883-84 (concluding that a "special" line-item appropriation was subject to an across-the-board allotment reduction instituted pursuant to Iowa Code section 8.31).

The Governor did implement a 3.25 percent across-the-board reduction in appropriation allotments for all quarters of FY92. IAB Vol. XIV, No. 3, (8/7/91) pp. 273-74 (Executive Order No. 42). Based upon the statement in your

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[30] *See* Iowa Code Supp. §§ 455B.133B (1991) (air contaminant source fund created); Iowa Code Supp. §§ 455B.517 (1991) (detailing duties placed upon the Waste Management Authority by 1991 Iowa Acts, ch. 255, §§ 4); and 1991 Iowa Acts, ch. 255, §§ 17 (which includes the following provision: "Notwithstanding any limitation on division or department full-time equivalent positions in any enacted legislation, the moneys deposited in the air contaminant source fund may be expended to employ additional staff as necessary to carry out the provisions of this Act.").

opinion request letter that dedicated funding is "available," we assume that despite this allotment reduction sufficient funds are available to cover the cost of filling some or all of the vacant positions at the Authority.

Your primary inquiry is whether the Governor can, by ordering a freeze on executive branch hiring, limit the expenditure of available special fund monies? We believe that the determination which controls resolution of this issue is whether the Governor's hiring freeze constitutes an impoundment of otherwise available funds.

The term impoundment refers generally to a refusal by an executive official to spend, or allow the spending of, funds which have been made available by the legislature. *See* 1980 Op.Att'yGen. 786, 791, *citing* 27 A.L.R. Fed. 214, 217. The question of the legality of gubernatorial impoundment of funds was first descussed at length by this office in 1980 Op.Att'yGen. 786, in which we were asked to consider the impact of a directive in an item veto message instructing the Department of General Services to proceed with a renovation project as if only two million dollars were available even though the item veto resulted in a three million dollar appropriation for the project. We reasoned, in that opinion, as follows:

> Pursuant to [Iowa Constitution] Article IV, §9, the Governor is directed to execute faithfully the laws of this state. As applied to the question of spending appropriated funds, this directive requires the Governor to execute the law as it emerges from the legislative process. *[Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1221 (Mass. 1978).] He is not, therefore, free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law. *Id.* A refusal to expend funds for the purpose of amending or defeating legislative objectives must, nevertheless, be distinguished from the exercise of executive judgment that the legislative objectives can be accomplished by an expenditure of funds less than the amount appropriated. *Id.* Based upon the Governor's veto message, there is no indication of an attempt by the Governor to execute the renovation project pursuant to the $3 million appropriation which, subsequent to the item veto, properly constitutes the standard by which the legislative objective must be measured. Rather the Governor appears to have promulgated a blanket requirement to reduce the funds available for the renovation project. The prevailing judicial response to such action, at both the federal and state levels, yields a consistent view that the Governor does not have the constitutional authority, under his duty to execute the laws, to reduce or impound appropriated funds in this manner.

1980 Op.Att'yGen. at p. 792. We concluded that,

> [w]ith respect to expenditures of appropriations, [Iowa Code §8.31] provides the Governor with statutory authority to exercise reasonable judgment in deciding that the objective of an appropriation can be achieved without necessarily spending the full amount of the

> appropriation. *This section does not, however, provide the Governor with general discretion to reduce, alter, or eliminate the expenditure of appropriated funds by simply instructing an administrative official that they shall not be spent.* The exercise of such discretion is clearly a legislative function.

Id. at p. 797 (emphasis added); see also 1980 Op.Att'yGen. pp. 805-07.

We recently reiterated our view that the Governor lacks authority to impound appropriated funds in 1990 Op.Att'yGen. 30 (# 89-6-10(L)), in which we addressed the propriety of selective targeted reversions of appropriations.

> A threshold question which arises when the chief executive of the State requests "targeted reversions" from State agencies is the extent to which the targets are in fact a method of imposing mandatory reductions of the amounts appropriated to agencies. If in practice these "targets" are in fact mandatory, then the Governor has imposed a mandatory reduction without benefit of the statutory constraints imposed by Section 8.31. Such targets would be illegal. 1980 Op.Att'yGen. 805, 808.
>
> If, instead of imposing mandatory reductions, the Governor and department heads simply develop more efficient ways to administer state government and if the targets are not mandatory or imposed against a department with fear of sanctions, then the targeted guidelines could be within gubernatorial authority to eliminate waste or unnecessary spending. 1980 Op.Att'yGen. 786.

#89-6-10(L) at p. 2

While these prior opinions address questions regarding the impoundment of general fund appropriations, we believe that the rationale set forth is equally applicable to limitations upon the expenditure of special funds. If restrictions on the filling of vacant positions are mandatory or have the effect of preventing an agency from spending available dedicated funds as necessary to fulfill the agency's statutorily mandated duties, then the hiring freeze would likely be found to be an illegal impoundment of funds. The Governor can, however, suggest reductions in hiring as a means of making State government more efficient if this can be accomplished without preventing the fulfillment of legislatively mandated programs and is not mandatorily imposed upon state agencies.

In summary, we conclude that the Governor has no authority to impound special funds by imposing a mandatory hiring freeze to prevent spending of available special funds by State agencies. The Governor may, however, suggest agency spending reductions through voluntary hiring reductions as a means to eliminate waste and unnecessary spending in State government.

April 14, 1992

CAMPAIGN FINANCE DISCLOSURE; COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES: Charter Commission activities regarding ballot issue. Iowa Code §§56.2(15), 56.6(6); Iowa Code Supp. §§56.12A, 331.231, 331.234, 331.235, 331.262 (1991). Public funds may be used to maintain a charter commission through the date of the election on the proposed charter; however, public funds may not be used for expressly advocating support for (or opposition to) the proposed charter, even though private funds may be so expended. The contribution and expenditure of private funds for express advocacy is subject to separate accounting and reporting under chapter 56. (Donner to Williams, Director, Campaign Finance Disclosure Commission, 4-14-92) #92-4-4

Kay Williams, Executive Director, Campaign Finance Disclosure Commission: We are in receipt of your request for an opinion of the Attorney General regarding the application of Iowa Code Supp. section 56.12A (1991) to charter commissions created under recently modified Iowa Code Supp. section 331.234 (1991). We opine, in summary to the various questions you have posed, that *public* funds may not be expended by political subdivisions or by a county charter commission for activities expressly advocating support or opposition to the proposed charter.

We begin by noting that section 56.12A, which became effective July 1, 1991, expressly prohibits a governing body of a county, city, or other political subdivision of the state from expending or permitting the expenditure of public moneys "for political purposes, including supporting or opposing a ballot issue." 1991 Iowa Acts, chapter 226.

Iowa Code Supp. sections 331.231 through 331.252 (1991), originally enacted in 1988, provides a procedure for converting to an alternate form of county government. The initial stage of this process is the submission to the board of supervisors of a petition signed by the requisite number of eligible electors seeking appointment of a "charter commission." Upon resolution of the board of supervisors, that commission is appointed to study alternative forms of government. The charter commission must submit to the board of supervisors within twenty months after its organization a final report either recommending or not recommending the submission of a proposed charter for an alternative form of government to the electorate. If submission of a proposed charter is recommended, the commission is dissolved on the date of the general election at which the proposed charter appears on the ballot. If there is no proposed charter recommended, the commission is dissolved upon submission of its final report.

During its existence, the charter commission is entitled to make certain expenditures of public moneys. Subsections 3 and 4 of Iowa Code section 331.234, as recently amended by 1991 Iowa Acts, ch. 256, provide very explicit guidance on those expenditures:

> 3. The board shall make available to the commission in-kind services such as office space, printing, supplies, and equipment and shall pay the other necessary expenses of the commission including compensation

for secretarial, clerical, professional, and consultant services. The total annual expenses, not including the value of in-kind expenses, to be paid from public funds shall not exceed one hundred thousand dollars or an amount equal to thirty cents times the population of the commission area, according to the most recent certified federal census. The commission may employ staff as necessary.

4. The expenses of the commission may be paid from the general fund of the county or from any combination of public or private funds available for that purpose. The commission's annual expenses may exceed the amount in subsection 3 only if the excess is paid from private funds. If a proposed charter is submitted to the electorate, private funds donated to the commission may be used to promote passage of the proposed charter.

Iowa Code Supp. § 331.234(3)(4)(1991). With these statutory provisions in mind, we will now address each of your questions individually.

QUESTION 1

Is a charter commission a political subdivision as referenced in Iowa Code section 56.12A which is prohibited from expending public funds for political purposes, including the support of a ballot issue?

There is no definition of "political subdivision" in chapter 56. In prior opinions issued by this office, we have declined to provide one definition of political subdivision that will fit all cases. Rather, we have considered the question as to whether an entity is a "political subdivision" on a case by case basis. *See, e.g.*, 1988 Op.Att'yGen. 100; 1976 Op.Att'yGen. 823. This is particularly preferable to a "laundry list" definition because of the potential for excluding unanticipated entities, such as the "community commonwealth unit of local government" recently designated as a "political subdivision" by new Iowa Code Supp. section 331.262 (1991).

The cited 1976 opinion provides an analysis of case law from other jurisdictions which outlines the following characteristics to be considered in determining whether a particular entity is a political subdivision:

1. A defined geographic area;

2. Responsibility for certain functions of local government;

3. Public elections and public officers; and

4. Taxing power.

1976 Op.Att'yGen. at 825 - 827.

An entity which does not satisfy all or most of these requisites is not a "political subdivision." 1976 Op.Att'yGen. at 827. The only one of these criteria which might be satisfied by a charter commission would be the defined geographic area; it does not carry out normal functions of local government, nor is it accompanied by the election of public officers, nor does it possess taxing powers. Therefore, we believe that a charter commission itself is not a "political subdivision" as that term is used in section 56.12A.

However, since participating political subdivisions such as a county or city are unable to use public funds to support the ballot issue, allowing public funds to be funnelled through a charter commission and used for purposes that would otherwise be illegal would not be consistent with the policy implicit in the law. We conclude that allowing a charter commission to use public funds given to the commission for supporting the ballot issue also would be in violation of section 56.12A.

In addition to the policy implications of section 56.12A, section 331.234(3) only permits the use of public funds "to pay the . . . *necessary expenses* of the commission." The primary function of the charter commission is to receive information and make recommendations to the board of supervisors on the question of an alternative form of county government. Iowa Code Supp. § 331.235 (1991). While the commission's existence until the election and activity in support of the ballot issue is contemplated, specific provision is made that "*private funds* donated to the commission may be used to promote passage of the proposed charter." § 331.234(4) (Emphasis added). By extension and implication, public funds may not be used in support of the ballot issue. Expenditures in support of the ballot issue would not be "necessary expenses" of the charter commission payable by public funds.

QUESTION 2

> Is a charter commission permitted to use public funds for ministerial purposes until such time as the matter becomes a ballot issue?

Regardless of whether the charter commission is a "political subdivision" or not, "ministerial purposes" would not be "political purposes". Expenditures for ministerial purposes are specifically permitted by the express restrictions provided in Iowa Code Supp. § 331.234(3) and (4) (1991). However, if the charter commission engages in express advocacy in support of the proposed charter after it becomes a ballot issue, expenses directly related to that advocacy would not be purely "ministerial." Please refer to the answer to Question 6.

QUESTION 3

> If private funds are solicited to supplement those appropriated to support the administrative functions of the charter commission, should private funds be separated and accounted for in a separate banking account?

Section 331.234 (3) and (4) as amended specifically allow for use of private funds to supplement the public funds. However, there is no explicit requirement that the two sources of funding be kept segregated. Although not required, segregation of funds may be a practical method of establishing compliance with the provisions of subsection 4, allowing expenditures to exceed the maximum established in subsection 3 only if the excess is paid from private funds. However, if the funds are used to support the ballot issue, please refer to the answer to Question 5.

QUESTION 4

Can private funds be solicited for the sole purpose of supporting the work of the charter commission after the matter becomes a ballot issue?

There is no limitation in section 331.234 as to the use of private funds. However, if the funds are used to support the ballot issue, please refer to the answer to Question 5.

QUESTION 5

If private organizations contribute to the financing of the charter commission after the matter becomes a ballot issue, are these contributions subject to the provisions of Iowa Code section 56.2(15), requiring private permanent organizations which contribute in excess of $250 to file disclosure reports?

Iowa Code Supp. section 331.234(3) (1991) specifically permits *private funds donated to the commission* to be used to promote the passage of the proposed charter. Therefore, it appears the legislature anticipated the charter commission actively promoting the ballot issue. The public policy and purpose of Iowa Code chapter 56 in regard to ballot issue campaigns is to "[inform] the electorate of the source of support or opposition to an issue and providing data for regulating campaign practices." *Iowans For Tax Relief v. Campaign Finance Disclosure Commission*, 331 N.W.2d 862, 868 (1983). Consistent with this public policy, the charter commission should become subject to chapter 56 if it engages in express advocacy. The most analogous application of the chapter would be section 56.6(6), which requires a permanent organization temporarily engaging in activity in support of a ballot issue to organize a political committee, to "keep the funds relating to that political activity segregated from its operating funds," and to file the appropriate reports.

Section 56.6(6) was apparently adopted to codify and amplify the conclusion of the Iowa Supreme Court in *Iowans For Tax Relief v. Campaign Finance Disclosure Commission*, 331 N.W.2d 862 (1983). Iowans For Tax Relief (IFTR) was an Iowa non-profit corporation which solicited funds from contributors, with one objective being "to amend the Iowa Constitution to limit income taxes and property taxes, and to limit total state and local government spending." 331 N.W.2d 862, 864. IFTR assured contributors that their contributions would not be disclosed. In 1980, IFTR established a political committee to conduct a campaign for the passage of the constitutional convention issue (a ballot issue).

This committee used IFTR personnel and office space and received 95 percent of its cash contributions from IFTR. 331 N.W.2d 862, 865. The committee filed disclosure reports showing the contributions from IFTR. IFTR was requested to file disclosure reports by the Campaign Finance Disclosure Commission but refused on the ground that it was not a "political committee" as that term was then defined.

The Supreme Court ruled that "IFTR became a political committee, however, if at that time it consisted 'of persons organized for the purposes of accepting contributions, making expenditures, or incurring indebtedness in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting . . . a . . . ballot issue.' *See* § 56.2(6) [(1979)]." 331 N.W.2d 862, 865. The Court found that subsequent amendments to section 56.2 (resulting in language similar to that of section 56.2(15) in the 1991 Code) did not change the result, but only clarified the statute. 331 N.W.2d 862, 867. The Court further stated that "it seems clear the legislature intended the statute to apply to all organizations operating as political committees so long as they are doing so, whether on a permanent or temporary basis. . . IFTR solicited and received contributions for the covered purpose and funneled substantial amounts from those contributions to its temporary committee. It operated as a political committee because it received funds for a covered purpose." 331 N.W.2d 862, 867. A charter commission which solicits or receives contributions for the covered purpose (support of the ballot issue) is in virtually the identical situation, and would, therefore, be subject to reporting.

As to the contributing organizations, the question as to whether the organizations are also "political committees" and subject to reporting under chapter 56 will hinge on the factual circumstances. *See* § 56.2(15); discussion in answer to Question 6. Contributions over $250 designated for activities of express advocacy would be subject to chapter 56 reporting if the contributing entity is an organization identified under section 56.2(15). Contributions specifically designated for non-advocacy ministerial purposes would not be subject to reporting under chapter 56. Undesignated contributions (exceeding $250) by a covered entity which are expended at least in part for advocacy purposes are particularly subject to factual dispute as to whether they are "campaign contributions" given *for the purpose of supporting* the ballot issue. Iowa Code § 56.2(15). Given that your question is premised upon contributions made *after* the issue becomes a ballot issue, there may be an inference that most of the charter commission's activities after that point will be for the purpose of express advocacy. However, this issue would be subject to factual determination.

QUESTION 6

> Will all funds used by the charter commission after the matter has been determined to be a ballot issue be subject to the requirements of disclosure reporting and the prohibitions imposed by section 56.12A? Does this include any in-kind contributions received by the charter commission? For instance, can a public body (such as a city) provide accounting and payroll services to the charter commission at no cost, or will the charter

> commission be required to reimburse the city for services at fair market value?

We cannot conclude that all funds used by the commission after submission of a proposed charter to the board of supervisors is in support of the ballot issue. The focus must be on the use of the funds. Since the charter commission will not be dissolved until the day of the election, it may still incur "necessary expenses" not related to the support of the ballot issue. Guidance as to what activities are "in support of the ballot issue" can be found in a number of United States Supreme Court and federal court of appeals decisions construing restrictions on political speech.

In the pivotal case of *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the United States Supreme Court permitted restrictions on political speech to extend only to "communications that in express terms advocate the election or defeat" of a candidate (or ballot issue). 424 U.S. at 44, 96 S.Ct. at 612. In footnote 52 to this conclusion, the Court noted that this included communications "containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' . . . 'vote against,' 'defeat,' 'reject.'" *Id.*

The *Buckley* decision and the term "express advocacy" have been further construed by the United States Court of Appeals for the Ninth Circuit to go beyond certain key or magic words or phrases. *In F.E.C. v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), that court determined that the context of activity can be considered to assist in determining whether it was express advocacy. The standard provided by that court is that the activity will be express advocacy if it is susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate (or ballot issue). The court further broke this into three components:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered . . . Finally, it must be clear what action is advocated. Speech cannot be "express advocacy . . . " when reasonable minds could differ as to whether it encourages a vote for or against a candidate [or ballot issue] or encourages the reader to take some other kind of action.

807 F.2d at 864.

Using these principles as guidance, after the proposed charter becomes a ballot issue by resolution of the board of supervisors, in-kind or direct support of the charter commission may continue except where directly related to commission activity expressly advocating support of the ballot issue.

In conclusion, while public funds may support a charter commission in many respects through the date of the election on the proposed charter, public funds may not be used for expressly advocating support for (or opposition to) the proposed charter, even though private funds may be so expended. The contribution and expenditure of private funds for express advocacy is subject to separate accounting and reporting under chapter 56.

April 22, 1992

APPROPRIATIONS; LICENSE FEES; BOARD OF EDUCATIONAL EXAMINERS: Appropriation of License Fees for a Purpose Not Identified in Statute. U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 9; Iowa Code § 260.10 (1991). There is no constitutional or statutory provision which requires the legislature to appropriate all fees collected by the Board of Educational Examiners to the board. The Due Process Clauses of the Iowa Constitution and the United States Constitution require that the license fees collected by the board be reasonably related to the direct and indirect costs of the regulation and licensing required by Iowa Code chapter 260. (Barnett to Nearhoof, Executive Director, 4-22-92) #92-4-5

Orrin Nearhoof, Executive Director, Board of Educational Examiners: You have requested our opinion as to whether there is a constitutional or statutory obligation which requires the legislature to appropriate a fiscal year budget for the Board of Educational Examiners which is at least commensurate with the license fees collected by the board.

Iowa Code section 260.2 (1991) creates the Board of Educational Examiners. The board is empowered to regulate and license administrators and teachers who are employed in the schools of this state. *Id.* Among the board's powers is the power to establish, collect and refund license fees. *Id.* § 260.2(2). Iowa Code section 260.10 provides that "[i]t is the intent of the general assembly that licensing fees established by the board of educational examiners be sufficient to finance the activities of the board." The board has adopted administrative rules which specify the amount of license fees. 282 IAC 14.30. The executive director of the board is required to deposit license fees with the state treasurer, and the fees are credited to the general fund of the state. Iowa Code § 260.10. Expenditures and refunds made by the board are certified by the executive director of the board to the director of the Department of Revenue and Finance. *Id.* § 260.11. If the director of the Department of Revenue and Finance finds the expenditures or refunds to be correct, the director draws warrants upon the state treasurer to pay the expenditures or refunds from funds appropriated for this purpose. *Id.*

In fiscal year 1990 the board generated license fees of approximately $215,500, and in fiscal year 1991 the board generated license fees of approximately $214,000. The board requested an appropriation of approximately $150,000 for fiscal year 1991 and an appropriation of $675,000 for fiscal year 1992. Before deappropriation, the legislature appropriated $150,000 to the board for fiscal year 1991 and $125,000 to the board for fiscal year 1992.

Nothing in Iowa Code chapter 260 requires the legislature to appropriate all license fees collected by the board to the board or prevents the legislature from appropriating an amount for the board which is more or less than the sum of the license fees collected. Subsection 260.2(12) provides for establishing a budget request by the board and section 260.11 provides for the payment of board expenditures from funds appropriated for this purpose. Although section 260.10 expresses the legislature's intent that the board establish fees at a level sufficient to finance the activities of the board, this provision does not clearly express the legislature's intent to, in effect, create a continuing appropriation of all fees collected to the board.

A statute should not be construed as creating a continuing appropriation if there is doubt as to the legislature's intent. *See O'Connor v. Murtagh*, 225 Iowa 782, 789, 281 N.W. 455, 459 (1938); *Prime v. McCarthy*, 92 Iowa 569, 578, 61 N.W. 220, 223 (1894). In ascertaining whether the legislature intended to create a continuing appropriation, the courts will consider the established practices of the legislature. *O'Connor*, 225 Iowa at 789, 281 N.W. at 459. Each year since the board was reorganized, the board has prepared a budget, and the legislature has appropriated a portion of the fees collected to the board. The statutory language in chapter 260 and the legislative practice of appropriating a portion of the funds to the board each year does not clearly support the conclusion that the legislature intended to create a continuing appropriation of all of the fees collected by the board to the board. Even if such an appropriation had been intended by a past legislature, it is well established that one legislature cannot bind a future legislature. *E.g., Graham v. Worthington*, 259 Iowa 845, 870, 146 N.W.2d 626, 642 (1966).

We have previously indicated that the legislature is generally free to appropriate funds collected for one purpose to the fulfillment of another purpose provided that application of the funds to a different purpose does not conflict with a constitutional provision, impair a contractual relationship [31]or violate a statutory provision which requires funds to be applied to a specific purpose and to no other purpose. *See* Op.Att'yGen. #91-3-2 at page 6; accord Michigan Sheriffs' Association v. Michigan Department of Treasury, 75 Mich. App. 516, 255 N.W.2d 666, 672 (1977).

Statutory language is not sufficient to prevent the appropriation of funds for a purpose other than the purpose identified in a statute if the statutory language simply indicates the purpose for which the funds are to be expended. *See* Op.Att'yGen. #91-3-2 at pages 5-8; *accord Michigan Sheriffs' Association*, 255 N.W.2d at 671-72. We have indicated that statutory language explicitly prohibiting a separate fund from being merged into the general fund is sufficient to prevent appropriation of the funds collected pursuant to the statute for another purpose as is statutory language specifying that moneys are to be used only for the purpose identified in the statute. Op.Att'yGen. #91-3-2 at page 8. Iowa Code chapter 260 does not contain language which indicates that the license fees collected by the board are to be used only to finance the activities of the board.

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[31] There is no indication that any contractual relationship of the board was impaired by the failure of the legislature to appropriate all fees collected by the board to the board.

In addition we know of no constitutional provision which specifically prohibits the legislature from appropriating license fees collected by the board to the fulfillment of another purpose. Although the Iowa Constitution contains provisions which limit the use of some funds to educational purposes, these provisions are not applicable to license fees collected by the board. *See* Iowa Const. art. IX, 2nd, §§ 2-3.

The Due Process Clauses of the Iowa Constitution and the United States Constitution do, however, limit the state's ability to regulate lawful occupations through an exercise of the state's police power. *Green v. Shama*, 217 N.W.2d 547, 553-55 (Iowa 1974); *Pierce v. Incorporated Town of La Porte City*, 259 Iowa 1120, 1123-25, 146 N.W.2d 907, 909-10 (1966). License fees which are collected in the exercise of the state's police power on occupations which are not harmful or demoralizing must be limited to the amount reasonably necessary to cover the probable expense of issuing the license and the probable expense of inspection, regulation and supervision required by the applicable legislation. *Solberg v. Davenport*, 211 Iowa 612, 616-18, 232 N.W. 477, 480 (1930) *State v. Manhattan Oil Co.*, 199 Iowa 1213, 1217, 203 N.W. 301, 303 (1925); *State v. Osborne*, 171 Iowa 678, 687-88, 154 N.W. 294, 298 (1915). A person challenging the reasonableness of fees collected on lawful occupations pursuant to an exercise of police power generally has the burden of proving that the fees are unreasonable. *See Towns v. Sioux City*, 214 Iowa 76, 86, 241 N.W. 658, 663 (1932); *City of Ottumwa v. Zekind*, 95 Iowa 622, 626, 64 N.W. 646, 647 (1895); *accord, e.g., Talley v. Commonwealth*, 123 Pa. Commw. 313, 553 A.2d 518, 520 (1989); *Oak Park Trust & Savings Bank v. Village of Mount Prospect*, 181 Ill. App. 3d 10, 129 Ill. Dec. 713, 536 N.E.2d 763, 767 (1989). A fee schedule will be invalidated only if the revenues generated by the fees are excessive and bear no definite relationship to the regulatory scheme. *See Mayor and City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 586 A.2d 816, 826 (1991). All doubt concerning the reasonableness of the fees should be resolved in favor of the body setting the fee, and reasonable latitude in projecting the expense of regulation should be allowed. *Talley*, 553 A.2d at 520. [32]

Evidence showing the basis for a fee schedule, including evidence of a good faith effort to project actual expenses and actual income, would likely be considered by the courts when determining the reasonableness of a fee. *Mayor and City Council of Ocean City*, 586 A.2d at 826. It is also likely that the courts would consider all expenditures which are directly or indirectly relevant to the cost of regulation and licensing. *See Quad Canteen Service Corp. v. Ruzak*, 85 Ill. App. 3d 256, 406 N.E.2d 616, 617 (1980) (personnel time and expense, overhead costs and support staff fees relevant to determination of reasonableness); *Larson v. City of Rockford*, 371 Ill. 441, 21 N.E.2d 396, 398 (1939) (listing types of expenses which may properly be included for purpose of determining the overall expenditure); *Bowers v. City of Muskegon*, 305 Mich. 676, 9 N.W.2d 889, 891 (1943) (incidental expenses relevant); *see also Merrelli v. City of St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144, 149 (1959) (permissible direct and indirect expenses contrasted with impermissible costs of general

[32] Exceptions to the general rules included in this paragraph may be applicable in cases dealing with inherently harmful or demoralizing occupations or in cases involving such issues as constitutionally protected speech or expression.

government). A fee provision would probably not be invalidated merely because of the possibility that incidental revenue would be raised. *See Oak Park Trust & Savings Bank*, 536 N.E.2d at 767; *Ramaley v. City of Saint Paul*, 226 Minn. 406, 33 N.W.2d 19, 23 (1948). Additionally, the actual disposition of the fees collected should not be solely determinative of whether the fees were unreasonable. *See Perry v. Hogarth*, 261 Mich. 526, 246 N.W. 214, 216 (1933). However, evidence showing that fees are consistently disproportionate to the actual expenditures for licensing and regulation could be strong evidence that the fees are not reasonably related to the cost of regulation and licensing. *See Mayor and City Council of Ocean City*, 586 A.2d at 826; *Stark v. Commonwealth*, 90 Pa. Commw. 80, 494 A.2d. 44, 46 (1985). Fees greatly in excess of the cost of regulation could be found unreasonable as a matter of law. *See City of Chicago Heights v. Public Service Co. of Northern Illinois*, 408 Ill. 604, 97 N.E.2d 807, 810-11 (1951). Fee provisions established pursuant to an exercise of police power[33] which are found to be in excess of the reasonable costs associated with licensing and regulation are invalid. *E.g., Quad Canteen Service Corp.*, 406 N.E.2d at 619; *Ramaley*, 33 N.W.2d at 21; *Talley*, 553 A.2d at 521; *see Solberg*, 211 Iowa at 617)18, 232 N.W. at 480; *Manhattan Oil Co.*, 199 Iowa at 1217, 203 N.W. at 303.

In summary, it is our opinion that there is no constitutional or statutory provision which requires the legislature to appropriate all fees collected by the board to the board. The amount of the fees collected by the board must, however, be reasonably related to the direct and indirect costs of the regulation and licensing required by chapter 260.

April 22, 1992

MUNICIPALITIES: Joint Water Utility. Iowa Code Supp. ch. 389; Iowa Code Supp. §§ 389.2 and 389.3 (1991); 1991 Iowa Acts, ch. 168. The proposition to be submitted to the voters, pursuant to the referendum power granted in ch. 389, is limited to authorizing the adoption of a joint water utility.

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[33] A license fee or tax may be imposed pursuant to the state's police power or pursuant to the state's taxing power, and the legislature may exercise both powers in one act. *Solberg*, 211 Iowa at 616-17, 232 N.W. at 480. The denomination of a particular charge as a license tax or a license fee is not necessarily determinative of the power exercised. *Id.* Where a charge is fixed by the legislature in a statute, the fact that the charge exceeds or bears no relationship to the cost of regulation is persuasive evidence that the legislature intended the charge to be an exercise of the taxing power, particularly if regulatory provisions are not included in the legislation. *Id.* In this instance, however, the legislation provides numerous regulatory requirements, the fee was not specified by the legislature, and the legislature provided no guidance to the board for setting a tax for the purpose of raising general revenue. A delegation of the taxing power, without any criteria to determine the amount of general tax revenue to be raised, to a board having no duties relating to the state's overall fiscal policies would probably be an unconstitutional delegation of legislative power. *See generally Warren County v. Judges of the Fifth Judicial District*, 243 N.W.2d 894, 898 (Iowa 1976) (general rules applicable to delegation of legislative power). When two constructions of a statute are possible we will not construe a statute in a way which would render it unconstitutional. *E.g., Graham*, 259 Iowa at 855, 146 N.W.2d at 637. Accordingly, we do not construe chapter 260 as including a delegation of the state's taxing power to the board.

Upon adoption, a joint water utility board is authorized, but not required, to purchase or construct a joint water facility. While the proposition must be submitted to the voters in each city proposing to establish a common utility, only those cities approving the proposal may establish a joint water utility. Failure of the proposal in one or more cities does not render the proposal invalid for cities receiving electoral approval. Finally, the size and composition of a joint water utility board is not subject to a referendum. (Walding to Wissing, State Representative, 4-22-92) #92-4-6(L)

April 22, 1992

HIGHWAYS; CONFLICT OF INTEREST; PUBLIC OFFICERS AND EMPLOYEES; STATE EMPLOYEES: Iowa Code § 314.2 (1991). The fact that a state employee, not an employee of the Department of Transportation and not involved in contracting for road construction, leases property to a tenant, who operates a quarry on the leased premises and supplies the state with gravel for roadwork, does not constitute a violation of Iowa Code section 314.2 and invalidate all contracts between the tenant and the state or other governmental bodies. In order to violate section 314.2, the state employee must have some direct or indirect control over the contracting process and have some direct or indirect benefit from the contract. Each situation must be resolved in light of its particular facts. (Ferree to McNeal, State Representative, 4-22-92) #92-4-7(L)

April 22, 1992

CONSTITUTIONAL LAW; INSURANCE: Medicare supplemental policies; required mammography coverage. U.S. Const., art. VI; 42 U.S.C. § 1395ss; Iowa Code § 514C.4 (1991). Federal legislation regulating Medicare supplemental policies preempts a state statute requiring that such policies contain a defined minimum level of mammography coverage; a state statute which exempts such policies from the mammography coverage requirement would not violate the equal protection clause of the United States Constitution. (Hunacek to Doderer, State Representative, 4-22-920 #92-4-8

The Honorable Minnette Doderer, State Representative: You have requested an opinion of the Attorney General concerning the interaction between federal Medicare regulations and state law requiring mammogram coverage in Iowa. Before repeating and answering your questions, it would be helpful to set forth some background information.

Iowa Code section 514C.4 provides that an insurance policy must provide "minimum mammography examination coverage", in a sense that is specifically defined by subsection 2 of the statute. The statute also provides, in section 514C.4(1)(d), that this mandated coverage specifically applies to individual or group Medicare supplemental policies. Medicare is, of course, a federally established health care program for people aged 65 or over. Because Medicare does not pay all health-related costs that a senior citizen may incur, many companies issue policies that are designed to supplement these benefits. These are the Medicare supplemental insurance policies that are referred to in the state statute. Such policies have also become the subject of federal legislation. Section 1395ss of 42 U.S.C., part of the Social Security Act, sets forth certain

requirements for the regulation of these supplementary policies (which are also referred to as "Medigap" policies). The Omnibus Budget Reconciliation Act of 1990 amended many provisions of this federal legislation. The legislative history to this Act indicates a congressional concern with Medigap marketing practices which have resulted in a proliferation of policies, great variations in coverage, and the purchase of unnecessary and duplicative coverage by many senior citizens. 1990 U.S. Code Cong. & Ad. News 2104-05. Accordingly, one of the purposes of the Act was to establish simplification standards with regard to Medigap policy benefits, including uniform language, definitions and format. *Id.* at 2105.

With this as background, you ask the following two (slightly paraphrased) questions:

1. Does the federal legislation pre-empt the state statute?

2. Would a state statute exempting Medicare supplementary policies from the mammography coverage requirement of section 514C.4 violate the equal protection clause of the United States Constitution?

We will answer these questions in the order posed. For the reasons that follow, we believe that the answer to the first question is yes, and the answer to the second question is no.

A.

In 1990 Op.Att'yGen. 11 we discussed basic principles governing the concept of federal pre-emption:

> In general, Article VI of the United States Constitution, the so-called "Supremacy Clause," establishes the supremacy of federal law over state law. "It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that 'interfere, or are contrary to' federal law." *Hillsborough County v. Automated Laboratories, Inc.*, 471 U.S. 707, 713, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371 (1985). This may occur in several different ways. First, when acting within constitutional limits, Congress may pre-empt state law by so stating in express terms. *Id.* In the absence of such express language, congressional intent to pre-empt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary regulation. *Id.* Pre-emption of a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.* Moreover, it is now firmly settled that

> "state laws can be pre-empted by federal regulations as well as by federal statutes." *Id.*

Id. at 12-13. Application of these principles to the particular situation involved here, leads us to conclude that the federal statute preempts the state one.

The federal statute, as amended by the OBRA of 1990, provides as follows:

> The requirements of this subsection are as follows:
>
> (1) Each medicare supplemental policy shall provide for coverage of a group of benefits consistent with subsection (p).
>
> (2) If the medicare supplemental policy provides for coverage of a group of benefits other than the core group of basic benefits described in subsection (p)(2)(b), the issuer of the policy must make available to the individual a medicare supplemental policy with only such core group of basic benefits.
>
> (3) The issuer of the policy has provided before the sale of the policy, an outline of coverage that uses uniform language and format (including layout and print size) that facilitates comparison among medicare supplemental policies and comparison with medicare benefits.

42 U.S.C. § 1395ss(o). In section 1395ss(p), the statute invites the National Association of Insurance Commissioners (NAIC) to promulgate limitations on the groups or packages of benefits that may be offered under a medicare supplemental policy. The NAIC has formulated the standard policies, all of which supplement the mammography coverage provided under Medicare. Two of the standard policies provide coverage for more frequent mammograms by covering preventive medical care that is not covered by Medicare. These NAIC standards are identified in 42 C.F.R. § 403.210, which also state that (with certain exceptions not relevant here) Medicare supplemental policies must "comply with the provisions of the NAIC model standards." 42 C.F.R § 403.210(b).

It is thus apparent that there is a conflict between section 514C.4, which requires a defined minimum mammography coverage in Medicare supplementary policies, and the federal statute, which requires that the insurer offer at least one policy that does not contain such coverage. While we note that the federal statute does not act as a bar to insurers offering new or innovative benefits in a Medigap policy, it does act as a bar to a state requiring such coverage in <u>all</u> such policies. This congressional requirement is consistent with the concern, expressed in the legislative history of the act, for promoting choice among senior citizens regarding the purchase of such Medicare supplementary policies. Because of the inconsistency between the federal and state statutes, we must conclude that the state statute is, at least with regard to the issue of compulsory mammography coverage, preempted by the federal Act.

B.

You ask in your opinion request whether a state statute which would exempt Medicare supplementary policies from the compulsory mammography coverage requirement would violate the equal protection clause of the United States Constitution. We think not.

We note at the outset the strong presumption of constitutionality that is afforded any legislative enactment. *Beeler v. Van Cannon*, 376 N.W.2d 628, 630 (Iowa 1985). In an equal protection challenge,

> the first question is whether some fundamental right is involved. The answer determines the burden to be borne by the challenger. If no fundamental right is at issue the classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest.

Id. at 629. The party attacking the classification "has the heavy burden of proving the action unconstitutional, and must negate every reasonable basis upon which the action may be sustained." *Id.* at 630.

A state statute which exempted Medicare supplementary policies from a mammography coverage requirement would, under this standard, not violate the equal protection clause. The desire to comply with federal law is certainly a legitimate state interest. Moreover, the same concern expressed in the congressional legislation — the desire to provide uniformity and choice for senior citizens purchasing Medicare supplementary insurance — would also justify a statute which exempted such policies from the mammography requirement. A state could certainly rationally conclude that, given both the abuses that have taken place with regard to this kind of policy in the past, and the vulnerability of those who are purchasing these policies, such policies should be treated differently than other insurance policies. Although a legitimate difference of opinion could and does exist, the state could rationally conclude that there is a need for offering inexpensive policies without extra coverage that a policy holder may neither need nor want. Again, although a difference of opinion exists, Congress has, and the state could, rationally conclude that mammography examinations fall within that "extra coverage". The possibility of reaching this conclusion is sufficient to defeat an equal protection challenge to the statute.

April 28, 1992

TAXATION: Deductibility of Private Club Expenditures. Iowa Code Supp. §§ 422.7(24), 422.9(2)(g) and 422.35(14) (1991). Amounts paid to private clubs which impose time and place restrictions or limitations upon the use of their services or facilities based upon sex or age are not deductible expenses for Iowa tax purposes. Amounts paid to clubs which restrict participating memberships to those over 25 years of age are not deductible. Single gender golf tournaments held at private clubs do not per se destroy deductibility of amounts paid to the clubs. However, total exclusion of the opposite sex from any of the club's facilities, including the golf course, during such tournaments does destroy deductibility. (Hardy to Chapman, State Representative, 4-28-92) #92-4-9

The Honorable Kay Chapman, State Representative: The Attorney General is in receipt of your opinion request regarding the deductibility, for Iowa income tax purposes, of amounts paid to certain private clubs. The statutory provisions at issue are Iowa Code supplement sections 422.7(24), 422.9(2)(g) and 422.35(14) (1991). These provisions disallow the deduction, for Iowa income tax purposes, of:

> [T]he expenses otherwise deductible under section 162(a) of the Internal Revenue Code[34]
>
> . . . with respect to expenditures made at, or payments made to, *a club which restricts membership or the use of its services or facilities on the basis of age, sex,* marital status, race, religion, color, ancestry, or national origin.

(Emphasis added.)

Specifically, as to the interpretation and application of the emphasized statutory language, you asked the following seven questions:

> 1. Is it discriminatory to keep ladies out of lounge and dining on men's day? (Other lounge and dining is available)
>
> 2. Is it discriminatory not to let youth under the age of 21 play golf at certain times of the day?
>
> 3. Is it discriminatory to keep men out of lounge and dining on ladies day? (Other lounge and dining is available)
>
> 4. Is it discriminatory to have a separate men's golf tournament and a separate ladies golf tournament?
>
> 5. Is it discriminatory to have days set aside for men's golf and for ladies' golf?
>
> 6. Is it discriminatory to have a ladies' card room and men's card room?

[34] Section 162(a) of the Internal Revenue Code generally allows a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.

7. Is it discriminatory to restrict participating memberships to those over 25 years of age?

When language in a tax statute is ambiguous or unclear, various rules of statutory construction must be employed to determine the intent of the legislature when it enacted the statute in question. *American Home Products Corp. v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 142-143 (Iowa 1981). However, if the language employed in a statute is plain, clear and unambiguous, no construction is necessary or allowed. *Ladd v. Iowa West Racing Association*, 438 N.W.2d 600, 602 (Iowa 1989). In such cases, the function of courts is simply to apply the statutory language to the facts in question unless, of course, its application to a given set of facts would produce an absurd, ridiculous or anomalous result.[35] *Id.*; *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989).

In our opinion, the *Ladd* case is directly on point and is controlling here. As in the *Ladd* case, the language used in the present statutes is clear and plain. Therefore, the statutory language must simply be applied to each fact situation presented unless application of the plain language would create absurd results.

We begin by noting that the word "restrict" is not defined in the cited provisions. However, the ordinary and usual meaning of the word "restrict" is "to keep within certain limits; put certain limitations on; confine." *Webster's New World Dictionary of the American Language* 1213 (D.B. Guralnik 2d col. ed. 1974). A synonym for "restrict" is "limit." *Id.* Applying this definition to the fact situations enumerated, it is obvious that questions 1 through 3, 5 and 6 all involve time and/or place restrictions or limitations which are imposed upon the use of a club's facilities. Further, all of the restrictions involved are based upon either age or sex *on their face*. Therefore, under the plain language of the applicable provisions, any such limitations would destroy the deductibility of any and all payments made to the club which would otherwise be deductible.

The facts enumerated in question 7 clearly involve a facial limitation or restriction imposed upon membership based solely upon age. The result is the same as the previous questions. In our opinion if such limitation exists, no amounts paid to the club are deductible on Iowa returns.

Question number 4 presents a somewhat different problem. Since the statutes in question speak to restrictions imposed upon the "use of its services or facilities" based upon the enumerated prohibited classifications, the mere organization of and holding of separate men's and women's golf tournaments would not facially violate the statutory language. However, if any of the facilities of the

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[35] One example of an application of the plain language of these provisions which would produce an absurd result is the provision by a private club of separate but equal restrooms and/or locker and dressing facilities for its clientele based upon gender. In our view, the legislature cannot reasonably have intended for the mere duplication of such facilities to destroy the deductibility of amounts paid to the club given the compelling privacy concerns involved, none of which exist as to the present factual scenarios.

club are monopolized during either type of tournament such that a member of the opposite sex would be precluded from using them during the tournament, this would clearly create a limitation upon the use of the club's facilities based upon gender. This would preclude single-gender monopolization of the course itself as well during the tournament. It is our view that in such circumstances, the deduction would be lost. To prevent this from occurring, there are a number of options which the club may exercise, such as simultaneously scheduling the tournament participants for tee off from the front nine and all others from the back nine or allowing non-tournament persons to schedule and to tee off and play between tournament members on a first-in-time basis.

Further, to the extent that the club itself sponsors or organizes either type of tournament as a service to its members, the same sponsorship and organization services must also be made available to members of the opposite sex. Otherwise, deductions may not be taken.

It should be noted that there exists no de minimis exception language in the cited statutes. Further, it would be improper to read any exceptions into the statutes by means of statutory construction since the legislature gave no indication in the language it used that exceptions were contemplated when the statutes in question were passed. *Ladd v. Iowa West Racing Association*, 438 N.W.2d 600, 602 (Iowa 1989). The result is that if just one prohibited limitation were to exist at the club at any time during the tax year of the deduction claimant, the deduction could not be taken.

Finally, two additional points also warrant mention. First, it is important to understand that the cited statutes do not per se prohibit any conduct or policies. They simply deny deductions to those who patronize private clubs which employ such restrictions. Second, we have not been asked and do not offer any opinion as to any given club's status as a private club under these statutes.

In summary, it is our opinion that Iowa Code Supp. §§ 422.7(24), 422.9(2)(g) and 422.35(14) prevent deductibility, for Iowa income tax purposes, of all payments made to private clubs when such clubs impose the enumerated time and/or place limitations or restrictions upon the use of their services or facilities based upon age or sex. Further, payments made to a club which restricts participating memberships to those over 25 years of age are not deductible. Finally, separate tournaments based upon the gender of the participants do not per se destroy the deductibility of amounts paid to the club. However, if the services or facilities of the club are monopolized by members of a single sex during the tournaments, the deductibility of all expenditures made at and payments made to the club is destroyed.

MAY 1992

May 18, 1992

COUNTIES AND COUNTY OFFICERS: County Home Rule Implementation and County Ordinances. Iowa Code §§ 331.301(5), 331.302(6), 331.302(7) and 331.302(9) (1991). County ordinances are not invalid due to the failure of a board of supervisors to compile a code of ordinances at least once every five years. (Reno to Anstey, Mills County Attorney, 5-18-92) #92-5-1(L)

May 18, 1992

CITIES; COUNTIES; LAW ENFORCEMENT: Notice of Parking Violations. Iowa Code § 321.236(1) (1991). If authorized by ordinance, cities and counties can serve a simple notice of fine for overtime parking violations by leaving a copy of the notice on the vehicle. This method of service is a reasonable means of effecting "simple notice" as well as consistent with the statutory right of local authorities to regulate vehicular parking in section 321.236(1). (Odell to Hibbard, State Representative, 5-18-92) #92-5-2

The Honorable Dave Hibbard, State Representative: You have requested an opinion of the Attorney General on two questions involving the legality of the method cities and counties use to serve notice of overtime parking violations. Specifically, your questions are:

> Does the constitutional home rule authority of cities and counties authorize them to issue nonmoving traffic violation notices, citations or complaints which may be properly served by placing the notice, citation or complaint on the vehicle which is illegally parked.
>
> Is there statutory authority allowing either cities or counties to issue nonmoving traffic violations, notices or complaints and properly serve them by leaving the notice, citation or complaint on the vehicle which is illegally parked.

The inquiry begins with an analysis of Iowa Code section 321.236(1), which authorizes cities and counties to regulate vehicular parking and provides two methods for charging overtime parking violations:

> Parking meter, snow route, and overtime parking violations which are denied shall be charged and proceed before a court the same as other traffic violations. Filing fees and court costs shall be assessed as provided in section 602.8106, subsection 1 and section 805.6, subsection 1, paragraph "a" for parking violation cases. Parking violations which are admitted:
>
> a. May be charged and collected upon a simple notice of fine payable to the city clerk or clerk of the district court, if authorized by ordinance.

A violation of an overtime parking ordinance is alleged in one of two ways on the uniform citation and complaint, adopted in Iowa Code section 805.6 as the general charging document for parking, traffic and other scheduled violations. Under the first method, overtime parking can be prosecuted as a scheduled violation, with the uniform citation and complaint used to invoke the court's jurisdiction and establish a court appearance date. If authorized by ordinance, overtime parking is alternatively alleged by a "simple notice of fine" on the uniform citation and complaint which is typically left on the windshield of the violating vehicle. *City of Des Moines v. Iowa District Court*, 431 N.W.2d 764 (Iowa 1988). Although this notice does not alone trigger any court procedure, formal prosecution ensues, following nonpayment of the fine, by filing the ticket as a complaint under I. R. Cr. P. 35, and serving it as a civil action original notice. *City of Des Moines v. Clerk of Court*, 449 N.W.2d 363, 365 (Iowa 1989); Iowa Code § 804.1 (1991).

The Code neither defines "simple notice of fine" nor mandates a procedure to follow when charging overtime parking by this method. When notice is required but no method is prescribed, the notice must only be a reasonable one under the circumstances. *Buchholz v. Board of Adjustment of Bremer County*, 199 N.W.2d 73, 77 (Iowa 1972). To determine whether "windshield service" is a reasonable means of giving "simple notice" under section 321.236, we must consider that statutory language in light of its underlying purposes, the object sought to be accomplished and the consequences of various interpretations. *Probasco v. Iowa Civil Rights Commission*, 420 N.W.2d 432, 434 (Iowa 1988).

Initially, the "simple notice of fine" is established as an alternative to the formal procedures in section 321.236 for scheduled violations. *See* Iowa Code §§ 805.6 et seq. The informality assumed in the "simple notice of fine" process is reflected in the statutory prohibition against assessing court costs or other fees when a fine is paid under this method. Section 321.236(l) (a) ("No costs or other charges shall be assessed. . . ."). In enabling local authorities to adopt this informal overtime parking disposition, the legislature intended to free court dockets from the congestion engendered by this common and frequent violation. That legislative purpose would be thwarted if every parking violation necessarily entailed formal prosecution by the charging authority.[36]

Aside from serving the interests of judicial economy, the informal windshield service of a parking violation notice promotes efficient use of local authority personnel. Leaving a notice on the windshield of an unattended vehicle, at the site of the violation, is the easiest and most direct means of alerting the driver that the parking ordinance has been violated. This informal process obviates the expense, delay and personal resource expenditure involved in following the statutory steps for verification in section 805.6(4), locating the driver or registered owner of the vehicle, and effecting formal service of the citation. Section 321.236(1) is therefore statutory authority for cities and counties to use windshield service as proper "simple notice" of a parking violation.

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[36] Although empowered to adopt an ordinance providing for the "simple notice of fine procedure", a local authority is not required to follow it: overtime parking may be initially charged and prosecuted as any other traffic violation despite the ordinance. Iowa Code § 321.236(1)(b) (1991).

This method of notice is also consistent with the constitutional home rule authority of cities and counties. Section 321.236 expressly preempts the enforcement and regulation of motor vehicle offenses, except as specifically provided in subsections (1)-(13). 1990 Op.Att'yGen. 48. Cities and counties can therefore adopt any method of effective "simple notice of a fine" that is not "in conflict with, contrary to or inconsistent with" other provisions of Iowa Code chapter 321. Because we have concluded that leaving a copy of the notice on an illegally parked vehicle is a reasonable means of serving a "simple notice of fine" within the meaning of Iowa Code section 321.236(1)(a), it is also consistent with local authorities' statutory right to regulate vehicular parking.

May 27, 1992

GARNISHMENT; LABOR: Income used to determine garnishment limitations. Iowa Code §642.21 (1991); 15 U.S.C. §1673(a). For purposes of Iowa Code section 642.21 and 15 U.S.C. §1673(a), the maximum garnishment amount is based on the disposable earnings of the employee, rather than the gross pay earned. The graduated limitations of how much an individual judgment creditor can garnish each year are based on the total earnings of the employee. (Kochenburger to Jay, State Representative, 5-27-92) # 92-5-3(L)

May 28, 1992

APPROPRIATIONS; GOVERNOR: Payment of salary increases from agency general appropriations. Iowa Const. art. III, §16; Iowa Code §8.43 (1991). If no other appropriation exists, judicially mandated salary increases may be paid from the employing agencies' general appropriations for salaries and support. Separate statutory authority would need to be found to pay salary increases to non-contract state employees. The veto of section 1 of H.F. 2490, while leaving sections 2 and 3 intact, would result in such a situation. Any proposed item veto should be carefully scrutinized. Further, depending on its factual effect, the Court might conclude that a veto of the salary adjustment appropriation and instructions to pay the salary awards from each agency's general appropriation violated the adjudicated pay raises granted to contract covered employees or constituted an improper impoundment of funds by reducing or diverting that amount from other appropriations. (Krogmeier and Osenbaugh to Tegeler, Director, Department of Management, 5-28-92) #92-5-4

Gretchen Tegeler, Director, Iowa Department of Management: On May 18, we received your request for an opinion concerning the State's ability to pay both noncontract and adjudicated contract salary increases from respective agencies' general budget line item for salaries and support without an appropria,tion to the salary adjustment fund provided in Iowa Code section 8.43 (1991).

We point out that in *AFSCME v. State of Iowa*, 484 N.W.2d 390 (Iowa 1992), the Governor argued that payment of increases from general appropriations was inconsistent with the practice of separately funding salary increases, as provided in Iowa Code section 8.43, under the holding of *O'Connor v. Murtagh*, 225 Iowa 782, 281 N.W. 455 (1939). In *O'Connor*, the Court held that a 69-year history of specific appropriations followed by a failure to pass a specific appropriation indicated the legislature did not intend to utilize a general

appropriation for that purpose. Thus, money could not be spent for that specific purpose. While the Court had the opportunity to rely on *O'Connor* in the *AFSCME* case, it declined the opportunity to do so.

In the State's current situation, there is no question that the monies must be spent for the contract covered employees as these salary increases represent an adjudicated obligation of the State. Further, the General Assembly has now passed the salary adjustment bill, H.F. 2490. Thus, there is no legislative intent to not fund the salary awards. It is only a potential veto that stands in the way of paying the salary increases to contract covered employees.

As you note, in *AFSCME*, the Supreme Court did not invalidate the Governor's veto of the 1991 appropriation to pay the awards. There, however, it specifically found that the veto was done in a good faith belief the awards were not binding. 484 N.W.2d at 395. Thus, *AFSCME* does not address what the Court would do should the Governor veto an appropriation to pay salary increases which have already been adjudicated as binding on the State.

To our knowledge, there is no language in the several general appropriation bills precluding the payment of the salary increases from the line items for salary and support costs. Section 8.43, while creating a separate salary adjustment fund, does not prohibit the use of other funds for that purpose. Most significantly, the Court has determined the State is bound to pay the contract awards, and *Kersten v. Department of Social Services*, 207 N.W.2d 117 (Iowa 1973), holds that the required legislative appropriation to pay for breach of contract can be found in the statute conveying authority to enter into the contract and the statute appropriating monies to the agency. Other legal barriers, however, may preclude this course of action in this case.

We cannot determine factually whether the regular agency appropriations for salaries and support costs are sufficient to pay the salary increases. If the effect would be to fund the contract award through layoffs and furloughs, significant issues would be raised regarding compliance with the order of the Iowa Supreme Court in *AFSCME* as we have previously advised. The result of any action resulting in furloughs must also be consistent with the Addendum to the 1991-93 Labor Agreement. The Supreme Court very clearly held the State was bound to pay awards despite a veto of the salary adjustment bill. The Court further indicated it would intercede if a failure to act or a deadlock "left an *adjudicated* state obligation uncollectible." The Court went on to say, "We trust, owing to the goodwill and respect for the rule of law on the part of the governor and the legislators, such a point will not be reached in this dispute." 484 N.W.2d at 396.

You have not advised us of the plan the Governor is considering, which would raise the issues in your opinion request. Under the salary bill pending the Governor's signature, H.F. 2490, however, there would be significant questions raised if the Governor attempted to utilize his item veto power to separate the appropriation for contract awards from the increases for non-contract employees.

Section 1 of H.F. 2490 contains an appropriation of $101,009,928 for salary increases for contract and noncontract employees. Subsection 11 of section 1 effectively appropriates that portion of the $101,009,928 necessary for the increases for noncontract employees. The specific amount of the noncontract raises are authorized in sections 2 and 3 of the bill. We do not believe that section 1, subsection 11 is amenable to item veto. Only section 1 in its entirety could be properly vetoed. For a detailed discussion of item veto issues, *see* 1988 Op.Att'yGen. 39.

A veto of all of section 1 while leaving sections 2 and 3 intact, would leave no salary adjustment appropriation but leave authorization under sections 2 and 3 for noncontract employee raises and leave authorization under the *AFSCME* ruling for contract covered employees. With that result, authorization for salary increases for fiscal year 1993 exists, but without a specific salary increase appropriation.

Further, the Governor's veto of the salary adjustment bill on the assumption that the increases would be paid from general agency appropriations could result in an improper impoundment of funds from the other appropriations. The Governor has no power to reduce the amount appropriated for an item or to exercise "any creative legislative power" with regard to appropriations. 1980 Op.Att'yGen. 786, 788-789. The Governor has been delegated limited power to implement an across-the-board cut to prevent a deficit at the end of the fiscal year. 1982 Op.Att'yGen. 70. A court might well find that the effect of a veto of the salary adjustment bill and instructions to pay the increases from general agency salary and support appropriations improperly reduced the appropriations by the amounts to fund the salary increases. An item veto of the salary appropriation and shifting this purpose to the general appropriation could be challenged under this theory as well.

In conclusion, if no other appropriation exists, judicially mandated salary increases may be paid from the employing agencies' general appropriations for salaries and support. Separate statutory authority would need to be found to pay salary increases to non-contract state employees. The veto of section 1 of H.F. 2490, while leaving sections 2 and 3 intact, would result in such a situation. Any proposed item veto should be carefully scrutinized. Further, depending on its factual effect, the Court might conclude that a veto of the salary adjustment appropriation and instructions to pay the salary awards from each agency's general appropriation violated the ruling in *AFSCME* or constituted an improper impoundment of funds by reducing or diverting that amount from other appropriations. The primary holding in *AFSCME* is that the Court can intercede if the Governor and the General Assembly fail to meet judicially determined obligations.

JUNE 1992

June 2 1992

TAXATION: Apportionment of Taxes; Applicability to Delinquent Taxes. Iowa Code §§ 449.1, 449.3 (1991). County boards of supervisors are not authorized to apportion delinquent taxes pursuant to chapter 449. County boards of supervisors may not demand payment of taxes as a requirement of apportionment under chapter 449. (Hardy to Crowl, Pottawattamie County Attorney, 6-2-92) #92-6-1(L)

June 3, 1992

SCHOOLS AND SCHOOL DISTRICTS; PUBLIC RECORDS: Student records, Personnel information; Attorney Work Product. Iowa Code §§ 22.1, 22.2, 22.7(1), 22.7(4), 22.7(11) (1991). Formal, official documents by which a school superintendent conveys official information to school board members containing information about the school district are public records. If the information contained in these letters falls within a statutory exemption such as student records, personnel information, or attorney work product, it is a confidential public record and unavailable for public inspection. Chapter 22 does not require the school district to retain copies of these letters. (Boesen to Daggett, State Representative, 6-3-92) #92-6-2(L)

June 3, 1992

SOIL CONSERVATION DISTRICTS: Audit required. Iowa Code § 467A.6 (1991). Iowa Code section 467A.6 (unnumbered paragraph five) requires that an independent audit be performed of the accounts of receipts and disbursements of a soil and water conservation district, which may be performed by either the Auditor of State or a certified public accountant. Payment of the cost shall be provided from proper public funds of the district receiving the audit. (Hindt to Johnson, State Auditor, 6-3-92) #92-6-3(L)

June 4, 1992

COUNTIES; REAL PROPERTY: Plats of survey for property divisions. Iowa Code §§ 409A.1-4 (1991). "The North 125 feet of the South 445 feet of Lot 1 . . ." is an example of a "specific quantity description" rather than a "metes and bounds description." The county auditor may not require filing of plat of survey for a specific quantity description unless it results in uncertainty about the location of the common boundary between two newly created parcels. (Smith to Rachels, Marion County Attorney, 6-4-92) #92-6-4(L)

June 11, 1992

MENTAL HEALTH; SUBSTANCE ABUSE: Costs. Iowa Code §§ 125.43, 125.44, 230.1, 230.15, 230.18, 331.424 (1991). There is no statutory mandate that a county must pay for the costs of treatment of an indigent person involuntarily committed for mental health or substance abuse to a private facility. The Code does not limit the number of times a county is responsible for the costs of substance abuse treatment. (McGuire and Ramsay to Zenor and Schultz, Clay and Clinton County Attorneys, 6-11-92) #92-6-5

Michael L. Zenor, Clay County Attorney, and Lawrence H. Schultz, Clinton County Attorney: You have both requested opinions from this office pertaining to the county's financial obligation to pay for treatment costs of indigent mental health patients under involuntary commitments, and substance abuse treatment costs for indigent persons. Specifically, you ask about the county's responsibility when indigent persons are committed to a private facility. The question of Mr. Zenor pertains to the county's liability to pay for treatment in view of previously repealed legislation, specifically, the repeal of Iowa Code section 444.12. *See* Iowa Code § 444.12 (1981). The questions of Mr. Schultz pertain to the liability of the county to pay for substance abuse treatment. Since your questions are related, we will address both requests in one opinion.

Over the past years there have been changes to the Iowa Code that have impacted on a county's obligation to pay for the costs of treatment of indigent mental health and substance abuse patients at private facilities. Prior opinions of this office found that the county of legal settlement is responsible for the cost of mental health treatment of indigent residents that are involuntarily committed. *See* 1980 Op.Att'y.Gen. 425; 1982 Op.Att'y.Gen. 283. In rendering these opinions, we relied on Iowa Code section 444.12 as well as Iowa Code section 230.18. Your requests question the continued validity of these opinions in light of the repeal of Iowa Code section 444.12.

Currently counties derive their authority through county home rule. *See* Iowa Code chapter 331. This chapter gives counties broad authority to provide general services as they determine and to levy taxes to pay for those services. Under county home rule, counties are free to determine for what general services they will pay, unless services are mandated by some other statutory provision. *See* Iowa Code § 331.421(1) and § 331.424(1)(a) & (c) (1991).

Iowa Code chapter 230 addresses the support of the mentally ill. Section 230.1 states the county is responsible for the costs, including the "commitment and support of a mentally ill person admitted or committed to a state hospital." The county in which the person has legal settlement is responsible for these costs. Iowa Code § 230.1(1). Under section 230.15 the individual, or person legally liable for the individual's support, are personally responsible for the cost of support. This provision allows the county to attempt to recoup any funds expended by the county for the support of the person in a state hospital.

There is no mandatory requirement or provision in chapter 230 that requires a county to pay for the cost of mental health treatment at a private facility. Further, there is no other statutory requirement that would appear to require the county to pay for treatment in a private facility.

As stated previously, prior opinions of this office found that the counties did have a responsibility to pay for the costs of treatment at private facilities. *See* 1980 Op.Att'y.Gen. 425 and 1982 Op.Att'y.Gen. 283. These opinions were based on the language of section 444.12 which stated that the counties shall pay for treatment for persons who are treated in a ". . . public or private facility: (a) in lieu of admission or commitment to a state mental health institute. . ." Iowa Code § 331.424(1)(c) which was enacted in 1983. This section was

repealed in 1981, no other code provision was enacted to require payment for treatment at private facilities.

Similar language to the old section 444.12 is found in section 331.424 (1)(c) which was enacted in 1983. This section provides that the county may certify supplemental levies for the mental health treatment of persons treated in a ". . . public or private facility, which placement is in lieu of admission or commitment to. . .a state mental health institute. . . ." Iowa Code § 331.424(1)(c) (1991). We do not read this Code provision as *requiring* a county to pay for such service. Rather, it *allows* a county to levy taxes to pay for such services if a county has determined that such service is a "general service."

A prior opinion based the determination of county liability for treatment in private facilities on Iowa Code section 230.18. *See* 1982 Op.Att'y.Gen. 283. Section 230.18 provides:

> The estates of mentally ill persons who may be treated or confined in any county hospital or home or in any private hospital or sanitorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support.

Iowa Code § 230.18 (1991). This code section is the same today as when the opinion was issued in 1982.

The opinion above stated that section 230.18 "implicitly" required the counties to pay for treatment in a private facility. The opinion went on to say that the language of section 444.12 supports this position.

We conclude that the finding of 1982 Op.Att'y.Gen. 283 is incorrect to the extent it is construed to rely solely on section 230.18. Section 230.18 does nothing more than provide a mechanism for the county to recover any expenses it may have incurred for the care of a mentally ill person. It is the opinion of this office that to the extent chapter 331 allows the county to pay for treatment in a private facility, section 230.18 provides a means to recoup the costs. Section 230.18 does not, on its own, require the county to pay for treatment in a private facility. With the repeal of section 444.12, we find this previous opinion to be inconsistent with current law.

The financing of the costs of treatment for involuntarily committed substance abusers is specified in Iowa Code § 125.44 (1991). This section provides that a substance abuser "is legally liable to the facility for the total amount of the costs of providing care, maintenance, and treatment for the substance abuser. . . while a voluntary *or committed patient in a facility.*" (Emphasis added.) Under this language the substance abuser is responsible for the total amount of the costs whether voluntary or involuntarily committed.

Section 125.44 provides a mechanism for payment by the state when the substance abuser is unable to pay the costs of treatment. Pursuant to section

125.44, the Iowa Department of Public Health may enter into contracts with the substance abuse facilities to pay for the cost of ". . . care, treatment, and maintenance of substance abusers. . . ." Iowa Code § 125.44 (1991). When a substance abuser is treated at a facility that has entered into a contract with the Department, the state will pay in accordance with the contract. *Id.* In such a situation, there is no financial liability on the county for the costs of "care, treatment and maintenance."[37]

The same type of funding does not apply when the substance abuser is treated at a mental health institute. The Department does not enter into contracts to pay for treatment with the mental health institutes. See Iowa Code § 125.44. Pursuant to section 125.43, chapter 230 applies in determining costs for treatment at a mental health institute. Pursuant to section 230.1(1), the county may be responsible for the costs of care in a mental health institute. Under section 230.15, the individual is responsible for costs of care, maintenance and treatment and the county can attempt to recover these costs. Section 230.15 states that a "substance abuser or chronic substance abuser is legally liable for the total amount of the cost of providing care, maintenance and treatment. . . while a voluntary or committed patient. When a portion of the cost is paid by a county, the substance abuser is legally liable to the county for the amount paid." Iowa Code § 230.15 (1991). In those instances when the county is liable, section 230.1 provides that the county in which the person has "legal settlement", is responsible. *See* Iowa Code § 230.1(1) (1991). If the person has no "legal settlement" in the state, the state is responsible. *See* Iowa Code § 230.1(2) (1991).

It is the opinion of this office that there is no statutory limit to the number of times a county may be responsible for payment or any provisions allowing the county to specify the type of treatment. To the extent the county is responsible under chapter 230, it is responsible for "the necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support. . . ." Iowa Code § 230.1. So long as there is a determination that additional treatment is necessary, the county would continue to be responsible under section 230.1(1).[38]

In summary, there is no statutory requirement that a county pay for the costs of treatment of an indigent person involuntarily committed for mental health or substance abuse to a private facility. Further, the Code does not limit the number of times that a county may be responsible for necessary expenses for substance abuse treatment.

June 22, 1992

COUNTIES: Hospital levy referendum. Iowa Code § 347.7 (1991). A county should not attempt to pursue a referendum for the alternate use of funds

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[37] A prior Attorney General's Opinion addressed the issue of costs of commitment and found that the commitment costs are expenses of the county. 1988 Op.Att'yGen. 29 (#87-3-4). See also 1986 Op.Att'yGen. 10.

[38] There is a limit as to the personal liability of an individual treated at the mental health institute. Section 230.15 provides limits of liability to the county by the individual.

generated from the hospital operation and maintenance levy, allowed by Iowa Code section 347.7, until the department of public health has adopted guidelines for this procedure as required by section 347.7. (Scase to Beres, Hardin County Attorney, 6-22-92) #92-6-6(L)

June 30, 1992

ELECTIONS: Absentee Voting; Application for Ballot. Iowa Code § 53.2 (1991). A commissioner of elections shall accept absentee ballot request forms whether received directly from the voter, through the mail or through a third party courier. (Krogmeier to Baxter, Secretary of State, 6-30-92) #92-6-7(L)

JULY 1992

July 9, 1992

COUNTIES: County Attorney Duties; Joint 911 Service Board. Iowa Code ch. 477B, 613A (1991). The joint 911 service board is not a board of the county whose members are entitled to seek legal advice and services from the county attorney. The county attorney must, however, provide advice on matters of interest to the county and defense to county officers who serve as members of the joint 911 service board. The joint 911 service board is required to defend and indemnify its employees and may purchase liability and property insurance. (Scase to Connolly, State Senator, 7-9-92) #92-7-1(L)

July 14, 1992

CONSTITUTIONAL LAW: Ethanol subsidies to large producers. United States Const. Amend. XIV; Iowa Const. art. I, § 6; Iowa Code § 159A.8 (1991); 1992 Iowa Acts, ch. 1099, § 5 (H.F. 2456). Given the strong presumption of constitutionality, a court would likely find a rational basis for limiting ethanol subsidies to those gallons attributable to new or expanded production capacity exceeding five million gallons per year. The classification would therefore likely pass muster under the equal protection clause. (Osenbaugh to Halvorson, State Representative, 7-14-92) #92-7-2

The Honorable Roger A. Halvorson, State Representative: You have requested an opinion of the Attorney General concerning the following issue: Is House File 2456, which subsidizes only large producers of ethanol, fair and constitutional? House File 2456 establishes an ethanol production incentive program. Only entities developing new facilities or expansions with an annual production capacity of over five million gallons per year are eligible for incentives. H.F. 2456, § 5; Iowa Code § 159A.8 (1991). A certified ethanol producer will receive an incentive payment of twenty cents for each gallon of ethanol produced by the new facility or expansion.

You ask us to opine on the fairness of limiting this subsidy to large producers. In issuing Attorney General's opinions, this office applies the standards which

would be applied by a court. In other words, the opinion resolves issues of law, not of fact or policy. 1972 Op.Att'yGen. 686; 61 IAC 1.5(3)"c". What is "fair" is an issue for the legislature to decide. We, like a court, can only opine whether a statute is so "unfair" or without a reasonable basis as to be unconstitutional.

The equal protection clause is found in the Fourteenth Amendment of the United States Constitution which states:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

A similar provision is found in the Iowa Constitution which provides:

> All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.

Iowa Const. art. I, § 6.

This office addressed the issue of how these two laws relate when we opined:

> It is well-settled law in this state that Art. I, § 6 of the state constitution places substantially the same limitations on state legislation as does the equal protection clause of the 14th Amendment of the Federal Constitution. *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977). Therefore, the discussion of the constitutionality of . . . (a statute) as it concerns equal protection will be treated in one section. So, while the analysis of equal protection is couched in terms of the federal equal protection clause, the analysis is applicable to the concerns under the equal protection clause of the Iowa Constitution.

1980 Op.Att'yGen. 471. *See also Harden v. State*, 434 N.W.2d 881, 886 (Iowa 1984).

In evaluating the constitutionality of a statute it is necessary to determine what test the courts use in analyzing the issue. Generally, in cases determining the constitutionality of a statute with respect to the equal protection clause, the courts use the rational basis test. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195 (1983); *Heritage Cablevision v. Board of Supervisors*, 436 N.W.2d 37, 38 (Iowa 1989); *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 836 (Iowa 1990). A higher level of scrutiny is applied in cases where the statute at issue involves fundamental rights or suspect classifications. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195 (1983); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Because House File 2456 does not involve a fundamental right or a suspect classification, the rational basis test would be used in determining its constitutionality.

In this case, the statute in question has certain requirements that must be met in order for a facility to be eligible to receive the state subsidy. One of those requirements is that "[t]he production facility has an annual production of at least five million gallons of ethanol." Iowa Code § 159A.8(2)(b). By way of this requirement, the legislation is essentially defining two classes of ethanol producers: those who produce more than five million gallons per annum (big producers) and those who produce less than five million gallons per annum (small producers). Big new producers receive incentive payments and small new producers do not. This classification of big and small producers and the different manner in which the two are treated by the statute is at the core of the issue of the constitutionality of this statute.

In applying the rational basis test, there is a strong presumption in favor of the constitutionality of a legislative enactment. *United States v. Watson*, 423 U.S. 411, 416 (1976); *United States v. Di Re*, 332 U.S. 581, 585 (1947); *Alaska Packers Assn v. Industrial Accident Commission of Calif.*, 294 U.S. 532, 543 (1935); *Elk River Coal and Lumber Co. v. Funk*, 271 N.W. 204, 210 (1937). This presumption in favor of constitutionality has been specifically extended to legislative classifications. *NewYork State Club Assoc. Inc. v. City of New York et al.*, 487 U.S. 1, 17 (1987); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969); *Bordens Farm Products Co. v. Baldwin*, 293 U.S. 194, 210 (1934). The presumption in favor of legislative classifications is so strong that, when the classification is called into question, if any state of facts can be reasonably conceived that would sustain it, the existence of the state of facts at the time the law was enacted must be assumed. *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Carmichael v. Southern Coal and Coke Co.*, 302 U.S. 495, 520 (1936). A statute "will not be held invalid unless it is clear, plain, and palpable that such decision is required." *City of Waterloo et al. v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977); *See also State v. Duncan*, 414 N.W.2d 91, 95 (Iowa 1987); *Larsson v. Iowa Bd. of Parole*, 465 N.W.2d 272, 273 (Iowa 1991).

In the case at hand, it is clear that the big and small producers will be treated unequally. However, this unequal treatment is not unlawful as long as all members within each separate class are treated the same, *New York State Club Assoc. Inc. v. City of New York et al.*, 487 U.S. 1, 17 (1987), and there is a rational basis for the classification, *Exxon Corp. v. Eagerson*, 462 U.S. 176, 195 (1983). Here, it is clear that all big producers will receive the incentive payments and all small producers will not. Thus all members in each class are treated equally. Therefore, the only challenge remaining is that of the rational basis for the classifications.

It has been suggested to us that industry experts have opined that a plant would have to produce more than five million gallons of ethanol in order to remain profitable. A reasonable legislature could choose to subsidize only facilities that could be economically viable. Another basis might be the legislative goal to encourage the purchase of sufficient quantities of corn to benefit the farm economy. Under these assumptions, subsidizing only big new producers seems rational. But, even if this economic impact standard is not found to pass the rational basis test, the statute will not be held in violation

of the equal protection clause unless *no* rational basis for the classification can be found. *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 520 (1936).

Therefore, given the strong presumption of rationality that statutes are afforded, it is our opinion that a court would likely find that there is a rational basis for the classifications in the ethanol incentive statute. Thus, we opine that limiting ethanol incentives to newly constructed large production facilities is not in violation of the Fourteenth Amendment of the United States Constitution or Article I, section 6 of the Iowa Constitution.

AUGUST 1992

August 4, 1992

MOTOR VEHICLES: Vehicle Recyclers. Iowa Code ch. 321H (1991). A person whose primary business is selling wrecked or damaged vehicles at auction is not automatically precluded from obtaining a vehicle recyclers license. (Hunacek to Rensink, Director, Department of Transportation, 8-4-92) #92-8-1(L)

August 5, 1992

STATUTORY CONSTRUCTION; COUNTIES AND COUNTY OFFICERS: Deadline for filing proposed charter for election. Iowa Code §4.11 (1991); Iowa Code Supp. §331.237 (1991); 1991 Iowa Acts, chs. 129, 256. Two amendments to section 331.237(1) by the 1991 General Assembly are irreconcilable in providing conflicting deadlines for receipt of a proposed charter for county government. The later enacted amendment prevails. The appropriate filing deadline for submitting a proposed commonwealth charter at the next general election is, therefore, "not later than sixty days before the next general election." (Donner to Sarcone, Polk County Attorney, 8-5-92) #92-8-2

John Sarcone, Polk County Attorney: You have requested an opinion of the Attorney General regarding the appropriate filing deadline for submitting a proposed commonwealth charter at the next general election. Specifically, your question relates to the interpretation to be given to Iowa Code section 331.237(1) in light of two bills amending that section during the 1991 session of the general assembly: 1991 Iowa Acts, ch. 129 (House File 420); and 1991 Iowa Acts, ch. 256 (House File 693).

House File 420 was an act "relating to corrective changes to Iowa's election laws, providing emergency powers to the state commissioner of elections, relating to election nomination papers and affidavits, the affidavit filing requirements for a single public office by primary election candidates and certain general election candidates, and relating to absentee voting." The bill, 1991 Iowa Acts, chapter 129, section 25, purported to amend Iowa Code section 331.237(1) (1991) as follows:

> 1. If a proposed charter for county government is received not later than ~~sixty~~ *five working* days before the *filing deadline for candidates for county offices specified in section 44.4 for the* next general election, the board shall direct the county commissioner of elections to submit to the qualified electors of the county at the next general election the question of whether the proposed charter shall be adopted. If a majority of the votes cast on the question is in favor of the proposal, the proposal is adopted.

The House and Senate Journals reflects that this language passed the House on March 25, 1991, passed the Senate on April 17, 1991, and repassed the House on April 22, 1991. The bill was enrolled on May 3, 1991, and became effective immediately upon being signed by the Governor on May 7, 1991.

House File 693 was an act "relating to alternative forms of local government and creating a new alternative form of local government for cities known as a consolidated metropolitan corporation, with provisions relating to its charter process, legislative body, tax collection, and service delivery, and to a new alternative form of county government." The bill, 1991 Iowa Acts, chapter 256, section 12, purported to amend Iowa Code section 331.237(1) (1991) as follows:

> 1. If a proposed charter for county government is received not later than sixty days before the next general election, the board shall direct the county commissioner of elections to submit to the qualified electors of the county at the next general election the question of whether the proposed charter shall be adopted. *A summary of the proposed charter or amendment must be published in the official county newspapers and in a newspaper of general circulation in each participating city, if applicable, at least ten but not more than twenty days before the date of the election.* If a majority of the votes cast on the question is in favor of the proposal, the proposal is adopted.

The House and Senate Journals reflects that this language was passed by the House on April 19, 1991, passed by the Senate on May 11, 1991, and repassed by the House on May 11, 1991. The bill was enrolled on May 12, 1991, and became effective immediately upon being signed by the Governor on June 10, 1991. House File 693, therefore, became effective nearly one month after House File 420.

Iowa Code section 4.11 provides instruction as to statutory interpretation where there are multiple amendments to the same section:

> If amendments to the same statute are enacted at the same . . . [session] of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. *If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails.* [Emphasis added.]

The Iowa Code Editor has attempted to reconcile these two amendments, and has caused the publication of section 331.237(1) in the 1991 Supplement to the Iowa Code as follows:

> 1. If a proposed charter for county government is received not later than five working days before the filing deadline for candidates for county offices specified in section 44.4 for the next general election, the board shall direct the county commissioner of elections to submit to the qualified electors ofthe county at the next general election the question of whether the proposed charter shall be adopted. A summary of the proposed charter or amendment must be published in the official county newspapers and in a newspaper of general circulation in each participating city, if applicable, at least ten but not more than twenty days before the date of the election. If a majority of the votes cast on the question is in favor of the proposal, the proposal is adopted.

This version combines the changes to section 331.237(1) added by the first sentence of the House File 420 amendment with the new second sentence added by House File 693.[39]

We conclude that the two amendments to section 331.237(1) are irreconcilable and that the appropriate filing deadline for submitting a proposed commonwealth charter at the next general election is "not later than sixty days before the next general election."

The two amendments contain conflicting time periods for filing, the first indicated by underlining, the second by restating 1991 Code language. Because the "five days prior" language was not restated in the later of the two amendments, the amendment of House File 420 has been effectively repealed; by using the language existing prior to the effective date of House File 420, the legislature has effectively reinserted the "sixty day" provision into the law.

Where an amending act rewrites a statute "to read as follows", provisions of the original statute not carried forward into the new enactment are deemed repealed. *Women Aware v. Reagen*, 331 N.W.2d 88, 91 (Iowa 1983); *State v. Garland*, 250 Iowa 425, 431, 94 N.W.2d 122, 124 (1959). This rule regarding the failure of subsequent amendments to fully carry forward the prior provisions is also stated in Sutherland, *Statutory Construction* § 22.32, p. 279-281 (Sands 4th ed. 1985 rev.):

> When the amendatory act purports to set out the original act or section as amended, all matter in the act or section that is omitted in the amendment is considered repealed... Only those provisions of the original act or section repeated in the amendment are retained.

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[39] The Code Editor's duties appear in Iowa Code Ch. 14. These duties include the correction of grammatical, clerical, and spelling errors, as well as erroneous citations. We question whether the Code Editor's above compilation of the two amendments to 331.237(1) fall within these parameters; however, this is not determinative of the question that you raise.

After May 7, 1991, if the legislature intended to retain those amendments, House File 693 could and should have been amended prior to its passage on May 11, 1991, to reflect amendment to "Code 1991, as amended by House File 420", and then restate the most current language. The legislature's own procedures allow for this operation. As stated in the *1983 Iowa Bill Drafting Guide*: "If a section has been amended previously by the same session of the General Assembly, the amending clause to subsequent amendments should indicate this fact, and the section should be set out in its recently amended form but without strike-throughs and underlines from the previous amendment." *Id.* at 51. Similar language exists in the current bill drafting guide awaiting approval of the legislative council.

Sutherland, *Statutory Construction* § 23.12 (cited above), further explores the context of same session amendment by stating:

> Amendments are often made to an act or section which ignore prior amendments of the same act or section. . . [T]hose provisions of the prior amendments that conflict with the new amendment are impliedly repealed. And as a general rule, if the new amendment purports to set out the original act or section as amended — generally indicated by the phrase "to read as follows" — and fails to reenact the prior amendments therein the prior amendments are considered repealed.

The conflicting filing deadlines in House File 420 and House File 693 are not reconcilable. Section 4.11 therefore provides that the most recent amendment, House File 693, controls.

Consistent with the rules of statutory construction regarding the restatement of prior Code language and consistent with Iowa Code section 4.11, the two amendments to section 331.237(1) made by the 1991 General Assembly are irreconcilable. The later enacted amendment prevails. The Code Editor incorrectly attempted to harmonize the two bills. The appropriate filing deadline for submitting a proposed commonwealth charter at the next general election is, therefore, "not later than sixty days before the next general election."

August 12, 1992

WEAPON PERMITS: Nonprofessional weapon permits are issued for statewide use unless otherwise restricted or limited by the issuing authority. Iowa Code §§ 724.6, 724.7, 724.11 (1991); 661 IAC 4.4(2); and 1980 Op.Att'y.Gen. 438. (Young to Swanson, Montgomery County Attorney, 8-12-92) #92-8-3

Bruce E. Swanson, Montgomery County Attorney: You have requested an opinion of the Attorney General interpreting Iowa Code section 724.7 (1991). You pose the following question:

> Does a nonprofessional firearm permit issued pursuant to Iowa Code § 724.7 authorize the carrying of a weapon statewide or only in the county of issuance?

Our review of Iowa Code chapter 724, relevant provisions of the Iowa Administrative Code, and a prior opinion of this office leads us to the answer that a nonprofessional firearm permit authorizes the carrying of a weapon statewide absent restrictions or limits placed on the permit by the issuing authority.

Iowa Code section 724.7 provides as follows:

> Any person who can *reasonably justify going armed* may be issued a nonprofessional permit to carry weapons. Such permits shall be on a form prescribed and published by the commissioner of public safety, which will be readily distinguishable from the professional permit, and shall identify the holder thereof, and *state* the reason for the issuance of the permit, and *the limits of the authority granted by such permit.* All permits so issued shall be for a definite period as established by the issuing officer, but in no event shall exceed a period of twelve months. (Emphasis added.)

Unlike Iowa Code section 724.6, which expressly allows a professional permit holder to carry a weapon statewide while engaged in employment and while going to and from the place of employment, Iowa Code section 724.7 does not have an employment component limiting the permittee. Absent this restriction, a nonprofessional permit holder can carry a weapon statewide *unless* otherwise restricted or limited by the issuing authority.

The sheriff of the county in which an applicant for a nonprofessional weapon permit resides is given the discretion to issue a permit after determining that the requirements of the application process and statute are satisfied. *See* Iowa Code § 724.11. A nonprofessional permit holder's authority to carry a weapon statewide is not unfettered. In fact, the permit is to state the reason for its issuance and the "limits" of authority granted. *See* Iowa Code § 724.7. In addition to having the discretion whether to issue the permit, the county sheriff has the discretion and authority to restrict or limit the authority granted on nonprofessional permits issued. *See* 661 IAC 4.4(2).

Although this office has not addressed the precise question that you have raised, we have opined that the issuing authority has the broad discretion to issue a nonprofessional permit to carry a weapon in a manner otherwise prohibited by statute. *See* 1980 Op.Atty.Gen. 438 (addressing a sheriff's authority under Iowa Code section 724.7 to issue a permit to a person to carry a weapon loaded and neither broken down nor in a case contrary to a statutory restriction).

In summary, we conclude that Iowa Code section 724.7 authorizes a nonprofessional permit holder the authority to carry a weapon statewide. The issuing authority for such permit has the discretion to restrict or limit the authority granted, including a geographic restriction.

August 12, 1992

LICENSING; EDUCATIONAL EXAMINERS; CHILD ABUSE: Disqualification of Applicants Before Board of Educational Examiners. Iowa Code §§260.2(14), 260.6(2) and (3) (1991). Where disqualification of an applicant is being considered on conviction of a felony, child abuse or sexual abuse of a child, the convictions must be evaluated prior to disqualifying the applicant. (Miller-Todd to Nearhoof, Board of Educational Examiners, 8-12-92) #92-8-4(L)

August 27, 1992

VETERANS' AFFAIRS: Commission Appointments. Iowa Code §35A.2, as amended by 1992 Iowa Acts, ch. 1140 (S.F. 2011), sec. 8; 1992 Iowa Acts, ch. 1140, (Senate File 2011), sec. 41; Iowa Code §§69.16, 69.16A (1991). Members of the previous Commission within the Division of Veterans' Affairs serving unexpired terms on the effective date of Senate File 2011 may serve on the new Commission of Veterans' Affairs in their discretion until the expiration of the terms to which they were appointed and the decision to do so does not trigger the nomination, appointment or confirmation process under Senate File 2011. Future nominations by veterans' organizations which conflict with balance requirements for political affiliation and gender under Iowa Code sections 69.16 and 69.16A should be resolved by consultation between the nominating veterans' organizations and the governor. If conflicts with these requirements are not resolved informally, the governor may make appointments of persons who otherwise meet the qualifications for appointment outside the nominating procedure. (Pottorff to Governor Branstad and Senator Kibbie, 8-27-92) #92-8-5(L)

August 28, 1992

SCHOOLS; PUBLIC PROPERTY: Change in facility use; education of handicapped children. Iowa Code §§274.1, 274.7, 278.1(2), 282.2(3), 296.1 - 296.6, 297.22, 298.2 - 298.3, 298.21 (1991). A school board may alter the educational purpose served by a school building constructed with proceeds from bonds issued for a particular purpose in order to meet the current needs of the school district. A court would not likely reverse the exercise of a school board's discretion in the absence of some showing of fraud, arbitrary action or abuse of discretion. Handicapped children are to be educated in the least restrictive environment available which is appropriate for each child, but separate facilities for handicapped children are not prohibited under all circumstances. (Barnett to Millage, State Representative, 8-28-92) #92-8-6

David A. Millage, State Representative: You have requested an opinion of the Attorney General concerning the possible conversion of a special education school into an elementary education facility. You have indicated that if the special education school is converted to an elementary facility, the children who are currently educated at the special education school will be integrated into schools throughout the school district in the least restrictive environment which is available for each child.

Specifically you have asked the following questions:

> 1. Is it permissible for a school board, by a majority vote to, in effect, override a school bond referendum for a specific purpose prior to the bonds being paid?
>
> 2. Is it permissible for a school district, while accepting federal and state funds for handicapped services, to provide a segregated facility for the severely and profoundly handicapped student?

In May and December of 1975 the voters of the Davenport Community School District defeated a school bond proposal calling for the building and furnishing of a new special education building for handicapped students and for a new elementary school building. However, in August of 1976 the voters of the district passed a referendum calling for the building and furnishing of a new special education building. The question considered by the voters was as follows:

> Shall the Davenport Community School District in the Counties of Scott and Muscatine, State of Iowa, issue bonds in the sum of $2,900,000 for the purpose of carrying out a school building program consisting of building and furnishing a new special education building for handicapped children and procuring sites for school buildings, all in and for said school district.

As a result of the successful referendum, bonds were issued, and the funds received from the sale of the bonds were used to build the Truman School for the Severely and Profoundly Handicapped. The last bond payment was made by the district in June of 1992.

The affairs of each school corporation are to be conducted by the school board consistent with the powers given to the corporation by law. Iowa Code §§ 274.1, 274.7 (1991). We find no statutory provision which would prevent the Davenport School Board from now authorizing the Truman School to be used as an elementary school building. The bonded indebtedness on the Truman School building has been fully paid. The fact that a school building was constructed with bond proceeds from bonds issued for a particular purpose should not permanently restrict the use of the building. *Cf. Barclay v. School Township of Wapsinonoc*, 157 Iowa 181, 138 N.W. 395, 397 (1912) (taxpayer had no vested right to have a school building used for the purpose for which it was constructed when voters had directed the disposition of the building.) The needs of a school district can be expected to change substantially over time, and the useful life of a school building is likely to span several changes in circumstances. Based upon the facts which you have presented, it is our opinion that the Davenport School Board may now authorize the use of the Truman School as an elementary school facility.[40]

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[40] Our opinion considers only possible use restrictions which are found in Iowa statutes. Bond covenants may also restrict the use made of a facility. In addition, if a facility was built in whole or in part with funds from a source other than the sale of bonds, such as federal funds, additional use restrictions may apply.

You have also inquired as to whether the Davenport School Board had the power to change the use of the Truman School to an elementary education facility prior to paying the bonds in full when the bonds were issued for the particular purpose of building a school for handicapped children. Under Iowa's statutory scheme both the school board and the voters have powers related to the disposition and acquisition of school buildings. The school board may sell, lease, or dispose of a schoolhouse which belongs to the district. Iowa Code § 297.22 (1991). The school board may also dispose of funds from the sale of a schoolhouse without a vote of the electorate provided that the funds are used to acquire additional school sites or for the erection or repair of schoolhouses. Iowa Code § 279.41. Indebtedness for the purpose of purchasing, building and repairing schoolhouses must, however, be approved by the voters. Iowa Code § 296.1. The purpose of a bond issue must be stated. Iowa Code § 296.2. The voters may also direct the sale, lease or other disposition of any schoolhouse and the purpose for which the proceeds will be used. Iowa Code § 278.1(2). Iowa Code section 296.13 restricts the use to which bond proceeds and the proceeds of taxes certified to pay principal and interest on bonded indebtedness may be applied unless the electors authorize the proceeds to be used for a different purpose. While no specific statute directly addresses the question of changing the use of a school building, surely the legislature intended that if a school board has the authority to sell or dispose of school buildings it also inherently has the authority to decide how a school building is used.

The Iowa Supreme Court has not construed these sections in the context of the question which you have raised, but it is our opinion that a school board may direct that a building constructed with bond proceeds be used for an alternative educational purpose in order to meet the changing needs of the district. *Cf. Silverman v. Board of Education of Millburn Township*, 134 N.J Super. 253, 339 A.2d 233, 237-38, (*aff'd* 136 N.J. Super. 344 A.2d 611 (1975)). (The court allowed a school board to change the use of the facility prior to completing bond payments where the purpose of the bond issue had been fulfilled and changed circumstances supported the different use.) Whether circumstances render the Truman School unsuitable or unnecessary for the education of handicapped children and more suitable for another purpose is for the local school board to determine. A court would not likely reverse the exercise of a school board's discretion in the absence of some showing of fraud, arbitrary action or abuse of discretion. *Carson v. State*, 240 Iowa 1178, 38 N.W.2d 168, 176 (Iowa 1949). Electors dissatisfied with the decision of the school board may express their dissatisfaction at the next school board election.[41]

You have also asked whether state or federal law prohibits the use of a segregated facility to educate handicapped children. Both state and federal law generally require that a school district meet each child's educational needs within the least restrictive environment available. *See* 20 U.S.C.A. § 1412(3)-

[41] This is not a case in which the purpose of the bond issue was misstated or stated in bad faith at the time the referendum was passed. The Iowa Supreme Court has indicated the importance of stating the "purpose" for a bond election for consideration by the voters and has invalidated a bond election where the petition for election addressed a new "schoolhouse" but the ballot addressed a new "senior high school." *Honohan v. United Community School District*, 258 Iowa 57, 137 N.W.2d 601, 603-04 (1965).

(5) (West Supp. 1992); Iowa Code § 281.2(3) (1991). This standard is clearly expressed in Iowa Code section 282.2(3) which provides in part:

> It is the policy of this state to require school districts and state operated educational programs to provide or make provision, as an integral part of public education, for a free and appropriate public education sufficient to meet the needs of all children requiring special education. This chapter is not to be construed as encouraging separate facilities or segregated programs designed to meet the needs of children requiring special education when the children can benefit from all or part of the education program as offered by the local school district. To the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education.

Accordingly, applicable laws do not prohibit the use of separate facilities for the education of handicapped children, but do require that each child's needs be considered and that each child be educated in the least restrictive environment available which is appropriate for that child.

SEPTEMBER 1992

September 8, 1992

INCOMPATIBILITY OF OFFICES; CONFLICT OF INTEREST: County supervisor and local school director. Iowa Code §§ 298.8, 331.216 (1991). The doctrines of incompatibility of office and conflict of interest do not preclude an individual from serving both as a member of the county board of supervisors and as a member of the board of directors of a local school. All prior opinions finding these offices to be incompatible, including 1962 Op.Att'yGen. 348 and 1960 Op.Att'yGen. 173, are overruled. (Scase to Halvorson and Ferguson, 9-8-92) #92-9-1

Rod Halvorson, State Representative, and Thomas J. Ferguson, Black Hawk County Attorney: You have each requested an opinion from this office addressing whether one individual may serve as a member of both the county board of supervisors and the board of directors of a local school district. Upon review of relevant legal principles, we find that these two positions are compatible and that no per se conflict of interest would arise from service on these two boards.

In examining whether one person may hold two elective offices we must consider the doctrines of incompatibility of office and conflict of interest. The incompatibility and conflict of interest doctrines, while often confused, are distinct concepts. As our prior opinions indicate, the "doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder." 1988 Op.Att'yGen. 21 [# 87-1-15(L)], *quoting* 1982 Op.Att'yGen. 220, 221. Conflict of interest issues,

on the other hand, require examination of "how a particular office holder is carrying out his or her official duties in a given fact situation." *Id.*

Looking first to the incompatibility of office issue, the initial determination to be made is whether both positions in question are "offices" as defined by Iowa law. The incompatibility doctrine does not apply if a person holds one office but is merely employed by another body. *See* 1988 Op.Att'yGen. 21; 1968 Op.Att'yGen. 257. We find it clear that members of both a county board of supervisors and a local school board are officers. *See State v. Taylor*, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966).

No constitutional or statutory provision directly prohibits one person from serving concurrently as a county supervisor and as a director on a local school board.[42] In the absence of a statutory provision on point, the propriety of such action must be resolved by application of the common law doctrine of incompatibility of office. This doctrine has been set forth by the Iowa Court as follows: "If a person, while occupying one office, accept[s] another incompatible with the first, he *ipso facto* vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." *State v. White*, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965), *quoting State ex rel. Crawford v. Anderson*, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912).

The *White* court offered the following guidelines for determination of incompatibility issues:

> The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of office, as upon physical inability to be engaged in both at the same time. But that the test on incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other and subject in some degree to its revisory power, or where the duties of the two offices are inherently inconsistent and repugnant. A still different definition has been adopted by several courts. It is held that incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.

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[42] In fact, as to the supervisor position, Iowa Code § 331.216 (1991) expressly allows a member of a county board of supervisors to serve as a member of any *appointive* board or commission of the state, a political subdivision, or a nonprofit corporation or agency receiving county funds. This statutory provision does not, however, address the ability of a supervisor to accept another elective office.

State v. White, 257 Iowa at 609, 133 N.W.2d at 904-05 (citations omitted). This office has, in recent years, consistently applied the test from *White* when analyzing incompatibility issues. *C.f.* 1982 Op.Att'yGen. 220, 226.

Upon review of relevant statutory provisions, we conclude that the offices of county supervisor and local school board director are not "inconsistent" under the *White* test. Neither office is subordinate to, or subject to discretionary revisory power of, the other. While county supervisors are responsible for levying a tax upon certification of the amount to be levied by the local school board of directors, this duty is essentially ministerial in nature. *See* Iowa Code § 298.8 (1991). The supervisors must levy the amount certified by the board of directors unless that amount is in excess of the amount authorized by law, in which case the supervisors are to levy "so much thereof as authorized by law." *Id.* We do not believe that this one overlapping, non-discretionary function renders these two offices incompatible. *See* 1984 Op.Att'yGen. 153 [#84-8-7(L) at p. 4)] (concluding tax levying function of the board of supervisors did not render that office incompatible with the board of directors of an area vocational school). Nor do we find the statutory functions of these two boards to be "inherently inconsistent or repugnant."

We therefore conclude that the office of county supervisor is not incompatible with the office of local school board director. In doing so, we overrule all prior opinions of this office holding to the contrary, including 1962 Op.Att'yGen. 348 and 1960 Op.AttyGen. 173.[43] This conclusion is in keeping with our previously stated view that "the common law doctrine of incompatibility should be construed narrowly and applied cautiously, which has not always been the practice in the past." 1982 Op.Att'yGen. 16 [#81-1-8(L) at p. 2] (concluding that office of city council is compatible with service as a director on a local school board). Our rationale for this view is as follows:

> First, the legislature has indicated it is willing to suspend applications of the doctrine which are perceived to create hardship.
>
> Second, certain applications of the incompatibility doctrine, including the present one, approach infringing upon interests of institutional dimension: the interest of a person in seeking public office, and the interest of constituents in having their choice of representation respected.
>
> For the most part, a person would be likely to serve in both offices [city council and school board] only in our smaller communities. In smaller communities, the voters would ordinarily be aware that a candidate was serving in another office and, in any case, an opposing candidate would be free to make an issue of the potential dual office holding so that the voters would be making an informed choice.

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[43] We note that at the time of issuance of these prior opinions Code § 298.2 vested the county board of supervisors with authority to recommend additions to school district levies. *See* Iowa Code § 298.2 (1958). As discussed above, county supervisors no longer retain this discretionary authority over local schools.

Id. at pp. 2-3 (citations omitted).

Having found these two offices to be compatible, we next consider the doctrine of conflict of interest. A conflict of interest is generally defined as existing "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. "It is not required that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the *potential* for conflict of interest which the law desires to avoid." *Wilson v. Iowa City*, 165 N.W.2d 813, 819 (Iowa 1969) (emphasis in original).

"An allegation of conflict of interest raises a question of divergence of loyalties." 1982 Op.Att'yGen. 220, 223. Determination of whether a conflict of interest exists in a given situation requires analysis of the particular facts of the case and the action taken by an office holder. *See Id.* and 1988 Op.Att'yGen. 21 [#87-1-15(L)]. While evidentiary questions of this nature are not appropriately resolved through the opinion process, we have reviewed the statutory provisions setting forth the duties of county supervisors and directors of local school districts and perceive no per se conflict of interest exists between these positions.

We do caution, however, that there may well be situations in which an actual conflict of interest arises for an individual serving in these two capacities. We cannot, through an opinion, anticipate all circumstances in which a conflict might arise for an individual serving both as a county supervisor and school board director. It appears, however, from review of the statutory functions of each of these boards, that the potential for conflict would be minimal and that conflicts could be avoided by the officer's awareness, and cautious exercise, of the need to abstain from discussion and voting when a conflict or the potential for conflict exists.

In summary, we conclude that the doctrines of incompatibility of office and conflict of interest do not preclude an individual from serving both as a member of the county board of supervisors and as a member of the board of directors of a local school. All prior opinions finding these offices to be incompatible, including 1962 Op.Att'yGen. 348 and 1960 Op.Att'yGen. 173, are overruled.

September 9, 1992

SANITARY DISTRICTS; TAXATION: Late-payment penalties for delinquent sewer charges. Iowa Code § 358.20 (1991); Iowa Code Supp. §§ 445.37, 445.39 (1991). Late-payment penalties provided by sanitary district ordinance are properly certified to the county treasurer as liens of delinquent sewer charges. Certified sanitary district sewer charges including late-payment penalties must be treated by the county treasurer as unpaid taxes to which interest accrues after the statutory delinquency date for the first installment of unpaid real property taxes. (Smith to Angrick, Citizens' Aide/ Ombudsman, 9-9-92) #92-9-2(L)

September 17, 1992

GIFTS; LOBBYISTS: Lobbyist and Client Reporting Requirements; Personal Financial Disclosure Statements. 1992 Iowa Acts, ch. 235; Iowa Code ch. 68B. The term "official" in H.F. 2466 includes persons appointed to serve on state boards, commissions, committees, or councils. Whether a board or commission member receives a salary or per diem is not a determinative factor in resolving the scope of the term "official." The identity of the appointing authority, moreover, is not a factor in determining whether a board or commission member is an "official" for purposes of section 68B.5A. The definition of "lobbyist" which includes representation on a regular basis of certain organizations denotes recurring activity. Application of the definitions of a "lobbyist" in specific factual circumstances will ultimately need to be resolved by legal advice rather than through the opinion process. We cannot anticipate all the factors that may affect this determination in the opinion process. Those persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992," are prohibited "within two years after the termination of service or employment" from becoming a lobbyist. House File 2466 does not restrict officials from lobbying during service in state government. The definitions of "contribution" and "gift" under H.F. 2466 control in determining what should be included in lobbyists' reports. The term expenditure, not otherwise defined, should be given its ordinary meaning as a disbursement for the purpose of lobbying. The first client report, due on January 31, 1993, need not include information from the preceding calendar year. The requirements of H.F. 2466 concerning the filing of personal financial disclosure statements are applicable to officials, members of the general assembly and candidates for state office. Officials are defined to include: members of the governor's office and other statewide elected offices, i.e., the Governor, the Lieutenant Governor, Auditor, Treasurer, Secretary of State, Secretary of Agriculture, and Attorney General; members of state agencies, e.g., state boards, commissions, councils or committees; all employees of the governor's office; and all supervisory personnel of other statewide elected offices and state agencies. The statement of personal financial disclosure does not require a disclosure of income but requires disclosure of sources of income and significant financial interests. Significant financial interests are defined to include a greater than 5 percent ownership interest in any outstanding issuance of stocks, bonds, bills, notes, mortgages or other securities; any employment or association for compensation within the previous twelve months with certain entities that have an interest in matter before the body of which the filing person is a member; and offices and directorships in certain listed entities. The statement is filed by members of the general assembly with the respective clerk of the members' house. Officials and candidates for state office should file the statement with the campaign finance disclosure commission. (Krogmeier and Pottorff to Governor Branstad, 9-17-92) #92-9-3

The Honorable Terry E. Branstad, Governor: Your office has forwarded to the Attorney General three separate requests for opinions concerning the provisions of House File 2466, which, inter alia, govern the activities of officials and lobbyists and require personal financial disclosure statements. Your requests focus on five areas of concern: the scope of the term "official"; the scope of

the term "lobbyist"; the application to officials of a two-year ban on lobbying; the construction of reporting requirements imposed on lobbyists; and the construction of the requirements for filing personal financial disclosure statements. In order to address these interrelated issues thoroughly and concisely, we are combining our responses into one opinion.

I. DEFINITION OF "OFFICIAL"

You point out that H.F. 2466 prohibits an official from becoming a lobbyist within two years after termination of service or employment. In light of this prohibition, you pose several questions concerning the scope of the term "official." You inquire whether the term includes persons appointed to serve on state boards, commissions, committees and councils, whether the person must receive, or be eligible to receive, a salary or per diem in order to be classed as an official and whether the identity of the appointing authority is relevant in determining if a person is an official.

It is our opinion that the term "official" in H.F. 2466 includes persons appointed to serve on state boards, commissions, committees, or councils. Whether a board or commission member receives, or is eligible to receive, a salary or per diem is not a determinative factor in resolving the scope of the term "official." The identity of the appointing authority, moreover, is not a factor in determining whether a board or commission member is an "official" for purposes of this statute.

House File 2466 enacts a wide range of provisions governing the conduct of governmental officials and employees. The term "official" is specifically defined to mean:

> an officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full-time or part-time *but does not include officers or employees of political subdivisions of the state.* "Official" includes but is not limited to supervisory personnel, *members and employees of the governor's office, members of other statewide elected offices,* and members of state agencies and does not include members of the general assembly, legislative employees, *or officers or employees of the judicial branch of government who are not members or employees of the office of attorney general.*

1992 Iowa Acts, ch. 235, § 1(14) (new language underlined). This section does not become effective until January 1, 1993. 1992 Iowa Acts, ch. 235, § 40.

This new definition of "official" in H.F. 2466 will succeed the definition presently contained in Iowa Code chapter 68B. Section 68B.2(11) currently defines an "official" to mean:

> an officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full-time or part-time. "Official" includes but is not limited to supervisory personnel and members of state agencies and does not include members of the general assembly or legislative employees.

The new definition of "official" will expressly exclude officers or employees of political subdivisions of the state and officers or employees of the judicial branch of government who are not members or employees of the office of attorney general but will expressly include members and employees of the governor's office and members of other statewide elected offices.

With these differences in the definitions and the effective dates noted, we turn to your questions with regard to officials. In responding to your questions we observe familiar principles of statutory construction. When interpreting a statute, the ultimate goal is to ascertain and give effect to the intention of the legislature. *John Deere Dubuque Works v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989). Words in a statute are to be given their ordinary meaning, unless defined differently by the legislature or possessed of a particular and appropriate meaning in law. *Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*, 463 N.W.2d 76, 84 (Iowa 1990). Statutes dealing with the same subject matter are considered together and must be harmonized in light of their common purpose. *Metier v. Cooper Transport Co., Inc.*, 378 N.W.2d 907, 912 (Iowa 1985).

Applying these principles, we have little doubt that the term "official" in H.F. 2466 includes persons appointed to serve on state boards, commissions, committees, or councils. The first sentence of the definition expressly includes "an officer of the state of Iowa whether elected or appointed." The second sentence of the definition, moreover, expressly includes "members of state agencies." The term "agency", furthermore, is defined elsewhere in the bill to include, inter alia, "a department, division, board, commission, or bureau . . . of state government." 1992 Iowa Acts, ch. 235, §1. Giving these words their ordinary meaning, the term "official" would clearly include persons appointed to serve on state boards and commissions.

Although the terms "committees" or "councils" do not appear literally in the definition of agency, we believe persons appointed to these bodies would also be officers "of the state of Iowa" within the scope of the definition to the extent that these persons exercise governmental authority. In order for a public position to be considered an "office" at common law, the following five factors must be present: 1) the position must be created by the constitution or legislature or through authority conferred by the legislature; 2) a portion of the sovereign power of government must be delegated to that position; 3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; 4) the duties must be performed independently and without control of a superior power other than the law; and 5) the power must have some permanency and continuity, and not be only temporary and occasional. 1982 Op.Att'yGen. 220, 224; *State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289, 292 (1966). Persons appointed to serve on state committees or councils who fulfill these criteria are within the scope of the term "official."

In view of our resolution of the first question, we do not consider whether a board or commission member receives a salary or per diem to be a determinative factor in resolving the scope of the term "official." Although the phrase "receiving a salary or per diem" modifies the term "official" in

the first sentence of the definition, the second sentence further states that "official" includes "members of state agencies" without qualification as to compensation. It is clear, moreover, that the second sentence is not merely delineating a subset of the definition of official in the first sentence. The first sentence addresses only "officers of the state of Iowa." The second sentence, by contrast, expands to reach "members" and "employees" of entities which would not otherwise fall within the definition of an "officer." Both sentences combine to define the term "official." Members of boards or commissions who do not receive, or are not eligible to receive salary or per diem, therefore, are "officials" as members of state agencies.

Members of state agencies, in certain circumstances, may be appointed by private organizations. *See, e.g.*, Iowa Code § 249A.4(8) (1991) (Medical Assistance Advisory Council). We find nothing in H.F. 2466, however, that suggests that the identity of the appointing authority is a factor in determining whether a board or commission member is an "official" for purposes of section 68B.5. The definition itself includes officers of the state of Iowa "whether elected or appointed" without further elaboration. Persons so appointed are, nevertheless, members of the bodies on which they serve. A contrary conclusion would not give effect to the legislative intent of section 68B.5A. We perceive no reason to distinguish between members of state agencies based on the source of appointment for purposes of applying restrictions on lobbying activities or requirements concerning financial disclosure.

II. DEFINITION OF "LOBBYIST"

We are able to provide limited legal principles as guidance in determining the conduct that would define a "lobbyist" under the statute. A "lobbyist" is defined in H.F. 2466 alternatively to mean a person who engages in any one of the following three activities:

> (1) Is paid compensation for encouraging the passage, defeat, or modification of legislation or regulation, or for influencing the decision of the members of the general assembly, a state agency, or any statewide elected official.
>
> (2) Represents on a regular basis an organization which has as one of its purposes the encouragement of the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or any statewide elected official.
>
> (3) Is a federal, state, or local government official or employee who represents the official position of the official or employee's agency and who encourages the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or the office of the governor.

1992 Iowa Acts, ch. 235, § 1(10)(a). You have specifically focused on the second of these definitions and inquire what, in our opinion, would constitute representation "on a regular basis."

The first definition of lobbyist most fits the common perception of that term, i.e., one who is paid compensation to encourage the certain legislative action. This definition also includes influencing particular regulation or the decision of legislators, a state agency, or a statewide elected official, if done for compensation. 1992 Iowa Acts, ch. 235, § 1. One occurrence is sufficient to make a person a lobbyist; this section does not require that the activity be done on a "regular basis." A person who receives compensation to influence a legislator or a state agency, therefore, is a lobbyist unless one of the specific narrow exceptions applies. It should be noted that a person does not become a lobbyist if activities are limited to testimony at formal public hearings or appearance as a lawyer on behalf of a client before an agency or in a contested case.

The second definition of lobbyist would also include representation of an organization on a regular basis, even if without compensation. Giving the term "regular" its ordinary meaning, we conclude that representation on a "regular basis" would encompass representation that is not limited to a single occasion. The term "regular" is commonly defined to mean "recurring or functioning at fixed or uniform intervals." *Webster's New Collegiate Dictionary* at 966 (2nd ed. 1974). "Regular" representation, therefore, denotes recurring activity.[44]

The third definition of lobbyist will encompass many federal, state, or local employees. Any governmental official or employee becomes a lobbyist if the person representing the official position of the agency seeks to influence the decision of a legislator, a state agency, or the Governor, unless a specific exception applies.[45]

The definition of "lobbyist" is significant in two major respects. First, there are restrictions on activities by, or with, lobbyists.[46] *See, e.g.*, 1992 Iowa Acts, ch. 235, §§ 11, 18. Second, state officials, state employees, legislators, and legislative employees cannot become a lobbyist within two years after termination of service or employment. 1992 Iowa Acts, ch. 235, § 5.

You have posed five separate fact patterns and asked our office to determine in each case whether individuals described would be "lobbyists" under H.F. 2466. Under our rules governing opinions, we generally decline to issue an opinion when the question calls for the resolution of a question of policy rather then the resolution of a question of law. *See* 61 IAC 1.5(3)(c). The fact patterns which you pose would require the resolution of policy in determining how the term "lobbyist" should be applied in specific context. Application of the definitions of a "lobbyist" in specific factual circumstances will ultimately need to be resolved by legal advice rather than through the opinion process.

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[44] Alternative definitions of "lobbyist" under subsections 1 and 3 do not require that the activity occur on a regular basis.

[45] Notable exceptions are the Governor, Lieutenant Governor, statewide elected officials and elected federal officials.

[46] Although H.F. 2466 includes federal officials and employees within the definition of lobbyist when espousing the official position of the federal agency, we question whether the state can regulate the exercise of federal duties by a federal official or employee.

III. TWO-YEAR BAN ON LOBBYING

With regard to lobbyists, you inquire when the two-year prohibition against lobbying is triggered, whether the prohibition restricts officials from lobbying during service in state government and to what extent the restrictions would limit board and commission members from contacting legislators either during service or within two years after service? It is our opinion that those persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992," are prohibited "within two years after the termination of service oremployment" from becoming a lobbyist. House File 2466, moreover, does not restrict officials from lobbying during service in state government.

Section 68B.5A, which became effective on July 1, 1992, states that:

> [a] person who has served as an official, state employee, member of the general assembly, or legislative employee shall not within two years after the termination of service or employment become a lobbyist.

1992 Iowa Acts, ch. 235, §5. Those persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992," are prohibited "within two years after the termination of service or employment" from becoming a lobbyist.

The effective date of this section is separately addressed:

> Section 5 and 7 of this Act shall apply to officials, employees, members of the general assembly, or legislative employees who are employed, hold office, or terminate service or employment on or after July 1, 1992.

1992 Iowa Acts, ch. 235, §38. Under the express language of this provision, section 5, which contains the two-year ban on lobbying, applies to persons described in this section, i.e., persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992."

Reading sections 5 and 38 of H.F. 2466 together, we conclude that those persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992," are prohibited "within two years after the termination of service or employment" from becoming a lobbyist. Under this construction, "July 1, 1992," is the first effective date of the prohibition and the "termination of service or employment" is the triggering event. Accordingly, officials who still held office on July 1, 1992, are subject to the ban and the ban will be triggered upon termination of service.

We find little support in the statute for a construction that the ban on lobbying applies to officials during their period of service on state boards or commissions. The provisions governing lobbyist registration, which do not become effective until January 1, 1993, expressly include requirements applicable to officials "representing the official positions of their departments, commissions, boards, or agencies." These persons are required to present a "letter of authorization

from their department or agency heads prior to the commencement of their lobbying." 1992 Iowa Acts, ch. 235, § 18. It would make little sense to impose this requirement effective January 1,1993, if all officials were prohibited from lobbying during service on boards and commissions after July 1, 1992.

In view of our resolution of the issue of when the ban on lobbying is triggered, it is unnecessary for us to address further the extent to which H.F. 2466 restricts officials from contacting legislators or other elected state officials during their service on boards and commissions. When the provisions governing lobbyist registration and reporting become effective on January 1, 1993, however, state officials will need to comply with these requirements when their contacts with legislators or other elected state officials rise to the level of "lobbying" as defined in H.F. 2466.

IV. LOBBYIST AND CLIENT REPORTING REQUIREMENTS

You pose two questions concerning the reporting requirements imposed on lobbyists and their clients. You point out that H.F. 2466 requires a lobbyist to report to the Campaign Finance Disclosure Commission the lobbyist's clients, all campaign contributions made during the prior calendar month and the recipient of the campaign contributions. The report further requires itemization of "contributions, expenditures, and gifts" in the report. You ask what would be included as "contributions, expenditures, and gifts?"

You also note that a lobbyist's client is required to report to the executive council or the general assembly no later than January 31 and July 31 of each year information on all salaries, fees, and retainers paid by the client to the lobbyist. The report due on January 31, moreover, shall include a cumulative total of all lobbying expenditures for the "preceding calendar year." In view of the fact that the reporting obligation does not become effective until January 1, 1993, you inquire whether the January 31 report must include information on the preceding calendar year.

In our opinion the definitions of "contribution" and "gift" under H.F. 2466 control in determining what should be included in lobbyists' reports. The term expenditure, not otherwise defined, should be given its ordinary meaning as a disbursement for the purpose of lobbying. The first client report, due on January 31, 1993, need not include information from the preceding calendar year.

Two of the terms about which you inquire are specifically defined in H.F. 2466. A "contribution" means a "gift, loan, advance, deposit, rebate, refund, transfer of money, an in-kind transfer, or the payment of compensation for the personal services of another person." 1992 Iowa Acts, ch. 235, § 1(5). A "gift," in turn, is defined extensively to include "anything of value in return for which legal consideration of equal or greater value is not given and received" if the donor fits within one of four defined categories and any of ten itemized exceptions to the definition does not apply. 1992 Iowa Acts, ch. 235, § 1(6).

We note that the term "contribution" is also defined under chapter 56, the enabling act for the Campaign Finance Disclosure Commission with whom the reports are to be filed. *See* Iowa Code § 56.2(8)(a)-(b) (1991). A significant difference in these definitions, however, is that the definition under H.F. 2466 includes simply "the payment of compensation for the personal services of another person." Chapter 56, by contrast, includes "the payment *by any person other than a candidate or political committee* of compensation for the personal services of another person *which are rendered to a candidate or a political committee for any such purpose. Id.* (Emphasis added.) Chapter 56, therefore, would modify the payment compensation for personal services to exclude payments made by a candidate or a political committee for personal services rendered to them. In any circumstances in which this distinction is important, the definition of "contribution" in H.F. 2466 should prevail in order to read all portions of H.F. 2466 in pari materia. *See In the Interest of E.C.G.*, 345 N.W.2d 138, 141 (Iowa 1984).

The term "expenditure" is not further defined in either H.F. 2466 or chapter 56. Giving the term its ordinary meaning, however, expenditure simply denotes a disbursement. *Webster's New Collegiate Dictionary* at 399. In order to effectuate the intent of the legislature, to be reportable the expenditures must be for the purpose of lobbying.

The provisions governing client reporting become effective on January 1, 1993, thirty days before the first report is due. 1992 Iowa Acts, ch. 235, §§ 20, 40. Section 20 expressly requires a January 31 report to include "a cumulative total of all lobbying expenditures for the preceding calendar year." We do not construe this report, however, to cover periods preceding the effective date. Statutes are presumed to apply prospectively only. *Sisco v. Iowa-Illinois Gas and Electric*, 368 N.W.2d 853, 861 (Iowa App. 1985). To apply this requirement to the preceding calendar year would give the statute retrospective application.

V. PERSONAL FINANCIAL DISCLOSURE STATEMENTS

With regard to personal financial disclosure requirements of House File 2466, you ask to whom the section applies, what information is required to be disclosed and, in general, what will be the procedural requirements for filing appropriate disclosure statements?

Section 17(1) of H.F. 2466 reads as follows:

> Except as otherwise provided in this section, each official, member of the general assembly, and candidate for state office shall file a statement of personal financial disclosure in the manner provided in this section that discloses the sources of the person's income and any significant financial interests of the official, member, or candidate in the manner required in this section.

1992 Iowa Acts, ch. 235, §17(1). This provision makes the financial disclosure requirements applicable to officials, members of the general assembly and candidates for state office. The financial disclosure requirements become effective on January 1, 1993. 1992 Iowa Acts, ch. 235, §40.

In determining the scope of the financial disclosure requirements, we note that the definitions set forth in section 1 of H.F. 2466 will become effective on the same date that the financial disclosure requirements become effective. The new definitions of "official", "member of the general assembly," and "candidate," therefore, are applicable.[47]

In view of the definition of "official" discussed, *supra*, the term would encompass those persons appointed to serve on state boards, commissions, committees or councils, regardless of whether they receive, or are eligible to receive, a salary or per diem or whether they were appointed to their position by a private organization. In addition, however, the definition of "official" includes "supervisory personnel," "members and employees of the governor's office," "members of other statewide elected offices" and "members of state agencies." Under these terms, all employees of the governor's office and all members and supervisory personnel of other statewide elected offices and state agencies are included.

"Supervisory personnel" are not defined in H.F. 2466 or elsewhere in chapter 68B. Although the terms "supervisory personnel" are carried over from the current definition of "official," the terms have not been previously construed. A statutory definition of "supervisory employees", however, is included in the Public Employment Relations Act under chapter 20.

Section 20.4(2) excludes from the provisions of chapter 20 elected officials, persons appointed to fill elective offices, members of boards or commissions, representatives of a public employer, including a administrative officer, director or chief executive officer as well as the officer's or director's deputy, first assistant and "any supervisory employees." "Supervisory employees", in turn, are defined to mean:

> any individual having authority in the interest of the public employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . .

Iowa Code §20.4(2) (1991). Construing this statute, the Iowa Supreme Court has explained that the functions listed are disjunctive, possession of any one of them is sufficient to make an employee a supervisor. The "individual who

[47] The terms "member of the general assembly" and "candidate" are specifically defined in the statute. 1992 Iowa Acts, ch. 235, 1(3), 1(13).

merely acts as a conduit for orders emanating from superiors," however, is not included in the definition. *City of Davenport v. Public Employment Relations Board*, 264 N.W.2d 307, 313-14 (Iowa 1978).

In our view, this definition under chapter 20 may reasonably be imported to chapter 68B to define the scope of those persons required to file personal financial disclosure statements. The purpose of excluding "supervisory employees" from chapter 20 is to "exclude the arms and legs of management in executing labor policies" from collective bargaining. *Id.* at 313, quoting from, *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (5th Cir. 1967). Otherwise, the unionization of supervisory employees would blur the "traditional distinction between management and labor" and dilute the loyalty of supervisors to their employers. *City of Davenport v. Public Employment Relations Board*, 264 N.W.2d at 313, quoting from, *International Ladies Garment Workers' Union AFL-CIO v. NLRB*, 339 F.2d 116, 122 (2nd Cir. 1964). Although dilution of loyalty is not a concern under chapter 68B, identification of management personnel who have discretionary authority is, nevertheless, important. The goal of financial disclosure is to reveal the financial interests of the decision-makers in state government. Applying the definition in chapter 20 is consistent with this goal.

The term "official" will also reach "members" of the governor's office, of other statewide elected offices, and of state agencies." The term "member" is not separately defined. An "agency member" for the purpose of the Iowa Administrative Procedure Act under chapter 17A, however, is defined to mean "an individual who is the statutory or constitutional head of an agency, or an individual who is one of several individuals who constitute the statutory or constitutional head of an agency." Iowa Code § 17A.2(10)(1991). An agency, in turn, may include an "officer or administrative office of the state." Iowa Code § 17A.2(1)(1991). Utilizing this definition of "member", we conclude that a "member . . . of the governor's office, members of other statewide elected offices, and members of state agencies" includes, in addition to those persons appointed to state agencies identified as "officials", supra, the Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, Secretary of Agriculture and Attorney General.[48]

We note that both "members and *employees* of the governor's office" are defined as officials.[49] In our view, it is unlikely that an "employee" as used in the definition of "official" is synonymous with "supervisory personnel" or "members" of that office. A statute should not be construed so as to make any part of it superfluous

[48] The governor is excluded from the definition of "agency" in chapter 17A. Iowa Code § 17A.2(1)(1991). This exclusion is not significant in our reliance on chapter 17A definitions, however, because members of the governor's office are expressly drafted back into the definition of "official" under H.F. 2466.

[49] The 1991 statute defines an "employee" to mean "a fulltime, salaried employee of the state of Iowa and does not include part-time employees or independent contractors. Employee includes but is not limited to all clerical personnel." Iowa Code § 68B.2(4)(1991). Definitional provisions, however, are struck by H.F. 2466 and this definition of employee is not reenacted, although there are definitions of "legislative employee," "public employee" and "state employee." 1992 Iowa Acts, ch. 235, 1(9), (17) and (21).

unless no other construction is reasonably possible. *Iowa Auto Dealers v. Iowa Department of Revenue*, 301 N.W.2d 760 (1981). If the term were limited to those persons who possess the attributes of supervisory personnel or members, the term would be superfluous. The term "employee," therefore, should be given its ordinary meaning.

An employee is commonly defined as a person who works for salary or wages and performs work subject to the direction and control of another. 1982 Op.Att'yGen. 496, 500. Under this definition, an employee will include any salaried person within the office, full or part-time, excluding an independent contractor.

The information required to be disclosed in the statement of personal financial disclosure is set out in section 17(1). This provision indicates that the official, member of the general assembly or candidate for state office is required to file the statement of personal financial disclosure which is to include "the sources of the person's income and any significant financial interests." Significant financial interest is further defined in subsection 2 of section 17. This definition is as follows:

> For purposes of this section, "disclosure of sources of income" includes disclosure of the nature of each business in which the official, member, or candidate is engaged and the nature of the business of each company in which the official, member, or candidate has an income-producing interest. For purposes of this section, "significant financial interests" includes investments in stocks, bonds, bills, notes, mortgages, or other securities offered for sale through recognized financial brokers if greater than five percent of the total outstanding issue of any stocks, bonds, bills, notes, mortgages, or other securities of the offering entity; any in-state or out-of-state business, trade, labor, farm, professional, religious, educational, or charitable association, foundation, or organization which is involved in supporting or opposing any measures brought before the body in which the official, member, or candidate holds office and by which the official, member, or candidate is employed or retained or has rendered services for compensation within the previous twelve months; any office or directorship held during the previous twelve months by the official, member, or candidate in any corporation, firm, enterprise, labor union, farm organization, cooperative, religious, education, or charitable association or organization or trade or professional association.[50]

Subsection 17(1) and the other subsections within section 17 of H.F. 2466 do not appear to require the disclosure of the amount of income of those who are required to file financial disclosure statements. What is required to be disclosed is the source of the income and any significant financial interests.

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[50] We note that a broad disclosure requirement covering any office or directorship in the various organizations and associations listed may raise First Amendment issues. *See NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

Sources of income would include employment and interests in business which are of an income producing nature. Significant financial interests are defined in three categories:

> 1. more than 5% ownership interest in any outstanding issuance of stocks, bonds, bills, notes, mortgages or other securities;
>
> 2. any employment or association with certain groups or organizations where compensation was paid within the previous twelve months; and
>
> 3. any office or directorship held during the previous twelve months in the types of entities listed.

The procedure to be used for filing the disclosure statements is delineated in section 17(3):

> *A candidate* for state office shall file the statement of personal financial disclosure *with the campaign finance disclosure commission* concerning the year preceding the year in which the election is to be held. The statement shall be filed no later than thirty days after the date on which the person formally becomes a candidate. *Officials shall file the statements at times designated by the executive council.* Members of the house of representatives shall file the statements with the chief clerk of the house, and members of the senate shall file the statements with the secretary of the senate, at times designated by the chief clerk and the secretary. (Emphasis added.)

No specific procedure for officials of the state is set forth in the bill. Candidates for state office are to file the statement with the Campaign Finance Disclosure Commission. Members of the legislature file with the appropriate clerk of their house. Officials file the statements "at times designated by the executive council." However, the agency with which officials file is not set forth in the legislation.

Elsewhere in H.F. 2466, duties are prescribed to the Executive Council for purposes of lobbyists' registration and lobbyists' filings. The Executive Council is to provide rules regarding certain lobbyist activities before state agencies. *See* section 18. However, no specific reference is made to the executive council having any responsibilities with regard to the filing of the financial disclosure statements other than the designation of the filing times for officials. Absent some clarification of this issue and as the previous sentence in the same section indicates that candidates for statewide office file their statements with the campaign finance disclosure commission, we recommend that officials file their statements with the campaign finance disclosure commission. This matter should be clarified by future legislation.

Additional procedural requirements may have to be specified by the campaign finance disclosure commission as to the proper form and other issues concerning

the filing of the documents. We suggest that the legislature clearly provide the campaign finance disclosure commission, the executive council, or some other body with specific rulemaking authority to clarify any issues concerning the financial statements.

In summary, it is our opinion that:

1. The term "official" in H.F. 2466 includes persons appointed to serve on state boards, commissions, committees, or councils. Whether a board or commission member receives a salary or per diem is not a determinative factor in resolving the scope of the term "official." The identity of the appointing authority, moreover, is not a factor in determining whether a board or commission member is an "official" for purposes of section 68B.5A.

2. The definition of "lobbyist" which includes representation on a regular basis of certain organizations denotes recurring activity. Application of the definitions of a "lobbyist" in specific factual circumstances will ultimately need to be resolved by legal advice rather than through the opinion process. We cannot anticipate all the factors that may affect this determination in the opinion process.

3. Those persons who "are employed, hold office, or terminate service or employment on or after July 1, 1992," are prohibited "within two years after the termination of service or employment" from becoming a lobbyist. House File 2466 does not restrict officials from lobbying during service in state government.

4. The definitions of "contribution" and "gift" under H.F. 2466 control in determining what should be included in lobbyists' reports. The term expenditure, not otherwise defined, should be given its ordinary meaning as a disbursement for the purpose of lobbying. The first client report, due on January 31, 1993, need not include information from the preceding calendar year.

5. The requirements of H.F. 2466 concerning the filing of personal financial disclosure statements are applicable to officials, members of the general assembly and candidates for state office. Officials are defined to include: members of the governor's office and other statewide elected offices, i.e., the Governor, the Lieutenant Governor, Auditor, Treasurer, Secretary of State, Secretary of Agriculture, and Attorney General; members of state agencies, e.g., state boards, commissions, councils or committees; all employees of the governor's office; and all supervisory personnel of other statewide elected offices and state agencies.

6. The statement of personal financial disclosure does not require a disclosure of income but requires disclosure of sources of income and significant financial interests. Significant financial interests are defined to include a greater than 5 percent ownership interest in any outstanding issuance of stocks, bonds, bills, notes, mortgages or other securities; any employment or association for

compensation within the previous twelve months with certain entities that have an interest in matter before the body of which the filing person is a member; and offices and directorships in certain listed entities.

7. The statement is filed by members of the general assembly with the respective clerk of the members' house. Officials and candidates for state office should file the statement with the campaign finance disclosure commission.

September 21, 1992

TAXATION: Property tax suspension and abatement procedures following a public bidder sale. Iowa Code §§ 427.8, 446.18, 446.29 (1991). If the certificate of purchase holder following a public bidder sale is a private person, suspension or abatement procedures under section 427.8 are not available. If the certificate of purchase holder is a public body, section 427.8 procedures are still available because past due taxes, special assessments, or rates and charges remain unpaid. (Miller to Ferguson, Black Hawk County Attorney, 9-21-92) #92-9-4(L)

September 21, 1992

PUBLIC RECORDS. Counties, lawful custodian of record books. Iowa Code ch. 22; Iowa Code §§ 22.1, 331.303, 331.303(1), 331.303(2), 331.504, 331.504(1), and 331.504(2) (1991). The lawful custodian of the record books referred to in sections 331.303(1) and 331.504(2) is the county board of supervisors. An analysis of the substantive responsibilities of a county auditor and a county board of supervisors identifies the county board of supervisors as the lawful custodian of the record books referred to in sections 331.303(1) and 331.504(2). (Moline to Riordan, State Senator, 9-21-92) #92-9-5

James R. Riordan, State Senator: You have requested an opinion of the Attorney General interpreting Iowa Code section 22.1 as it applies to the "record books" referred to in sections 331.303 and 331.504. The basic inquiry you present is as follows:

> Pursuant to § 22.1, what government body is the lawful custodian of the record books referred to in Iowa Code §§ 331.303(1) and 331.504(2).

Our review of sections 22.1, 331.303(1), and 331.504(2), relevant Iowa court decisions, and prior opinions of this office lead us to respond that the lawful custodian of the record books kept by the county board of supervisors and maintained by a county auditor is the county board of supervisors.

The issue raised in your request focuses on the identity of the "lawful custodian" of the record books kept by a county board of supervisors. The complicating factor is that while section 331.303(1) requires a county board of supervisors to "keep" certain record books, section 331.504(2) requires a county auditor to maintain those same record books. Given that two government bodies have a statutorily mandated duty concerning these record books, your request asks which government body is the lawful custodian of those records pursuant to section 22.1.

Iowa Code section 331.303(1) provides as follows:

> The board shall:
>
> 1.Keep record books as follows:
>
> a. A *"minute book"*.
>
> b. A *"warrant book"*.
>
> c. A *"claim register"*.

The statute expressly requires the board to "keep" several types of "record books". Iowa Code § 331.303(1) (1991). "Keep" is defined as "[t]o have or retain in one's power or possession." *Black's Law Dictionary* 868 (6th ed. 1990). A "keeper" is defined as ". . . A custodian, manager, or superintendent; one who has the custody or management of any thing or place; one who has or holds possession of anything." *Id.*

A county auditor's duties concerning the above-described record books are set out in Code section 331.504(2). That section states as follows:

> The auditor shall:
>
> 2. Maintain the books and records required to be kept by the board under section 331.303.

"Maintain" is defined as ". . . acts or repairs and other acts to prevent decline; lapse or cessation from existing state or condition." *Black's Law Dictionary* 753 (6th ed. 1990).

When comparing the duties of a county board of supervisors and a county auditor, it is clear that the board of supervisors has the responsibility to actually manage the record books described in section 331.303(1). In fact, section 331.303(2) expressly requires the county board of supervisors to manage its records in compliance with Code chapter 22. In comparison, a county auditor merely acts as a board of supervisors' agent to make sure that the board's proceedings are recorded in an accurate and correct manner. Iowa Code section 331.504.1 (1991). (The minutes of the board shall include a record of all actions taken and the complete text of the motions, resolutions, amendments, and ordinances adopted by the board.)

Iowa Code section 22.1 states that "the government body currently in physical possession of the record" is the "lawful custodian" of a given public record. However, section 22.1 contains the following express exceptions to the physical possession test:

> "Lawful custodian" does not mean an automated data processing unit of a public body if the data processing unit holds the records solely as

the agent of another public body, nor does it mean a unit which holds the records of the other public bodies solely for storage. Clearly, the legislature recognized as one exception to the "current physical possession" test situations where the governmental body possessing the records has no substantive function concerning the records, but instead holds or stores those records as the "agent" of a government agency that is charged with substantive responsibility for those records. Iowa Code § 22.1 (1991).

Section 22.1 does not rely on "current physical possession" to determine the identity of the "lawful custodian" of a public record if the agency having such possession is holding or storing records merely as an agent of another governmental body. Iowa Code § 22.1 (1991). Our analysis leads us to apply the same standard to a county auditor's role regarding the county board of supervisors' record books. The county auditor merely acts as the "agent" of the board of supervisors to "maintain" the board's record books. Iowa Code § 331.504(2) (1991). The "current physical possession" test is therefore inapplicable to determine the "lawful custodian" of the record books referred to in sections 331.303(1) and 331.504(2). Instead, an analysis of the respective substantive responsibilities for those record books identifies a county board of supervisors as the lawful custodian of the record books referred to in sections 331.303(1) and 331.504(2).

In summary, a county board of supervisors has substantive responsibility for the record books described in section 331.303(1). In contrast, a county auditor merely acts as the board's agent for purposes of maintaining those record books. Iowa Code § 331.504(2) (1991). Therefore, pursuant to section 22.1, a county board of supervisors would be the lawful custodian of the record books described in sections 331.303(1) and 331.504(2) even if the records are in the physical possession of the county auditor.

September 28, 1992

MUNICIPALITIES: Creation of new employee classification "public safety officer." Iowa Code §§ 364.1, 364.16, 372.5, 411.1(2), 411.1(3), 411.35 (1991); Iowa Const. art. III, § 38A. A municipality has home-rule and statutory authority to consolidate police and fire protection functions into new "public safety officer" employee classification. If the municipality participates in the state-wide retirement system in Iowa Code chapter 411, and the "public safety officer" meets the definitions in sections 411.1(2) and 411.1(3), the employee will be covered by chapter 411 benefits. (Odell to Lind, State Senator 9-28-92) #92-9-6(L)

OCTOBER 1992

October 6, 1992

ELECTIONS: Counties; Municipalities, Schools. Iowa Code §§ 47.2(1), 47.3 (1991). Political subdivisions may only authorize the presentation of questions to voters of matters that are specifically required or authorized by law to be placed before the electorate. The commissioner of elections is authorized

to refuse to conduct an election that is not required or authorized by law. The results of an unauthorized election are not binding on government officials. Public funds may not be expended to pay the costs of an unauthorized election. (Krogmeier to Baxter, Secretary of State, 10-2-92) #92-10-1

Elaine Baxter, Secretary of State: You have asked for an opinion from our office concerning several questions which involve the authority to hold elections on matters that are not specifically authorized or required by law. You ask whether school districts and other political subdivisions may hold special elections to present questions to voters that are not authorized or required by statute or the Constitution to be voted upon and whether, if presented with such a request or petition, the county commissioner of elections has the authority to refuse to conduct such an election. You have also asked what entity pays the expenses of conducting such an election. For the reasons stated in this opinion, we are of the opinion that elections may only be held upon matters which are specifically authorized by the Constitution or statutes of the state.

We have previously opined on several related issues. In 1972 Op.Att'yGen. 263, we held that in the absence of constitutional or statutory authority, the submission of a question to the voters at a regular municipal or school election is unlawful and that a city did not have authority under the municipal home rule amendment to submit an issue to the voters not directly related to its municipal affairs and authorized by statute. In that opinion, Attorney General Turner stated:

> I find no authority, express or implied, for the submission of such an issue to the people of this state or to any municipality, school district or other political subdivision thereof. All government elections in Iowa are authorized by statute. (Citations omitted.) Since our election laws are so carefully detailed and prescribed, I must conclude that in absence of constitutional or statutory authority, such submissions to the voters are unlawful.

1972 Op.Att'yGen. 263, 264.

We have also opined that a special election for a public opinion poll is not authorized by the Constitution or the Code. 1972 Op.Att'yGen. 520. In 1976, we opined that the municipal home rule amendment does not give cities the authority to, by municipal charter, establish a type of election not otherwise allowed by law. 1976 Op.Att'yGen. 681.

In 1977, we opined that a city council must determine whether a locality is to have a Sunday liquor sales ordinance and that submitting such a question to the voters in a popular community election was foreclosed. 1978 Op.Att'yGen. 81. There we noted that:

> The Iowa Supreme Court, in interpreting the right to hold initiatives or referenda under these provisions, held invalid an ordinance passed

> after such an election because the question was one which was to be decided by the council since it did not fall in the category of question which could be presented to the voters. *Murphy v. Gilman*, 20 Iowa 58, 214 N.W. 679 (1927).

The central theme of all of these previous opinions is that elections may only be called pursuant to the authority of state law or the constitution. No independent authority to specify questions on the ballot or to conduct elections not required or authorized by law is granted to any city, county or school district. The policy of this office is not to overrule previous opinions unless they are clearly erroneous. 1980 Op.Att'yGen. 107, 108. State and local officers are entitled to rely on the opinions of the Attorney General in the conduct of their public duties. With this standard in mind, we have considered the above referred to opinions of this office and find them to be correct and still the applicable law in Iowa.

In addition to previous opinions of this office, other authority indicates that elections may only be called and held where specifically authorized by the Constitution or statutes of the state. In *State v. Claussen*, 216 Iowa 1079, 1107, 250 N.W. 195, 207 (1933,) in a concurring opinion, the Court noted:

> As previously indicated, the electors of this state cannot vote unless authorized by the Constitution or some legislative enactment.

We also note the following general principle of law:

> It is fundamental that a valid election cannot be called and held except by authority of the law. There is no inherent right in the people, whether of the state or of some particular subdivision thereof, to hold the election for any purpose. Accordingly, an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is a malady, notwithstanding the fact that such election was fairly and honestly conducted.

26 Am.Jur.2d Elections § 183.

With these authorities and previous opinions in mind, we conclude that political subdivisions may only authorize the presenting of questions to voters on matters that are specifically required or authorized to be placed before the electorate by statute or the Constitution. The county commissioner of elections is required to conduct all elections within the county. Iowa Code § 47.2(1) (1991). The commissioner of elections does not have the authority to conduct an illegal or unauthorized election, and, therefore, has the authority to refuse to conduct an election if the election is not specifically authorized or required by statute or by the Constitution. The results of an unauthorized election are not binding upon any authorities of local government or of the state. Public funds may be spent pursuant to Code section 47.3 for the purpose of conducting elections. Public funds may not be expended to pay the costs for the holding of an unauthorized election.

October 7, 1992

MUNICIPALITIES: Manufactured Homes. Preemption. U.S. Const. art. VI; 42 U.S.C. §§5401, et seq.; 24 C.F.R. §§ 3280, et seq.; Iowa Code §414.28 (1991); 661 IAC 16. The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§5401, et seq., governs the design and construction of manufactured homes, but does not regulate the installation and setup requirements of modular homes. A municipality, therefore, is not preempted by the federal manufactured home construction and safety standards from adopting and enforcing a foundation system for manufactured homes. (Walding to Gronstal, State Senator, 10-7-92) 92-10-2(L)

October 14, 1992

INCOMPATIBILITY; CITIES; COUNTIES; GENERAL ASSEMBLY: Simultaneous service in general assembly and on local boards or commissions. Iowa Constitution, art. III, §22; Iowa Code chapters 137, 388 (1991). Simultaneous service in the general assembly and on a local utility board is prohibited by article III, §22, of the Iowa Constitution when the board member receives $400 per year compensation plus actual expenses. Simultaneous service in the general assembly and on a county health board is not prohibited by article III, §22, when the board member is reimbursed only for "actual expenses" nor is it prohibited by the common law doctrine of incompatibility. (Doland to Gustafson, Crawford County Attorney, Hutchins, State Senator, and Martin, Cerro Gordo County Attorney, 10-14-92) #92-10-3

Paul L. Martin, Cerro Gordo County Attorney, Thomas E. Gustafson, Crawford County Attorney, The Honorable Bill Hutchins, State Senator: You have each requested an Attorney General's opinion concerning simultaneous membership on local boards or commissions while serving in the general assembly. Mr. Gustafson and Senator Hutchins have asked whether the holding of a seat in the general assembly is incompatible with being an appointed member of a municipal utility board. Mr. Martin has specifically asked whether any incompatibility exists between serving in the general assembly and serving on a county board of health, either under common law or under article III, section 22 of the Iowa Constitution. Since these questions relate to the same issues, we have combined them into this one opinion concerning incompatibility between service in the general assembly and service on local boards and commissions.

For the reasons stated in this opinion, we conclude that holding a position as a member of a board of trustees of a municipal utility while serving in the general assembly is incompatible under article III, section 22 of the state Constitution. We conclude that the office of county health board member is not incompatible with service in the general assembly.

An analysis of both of these questions hinges on article III, section 22 of the Iowa Constitution. It states:

> *Disqualification.* No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly; but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

In order for section 22 to be applicable, the utility or health board position must be a "public office" that is "lucrative." Public office has previously been defined in case law and various Attorney General opinions. The requirements are: 1) The position must be created by the constitution or legislature or through authority conferred by the legislature. 2) A portion of the sovereign power of government must be delegated to that position. 3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. 4) The duties must be performed independently and without control of a superior power other than the law. 5) The position must have some permanence and continuity, and not be only temporary and occasional. *State v. Taylor*, 144 N.W.2d 289, 292 (Iowa 1966), 1968 Op.Att'yGen. 711; 1982 Op.Att'yGen. 220, 224.

We will apply the above outline of relevant authority to the question posed by Mr. Gustafson and Senator Hutchins concerning the municipal utility board member first. The utility board was established pursuant to chapter 388 of the Iowa Code and that chapter defines the duties and powers of the board. Section 388.4 states that the board may exercise "all powers of a city" in relation to the utility system. The position is not temporary and occasional since the ordinance specifies the term of office to be six years. It is clear therefore that the utility board of trustees was created by the legislature, has sovereign power, has duties and powers defined by the legislature, and has permanency and continuity. The only question under this analysis is whether the board performs its duties independently and without control of a superior power other than the law since the city council and the mayor have the power of appointment, and the city council has the power of removal of a trustee. In *State v. Taylor* however, the Supreme Court held that a city zoning inspector was a public officer even though the inspector was appointed by the city manager and reported to a zoning enforcement officer. 144 N.W.2d 289, 293 (Iowa 1966).

We believe that the local utility board of trustee member does hold a public office under the *State v. Taylor* analysis. Pursuant to their statutory authority, a city utility board has all of the powers of a city in relation to the utility system with certain specific exceptions. Iowa Code §388.4 (1991). The utility board has the authority to purchase, condemn or otherwise acquire real estate and other property; manage, control and operate the same; issue revenue bonds, pledge orders or other obligations payable from the revenues of the utility system and control all tax and other revenues received by the system without any control from other city officials. Iowa Code §388.4(2) and §388.5 (1991). The exceptions listed in Iowa Code section 388.4(1) do provide some constraints on this authority however. These exceptions make it clear that property of the utility system is held in the name of the city, with all property acquisition and control rights in the utility board. In addition, the utility board may not

certify taxes to be levied, pass ordinances or amendments to ordinances, or issue general obligation or special assessment bonds. Iowa Code § 388.4(1) (1991).

Given these broad statutory powers of a utility board with little or no control other than the power of appointment and the power of taxation being retained by other city officials, we conclude that a utility board does perform its duties independently and without control of a superior power. Thus, we conclude that a city utility board of trustee member does hold an office.

Section 22 also requires that the office be "lucrative." The ordinance attached to your inquiry indicates that trustees receive $400 per year compensation plus their actual expenses. Case law and previous Attorney General opinions indicate that one who receives only actual expenses does not hold a "lucrative" office. It appears, however, that any amount of compensation above and beyond actual expenses would be considered lucrative. *See* 1976 Op.Att'yGen. 6, 12-14, and cases cited therein. A state senator, for example, was barred by section 22 from serving on the Iowa Natural Resources Council when the latter office paid 25 dollars per day for each day of service plus expenses. 1960 Op.Att'yGen. 218. [#59-1-16.] Similarly, the director of the Iowa State Fair had to relinquish that office before taking the oath of office as state senator when the state fair position paid him $640 in meals and expenses for the year. 1968 Op.Att'yGen. 711.

We conclude that membership on the utilities board is a lucrative public office and the trustee in your question will have to relinquish that position before taking the oath of office as a state representative. Because we find that article III, section 22 of the Iowa Constitution is dispositive of this issue, we will not discuss the other possible constitutional or common law impediments to the dual offices of utility board member and state representative.

Applying the aforementioned "public officer" analysis to the position of county health board member, we also conclude that a county health board position is a public office. The position is created by the legislature, has been delegated sovereign power, has duties defined by the legislature which are performed independently of any superior authority, and its members serve for a set term of three years. Iowa Code ch. 137 (1991).

We do not find that the health board position is a "lucrative" public office, however. As we discuss above, the term "lucrative" has been previously defined in several Attorney General's opinions. Based upon these opinions, it appears that in spite of its broad definition, the term "lucrative" does not apply when the officer is paid only for actual expenses. *See* 1976 Op.Att'yGen. 6, 13, and cases cited therein. It is our understanding that the members of a county health board receive no compensation but are only reimbursed for their necessary expenses. Iowa Code § 137.12 (1991). Thus, it does not appear that there is any compensation paid such that the health board member would be considered to hold a "lucrative" office.

While we find no constitutional impediment to service on both the county health board and in the general assembly, we have also reviewed the common law doctrine of incompatibility. The doctrine of incompatibility is "construed narrowly" and "applied cautiously" by this office. 1982 Op.Att'yGen. 16 [#81-1-8(L)]. The definition of incompatibility is set out in *State ex rel. Lebuhn v. White*, 133 N.W.2d 903, 905 (Iowa 1965):

> . . . the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other and subject in some degree to its revisory power, or where the duties of the two offices are inherently inconsistent and repugnant.

The duties of a county health board member essentially involve enforcing the state health laws and the rules and orders of the Iowa Department of Public Health. Iowa Code § 137.6 (1991). The general assembly does not have direct revisory power over the county health boards or the members. While the general assembly can review and amend the local board of health enabling statute at any session, this is not the "revisory" power held by one office over another that is prohibited by *White*. *See* 1974 Op.Att'yGen. 545, 546. Further, funding for local health boards comes from federal appropriations, local taxation, licenses, fees for personal services, or from gifts, grants, bequests, or other sources. Iowa Code § 137.18 (1991). In addition, emergency funds are available from the commissioner of the Department of Public Health. Iowa Code § 137.19 (1991). It appears that the general assembly makes no direct appropriation to county health boards. We find, therefore, that the county board of health is analogous to the soil conservation district commissioner and the county conservation board member examples cited in previous opinions. 1970 Op.Att'yGen. 763, 764; 1974 Op.Att'yGen. 545, 546.

Thus, we conclude that the offices of county health board member and member of the general assembly are not incompatible at common law. The functions of one office are not subordinate to the other; and the nature and duties of the two offices are not such as to render concurrent service improper as a matter of public policy.

In addition to incompatibility, the holding of two offices simultaneously raises conflict of interest concerns as well. Incompatibility and conflict of interest questions are distinct concepts. The doctrine of incompatibility is concerned with the "duties of an office apart from any particular office holder." 1982 Op.Att'yGen. 220, 221. In contrast, a conflict of interest question "focuses on how a particular office holder is carrying out his or her official duties in a given fact situation." *Id.* A conflict of interest question can only be decided by looking at the various facts surrounding a particular action by an office holder. Since the health board member in the question posed is not yet a member of the general assembly, an analysis of the circumstances under which a conflict might arise is obviously premature at this time. We note this concern, however, in the hopes that awareness of it will allow the member to avoid potential conflict by abstaining from discussion and voting on those matters that may

raise a question concerning a possible conflict of interest. *See* Op.Att'yGen. #92-9-1 (Scase to Halvorson and Ferguson).

In summary, we are of the opinion that simultaneous service in the general assembly and on a local utility board is prohibited by article III, section 22, of the state Constitution. Simultaneous service in the general assembly and on a county health board is not prohibited by article III, section 22, nor is it prohibited by the common law doctrine of incompatibility of offices.

October 26, 1992

SUBSTANCE ABUSE: Mandatory substance abuse evaluation and treatment for employees. Iowa Code §730.5 (1991). A preemployment physical is an examination to determine the fitness of an individual for a particular employment purpose. Iowa Code section 730.5 does not impose a duty on an employer to pay for the treatment of an employee who has declined coverage under an employer sponsored plan or to pay for a former employee's treatment. (West to Schultz, Clinton County Attorney, 10-26-92) #92-10-4(L)

October 26, 1992

SCHOOLS: Tort Levy; Health Benefit Plans. Iowa Code §§296.7, 296.7(1), 296.7(2), 296.7(3), 296.7(5) and 296.7(6) (1991); 1990 Iowa Acts, ch. 1234, §1. School districts are prohibited from using a tort levy to pay employee health benefit plans. (Reno to Varn, State Senator, 10-26-92) 92-10-5(L)

October 28, 1992

CONSTITUTIONAL LAW; EQUAL RIGHTS AMENDMENT: Gender Balance. Iowa Const. art. I, §1 (proposed amendment); Iowa Code §69.16A. The passage of the Equal Rights Amendment will not affect statutory requirements for gender balance on state boards and commissions. (Anderson to Kremer, State Representative, 10-28-92) #92-10-6

The Honorable Joseph M. Kremer, State Representative: You have requested an opinion of the Attorney General regarding the impact of the Equal Rights Amendment on existing statutes requiring gender balance on appointive boards and commissions. Specifically, you have asked whether the passage of the Equal Rights Amendment would invalidate gender balance statutes.

A proposed amendment to Article I, section 1 of the Iowa Constitution, commonly referred to as the "Equal Rights Amendment" (ERA) is on the ballot in November. If the amendment is approved, this section of the Constitution will read as follows:

> Article I, section 1, - Rights of Persons. All men *and women* are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness. *Neither the state nor any of its political subdivisions shall, on the basis of gender, deny or restrict the equality of rights under the law.*

(New language emphasized.)

The existing requirement for gender balance on state boards and commissions is codified in Iowa Code section 69.16A (1991), which reads as follows:

> All appointive boards, commissions, committees and councils of the state established by the Code if not otherwise provided by law shall be gender balanced. No person shall be appointed or reappointed to any board, commission, committee, or council established by the Code if that appointment or reappointment would cause the number of members of the board, commission, committee or council of one gender to be greater than one-half the membership of the board, commission, committee or council plus one if the board, commission, committee or council is composed of an odd number of members. If the board, commission, committee or council is composed of an even number of members, not more than one-half of the membership shall be of one gender.

Consideration of the issue you raise requires a review of the guidelines relating to opinion requests. The Attorney General may decline to issue an opinion where the question calls for resolution of, or speculation about, a question of fact or policy rather than determination of a question of law, or where the legal question is dependent upon the facts of specific cases. Additionally, the Attorney General may decline to issue an opinion where the request does not involve a concise question of state law. (61 IAC 1.5(3).)

While we cannot speculate on all possible fact patterns which may arise, a review of the analyses given ERA's by other jurisdictions is instructional. Courts of those states which have amended their constitutions to include an equal rights amendment have varied in their interpretations of the provisions. Some state courts have adopted the view that legislative classifications based upon sex may be upheld so long as the classification bears some reasonable relation to a legitimate state interest. *See, e.g., Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973) (holding a state statute excusing women with children from jury duty, without mentioning men, not violative of ERA because statute was based on a reasonable classification bearing a rational relationship to a legitimate state interest). On the other end of the spectrum, "[t]hree states (Washington, Pennsylvania and Maryland) interpret their ERA as an absolute bar to gender-based classification, irrespective of any governmental interest identified." Gammie, Beth, *State Era's: Problems and Possibilities*, 1989 Illinois L.Rev. 1123, 1137. Taking a middle ground approach are several state courts which have upheld sex-based classifications when a compelling state interest exists. This interpretation involves use of the strict scrutiny standard employed by the United States Supreme Court when reviewing racial discrimination cases under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *See, e.g., People v. Ellis*, 57 Ill.2d 127, 311 N.E.2d 98 (1974). Although the Washington state courts have interpreted their equal rights amendment as an absolute bar to legislative gender-based classifications, a statutorily required division of offices in the state committee of a political party between men and women has been upheld. *Marchioro v. Chaney*, 582 P.2d 487 (Wash. 1978), aff'd 442 U.S. 191, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979).

In *Marchioro*, the court faced the argument that the reservation of one of the positions on the committee for a female and one for a male constituted a violation of the equal rights amendment. In its analysis the court stated that under the ERA the only criterion to be considered was whether the classification by sex was discriminatory. The court went on to state:

> . . .
>
> The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. An equal number of both sexes must be elected to the committee and as chairman and vice chairman of the state committee. Neither sex may predominate. Neither may discriminate or be discriminated against. There is an equality of numbers and an equality of rights to be in office and to control the affairs of the state committee. The ironic result of plaintiffs' theory would be to abolish a statute which mandates equality by invoking a provision of the constitution passed to guarantee equality.
>
> The major objection of plaintiffs seems to be that one of the positions on the state committee from each county is reserved for a female and the other for a male and that violates the equal rights amendment. But if the statute simply said, "The state committee of each major political party shall be composed of an equal number of women and men" there clearly would be no abridgment or denial on account of sex or any equality of rights under the law. We have found no case or any literature which suggests mandated equality by statute would violate the equal rights amendment.

Id., 582 P.2d at 492.

In another case, involving a challenge to an affirmative action plan designed to correct the under representation of women in the construction industry, the same court held:

> As long as the law favoring one sex is intended solely to ameliorate the effects of past discrimination, it simply does not implicate the ERA . . . The only requirements which a sex-based affirmative action program need satisfy are that it be intended solely to eliminate the effects of past discrimination and that there be a rational basis for concluding that such effects remain.

Southwest Washington Chapter, National Electrical Contractors Association v. Pierce County, 667 P.2d 1092 (Wash. 1983).

Historically, the Iowa Supreme Court has not taken the strict view adopted by the Washington court as to state constitutional limitations on legislative authority. Rather, this jurisdiction has interpreted such provisions in the Iowa Constitution as identical to the limiting clauses of the Fourteenth Amendment

of the United States Constitution. *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977). Further, Iowa courts are hesitant to declare any statute unconstitutional and will do so only when a statute "clearly, palpably and without doubt infringe[s] upon the constitution." *Larsson v. Iowa Board of Parole*, 465 N.W.2d 272, 273 (Iowa 1991). Therefore, we are led to conclude that the passage of the ERA would not invalidate the current statutory requirement of gender balance on public boards and commissions.

To conclude, your questions cannot be answered definitively in the context of an Attorney General's opinion in the absence of a specific factual situation to which these legal principles can be applied. However, a review of the decisions in other jurisdictions leads us to conclude that present statutory gender balance requirements for appointive bodies would remain unaffected by passage of the proposed equal rights amendment.

NOVEMBER 1992

November 12, 1992

COUNTIES AND COUNTY OFFICERS: Denying Access of Deputy Auditor to Closed Session of County Board of Supervisors. Iowa Code §§21.5, 331.221(2), 331.503(2), 331.504(1), 331.903(1), 331.903(4) (1991). A county board of supervisors may not deny a deputy auditor access to a closed session to take minutes or tape record the session, when the deputy has been designated to serve as secretary to the board in the absence of the county auditor. (Christenson to Doyle, State Senator, 11-12-92) #92-11-1(L)

November 12, 1992

MOTOR VEHICLES; LAW ENFORCEMENT: Command responsibility at scene of automobile accident. Iowa Code §§ 102.2, 102.4 (1991). Responsibility for command at an auto accident scene during a fire or hazardous substance emergency belongs to the ranking fire officer who must defer to the extent possible to a peace officer present with respect to traffic control. If there is no fire or hazardous substance emergency, command of the scene is the responsibility of a peace officer present. (Williams to Jochum, State Representative, 11-12-92) #92-11-2(L)

November 12, 1992

SCHOOLS: General fund expenditures; extracurricular activities. Iowa Code §§256.11(5)(g), 279.28, 280.3, 280.13, 280.14, 285.11(6) (1991). A public school board of directors may use general fund revenues to provide equipment and facilities necessary for the teaching of interscholastic athletics and other extracurricular activities which are incorporated into the school's educational program. We affirm in part and reverse in part 1936 Op.Att'yGen. 375 as it relates to the propriety of general fund expenditures for particular cost items. (Scase to Horn, State Senator, 11-12-92) #92-11-3

Wally E. Horn, State Senator: You have requested an opinion of the Attorney General addressing the following:

> May a school district pay for the expenses of extracurricular activities, including the purchase of equipment and the maintenance of facilities necessary for the conduct of the extracurricular activities, from general fund revenues of the school district?

In presenting this inquiry, you acknowledge prior opinions of this office dated January 24, 1936 (1936 Op.Att'yGen. 375) and March 9, 1972 (1972 Op.Att'yGen. 392) and ask whether these opinions should be overruled as being clearly erroneous under present law. Before addressing the questions presented we will review relevant case law and prior opinions of this office.

It has been many decades since the Iowa Supreme Court has examined the propriety of school fund expenditures related to extracurricular activities. The most recent case we find, *Schmidt v. Blair*, 203 Iowa 1016, 213 N.W. 593 (1927), held that local school boards could not, under controlling provisions of the 1924 Iowa Code, use school buses and expend school funds to provide transportation to and from intermural athletic games, spelling contests, or oratorical contests. The *Schmidt* court noted that, while existing statutes required schools to provide transportation to and from school for students living more than one mile from the school, the Code did not allow for any other transportation by schools. Therefore, the use of school buses and expenditure of school funds for extracurricular activity transportation was found improper.

The holding of *Schmidt* appears consistent with the court's one previous pronouncement on the expenditure of school funds. In *Bellmeyer v. Independent District of Marshalltown*, 44 Iowa 564 (1876), the court upheld the use of school funds to purchase an organ for a district school. This holding was based upon statutory provisions allowing school boards to "use any unappropriated contingent fund in the treasury to purchase records, dictionaries, maps, charts and apparatus for use of the schools in their districts," and empowering independent districts to determine what courses would be taught in the district. 44 Iowa at 565-66. Upon finding that a school district could determine that music should be taught, the court concluded that "a musical instrument is properly connected with a musical education so as to be denominated apparatus in the language of the statute." 44 Iowa at 566.

In 1935 and 1936 this office issued a series of opinions related to school fund expenditures for extracurricular activities. In the first, 1936 Op.Att'yGen. 38, we concluded that revenues generated by a school through admission fees for social events could be properly segregated from the general fund monies and used for any purpose, including entertainment expenses. Soon thereafter, we were asked to determine whether a school board could "install flood lights in connection with an athletic field for the purpose of providing light for interscholastic athletic events to be held at night and to pay for the expense of the same out of the general fund of the district." 1936 Op.Att'yGen. 333. We reasoned that the answer to these inquiries depended upon whether the athletic field was used at night for physical education purposes.

> The controlling element in determining whether this expense should be paid out of the general fund or the athletic fund of the school must be determined by the nature of the use of the athletic field, for, if the field is used solely and exclusively for inter-scholastic games to which an admission is charged, it is apparent that the cost cannot be paid out of the general fund, but if the field is used by all the students who desire the use of the same and primarily, for the general physical education of the students, and only incidentally by inter-scholastic contests when the field is not in use by the general student body, then such expense should be paid out of the general fund.

1936 Op.Att'yGen. at 334.

We next examined related issues in 1936 Op.Att'yGen. 375. In response to a request from the state auditor, this opinion addressed the propriety of general fund expenditures for costs related to interscholastic athletic and academic contests. We recognized in this opinion that, while interscholastic athletics were explicitly excluded from the physical education program mandated by statute, a school board could exercise its discretion to include interscholastic athletics within the school program. We concluded that when interscholastic activities were included in a school program, "the instructional equipment necessary for the teaching of interscholastic athletics must be furnished and may be purchased from public funds." 1936 Op.Att'yGen. at 376. We then proceeded to consider a list of specific cost items provided by the auditor, identifying those which could be paid with public funds. We concluded that while public funds could properly be used to provide "instructional equipment" and facilities (including building and lighting athletic fields) necessary for teaching interscholastic athletics, travel expenses, personal equipment or clothing (i.e. uniforms) costs, hospital costs related to injuries, referee or judge's fees, promotional costs, and association membership fees should not be paid from public funds.[51] 1936 Op.Att'yGen. at 377. We suggested the creation of an activity fund, collecting revenue from admission fees, to defray some of the expenses for which public funds could not be used.

We last revisited this issue in 1972 Op.Att'yGen. 392, which addressed whether a school board could use public funds to purchase band uniforms. We relied on 1936 Op.Att'yGen. 375 for the general rule that "public school funds can be used for instructional equipment but not for personal equipment or clothing." 1972 Op.Att'yGen. at 393. We concluded as follows:

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[51] In 1984 Op.Att'yGen. 17 [#83-2-11(L)] we addressed the propriety of using monies generated through the schoolhouse levy authorized by Iowa Code section 297.5 (1981) to install lights for an athletic field. We concluded that Iowa Code section 297.5 (1981) would not allow schoolhouse funds generated from this levy to be used for athletic field lighting. This opinion did not, however, address whether general fund monies or schoolhouse funds from other revenue sources could be used for the installation of athletic field lights nor cite our 1936 opinions on this issue. We note that, effective July 1, 1991, Iowa Code section 297.5 was repealed and replaced by Iowa Code section 298.3. 1989 Iowa Acts (73 G.A.) ch. 135, §§108, 136. Section 298.3 (1991) contains much the same language limiting fund usage as did prior Code section 297.5.

> While it is proper to expend public funds for text books, music, and musical instruments which are necessary for the purpose of providing instruction in band or orchestral music, it is difficult to correlate the use of public funds for band uniforms, choir robes, caps and gowns for graduation, or gym suits. However, if the school board requires the wearing of such a uniform as a condition for obtaining credit in the course taught, then, in my opinion, the furnishing of such uniforms is as appropriate as the furnishing of the text books and instruments.

You have asked us to reconsider our prior opinions in light of changes in the law relating to the inclusion of extracurricular activities as part of a school's educational program. We do so, noting that it is the long-standing policy of this office not to overrule a prior opinion unless we find that the controlling law has changed or that the previous ruling was clearly erroneous. 1990 Op.Att'yGen. 94 [#90-12-2(L)], *citing* 1990 Op.Att'yGen. 51, 52.

The issues presented concern the spending authority of Iowa public schools. We begin our analysis by noting the basic principle that public school districts, as statutorily created entities, are subject to "Dillon's rule." The only powers which may be exercised by a school district are those expressly granted or necessarily implied from the statutes by which they are created and governed. *See Pleasant Valley Ed. Assn. v. School Dist.*, 449 N.W.2d 894, 897 (Iowa App. 1989); *Silver Lake Consol. School Dist. v. Parker*, 238 Iowa 984, 990, 29 N.W.2d 214, 217-18 (1947).

The authority of local school boards to determine course offerings, recognized by the Court in 1876, still exists today. Iowa Code section 280.3 (1991), provides in relevant part, as follows:

> The board of directors of each public school district and the authorities in charge of each non-public school *shall* prescribe the minimum educational program . . . for the schools under their jurisdiction. The minimum educational program shall be the curriculum set forth in section 256.11, except as otherwise provided by law.
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> . . .
>
> In addition, the board of directors or governing authority *may* include in the educational program of any school such additional courses, subjects, or activities which it deems fit the needs of the pupils.

(Emphasis added.) The curriculum requirements set forth in Code section 256.11 (1991) include mandatory physical education instruction. Iowa Code section 256.11(5)(g) provides, however, that a student participating in an organized athletic program may, under enumerated circumstances, be excused from mandatory physical education classes.

Administrative rules adopted by the State Board of Education define "educational program" as "the entire offering of the school, including out-of-class activities, and the arrangement or sequences of subjects and activities." 281 IAC 11.5(2). These rules require local school boards to sponsor a balanced activity program "sufficiently broad and balanced to offer opportunities for all students to participate" and expressly allow the inclusion of interscholastic contests and competitions so long as the school complies with state board rules adopted pursuant to Iowa Code section 280.13. 281 IAC 11.6(1) and 11.6(3). Iowa Code section 280.13 (1991) prohibits a public school from participating in or allowing students representing the school to participate in "any extracurricular interscholastic contest or competition" sponsored by an organization which is not registered with and does not follow the rules adopted for such organizations by the state board of education. *See* 281 IAC 36 (State Board rules for Extracurricular Interscholastic Competition).

We find, in review of these statutes and rules, a broad grant of discretion allowing local school boards to adopt a varied curriculum and activity program. The inclusion of extracurricular activities within the educational program of local schools is clearly contemplated. Having concluded that public schools are empowered to provide extracurricular activities within the offered educational program, we look to related statutes governing school operations.

Iowa Code section 280.14 (1991) requires each public school board to perform the following functions:

> Establish and maintain adequate administration, *school staffing*, personnel assignment policies, teacher qualifications, certification requirements, *facilities*, *equipment*, grounds, graduation requirements, instructional requirements, *instructional materials*, maintenance procedures and policies on extracurricular activities.

(Emphasis added.) Iowa Code section 291.13 (1991) requires the creation and maintenance of general and schoolhouse funds by each school district, providing as follows:

> The money received from the regular and voter-approved physical plant and equipment levies, the levy for public educational and recreational activities imposed under chapter 300, the proceeds of the sale of bonds authorized by law, and the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness shall be deposited in the schoolhouse fund and, except when authorized by the electors, shall be used only for the purpose for which originally authorized or certified. The money received from the district management levy shall be deposited in a subfund of the general fund of the school district. All other moneys received for any other lawful purpose shall be deposited in the general fund of the school district. The treasurer shall keep a separate account for each fund, and shall not pay an order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied.

Iowa Code section 279.28 (1991) provides that:

> The board of directors may provide for and *pay out of the general fund* to insure school property a sum as necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts, and *apparatus for the use of the schools* as deemed necessary by the board of directors for each school building under its charge; . . . .

(Emphasis added.)

Iowa Code section 297.5 (1991) sets, in general terms, the allowable uses for monies collected through schoolhouse levies. Iowa Code section 298.3 identifies appropriate uses of revenue generated through the regular and voter-approved physical plant and equipment levy. The purposes for which bonded indebtedness may be authorized, as set forth within Iowa Code section 296.1, include:

> . . . purchasing, building, furnishing, reconstructing, repairing, improving or remodeling a . . . gymnasium, stadium, field house, . . . and procuring a site or sites therefor, or purchasing land to add to a site already owned, or procuring and improving a site for an athletic field, or improving a site already owned for an athletic field, and for any one or more of such purposes.

Finally, statutory provisions regarding the establishment and operation of bus routes include the following reference to travel related to extracurricular activities:

> The use of school buses shall be restricted to transporting pupils to and from school and to and from extracurricular activities sponsored by the school when such extracurricular activity is under the direction of a qualified member of the faculty and a part of the regular school program . . . School employees of districts operating buses may be transported to and from school and approved activities which they are required to attend as a result of their responsibilities. . . .

Iowa Code § 285.11(6) (1991).

With this understanding of current statutes in mind, we turn to your specific inquiries. First, you ask whether a school district may pay for the expenses of extracurricular activities, including purchase of equipment and maintenance of facilities, from general fund revenues. We conclude, as we did in 1936 Op.Att'yGen. 375, that general fund monies may be used to provide equipment and maintain facilities necessary for the teaching of interscholastic athletics

and other extracurricular activities which are included as a part of the educational program of a public school.

We believe that our response to your first inquiry is consistent with the general holding of our prior opinions, 1936 Op.Att'yGen. 375 and 1972 Op.Att'yGen. 392. While we conclude that the general rule recognized in these opinions remains valid, statute and rule changes lead us to revise several of the responses given to specific cost item examples included in the opinions. We will, therefore, proceed through the list of items addressed in 1936 Op.Att'yGen. 375, responding to each example in light of current law as set forth above.

1. *Travel expenses for participants in interscholastic competitions and contests.* Iowa Code section 285.11(6) now directly allows school districts to use buses to provide pupils with transportation to faculty supervised extracurricular activities which are a part of the regular school program. We find no statutory provision prohibiting the use of general fund monies to finance such transportation. We conclude, therefore, that general fund revenue may be used for the cost of transporting pupils by school bus to supervised, school sponsored extracurricular activities.[52]

2. *Travel expenses of supervisors.* Iowa Code section 285.11(6) also allows the use of school buses to transport school employees required to attend extracurricular activities. We believe the cost of such transportation is properly paid from general fund revenues.

3. *Expenses incurred in providing uniforms and similar equipment for such participants.* Iowa Code section 280.14 requires school boards to provide equipment and instructional materials. Section 279.29 allows the use of general fund monies for the purchase of "apparatus for use in schools." We believe our prior opinion concluding that equipment *necessary* to instruction of extracurricular activities may be purchased from the general fund is consistent with these statutory provisions. We therefore affirm 1936 Op.Att'yGen. 375 as it relates to the purchase of athletic equipment. Mandatory safety equipment (i.e. football helmets and pads, baseball batting helmets, etc.) and other required uniform components may be purchased from the general fund. The cost of optional equipment or customizing uniforms should not be paid from public funds.

In analyzing whether uniforms can be purchased from the general fund, we reexamine 1972 Op.Att'yGen. 392. This opinion concluded that general fund expenditures for uniforms were appropriate only when the wearing of a uniform was "a condition for obtaining credit in the course taught." While this may be an easily workable test, we find it inappropriate in light of the fact that extracurricular activities may be included in public school's educational program even though no credit toward graduation is offered for the activity.

[52] We do note, however, that "that portion of the cost of the operation of a school bus used in transporting pupils to and from extra-curricular activities" must not be included in calculations determining the pro-rata cost of pupil transportation under Iowa Code section 285.1(12) (1991).

We believe the propriety of public fund expenditures for uniforms and equipment should be dependent upon whether the activity is a part of the school's educational program and, if so, whether the wearing of the uniform or equipment is necessary in order to participate. If both of these tests are met, public monies may be used for the purchases. To the extent that 1972 Op.Att'yGen. 392 is inconsistent with this conclusion it is overruled.

4. *Expenses incurred in paying claims from hospital and medical services for injuries sustained by students participating in interscholastic and intramural contests and exhibitions.* In 1936 Op.Att'yGen. 375 we opined, without citation of authority, that medical expenses resulting from injuries sustained by students, other than emergency first aid, could not be paid with public funds. We have reviewed current statutes and find no grant of authority relating directly to the payment of hospital or other medical claims for student injuries or the procurement of student medical insurance. We, therefore, affirm our 1936 opinion on this point.

We do note, however, that pursuant to Iowa Code chapter 613A (the municipal tort claims act) a local school district may incur tort liability for injuries sustained by a student participating in extracurricular activities. Iowa Code sections 298.4(2) and 613A.7 (1991) allow school boards to procure liability insurance using funds from the district management subfund of the district general fund.

5. *Expenses for referees' fees and judges' fees in connection with extracurricular contests and exhibitions.* Iowa Code section 280.14 requires school boards to maintain adequate school staffing. To the extent that qualified referees or judges must be employed to oversee extracurricular contests or competitions within a school's educational program, we believe that the cost of staffing these positions may properly be paid from the general fund.

6. *Expenses incurred in providing basketballs, footballs and similar equipment items, such items to be used solely in interscholastic contests.* As we opined in 1936 Op.Att'yGen. 375, we believe that the cost of providing this type of necessary equipment may be paid from the general fund.

7. *Expenses incurred in promoting or sponsoring interscholastic and intramural contests and exhibitions, (supplies, royalties for class plays, tickets, etc.).* We do not view purely promotional activities (printing of tickets and posters, or other advertising expenses) as necessary to an extracurricular program and, because of the optional nature of such expenses, do not believe general fund revenue should be expended for promotional costs. It would appear, however, that the payment of royalties for use of material for a class play or forensic presentation is a necessary component of the presentation, rather than a promotional cost, and thus is an appropriate general fund expenditure.

8. *Expenses incurred in building and lighting athletic fields to be used solely for interscholastic athletics.* In 1936 Op.Att'yGen. 375 this office concluded, without analysis or citation of authority, that this use of public funds was proper

(overruling, without reference, 1936 Op.Att'yGen. 333). More recently we opined that funds generated by the schoolhouse levy authorized by Iowa Code section 297.5 (1981), could be used to surface an athletic field but not to install lights at the field. 1984 Op.Att'yGen. 17. *See* footnote 1, above.

We now affirm 1936 Op.Att'yGen. 375 and 1984 Op.Att'yGen. 17, in that they conclude that public funds may be used for the construction of athletic facilities. Our review of current statutes reveals direct statutory authority for such public fund expenditures, but leads us to conclude that construction costs must be paid from a district's schoolhouse fund, rather than from general fund monies. Iowa Code section 298.3 allows the use of funds generated from the physical plant and equipment levy to purchase and improve grounds. "Improvement of grounds" is defined to include "surfacing and soil treatment of athletic fields and tennis courts." Iowa Code § 298.3(1)(b). In addition, Code section 296.1 allows authorization of bonded indebtedness to procure, build, furnish, repair, improve or remodel a gymnasium, stadium, field house, or athletic field. Funds generated from these sources are to be deposited into the district schoolhouse fund. Therefore, we believe that expenditures for these purposes should be made from the schoolhouse fund.

With regard to the lighting of athletic fields, we disagree with 1936 Op.Att'yGen. 375, which concluded that the lighting of athletic fields used solely for interscholastic events was an appropriate public fund expenditure. We do not believe that field lighting is a necessity for interscholastic competition. While the ability to play night games is an added convenience, it is not necessary for games to be scheduled after daylight hours. Therefore, we overrule that portion of 1936 Op.Att'yGen. 375 on this point. In doing so we adopt the reasoning of 1936 Op.Att'yGen. 333, holding that general fund monies may be used for athletic field lighting only if the field is regularly used at night for physical education activities included in the school curriculum.[53]

9. *Expenses necessary to membership of small student groups or, in some cases, the whole student body or the high school itself, in national, state and local associations, the purposes of such associations being to benefit, directly or indirectly, the students or groups who may be members. Among such associations will be found:*

A. Forensic associations.

B. The North Central Association of Schools.

C. Interscholastic athletic conference associations.

D. Band associations

As noted above, Iowa Code section 280.13 prohibits a public school from participating in or allowing students representing the school to participate in "any extracurricular interscholastic contest or competition" sponsored by

[53] Even if circumstances justify the expenditure of public funds for field lighting, funds generated from the physical plant and equipment levy authorized by Iowa Code section 298.3 may not be used to light an athletic field as this use is not within the enumerated authorized uses of these funds. *See* 1984 Op.Att'yGen. 17 (interpreting similar language contained in Iowa Code § 297.5 (1981)).

an organization which is not registered with, and does not follow the rules adopted for such organizations by, the state board of education. *See* 281 IAC 36 (State Board rules for Extracurricular Interscholastic Competition). In addition to the rules adopted pursuant to Code section 280.13, the State Board has adopted rules relating to membership in athletic conferences for public schools. 281 IAC 37. While Code section 280.13 and the State Board rules clearly anticipate local school participation in organization sponsored activities and athletic conferences, neither the statute nor the rules authorize expenditure of general fund moneys for membership fees in such organizations. Nor do we find the language of Code section 280.14 sufficiently broad to necessarily allow the payment of association membership fees with public funds.

It may be the case, however, that organization bylaws prohibit participation of non-member schools in organization sponsored events. If so, and participation in sponsored events is a component of the school's educational program, necessary membership fees may be paid from the general fund. If membership is optional, in that non-member schools may participate in sponsored events, then membership fees should not be paid from public funds.

In summary, we conclude that a public school board of directors may use general fund revenues to provide equipment and facilities necessary for the teaching of interscholastic athletics and other extracurricular activities which are incorporated into the school's educational program. We affirm in part and reverse in part 1936 Op.Att'yGen. 375 as it relates to the propriety of general fund expenditures for particular cost items.

November 12, 1992

TAXATION: CITIES: COUNTIES: 28E Agreement, Property Tax, Sanitary Landfill, Property Acquisitions By Tax Exempt Political Subdivisions. Iowa Code chs. 28E and 472 (1991); Iowa Code §§28E.1, 28E.3, 28F.1, 427.1(2), 427.18, 446.7 (1991). Property of a solid waste agency, which agency is created under Iowa Code chapter 28E and made up entirely of government units listed in section 427.1(2), is exempt from property taxes. Where the property is obtained through condemnation, Iowa Code section 427.18 is applicable and the solid waste agency is liable for property taxes for the fiscal year in which the property was acquired, but property taxes for prior years would be merged in the agency's tax exempt status. Under Iowa Code section 446.7, if after notice the agency fails to pay the taxes for the fiscal year of property acquisition, those taxes are required to be abated by the board of supervisors. (McCown to Martens, Iowa County Attorney, 11-12-92) #92-11-4

Mr. Kenneth Martens, Iowa County Attorney: You have requested an opinion of the Attorney General concerning the following questions:

> 1. Is property owned by the Regional Environmental Improvement Commission [a solid waste agency created under Iowa Code chapter 28E comprised entirely of governmental agencies] exempt from property taxes based upon Iowa Code Section 427.1(2)?

2. Does Iowa Code Section 427.18 regarding liability for past taxes of property acquired apply if this property is exempt from taxation and would the R.E.I.C. owe for the back taxes?

3. If the property is exempt from taxation can the delinquent property taxes be abated under Iowa Code Section 446.7?

You have provided this office with a copy of the articles of agreement forming the Regional Environmental Improvement Commission (R.E.I.C.). In addition you have provided a copy of the quit claim deed to the property in question. According to the articles of agreement, the R.E.I.C. was created as a separate entity in 1971 by units of government in Iowa County pursuant to Iowa Code ch. 28E. The quit claim deed shows that R.E.I.C. received title to the property for public purposes through an exercise of the power of eminent domain.

You indicate in your request that in July, 1989, the R.E.I.C. made an application for condemnation of real estate to expand the sanitary landfill under the eminent domain provisions of Iowa Code chapter 472. In August, 1989, the R.E.I.C. deposited the amount of the appraiser's valuation of the property with the Iowa County sheriff. The property owner appealed the condemnation proceedings and the land was subsequently transferred to the R.E.I.C. in November, 1991, pursuant to a settlement agreement. When the property was acquired by the R.E.I.C., the property taxes for the past two years were unpaid. Current fiscal year taxes have also not been paid.

Your first question concerns whether a sanitary landfill operated by a 28E entity made up of public agencies is exempt from property taxation in section 427.1(2). Section 427.1(2) provides:

The following classes of property shall not be taxed:

. . . .

2. The property of a *county*, township, *city*, school corporation, levee district, drainage district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit, except property of a municipally owned electric utility held under joint ownership and property of an electric power facility financed under chapter 28F which shall be subject to assessment and taxation under provisions of chapters 428 and 437.

(Emphasis added.) You indicated in your letter that R.E.I.C. is made up of cities in Iowa County as well as the county itself. Based on a reading of 427.1(2), it is apparent that the property could be exempt if the government units operated separate sanitary landfills. The question then is whether a 28E entity which is comprised entirely of section 427.1(2) government units is exempt from property taxes.

Statutes exempting property from taxation are construed strictly. *Atrium Village, Inc. v. Board of Review, Johnson County*, 417 N.W.2d 70, 72 (Iowa 1987). Doubts concerning exemption are resolved in favor of taxation. *Id.* The burden of proving exemption is on the party seeking exemption. *Id.* Exemption from property taxation under Iowa Code section 427.1(2) is subject to a three-part test[54] (1) municipal ownership of the property, (2) proof that the property is devoted to public use, and (3) proof that the property is not held for pecuniary profit. *City of Oskaloosa v. Board of Review of Oskaloosa*, No. 249/91-1160, slip op. at 5, (Iowa Sup. Ct. Oct. 21, 1992); *City of Osceola v. Board of Review of Clarke County*, No. 248/91-905, slip op. at 4-5, (Iowa Sup. Ct. Oct. 21, 1992); *Airport Bldg. Corp. v. Linn County Assessor*, 406 N.W.2d 806, 808 (Iowa App. 1987).

R.E.I.C. was created under Iowa Code chapter 28E through the joint exercise of powers by public agencies. "Counties and cities are 'public agencies' as that term is defined in Code §§ 28E.2". Op.Att'yGen. #91-9-2(L). A 28E entity created by joint action of public agencies is itself a public agency and political subdivision. *See Allis-Chalmers Corp. v. Emmett County Council*, 355 N.W.2d 586, 590 (Iowa 1984). *See also* Iowa Code § 28F.1 (joint entity of public agencies created to finance solid waste facilities is itself both a corporation and a political subdivision).

The purpose of Iowa Code chapter 28E is to permit state and local governments to make efficient use of their powers by enabling them to cooperate and provide joint services and facilities with other agencies. Iowa Code § 28E.1 (1991). A 28E entity comprised entirely of public agencies enjoys the same power, privilege and authority each individual public agency exercises or is capable of exercising. Iowa Code § 28E.3 (1991). Section 28E.3 provides the following regarding the joint exercise of powers by public agencies:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority. . . .

As previously indicated, the property would be exempt if the government units operated separate sanitary landfills. The effect of the 28E agreement is to create an entity which is an instrumentality of the county and cities. In *American College Testing Program, Inc. v. Forst*, 182 N.W.2d 826, 828 (Iowa 1970), the court found that a nonprofit organization which was only engaged in educational activities for educational purposes did not qualify as an educational institution entitled to exemption. The court noted, however, that an activity which would be exempt if performed by an exempt institution is also exempt when several qualifying institutions act in concert. Therefore, it is our judgment that a 28E entity which operates a sanitary landfill and is composed solely of section 427.1(2) exempt entities is exempt from property taxes.

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[54] For the purposes of this opinion, it is assumed that the property would be tax exempt under this test if the sanitary landfill would have been owned and operated by the county or by the cities.

Given the tax exempt status of the property under section 427.1(2), your second and third questions related to the R.E.I.C.'s liability for payment of the taxes, are combined. Your second question asks whether delinquent taxes must still be paid by R.E.I.C. pursuant to Iowa Code section 427.18. Your third question asks whether the delinquent property taxes can be abated under Iowa Code section 446.7.

Iowa Code section 427.18 (1991) provides:

> If property which may be exempt from taxation is acquired after July 1 by a person or the state or any of its political subdivisions, the exemption shall not be allowed for that fiscal year and the person or the state or any of its political subdivisions shall pay the property taxes levied against the property for that fiscal year, and payable in the following fiscal year. However, the seller and the purchaser may designate, by written agreement, the party responsible for payment of the property taxes due.

Iowa Code Supp. section 446.7 (1991) provides in pertinent part:

> When taxes are owing against parcels owned or claimed by a municipal or political subdivision of the state of Iowa, parcels held by a city or county agency . . ., or parcels of the state or its agencies, the treasurer shall give notice to the appropriate governing body which shall then pay the total amount due. If the governing body fails to pay the total amount due, the board of supervisors shall abate the total amount due.

Section 427.18 was enacted to preclude application of the property tax exemption provisions of section 427.1(2) in the first fiscal year of property acquisition. 1984 Op.Att'y.Gen 162, 166; Op.Att'y.Gen #80-1-19(L). When the R.E.I.C. acquired the property, delinquent and current fiscal year taxes were due. In a prior opinion to you, we stated:

> When a tax exempt governmental entity purchases or obtains property by condemnation, the tax liens are merged into the tax exempt status of the governmental entity and extinguished.
>
> There is no question that Iowa Code § 427.18 (1983) would apply to an outright purchase or land condemnation by a county government. The county would be liable for taxes during the first fiscal year of the county's acquisition by purchase or condemnation.

1984 Op.Att'y.Gen 162, 165. (Citations omitted.) In the situation presented, the property taxes for fiscal tax years prior to the year of acquisition are no longer owed upon acquisition by the R.E.I.C. because those liens were merged into the tax exempt status of that entity. Taxes that were levied against the property for the first fiscal year of the property acquisition are owed pursuant to section 427.18. However, section 446.7 operates to abate those taxes if R.E.I.C. fails to pay them. Op.Att'yGen. #81-1-12(L).

In summary, it is our opinion that property of a solid waste agency, which agency is created under Iowa Code chapter 28E and made up entirely of government units listed in section 427.1(2), is exempt from property taxes. Where the property is obtained through condemnation, Iowa Code section 427.18 is applicable and the solid waste agency is liable for property taxes for the fiscal year in which the property was acquired. Property taxes for prior years would be merged in the agency's tax exempt status. Under Iowa Code section 446.7, if after notice the agency fails to pay the taxes for the fiscal year of property acquisition, those taxes are required to be abated by the board of supervisors.

November 24, 1992

COUNTIES AND COUNTY OFFICERS: Interest on Tax Receipts. Iowa Code §§ 331.455(5), 441.16, 441.50, 453.7(2) (1991). Section 453.7(2) requires the county treasurer to credit the county general fund with interest earned on investment of receipts from the taxes levied for the assessment expense fund and special appraiser's fund. (Smith to Ollie, State Representative, 11-24-92) #92-11-5(L)

November 24, 1992

AGRICULTURE: Trusts. Iowa Code chapter 172C, §§ 172C.1(10), 172C.1(11), 172C.4, 172C.5(1), 172C.5(3)(a), 172C.5A, 172C.5A(3). The term "trust" as defined in Iowa Code section 172C.1(10) includes a revocable and irrevocable inter vivos trust. An inter vivos trust in which the trustee and beneficiary are the same person falls outside the statutory definition of trust. Therefore, such a trust is not subject to the restrictions and reporting requirements of chapter 172C. (Benton to Baxter, Secretary of State, 11-24-92) #92-11-6(L)

DECEMBER 1992

December 10, 1992

HEALTH; LABOR: Swimming pool and spa water heater inspections. 1992 Iowa Acts, ch. 1194, § 3; Iowa Code §§ 88.6(1), 89.3 (1991); Iowa Code Supp. § 135I.1 (1991). Senate File 2218, 1992 Iowa Acts, ch. 1194, completely removed the jurisdiction of the Division of Labor to inspect swimming pool and spa water heaters under chapter 89 (Boilers and Unfired Steam Pressure Vessels), but did not affect the division's authority to inspect swimming pools and spas for compliance with occupational safety and health standards under chapter 88. (Brauch to Meier, Labor Commissioner, 12-10-92) #92-12-1(L)

December 15, 1992

STATE OFFICERS AND EMPLOYEES: ETHICS: Sales; Lobbying. 1992 Iowa Acts, ch. 235. Iowa Code §§ 68B.3, 68B.4, 68B.5A, 68B.31 (1991). Effective January 1, 1993, section 68B.3 prohibits a sale of services, including architectural services, by an official to any state agency that is not competitively

bid. Negotiation cannot be defined as competitive bidding through rulemaking. Sales of goods or services by officials and state employees of the Department of Commerce to individuals, associations, or corporations subject to the regulatory authority of any agency within the Department must comply with the procedures for obtaining agency consent. Separate agencies within the umbrella of a regulatory agency may promulgate rules that designate sales which, as a class, do not constitute the sale of goods or services that affect an official's job duties or functions. Effective January 1, 1993, the spouse of an official or state employee will not be subject to the same limitations on sales of goods or services solely by virtue of this relationship. The limitations, moreover, will not extend either to a firm in which the official or employee is a partner or corporation of which the official or employee holds ten percent or more of the stock. The two-year ban on becoming a lobbyist would extend to a former official who is a certified public accountant engaging in paid advocacy for a client before a state agency but would not extend to the firm in which the certified public accountant is a member. When the statutory provisions go into effect, they apply to all officials serving terms at that time, regardless of when individual terms will expire following the effective date. Taking a leave of absence will not relieve officials from their obligations under the statutes. Despite a leave of absence, officials will retain their status as officials so long as they retain their appointment. Delegating authority to staff members on January 1, 1993, will not mitigate the impact of these provisions of law. (Pottorff to Thayer, Executive Secretary, Iowa Architectural Examining Board, 12-15-92) #92-12-2

K. Marie Thayer, Executive Secretary, Iowa Architectural Examining Board: You have recently asked our office for advice on behalf of the Architectural Examining Board concerning the application of House File 2466 which amended portions of chapter 68B that restrict transactions by officials and state employees with state agencies. You have included a list of numerous questions about application of §§ 68B.3 and 68B.4 to the business relationships of Board members.[55] These sections address the sale of goods or services by officials and state employees to state agencies. Specifically you inquire whether members of the Board will be able to continue to perform architectural services for state agencies in the absence of competitive bidding, whether certain negotiated procedures satisfy the competitive bidding requirement, how sales of services to other agencies within the Department of Commerce are affected, how sales of goods or services to state agencies by the spouse of a Board member are affected, whether these statutes will affect current Board members whose terms have not yet expired and whether Board members can avoid the impact of these statutes by taking leaves of absence or delegating duties to staff in anticipation of legislative amendments in 1993.

In a separate request you have asked additional questions on behalf of the Accountancy Examining Board concerning application of the provisions governing lobbyists to Board members who are certified public accountants (CPA's) and represent clients before the Department of Revenue and Finance.

[55] All citations are to the 1991 Iowa Code unless otherwise indicated. The section numbers in chapter 68B will alter when these sections are printed in the 1993 Iowa Code.

Specifically you inquire whether the two-year ban on becoming a lobbyist after termination of service prohibits CPA's from representing tax clients before the Department of Revenue and Finance and how this ban will affect the firms that employ these CPA Board members.

Because the issues that you raise are likely to recur with respect to other agencies throughout state government we have decided to respond in the form of an Attorney General's opinion. For the purpose of clarity and efficiency, the responses are consolidated.

SALES TO STATE AGENCIES

Chapter 68B currently prohibits an official or state employee from selling any goods having a value in excess of five hundred dollars to any state agency "unless the sale is made pursuant to an award or contract let after public notice and competitive bidding." Iowa Code §68B.3 (1991). House File 2466 amended §68B.3, *inter alia*, to include a sale of "services" in the scope of this prohibition. 1992 Iowa Acts, ch. 1228, §2. As a result, the sale of "services" will be subject to this prohibition on January 1, 1993. 1992 Iowa Acts, ch. 1228, §40.

Section 68B.3, as amended, appears clearly to prohibit a sale of services that is not made pursuant to public notice and competitive bidding. Effective January 1, 1993, section 68B.3 will state that "[a]n official, state employee. . . . shall not sell, in any one occurrence, any goods or services having a value in excess of five hundred dollars to any state agency unless the sale is made pursuant to an award or contract let after public notice and competitive bidding." 1992 Iowa Acts, ch. 1228, §2. Architectural service is the type of learned skill that would be encompassed in the term "service" in chapter 68B. *See* 1982 Op.Att'yGen. 496, 500. In the absence of competitive bidding, the sale of these services by officials will be prohibited. The term "official" will include Board members. Op.Att'yGen. #92-9-3.

The rules and procedures for negotiated contracts which you have forwarded to us for review do not appear to constitute a "public notice and competitive bidding" procedure. Words in a statute should be given their ordinary meaning unless defined differently by the legislature or possessed of a peculiar and appropriate meaning in law. *American Home Products v. Iowa State Board of Tax Review*, 302 N.W.2d 140, 143-44 (Iowa 1981). Public notice and competitive bidding, as the terms are ordinarily used, would typically include specific procedures for the issuance of requests for proposals, submission of bids on a competitive basis and review of bids after a closing date. 1980 Op.Att'yGen. 808. *See, e.g.*, 401 IAC 9.1 et seq. Substantial compliance with the specific procedures delineated is required by all bidders. *See, generally, Elview Construction Co. v. North Scott Community School District*, 373 N.W.2d 138 (Iowa 1985); *Scheckel v. Jackson County*, 467 N.W.2d 286 (Iowa App. 1991).

Ordinarily, the sale of professional services would not be subject to the public notice and competitive bidding process. Selection of professional services may turn on subjective elements which are not susceptible to formulation in the

bidding process. For this reason, selection of architectural service is more commonly made pursuant to the negotiated procedure that you have forwarded to us. The Department of Transportation rules which you have also forwarded to us, in fact, specifically exempt architectural and other professional services from the competitive bidding process. 761 IAC 20.3(3). The legislature, however, has now clearly expressed the intent to include services in the statutory requirement that competitive bidding precede sales by officials and state employees.

You suggest that the definition of "competitive bidding" could be modified by rulemaking. A state agency, however, cannot enact rules which contravene statutory provisions. *Iowa Auto Dealers Assoc. v. Iowa Department of Revenue*, 301 N.W.2d 760, 762 (Iowa 1981). The appropriate inquiry is whether a rational agency could conclude that a rule redefining "competitive bidding" is within its delegated authority. *See Histerote Homes, Inc. v. Riedeman*, 277 N.W.2d 911, 913 (Iowa 1979). In our view, a rule which attempted to impose a definition of competitive bidding that is plainly inconsistent with the ordinary meaning of the statutory language would be ultra vires. A legislative amendment, therefore, would be required.

SALES TO THOSE SUBJECT TO REGULATORY AUTHORITY

Section 68B.4 addresses sales of goods or services by officials and employees of regulatory agencies to individuals, associations, or corporations subject to the regulatory authority of that agency. These sales are prohibited except when specific statutory conditions are met.

You point out that the Department of Commerce is an umbrella agency which includes numerous professional licensing boards, the licensees of which are not connected to each other.[56] Under these circumstances, you inquire whether the restrictions of section 68B.4 only apply to a member of the Architectural Examining Board when dealing with persons regulated by that particular Board or whether the restrictions also apply to a member of the Board when dealing with any person regulated by any agency under the umbrella of the Department of Commerce.

The term "regulatory agency" is specifically defined in the act to include sixteen enumerated agencies, including the Department of Commerce. 1992 Iowa Acts, ch. 1228, § 1(20). This definition includes the entire Department and does not specify individual agencies within the Department as regulatory agencies. In light of this broad definition we would not advise the Board members to engage in sales of goods or services to persons regulated by any individual agency within the Department of Commerce without complying with the conditions set forth in the statute.

Compliance with the conditions set forth in the statute should not be a difficult task under the circumstances which you describe. Section 68B.4 currently requires that four conditions must precede a sale of goods or services by an

[56] The Department of Commerce includes six professional licensing boards as well as the Banking Division, the Credit Union Division, the Insurance Division, the Alcoholic Beverages Division and the Utilities Division.

official or employee of any regulatory agency to an individual, association or corporation subject to the regulatory authority of the agency:

> 1. Consent is obtained from the regulatory agency from an official or employee other than the person seeking consent;
>
> 2. The duties or functions performed by the person for the regulatory agency are not related to the regulatory authority of the agency over the individual, association, or corporation *or* the selling of goods or services by the person to the individuals, associations, or corporations or does not affect the person's duties or functions at the regulatory agency;
>
> 3. The selling of any goods or services by the person to an individual, association, or corporation does not include advocacy on behalf of the individual, association, or corporation to the regulatory agency in which the person is an official or employee; and
>
> 4. The selling of any goods or services by the person to an individual, association or corporation does not cause the person to sell goods or services to the regulatory agency on behalf of the individual, association, or corporation.

Iowa Code Supp. §68B.4(1)-(4) (1991). Each regulatory agency is required to promulgate rules specifying the method by which agency consent for the sales of goods or services by officials can be obtained. Iowa Code Supp. § 68B.4 (second unnumbered paragraph).

We have previously advised agencies that they may promulgate rules pursuant to §68B.4(2) that designate sales which, as a class, do not constitute the sale of goods or services that affect an official's job duties or functions. A sale of architectural services to an accountancy firm, for example, would not affect the job duties or functions of a member of the Architectural Examining Board. Sales of this service could be permitted to individuals, associations, or corporations subject to the regulatory authority of the Department of Commerce but not subject to the official's authority, therefore, so long as the other requirements of §68B.4 are met.

SALES BY SPOUSES

You question whether the restrictions on the sale of goods or services will similarly restrict spouses of Board members. Not all sections of chapter 68B will impact spouses of state officials and employees. The amended gift law prohibitions expressly apply to both a public official and that person's "immediate family member." 1992 Iowa Acts, ch. 1228, §9. The sections about which you inquire, by contrast, apply only to an official or state employee personally.

The lack of impact on spouses of the restrictions on sales of goods or services is due to repeal of specific language. A "catch-all" provision in chapter 68B that extended prohibitions against an official or employee equally to the spouse and minor children under the current statute has been repealed effective January 1, 1993, and has not been re-enacted. *See* Iowa Code §68B.2(13) (second

unnumbered paragraph) (1991). A spouse of an official or state employee, therefore, will not be subject to the same limitations on sales of goods or services solely by virtue of this relationship.

SALES BY FIRMS

The same "catch-all" provision that currently extends prohibitions against an official or employee to the spouse and minor children also extends the prohibitions to "a firm of which [an official or employee] is a partner and a corporation of which [an official or employee] holds ten percent or more of the stock either directly or indirectly. . . ." Iowa Code §68B.2(13) (second unnumbered paragraph) (1991). Because this section was repealed and not re-enacted, these prohibitions will not extend to a firm or corporation effective January 1, 1993.

Where restrictions on the sale of services is personal to the official or employee and does not extend to a firm in which the Board member is a partner, it may be possible to shield the Board member from the transaction and permit the firm to continue a business relationship with the State of Iowa. If this alternative is pursued, the Board member should, minimally, be financially insulated from the transaction so that the Board member does not share in any income to the firm from the State. Board members who wish to pursue this option should consult private counsel for the firm to make the necessary arrangements. If a spouse of an official or employee conducts business with the state, similar financial arrangements can be made to insulate the official or employee from the transaction.

LOBBYING BAN

You have inquired further about the effect of requirements governing lobbyists on members of the Accountancy Examining Board who are CPA's and who advocate for clients before the Department of Revenue. For those Board members who advocate for clients before state agencies the restrictions on lobbyists will present additional considerations. A "lobbyist" is defined to include a person who "is paid compensation for. . . influencing the decision . . . of a state agency. . . ." 1992 Iowa Acts, ch. 1228, §1(10)(a)(1). Although application of this provision is a factual question, the statute does appear to cover the paid advocacy of a CPA for a client before the Department of Revenue and Finance.

Our office has recently construed the plain language of section 68B.5A and opined that the ban on becoming a lobbyist which went into effect on July 1, 1992, applies to officials who held office on the effective date, triggers on termination of service and extends for two years. Op.Att'yGen. #92-9-3. A ban on becoming a lobbyist would, then, include engaging in paid advocacy for a client before a state agency.

Exceptions to the definition of "lobbyist" are of limited application in this situation. An exception exists for "a person who appears or communicates as a lawyer licensed to practice law in this state representing a client before any agency or in a contested case proceeding under chapter 17A." 1992 Iowa Acts, ch. 1228, §1(10)(b)(5). This exception, however, is limited to lawyers and does

not extend to CPA's. A separate exception does exist for "[p]ersons whose activities are limited to formal appearances to give testimony at. . . public hearings of state agencies and whose appearances as a result of testifying are recorded in the records of the. . . agency." 1992 Iowa Acts, ch. 1228, § 1(10)(b)(4). This exception may apply in narrow circumstances in which the advocacy is presented as testimony in a recorded public hearing.

Because the ban on an official becoming a lobbyist is personal and does not *per se* extend to a firm in which the CPA is a partner, only the affected Board members and not the entire firm would be subject to the two-year ban. Former Board members may consider shielding themselves from application of this statute as well as the statutes governing sales of goods and services. Only one who is "paid compensation" for "influencing"a state agency becomes a lobbyist under this definition. A former Board member can be shielded financially by declining compensation or taking steps to insure that any compensation is paid only to the firm and is financially segregated from any compensation paid by the firm to the former Board member. The former Board member would, of course, need to avoid engaging in conduct defined in the remaining alternative definitions of a lobbyist for the two-year period.[57]

EFFECTIVE DATES

The effective dates of these statutory provisions determine who is subject to the prohibitions. The two-year ban on lobbying became effective on July 1, 1992, and affects all officials who held office on or after the effective date. When statutory provisions addressing the sales of goods or services go into effect on January 1, 1993, these provisions will apply to all officials serving terms at that time, regardless of when individual terms will expire following the effective date. Taking a leave of absence will not relieve officials from their obligations under the statutes. Despite a leave of absence, officials will retain their status as officials as long as they retain their appointment to the Board. Delegating authority to staff members on January 1, 1993, therefore, will not mitigate the impact of these provisions of law.

In summary it is our opinion that:

1. Effective January 1, 1993, §68B.3 prohibits a sale of services, including architectural services, to any state agency that is not competitively bid. Negotiation cannot be defined as competitive bidding through rulemaking.

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[57] A person may also become a lobbyist by representing "on a regular basis an organization which has as one of its purposes the encouragement of the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or any statewide elected official" or by being a "federal, state, or local government official or employee who represents the official position of the official or employee's agency and who encourages the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or the office of the governor." 1992 Iowa Acts, ch. 1228, § 1(10).

2. Sales of goods or services by officials and state employees of the Department of Commerce to individuals, associations, or corporations subject to the regulatory authority of any agency within the Department must comply with the procedures for obtaining agency consent. Separate agencies within the umbrella of a regulatory agency may promulgate rules that designate sales which, as a class, do not constitute the sale of goods or services that affect an official's job duties or functions.

3. Effective January 1, 1993, the spouse of an official or state employee will not be subject to the same limitations on sales of goods or services solely by virtue of this relationship. The limitations, moreover, will not extend either to a firm in which the official or employee is a partner or corporation of which the official or employee holds ten percent or more of the stock.

4. The two-year ban on becoming a lobbyist would extend to a former official who is a certified public accountant engaging in paid advocacy for a client before a state agency but would not extend to the firm in which the certified public accountant is a member.

5. When the statutory provisions go into effect, they apply to all officials serving terms at that time, regardless of when individual terms will expire following the effective date. Taking a leave of absence will not relieve officials from their obligations under the statutes. Despite a leave of absence, officials will retain their status as officials so long as they retain their appointment. Delegating authority to staff members on January 1, 1993, will not mitigate the impact of these provisions of law.

December 31, 1992

TAXATION: Nonreimbursement Of Tax Sale Certificate Issuance Fee Upon Redemption. Iowa Code Supp. §§ 331.552, 447.1 and 447.13 (1991). County treasurers are not authorized to include the ten dollar tax sale certificate issuance fee imposed by section 331.552 as part of the amount redeemers are required to pay in order to redeem a parcel under section 447.1. (Hardy to Ricklefs, Jones County Attorney, 12-31-92) #92-12-3(L)

December 31, 1992

GIFTS; LOBBYISTS; STATE OFFICIALS AND EMPLOYEES: Definition of lobbyist. Iowa Code §§ 68B.2(6)(a)(3), (4); 68B.2(10)(a)(1), (2), (3); 68B.2(15), 68B.5A, 68B.22, 68B.31(4)(b) (1991); 1992 Iowa Acts, ch. 1228. Chapter 68B (as amended in 1992) contains many restrictions on lobbyists and their relationship to public officials and employees. The definition of lobbyist as a person who represents on a regular basis certain organizations does not include the organization itself but instead includes those who actively engage in lobbying activities as the organization's representative. The word "represents" as used in two of the three definitions of lobbyist means one who is authorized to speak or act on behalf of another. A person who represents an organization on a regular basis is one who is authorized to act on behalf of the organization on an on-going basis, and not simply one who speaks on the organization's behalf on a temporary or sporadic basis.

> Officers, employees, or agents who are delegated authority to act on the organization's behalf before the government body in question are lobbyists.

An organization which has lobbyists is not itself *per se* a lobbyist but may not provide gifts to officials or employees if the organization will be directly and substantially affected financially by performance of the official's or employee's official duties more than a substantial class of persons to which the organization belongs as a member of a business or geographic region. Local chambers of commerce may sponsor a legislative reception if those organizations will not be affected more by the legislators' actions than is true of businesses generally within the geographic area in question. However, the organization's legislative lobbyists cannot sponsor a reception, either directly or indirectly, at which a legislator is given food or drink worth more than $ 2.99. (Osenbaugh to Wise, State Representative, 12-31-92) #92-12-4

The Honorable Philip Wise, State Representative: We have received your request for an opinion concerning the definition of lobbyist in the 1992 amendments to chapter 68B, governing the ethics of public officials and employees.

The new law restricts lobbyists in a number of ways. It prohibits gifts by them to public officials and employees whose agencies they lobby, prohibits them from making loans to any state officials and employees, requires them to report their campaign contributions, prohibits them from making campaign contributions during the legislative session, and requires their clients to report all lobbying expenditures. Additionally, lobbyists are subject to a complaint procedure and sanctions, including suspension or termination of lobbying privileges. Iowa Code § 68B.31.

The 1992 amendments also expanded the definition of lobbying beyond the legislative arena to include activities seeking to influence executive action. Iowa Code section 68B.2(10)(a) defines lobbyist in three ways. The first is a person who is paid compensation to encourage legislative action or to influence a decision of a legislator, state agency, or any statewide elected official. § 68B.2(10)(1). The third definition is a government official or employee who engages in these activities while representing the official position of the agency in which employed. § 68B.2(10)(3). The second definition is at issue here.

That provision, Iowa Code section 68B.2(10)(a)(2), provides that a "lobbyist" includes a person that:

> Represents on a regular basis an organization which has as one of its purposes the encouragement of the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or any statewide elected official.

You ask us to further define what activities will be sufficient to meet this test and thus define which members of an organization will be treated as lobbyists under this statute. The ethics committees of each house of the general assembly has authority to adopt rules regarding lobbyists and lobbying

activities. 1992 Iowa Acts, ch. 1228 (House File 2466), §13(4)(b); Iowa Code §68B.31(4)(b) (1991). That rulemaking authority includes the power to define the behavior that fits within the statutory prohibition. Cf. *Histerote Homes, Inc. v. Riedmann*, 277 N.W.2d 911, 913 (Iowa 1979) (administrative agency rules); *see also* Iowa Const. art. III, §9.

At the outset we need to clarify the scope of our authority in the opinion process. This office is not delegated rulemaking authority to make policy in the application of the statute. In issuing an Attorney General's opinion, this office applies the same tests which a court would use in statutory construction. Thus we must construe the statute as written and cannot re-write the statute to conform to our views concerning wise public policy.

Our opinion can only address those matters which may be determined as a matter of law. Ultimately, application of these statutory criteria to specific facts requires adjudication, either through the complaint processes in the Act or by criminal prosecutions. The function of an opinion is to decide a specific question of law or statutory construction; it cannot resolve issues which are dependent upon factual matters. 1972 Op.Att'yGen. 686. Thus, we cannot precisely define what behavior might later be found to constitute lobbying. We can, however, provide legal guidance concerning how the terms of the statute should be construed. With this clarification in mind, we proceed to address your questions.

The first question is whether the entire organization must be treated as a lobbyist or whether the definition of a lobbyist includes only that person representing the organization.

It is evident from the sentence structure that the legislature did not intend to define as a lobbyist any organization that "has as one of its purposes the encouragement of the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the general assembly, a state agency, or any statewide elected official." A statute should be construed so as not to render any part of it superfluous. *Iowa Auto Dealers Association v. Iowa Department of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981). A lobbyist is specifically defined to include only "a person who represents on a regular basis" such an organization. If the legislature had intended the entire organization to be defined as a lobbyist, reference to "a person who represents" the organization would be meaningless. In order to give effect to the statutory phrase "a person who represents" an organization, therefore, it must be the representative of the organization, not the entire organization itself, that is a lobbyist.

We point out that the term "person" in this context is not limited to an individual. The definition of "person"encompasses firms and entities other than individuals. Iowa Code §68B.2(15). It would be a factual issue whether an individual or an entire firm was the representative of the organization in these activities, and thus the lobbyist. *See* Op.Att'yGen. # 92-12-2 (official can segregate self from rest of firm for purpose of two-year lobbying ban).

The three definitions of lobbyist all differentiate between the individual and the client the individual represents. For example, section 68B.2(10)(a)(1) defines as a lobbyist a person who is paid compensation, and not the person paying compensation for lobbying. Similarly, the third subsection includes the government official or employee who represents the official's or employee's agency, and not the agency itself, as the lobbyist. The legislature also differentiated between lobbyists and lobbyists' clients in imposing reporting requirements in sections 18 and 19 of the Act. Iowa Code §§ 68B.37, 68B.38. We also understand that the definitions of lobbyist were taken from prior House and Senate rules and that under past practice only the individual engaging in lobbying activities, and not the organization or client entity, registered as a lobbyist.

One becomes a lobbyist by engaging in specific conduct. For example, there is a two-year ban on "becom[ing] a lobbyist." H.F. 2466, § 5; Iowa Code § 68B.5A, as amended. "All lobbyists shall, on or before the day their lobbying activity begins, register . . . ." H.F. 2466, § 18; Iowa Code § 68B.36. As one becomes a lobbyist only by engaging in lobbying activity, the simple fact that an organization has as a purpose influencing governmental action would not make the entity a lobbyist. We conclude the second definition of lobbyist is intended to include a person who actively represents the organization in seeking to influence governmental action.

While it may seem anomalous that the representative but not the client is barred from providing gifts to public officials, defining lobbyist to include the client organization would make the law very broad. This is suggested by your question as to whether all members of the organization must register. The statute prohibits all lobbyists from making loans to any state employee or official. H.F. 2466, § 11; Iowa Code § 68B.24. If the organization and all of its members is a lobbyist, the Iowa Bankers Association or member banks would be barred from making loans to state employees because it hires a lobbyist. If possible, statutes should be construed to avoid illogical results. *Richmond v. State*, 464 N.W.2d 125 (Iowa 1990).

It is next necessary to define the phrase "a person who represents on a regular basis an organization . . . ." Words are given their ordinary meaning unless defined by the legislature or possessed of a particular and appropriate meaning in the law. *Good v. Iowa Civil Rights Commission*, 368 N.W.2d 151, 155 (Iowa 1985). Further, the meaning of a statute may be determined by reference to similar statutes. *State v. Williams*, 315 N.W.2d 45, 49-50 (Iowa 1982).

The term "represent" is defined in Black's Law Dictionary (6th ed.), p. 1301, as follows: "To represent a person is to stand in his place; to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent." "Represent" is frequently defined as "to speak or act with authority on behalf of another." 37 Words & Phrases 34-35. The Uniform Commercial Code defines a "representative" similarly to include an agent, officer, trustee, or "any other person empowered to act for another." Iowa Code § 554.1201(35). Thus, we would construe the term "represents" as one who has authority to act on behalf of the organization in seeking to influence legislative or executive

action. This could be an officer or employee of the organization or any other agent delegated this authority.

The representation must also be "on a regular basis." In Op.Att'yGen. # 92-9-3, p. 5, we opined that this would encompass representation that is not limited to a single occasion. We noted that the term "regular" is commonly defined to mean "recurring or functioning at fixed or uniform intervals." *Webster's New Collegiate Dictionary* at 966 (2nd ed. 1974). Black's Law Dictionary similarly defines "regular" as: "[s]teady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation . . . Made according to rule, duly authorized . . . Antonym of 'casual' or 'occasional.'" (p. 1285).

Combining the definitions of "represents" and "regular" leads to the conclusion one who represents an organization on a regular basis is one who is authorized to represent the organization before the governmental bodies on a recurring, and not temporary, basis. This definition excludes those who are not authorized to speak for, and bind, the organization. It also excludes those who only act on the organization's behalf on an occasional basis.

You ask specifically about a local chamber of commerce which has a legislative affairs committee which periodically contacts the legislators who represent that area to support or oppose particular legislation. The committee also asks chamber members to write or contact legislators. The committee makes one trip a year to Des Moines to "actively lobby" the legislators from the area. You question who are lobbyists — the chamber, the legislative affairs committee members, each member of the chamber, or only their paid lobbyist.

The paid lobbyist is clearly a lobbyist under subsection one. § 68B.2(10)(a)(1). The legislative affairs committee members appear to have been delegated authority to speak on behalf of the chamber on legislative issues and are doing so on a recurring or "regular basis." Thus, under this set of facts, those members appear to meet the second definition of lobbyist. The organization is not itself a lobbyist, as discussed above. Members who may write a legislator upon request by the chamber do not appear to meet the "regular basis" test and are not likely to be considered to be lobbyists.[58]

You also ask whether a number of chambers of commerce may co-sponsor a legislative dinner or banquet, such as a "Southeast Iowa Night," or whether the gift law would prohibit legislators from accepting more than $ 2.99 in food. Because the chamber is not itself a lobbyist, it is not per se a prohibited donor under Iowa Code section 68B.2(6)(a)(4) and section nine of the bill, Iowa Code § 68B.22.

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[58] The legislative ethics committee may wish to consider rules which draw clear lines to distinguish those who contact only their own legislators as part of an organization's "phone tree" and those who are specially designated to regularly represent the organization in legislative matters. We cannot engage in that type of rule-making in an opinion, but can only clarify the tests to be applied.

However, a gift of over $ 2.99 in food would still be prohibited if the chambers "[w]ill be directly and substantially affected *financially* by the performance or nonperformance of the donee's official duty in a way that is greater than the effect on the public generally *or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry, or region.*" The underlined language was added in the 1992 amendments. § 68B.2(6)(a)(3). (Emphasis added). If, however, the chambers' financial gain from legislative action would be the same as businesses generally in southeast Iowa, it would appear that the chambers could provide these benefits because of the exception contained in the added language. The chambers' lobbyists, however, may not provide the reception either directly or indirectly. H.F. 2466, § 9; Iowa Code § 68B.22.

Your question concerning the constitutionality of the lobbying registration and reporting requirements as applied to non-paid lobbyists will be addressed in a separate opinion which will consider the constitutional issues raised by the bill.

In conclusion, chapter 68B contains many restrictions on lobbyists and their relationship to public officials and employees. The definition of lobbyist as a person who represents on a regular basis certain organizations does not include the organization itself. The word "represents" as used in two of the three definitions of lobbyist means one who is authorized to speak or act on behalf of another. A person who represents an organization on a regular basis is one who is authorized to act on behalf of the organization on an on-going basis, and not simply one who speaks on the organization's behalf on a temporary or sporadic basis. Officers, employees, or agents who are delegated authority to act on the organization's behalf before the government body in question are lobbyists.

An organization which has lobbyists is not itself *per se* a lobbyist but may not provide gifts to officials or employees if the organization will be directly and substantially affected financially by performance of the official's or employee's official duties more than a substantial class of persons to which the organization belongs as a member of a business or geographic region. Local chambers of commerce may sponsor a legislative reception if those organizations will not be affected more by the legislators' actions than is true of businesses generally within the geographic area in question. However, the organization's legislative lobbyists cannot sponsor a reception, either directly or indirectly, at which a legislator is given food or drink worth more than $ 2.99.

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