Counties. Farm exemption from zoning and building codes, Iowa Const. art. III, § 39A; Iowa Code §§ 331.301(4), 331.301(5), 331.304(3)(b), 331.304(6), 335.2, 335.3, 335.4, 335.27, 335.30, 352.6, 414.23 (1995). A county may not conclusively utilize an objective minimum acreage test to define a "farm" for purposes of exempting (1) "land," "farm houses," "farm barns," and "farm outbuildings" from county zoning under Iowa Code section 335.2 and (2) "farm houses" and "farm buildings" from county building codes under Iowa Code section 331.304(3)(b). Counties must make a determination whether property is actually used for agricultural purposes, and in the case of a farm house, whether occupants are engaged in agriculture on the land where the house is located. Counties cannot deny farm exemption for a manufactured home solely because it is a manufactured home and not a site built, single family dwelling. The farm exemption ends when land is put to non-agricultural uses (like placement of "junk" cars) and counties may regulate those non-agricultural uses. (Tabor to Fink, State Senator, 1-17-97) #97-1-1(L)

January 17, 1997

The Honorable William Fink
State Senator
379 S-23 Hwy.
Carlisle, IA 50047

Dear Senator Fink:

You have requested our opinion on several issues concerning the exemption of farm houses and farm buildings from county zoning and building code regulation.

1. **Questions Posed.** We understand the crux of your inquiry to be whether a county may adopt an objective definition of a "farm" as any twenty acres or more of land that is zoned agricultural and conclusively utilize such definition to interpret the terms

a. "farm houses," "farm barns," and "farm outbuildings" contained in Iowa Code section 335.2 (1995), which deals with exemptions from county zoning,[1]

b. "land" contained in section 335.2, with respect to restrictions on the placement of "junk" cars, and

c. "farm houses" and "farm buildings" contained in Iowa Code section 331.304(3)(b) (1995), which deals with exemptions from county building codes.

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[1]Your letter asks about the exemption of "farm buildings" from county zoning. Section 335.2 includes the terms "farm barns" and "farm outbuildings." We assume that such terms encompass the types of buildings which you refer to as "farm buildings."

2. County Zoning.

a. General Rules. Counties are authorized to enact zoning regulations under the county home rule implementation provisions of Iowa Code chapter 331. Thompson v. Hancock County, 539 N.W.2d 181, 183 (Iowa 1994). Section 331.304(6) of such chapter, in turn, provides that "[t]he power to adopt county zoning regulations shall be exercised in accordance with chapter 335." Id.

Iowa Code chapter 335 governs county zoning. Section 335.3 describes broad powers of county boards of supervisors to adopt ordinances regulating property within counties, but lying outside of the corporate limits of any city. Section 335.4 describes the authority of boards of supervisors to divide counties into districts in order to implement such powers.[2] Under these provisions, counties may impose regulations of the type you mention in your letter, namely, restrictions on the number of houses which may be constructed on property, restrictions as to minimum lot sizes for houses, restrictions on the size of residences, and requirements for building permits for houses and buildings.

However, such powers are specifically made subject to section 335.2 which states:

> Except to the extent required to implement section 335.27, no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are

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[2] Section 335.4 states:

> For any and all of said purposes the board of supervisors may divide the county, or any area or areas within the county, into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations and restrictions shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

> primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used. However, the ordinances may apply to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream.[3]

The term "farm houses," "farm barns," and "farm outbuildings" as used in section 335.2 are not defined. When statutory terms are undefined, they have common meanings. See Iowa Code § 4.1 (38); 1976 Op. Att'y Gen. 301, 303. Counties must interpret these terms when exercising their zoning power. "Counties . . . are granted home rule power and authority not inconsistent with the laws of the general assembly, to determine their local affairs and government. . . ." Iowa Const. art. III, § 39A. In turn, section 331.301(4), which is part of the county home rule implementation chapter, states "[a]n exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law."

The question, thus, is whether a county zoning ordinance which objectively defines a farm as any twenty or more acres of land zoned agricultural and deems all houses, barns, or outbuildings on such farm to be "farm houses," "farm barns," or "farm outbuildings," respectively, under section 335.2 is irreconcilable with such section. It is our opinion that such an ordinance is irreconcilable with state law.[4]

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[3]It should be noted that the exception clause which begins section 335.2 applies if a county adopts an agricultural land preservation ordinance under chapter 335 which subjects farmland to the same use restrictions provided in Iowa Code section 352.6 for agricultural areas. See Iowa Code § 335.27 (1995). It is our understanding that the county which is the subject of your questions has not adopted an agricultural land preservation ordinance and, thus, the effect of the exception clause is not addressed here.

[4]From the outset, we note that many counties have used minimum acreage requirements to define "farm" for purposes of the exemption in section 335.2. See Hamilton, Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa, 31 Drake L. Rev. 565, 576-578 (1981) [hereinafter Freedom to Farm!] Professor Hamilton suggests two reasons for this: the ease of applying objective standards and the goal of preserving farmland by increasing acquisition costs. Id. at 576.

Our first consideration is the language of section 335.2 itself. It is our view that the legislature intended the phrase "which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used" to modify not only "other buildings or structures" but also the terms "land," "farm houses," "farm barns," and "farm outbuildings." Although this may seem redundant with the modifier "farm" preceding "houses," "barns," and "outbuildings," this sentence construction is necessary so that the term "land" is properly qualified as land used for agricultural purposes. Moreover, section 331.304(3)(b), which is quoted below in part 3 and provides a farm exemption from county building codes, contains such phrase notwithstanding the fact that the only terms modified are "farm houses" and "other farm buildings." See generally Iowa Code § 4.6 (statutory construction may involve consideration of statutes on same subject). Finally, in Iowa Code section 414.23, which applies the farm exemption of section 335.2 to zoning carried out by cities within the two-mile extraterritorial zone, the exemption is described in generalized terms as applying to "property used for agricultural purposes."

Therefore, we conclude from the statutory language that the legislature intended farm houses, farm barns, and farm outbuildings to qualify for the exemption in section 335.2 if actually used primarily for agricultural purposes.

This interpretation is consistent with the conclusion reached by the Attorney General in a 1953 opinion. 1954 Op. Att'y Gen. 96. The issue in that opinion was

> [w]hether or not a certain number of acres of land shall constitute a farm within the meaning of [Iowa Code section 358A.2, the predecessor to section 335.2] or whether the provision in that Code section which states "for use for agricultural purposes as a primary means of livelihood, while so used" shall govern what is intended as a farm under the provisions of said Code section. . . .[5]

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[5]The original language of the exemption in section 335.2 read:

> No regulation or ordinance adopted under the provisions of this Act, shall be construed to apply to land, farm houses, farm barns, farm outbuildings or other buildings, structures or erections which are adapted by reason of nature and area for use for agricultural

The Attorney General concluded that qualification for the exemption "is determined by the facts as to whether the land is used for agricultural purposes as a primary means of livelihood and not by the area of land with certain boundaries designated as a farm." Id. at 98 (emphasis added). In commenting on this opinion, Professor Hamilton has written,

> [T]he effect of the opinion was that [a county] could not establish a minimum acreage requirement to determine which farms may qualify for the exemption; rather, the focus had to be on the use of the land. The ruling is significant in that it means that qualifying for the exemption cannot be established by an objective test (e.g., 20 acres or 100 cows), rather it must be based on a factual analysis of the use of the land.

Freedom to Farm!, 31 Drake L. Rev. at 567.

The Iowa Supreme Court has not yet faced the issue whether a minimum acreage standard may be used by counties to interpret the terms "land," "farm houses," "farm barns," or "farm outbuildings" in section 335.2. We note that at least one Iowa district court has dealt with the issue. Id. at 580. In State v. Anders, No. 6223, Crim. (Warren County Dist. Ct. Aug. 31, 1979), the court set aside the conviction of a defendant who failed to obtain a building permit prior to constructing a structure, as required by county zoning ordinances for buildings on acreages of less than forty acres. The parties had stipulated that the defendant's property, consisting of thirty-five contiguous acres, was currently being farmed in its entirety with the exception of the structure in question, the farm house. Citing section 358A.2 (the predecessor to section 335.2) the court found that, regardless of the number of acres involved, the defendant's property was being used primarily for agricultural purposes and was exempt from the permit requirements. Id. at 2.

In County of Lake v. Cushman, 353 N.E. 2d 399 (Ill. App. 1976), the Appellate Court of Illinois faced the issue whether counties may use minimum area tests to define "agriculture

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> purposes as a primary means of livelihood, while so used.

1947 Iowa Acts, ch. 184, § 2 (emphasis added).

The "primary livelihood" test was removed by the legislature in 1963. 1963 Iowa Acts, ch. 218, § 2.

purposes" when applying exemptions from county zoning. Illinois law exempted land and buildings used for "agricultural purposes" from county zoning (except setback requirements). Lake County had an ordinance that required a minimum 200,000 square feet (about 4.6 acres) to be used for agricultural purposes in order to qualify for the zoning exemption. Cushman wanted to build a poultry hatchery on 3.9 acres of land and was denied a construction permit. The court held that the county had exceeded its authority and that the legislature had intended the exemption to be based on the use of the land, not on the amount of land involved. Id. at 401. The court went on to hold that the poultry hatchery was an agricultural purpose qualifying for the exemption. Id. at 401-405.

b. Exemption for "Land," "Farm Barns," and "Farm Outbuildings." Having concluded that counties must make a factual determination, for purposes of the exemption in section 335.2, whether "land," "farm barns," or "farm outbuildings" are actually being used primarily for "agricultural purposes," the question arises, what criteria may counties utilize for this evaluation? The Iowa Supreme Court recently discussed this issue in Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996) where the court held that buildings and structures related to a hog confinement operation were "buildings or structures" exempt from county zoning. The court said

> We believe that a fair reading of the words "for use for agricultural purposes" read in the context of the act [chapter 335] refers to the functional aspects of buildings and other structures, existing or proposed. The qualifying words "primarily adapted by reason of nature and area" also refer to the proposed structures and the site on which they are located . . . . [I]n determining what uses are for agricultural purposes we view agriculture as the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock.

Id. at 6.

Cases decided by the Iowa Supreme Court prior to Kuehl provide additional guidance as to what qualifies as an "agricultural purpose." See Helmke v. Bd. of Adjustment, 418 N.W.2d 346, 351-352 (Iowa 1988) (facility constructed by coop to store grain of member-farmers is "part of farming continuum" and exempt under section 358A.2, the predecessor to section 335.2); DeCoster v. Franklin Co., 497 N.W.2d 849, 853 (Iowa 1993) (waste

storage basin adjoining hog confinement building part of agricultural function held exempt under section 358A.2); Thompson v. Hancock Co., 539 N.W.2d 181, 183 (Iowa 1995) (hog confinement facilities which were part of "evolving agricultural functions associated with a particular farming operation" held exempt under section 335.2).[6]

Based on these authorities, counties must establish reasonable criteria to evaluate the function of the "land," "farm barns," or "farm outbuildings" involved, the nature of such property, and the area where such property is located, in order to determine whether the property is used for agricultural purposes and exempt under section 335.2.

While we have concluded an objective minimum acreage test cannot be determinative in this regard, the acreage of the farm involved certainly may be a relevant factor. Indeed, for purposes of administrative ease in determining the actual use of property, we believe it is permissible for a county to adopt an ordinance that (1) presumes that small tracts of land (and buildings on that land) are not used primarily for "agricultural purposes" and (2) allows the person involved to challenge that presumption by providing additional information to the county concerning the actual use of the property for "agricultural purposes."

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[6]For cases from other jurisdictions discussing definitions of the terms "agricultural purposes," "agriculture," "farming," and "farm," see County of Dekalb v. Vidmar, 622 N.E.2d 77 (Ill. 1993) (mobile home inhabited by individuals engaged in full-time business of raising animals for petting zoo and growing alfalfa for such animals held to be an "agricultural purpose" exempt from county zoning under Illinois law); Blauvelt v. County Comm'rs, 605 P.2d 132 (Kan. 1980) (house of farmer who owned and intended to farm 40 acres of land, on which the house was located, held to be an "agricultural purpose" exempt from county zoning under Kansas law); Corbet v. Shawnee County Comm'rs, 783 P.2d 1310 (Kan. 1989) (under legislative policy favoring agricultural uses as well as liberal construction given zoning ordinances to favor property owners, commercial wildlife preserve with primary uses being hunting and fishing was held to be an "agricultural purpose" exempt from county zoning under Kansas law); see also 5 E. Ziegler, Rathkopf's The Law of Zoning & Planning § 61.02 (4th ed. 1996); 3 American Law of Zoning 3d § 17.08 (1986); 101A C.J.S. Zoning & Land Planning § 129 (1979); Annot., Zoning-Farming or Agricultural Uses, 97 A.L.R.2d 702 (1964); 3 Am. Jur. 2d Agriculture § 1; 83 Am. Jur. 2d Zoning & Planning § 390 (1992); 16 Words & Phrases 390-398, 420-425 (1959).

c. Exemption for "Farm Houses." The analysis in point (b) with respect to "land," "farm barns," and "farm outbuildings" applies similarly to the determination by counties whether "farm houses" qualify for the exemption under section 335.2. However, it is our view that in the case of "farm houses," counties must also consider characteristics of the users of the property, i.e. the occupants of the farm house.

When statutory terms are undefined, they have common meanings. See Iowa Code § 4.1(38); 1976 Op. Att'y Gen. 301, 303. Webster defines "farmhouse" as "a house on a farm; the residence of a farmer." Webster's New Universal Unabridged Dictionary 664 (2nd ed. 1983). This definition leads us to conclude that farm houses are only exempt under section 335.2 if the individuals inhabiting the houses are engaged in agriculture on the land where the houses are located.

When the legislature was considering county zoning legislation in 1947, the version of the legislation originally passed by the House of Representatives included an explanation stating that the bill was "intended as a protection for the farmer and his investment in his land, which must be impaired if undesirable neighborhoods grow up around it." House File 426, 52nd G.A., 1st Sess. (Iowa 1947) (emphasis added), quoted in Note, County Zoning in Iowa, 45 Iowa L. Rev. 743, 754 (1960). The exemption was granted to farmers as "a political trade-off obtained by farm leaders before passage of county zoning was possible." Freedom to Farm!, 31 Drake L. Rev. at 573.[7]

Moreover, we believe the 1963 amendment to the farm house exemption, ante, note 5, which removed the "primary livelihood" test, implies a legislative intent to eliminate the requirement that, to qualify for the exemption, an individual be engaged in

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[7]Kansas has a farm exemption from county zoning similar to that found in section 335.2. See Kan. Stat. Ann. § 19-2921 (1995). In Blauvert v. County Comm'rs of Leavenworth County, 605 P.2d 132 (Kan. 1980), the Supreme Court of Kansas held that a house, which was occupied by a farmer who owned and intended to farm 40 acres of land, qualified for an exemption from county zoning as an "agricultural purpose." In language which would seem to apply to Iowa as well, the court said "the obvious purpose of the proviso in [Kan. Stat. Ann. § 19-2921] was to favor agricultural uses and farmers. Since this state's economy is based largely on the family farm it would appear the intent of the legislature was to spare the farmer from more governmental regulation and not to discourage the development of this state's farm industry." Id. at 135.

commercial agriculture as a primary source of income. "The effect of the amendment was to make the exemption available to smaller agricultural enterprises that might not have met a primary means of livelihood test, thereby broadening the exemption." Freedom to Farm!, 31 Drake L. Rev. at 567.

Counties in good faith must set reasonable objective criteria for applying the farm house exemption of section 335.2 to particular situations. The criteria should achieve the objectives of county zoning as set out in Iowa Code section 335.5 (1995) and reflect the realities of modern agriculture. See Freedom to Farm!, 31 Drake L. Rev. at 583-584.[8]

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[8]The term "farmer" has been defined in various ways. However, most definitions incorporate the notion that farmers are engaged in farming as a business or occupation. Webster defines "farmer" as "one who earns his living by farming; one who cultivates a farm, whether a tenant or the proprietor; a husbandman; an agriculturalist; one who tills the soil." Webster's New Universal Unabridged Dictionary 664 (2nd ed. 1983).

Black defines "farmer" as "[a] cultivator; a husbandman; an agriculturalist; one engaged in agricultural pursuits as a livelihood or business." Black's Law Dictionary 606 (6th ed. 1990). Further, Black's definition of the verb "farm" is "[t]o carry on business or occupation of farming." Id.

Another definition of "farmer" is "[t]he farmer is always a practitioner; the agriculturalist may be a mere theorist; the farmer follows husbandry solely as a means of living . . . ." Crabb's English Synonyms 341 (1917).

Courts in other jurisdictions have dealt with the issue of who is a "farmer." See County of Kendall v. Husler, 358 N.E.2d 1337 (Ill. 1977) (for purposes of county zoning ordinance which allowed mobile homes on agricultural property if occupant was substantially engaged in agriculture, occupant/landowner was held to be substantially engaged in agriculture, notwithstanding the fact the farm was farmed by custom farmers and the occupant/landowner was employed in town, because he received certain proceeds from such custom farming, he paid for or authorized certain farm purchases, and he was involved in certain farm management decisions); Holland v. Leonard, 504 N.Y.S.2d 792 (1986) (land was a "farm" for purposes of county zoning ordinance, which exempted mobile homes on farms from regulation, notwithstanding the fact that owner of the land rented it to others to do the farming); Kenagy v. Benton County, 838 P.2d 1076 (Or. App. 1992) (person held to be a "farm operator" for purposes

In addition to setting criteria, counties can set procedures for administering such criteria under Iowa Code section 331.301(5) (1995) which states:

> A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. If a procedure is not established by state law, a county may determine its own procedure for exercising the power.[9]

d. "Manufactured Homes." Your letter includes a question about the application of county zoning regulations to a "mobile home." We assume that you are referring to a "manufactured home" which is defined in Iowa Code section 335.30, for purposes of county zoning, as

> a factory-built structure, which is manufactured or constructed under the authority of 42 U.S.C. § 5403 and is to be used as a place for human habitation, but which is not constructed or equipped with a permanent hitch or other device allowing it to be moved other than for the purpose of

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of Oregon law permitting residences in exclusive farm zones); see also 16 Words & Phrases 401-408 (1959); 2 E. Ziegler, Rathkopf's The Law of Planning & Zoning § 23.08(20) (4th ed. 1996).

[9]Without making any endorsement, we note that at least one county, Story County, has established a set of performance based criteria and an administrative review procedure to define a "farm" for purposes of applying the exemption in section 335.2. Telephone interview with Les Beck, Director, Story County Planning and Zoning, August 16, 1996. Story County requires an applicant for the exemption to fill out an information sheet with questions relating to (1) crops, livestock, and other farm products produced (including the percentage for commercial production), (2) other types of agriculturally related activities on the farm, (3) type of farm management, (4) participation in farm and conservation programs, and (5) other relevant factors. When this data is evaluated, the county also considers how the land is assessed for property tax purposes and the viability of the land for agricultural purposes. Id.

> moving to a permanent site, and which does not have permanently attached to its body or frame any wheels or axles.

Your question deals with county zoning restrictions on the size and shape of manufactured homes. Section 335.30 states

> A county shall not adopt or enforce zoning regulations or other ordinances which disallow the plans and specifications of a proposed residential structure solely because the proposed structure is a manufactured home. However, a zoning ordinance or regulation shall require that a manufactured home be located and installed according to the same standards, including but not limited to, a permanent foundation system, set-back, and minimum square footage which would apply to a site-built, single family dwelling on the same lot. . . .

Under this provision, if a site-built, single family dwelling is exempt from standards (including size and shape restrictions) under the "farm house" exemptions of section 335.2 and section 331.304(3)(b), then a manufactured home located on the same site and inhabited by the same individuals would also be exempt. The exemption could not be denied with respect to the manufactured home solely because it was a manufactured home and not a site-built, single family dwelling.

e. Exemption for "Land" With Respect to Placement of "Junk" Cars. Your letter includes a question concerning the farm exemption in section 335.2 and county restrictions on the placement of "junk" cars (clearly a non-agricultural use of land). As discussed in point (b) above, to qualify for the farm exemption, land must be "primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used." Iowa Code § 335.2 (emphasis added). The exemption from county zoning ends when the land is put to a non-agricultural use (like the placement of "junk" cars) and that non-agricultural use could clearly be regulated by the county.

We are again guided by the purpose of the farm exemption in section 335.2, which was to allow individuals to carry out their farming operations without being overly burdened by county zoning regulations. We do not believe the legislature intended farmers, by virtue of the farm exemption, to avoid county zoning regulation of activities which are totally unrelated to agriculture.

3. **County Building Codes.** Counties are granted power to enact county building codes under section 331.304(3) of the county home rule implementation provisions of chapter 331. However, such power is limited by section 331.304(3)(b) which states that "[a] county building code shall not apply to farm houses or other farm buildings which are primarily adapted for use for agricultural purposes, while so used or under construction for that use."

The issue, as framed with respect to section 335.2 in part 2 above, is whether a county ordinance which defines a farm as twenty or more acres of land zoned agricultural and deems all houses and buildings on such land to be "farm houses" or "farm buildings" under section 331.304(3)(b), respectively, is irreconcilable with such section. It is our opinion that such an ordinance is irreconcilable with state law.

We reach this conclusion for the reasons stated above with respect to section 335.2, namely, that the exemption is stated in terms of use for agricultural purposes which cannot be determined solely from an objective minimum acreage test.

However, section 331.304(3)(b) may provide somewhat of a broader exemption than section 335.2. The qualifying language "by reason of nature or area" contained in section 335.2 was included in the original version of section 331.304(3)(b), 1963 Iowa Acts, ch. 218, § 1, but was omitted from the current version enacted as part of the home rule implementation provision in 1981. 1981 Iowa Acts, ch. 117, § 303(3)(b). This omission may indicate that the legislature intended counties to consider more factors when making a determination whether to exempt farm houses and farm buildings from building codes than when making a determination whether to exempt the same property from zoning regulations.

4. **Summary.** In summary, a county may not conclusively utilize an objective minimum acreage test to define a "farm" for purposes of exempting (1) "land," "farm houses," "farm barns," and "farm outbuildings" from county zoning under section 335.2 and (2) "farm houses" and "farm buildings" from county buildings codes under section 331.304(3)(b). Counties must make a determination whether the property is actually used for agricultural purposes and, in the case of a farm house, whether the occupants are engaged in agriculture on the land where the house is located. Counties cannot deny the farm exemption for a manufactured home solely because it is a manufactured home and not a site-built, single family dwelling. The farm exemption

ends when land is put to non-agricultural uses (like the placement of "junk" cars) and counties may regulate those non-agricultural uses.

Sincerely,

ERIC TABOR
Assistant Attorney General

COUNTIES; MENTAL HEALTH: Liability for mental health care. Iowa Code § 229.1B (as added by 1996 Iowa Acts, ch. 1183, § 19); Iowa Code § 229.6 (1995); Iowa Code § 229.11 (as amended by 1996 Iowa Acts, ch. 1983, § 20); Iowa Code § 230.1 (as amended by 1996 Iowa Acts, ch. 1183, § 24); Iowa Code § 252.16 (1995); Iowa Code § 331.440(2A) (as added by 1996 Iowa Acts, ch. 1183, § 38). In order to require the county of legal settlement to reimburse the costs of care of the individual committed, the single entry point process must be used to designate a hospital or facility for placement. So long as the single entry process point from either the county of residence or legal settlement is used, the county of legal settlement is liable pursuant to the provisions of chapters 229 and 230. (Ramsay to Bailey, Page County Attorney 2-12-97) #97-2-1(L)

February 12, 1997

Verd R. Bailey
Page County Attorney
109 East Main
P.O. Box 478
Clarinda, Iowa 51632

Dear Mr. Bailey:

You have requested an opinion from this office on the liability of a county of legal settlement for the costs and expenses associated with a mental health commitment. The legislature recently required that commitments pursuant to chapter 229 of the Iowa Code utilize a facility designated by the single entry point process. The single entry point process is generally a particular person designated by a county to act as the "gate keeper" of services which will require an expenditure of county funds for mental health services. See Iowa Code § 331.439 (Supp. 1995). Your question is which single entry point process must be used to require a county to pay the expenses associated with mental health commitments pursuant to chapters 229 and 230 of the Iowa Code: where the person has residence or where the person is legally settled. See Iowa Code § 252.16 (1995).

You correctly note that House File 2427 amended certain provisions of Iowa Code chapters 229 and 230 relating to the costs associated with the commitment of individuals to a mental health institution. 1996 Iowa Acts, 76th G.A., ch. 1183, §§ 19, 20, 21, 24. According to its title, House File 2427 relates to mental health services "paid for in whole or part by counties or the state. . . ." House File 2427 requires the use of the "single entry point process" for commitments before the county of legal settlement bears liability for the expenses associated with the commitment. A new provision, section 229.1B, was added to chapter 229 which states, "Notwithstanding any provision of this chapter to the contrary, any person whose hospitalization expenses are payable in whole or part by a county shall be subject to all requirements of the single entry point process." 1996 Iowa Acts, 76th G.A., ch. 1183, § 19. Further, section 230.1

concerning liability for the costs associated with a commitment to a mental health institute, was amended to include, "A county of legal settlement is not liable for costs and expenses associated with a person with mental illness unless the costs and expenses are for services and other support authorized through the single entry point process." 1996 Iowa Acts, 76th G.A., ch. 1183, § 24. Finally, Iowa Code section 229.11 was amended to read:

> If the expenses of a respondent are payable in whole or in part by a county, for a placement in accordance with subsection 1, [placement in the custody of a relative, friend or other suitable person] the judge shall give notice of the placement to the single entry point process and for a placement in accordance with subsection 2 or 3, [placement in a suitable hospital or nearest available facility] the judge shall order the placement in a hospital or facility designated through the single entry point process.

1996 Iowa Acts, 76th G.A., ch. 1183, § 20.

Further, the legislature amended the single entry point process as it relates to the application for services. 1996 Iowa Acts, 76th G.A., ch. 1183, § 38. This legislation states:

> An application for services may be made through the single entry point process of a person's county of residence. However, if a person who is subject to a single entry point process has legal settlement in another county or the costs of the services or other support provided to the person are the financial responsibility of the state, an authorization through the single entry point process shall be coordinated with the person's county of legal settlement or with the state, as applicable. The county of residence and county of legal settlement of a person subject to a single entry point process may mutually agree that the single entry point process functions shall be performed by the single entry point process of the person's county of legal settlement.

1996 Iowa Acts, 76th G.A., ch. 1183, § 38. This amendment allows the application process to occur in a county of residence. If the county of legal settlement is known, the application process of the county of legal residence may continue to be used so long as coordination between the county of residence and the county of legal settlement occurs. Analyzing this legislation with the provisions of Iowa Code section 229.6, the issue arises as to which single entry point process must be used. According to the provisions of Iowa Code section 229.6 a petition for commitment may be filed where the person has residence or where the person is located. Iowa Code § 229.6 (1995). Legal settlement is not mentioned.

This office has issued several opinions concerning the responsibility of counties to pay for the costs of commitment at one of the mental health institutions. Op. Att'y Gen. #95-3-1; 1994 Op. Att'y Gen. 95; 1994 Op. Att'y Gen. 80; 1994 Op. Att'y Gen. 35; 1992 Op. Att'y Gen. 135. These opinions concluded that a county was required to pay the related expenses pursuant to chapter 229 so long as an individual was admitted or committed to the mental health institute. House File 2427 modifies these prior opinions by now specifying that counties have no responsibility for costs unless the single entry point process is used. Thus, for placements other than with a relative, friend or other suitable individual, a court is now required to place individuals in the placement designated by the single entry point process. The legislation concerning the single entry point process application procedure clearly permits an application to be made with the person's county of residence. Only if the person's county of legal settlement is different than the county of residence must coordination occur. 1996 Iowa Acts, 76th G.A., ch. 1183, § 38.

The courts harmonize all portions of the statutes in question without giving undue importance to a single or isolated part so as to carry out the meaning and purpose of both statutes. Kelly v. State, 525 N.W.2d 409 (Iowa 1985); Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985); Office of Consumer Advocate v. Iowa State Commerce Comm'n, 376 N.W.2d 878, 881 (Iowa 1985). These rules are applied to Iowa Code chapters 229, 230 and 331. The legislature was attempting to address the ability of a county to designate a particular facility for commitments. The object and purpose appears to be to allow counties to control costs pursuant to their respective county management plans. See Iowa Code § 331.439 (Supp. 1995). The remedy that is provided to a county is that should a single entry point process not be used, the county is not responsible for the corresponding costs of the commitment. The rules of statutory construction are used to harmonize the commitment procedure with the apparent intent of the legislature to allow counties to control the costs associated with the commitment. These rules allow the harmonization of the principle that an individual may be committed by a court wherever that person is located or from the person's place of residence. See Iowa Code § 229.6 (1995).

The single entry point process where the person has residence must be used if the county of settlement is unknown. This harmonizes section 229.6 with the recent amendments to sections 229.1 and 230.1 and the county management plans. 1996 Iowa Acts, 76th G.A., ch. 1183, § 38. The legislature required only that a single entry point process be used in commitments pursuant to chapter 229. In specifying the use of a single entry point process, the legislature did not specify whether to use the particular process of the person's county of legal settlement, county of residence, or county where the person is found. The legislature easily could have stated that the single entry point process for the person's legal settlement must be used before corresponding liability follows. Based on the complex nature of legal settlement determinations, requiring a court to determine, prior to hearing, the person's county of legal settlement, would place an undue burden upon the commitment process. A court should not be burdened with determining legal settlement prior to a commitment in order for liability to follow.

Due to the complex nature of the legal settlement statute, as well as Supreme Court decisions which address the concepts determining legal settlement, using the single entry point process where the person has residence will allow the control of costs associated with the commitment. This method meets the legislature's goal, yet allows counties to preserve for later dispute the final issue of legal settlement. See Iowa Dep't of Human Services v. Cass County, 522 N.W.2d 615 (Iowa 1994).

In conclusion, in order to fulfill the requirements that the county of legal settlement reimburse the costs of care of the individual committed, the single entry point process must be used. So long as the designated facility from the single entry point process from where the person has residence is used, the county of legal settlement is liable pursuant to the provisions of chapters 229 and 230.

Sincerely,

Richard E. Ramsay
Assistant Attorney General

COUNTY OFFICERS: Combining duties of county assessor and county zoning administrator. Iowa Code §§ 331.323(1), 335.9, 441.17(1) (1997). Iowa Code sections 331.323(1), 335.9, and 441.17(1) (1997) do not, per se, preclude a county from combining the duties of county assessor with the duties of county zoning administrator. (Kempkes to Kenyon, Union County Attorney, 2-12-97) #97-2-2(L)

February 12, 1997

Mr. Timothy R. Kenyon
Union County Attorney
Courthouse
Creston, IA 50801

Dear Mr. Kenyon:

You have requested an opinion about a county's authority to combine the position of county assessor with the position of county zoning administrator. You ask whether "statutory language prohibits such a combination," and, if not, whether "actual, apparent, or potential conflicts of interest effectively prohibit it."

We cannot speculate about all the possible scenarios that might result in a conflict of interest for a person serving simultaneously as county assessor and county zoning administrator. See 1992 Op. Att'y Gen. 150; 1982 Op. Att'y Gen. 220, 221; see also 61 IAC 1.5(3). Unlike incompatibility of offices, potential conflicts of interest do not legally preclude the holding of an office, although the potential for such conflicts may be a significant policy factor for determining whether to combine two offices. See 1988 Op. Att'y Gen. 21 (#87-1-15(L)). We can, however, provide an answer to your question about incompatible offices: Iowa Code sections 331.323(1), 335.9, and 441.17(1) (1997) do not, per se, preclude a county from combining the position of county assessor with the position of county zoning administrator.

I.

Chapter 331 governs counties in general. Section 331.323(1) provides:

> A county may combine the duties of two or more of the following county officers and employees . . . .:
>
> a. Sheriff
>
> b. Treasurer
>
> c. Recorder
>
> d. Auditor
>
> e. Medical examiner
>
> f. General assistance director
>
> g. County care facility administrator
>
> h. Commission on veteran affairs
>
> i. Director of social welfare
>
> j. County assessor
>
> k. County weed commissioner.

See generally Iowa Code § 331.238(2)(f) (alternative form of county government "may include provisions for . . . combining duties of elected officials or the elimination of county offices"). Section 331.323(1) also provides the procedure for combining the duties of such offices or abolishing them; it begins with a petition from a specified number of electors and requires the county to combine the duties upon voter approval.

Chapter 335 governs county zoning. Section 335.9 provides that a county board of supervisors shall appoint an administrative officer to enforce its zoning resolutions or ordinances. Section 335.9 further provides that the administrative officer "may be a person holding other public office in the county, or in a city or other governmental subdivision within the county . . . ."

Chapter 441 governs county assessors, whose salary and compensation are set by conference boards. Iowa Code § 441.16. Section 441.17(1) provides that county assessors "shall [d]evote full time to the duties of the assessor's office and shall not

engage in any occupation or business interfering or inconsistent with such duties."

We recognize that sometime around 1985 the Code Editor apparently substituted "full time" for "his entire time" in section 441.17(1) in an effort to make all statutes "gender-neutral." Compare Iowa Code § 441.17(1) (1985) ("[d]evote full time") with Iowa Code § 441.17(1) (Supp. 1983) ("[d]evote his entire time"). This editorial decision, however, did not amount to a substantive change in section 441.17(1). See, e.g., Iowa Code § 14.13(2) (1989).

II.

You have asked whether "statutory language" prohibits a person from serving simultaneously as county assessor and county zoning administrator. We focus upon sections 331.323(1), 335.9, and 441.17(1) seriatim.

First: Section 331.323(1) permits a county to combine the duties of eleven specified officers and employees. See generally Iowa Code § 4.1(30)(c) (use of "may" in statute generally confers a power). It lists the county assessor as one of these officers and employees, see Iowa Code § 331.323(1)(j); however, it does not list the county zoning administrator. The question thus arises whether section 331.323(1) precludes a county from combining the duties of these two positions.

We note section 331.323(1) does not provide that counties may only combine the duties of the eleven specified positions. See Iowa R. App. P. 14(f)(13) (statutory interpretation focuses upon what legislature actually wrote, not what it should or might have written); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990) (impermissible to extend or enlarge terms of statute under guise of statutory intepretation). Cf. Iowa Code § 331.301(10)(a) (county shall lease or lease-purchase "only for" a specified term), § 331.304(8) (county power to take private property for public use shall "only be exercised" under certain circumstances). See generally Iowa Const. amend. 39A (1978) (providing for county home rule). We therefore believe that section 331.323(1) does not prohibit a person in one of the eleven listed positions from performing the duties of any unlisted position. It appears that the import of section 331.323(1) lies in its procedure whereby electors may initiate and vote for proposed combinations of duties or abolishment of an office and whereby a county must, upon voter approval, thereafter proceed to combine those duties in one position or abolish an office.

Second: Section 335.9 permits county supervisors to appoint as county zoning administrator a person "holding other public office in the county." See Iowa Code § 4.1(30)(c). We believe

that such language clearly encompasses a person holding the office of county assessor. See 1990 Op. Att'y Gen. 837 (#89-10-3(L)).

Third: Section 441.17(1) requires county assessors to devote their "full time" to the duties of their office. See Iowa Code § 4.1(30)(a) (use of "shall" in statutes normally imposes a duty); 1976 Op. Att'y Gen. 725, 728. Consistent with the Code Editor's editorial change, we believe that "full time" equates with "entire time." See Miller v. Walley, 84 So. 466, 468 (Miss. 1920); 1987 Ohio Op. Att'y Gen. 87-085; see also Johnson v. Stoughton Wagon Co., 95 N.W. 394, 397 (Wis. 1903) ("entire time" simply cannot have a literal meaning in an employment context: the phrase "certainly does not require 24 hours a day of an employee's time, nor, indeed, every moment of his waking hours"). See generally State v. Hinshaw, 197 Iowa 1265, 198 N.W. 634, 637 (1924) (a public officer "is not required to give every instant of his time to the public service").

We also believe that those two phrases mean employed for or involved with an amount of time considered a normal or standard amount for work during a given period. See 1996 Op. Att'y Gen. ___ (#95-6-6(L)); 1990 Ohio Op. Att'y Gen. 90-114; Webster's Ninth New Collegiate Dictionary 460 (1979); see also Jenkins v. Armstrong, 211 S.W.2d 908, 910 (Tenn. App. 1947) ("entire working time" does not require working an unreasonable amount of time beyond usual office hours); 1976 Op. Att'y Gen. 786, 788 ("overtime" may denote work performed after regular hours); 1934 Op. Att'y Gen. 283, 284 (rule that public officer devote "full time" to official duties "does not mean twenty-four hours a day"). See generally Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to approved English usage).

This textual analysis aligns with a prior opinion involving section 441.17(1) as it relates to county assessors serving in another position within county government. In 1968, we considered whether section 441.17(1) permitted a county assessor to serve simultaneously as county civil defense director. We pointed out that no statute "contains [any] prohibition as to who may be appointed as director of civil defense" and reasoned that the "full time" requirement of section 441.17(1) did not preclude the county assessor from serving in this other position so long as it "would not prevent him from devoting his full time" to the office of county assessor. 1968 Op. Att'y Gen. 370, 370.

We added, however, that if the duties of both positions "are so extensive and demanding that one person would be physically unable to be engaged in both at the same time," the position of civil defense director would be an occupation prohibited by section 441.17(1) as one interfering or conflicting with the county assessor's office. Id. at 372. We also noted that "unless the duties of civil defense director could be performed at night and on

weekends, the requirement that the county assessor devote "his entire time" to the duties of the assessor's office would be violated. Id. at 372. See 1982 Op. Att'y Gen. 119, 119-20 & n. 1; see also 1990 Op. Att'y Gen. 837 (#89-10-3(L)).

We referred to the 1968 opinion in a 1990 opinion that considered the question whether the "full time" requirement of section 441.17(1) "would prohibit the assessor from doing eminent domain appraisals as extra duty of the assessor's office." 1990 Op. Att'y Gen. 65 (#90-2-7(L)). We pointed out that section 441.17(1) requires county assessors to devote their "entire time" to specified duties and that no statute "requir[ed] or suggest[ed]" county assessors had any additional duty to make such appraisals. We recognized that section 441.17(1) does not stand in isolation in defining the duties of county assessors and that other statutes, such as section 331.323(1), may allow a county officer "to assume additional duties."

Neither section 441.17(1) nor our prior opinions preclude a county assessor from serving simultaneously as county zoning administrator. A county seeking to combine the two positions, however, must consider the requirement that a county assessor devote "normal" or "standard" working hours to the duties of the assessor's office and the possibility that a single person cannot physically perform the duties of both positions. See 1990 Op. Att'y Gen. 65 (#90-2-7(L)); 1982 Op. Att'y Gen. 119, 119-20 & n. 1; 1968 Op. Att'y Gen. 370, 372. These considerations, we note, depend upon a weighing of the specific facts and circumstances surrounding the duties of both positions. See 1978 Op. Att'y Gen. 199, 200. See generally 1934 Op. Att'y Gen. 283, 284 (a public officer "can do better work and more of it if he has, at proper intervals, brief time for relaxation"; if "he does outside work . . . , he should not allow it in any way to interfere with the full and honest performance of the duties of his office").

III.

Iowa Code sections 331.323(1), 335.9, and 441.17(1) (1997) do not, per se, preclude a county from combining the position of county assessor with the position of county zoning administrator.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS; LAW ENFORCEMENT: Ownership of funds received by unit of reserve deputy sheriffs. Iowa Code §§ 28E.21, 80A.1, 80D.1, 331.902 (1997). Whether a unit of reserve deputy sheriffs has any control over money received in return for providing security services to cities within the county and money that has been received as donations depends upon the particular facts and circumstances. A reserve unit may have control of the funds if, for example, it received them in a private capacity. (Kempkes to Wibe, Cherokee County Attorney, 2-26-97) #97-2-4(L)

February 26, 1997

Mr. John A. Wibe
Cherokee County Attorney
P.O. Box 100
Cherokee, IA 51012

Dear Mr. Wibe:

You have requested an opinion involving a unit of reserve deputy sheriffs facing termination by the county and having within its possession certain funds. You ask whether the reserve unit may, upon its termination, distribute to charitable organizations or other reserve units money that has been received in return for providing security services and money that has been received as donations. We understand that the reserve unit always received these funds as a unit and not as individuals, that it kept them in separate accounts, and that it applied them toward such things as uniforms, equipment, training services, and operating expenses. We also understand that the reserve unit received the cash donations through fund-raising activities, that it provided the security services to various cities within the county, and that the county sheriff approved the provision of those services and the fund-raising activities.

Any answer to your question rests upon determining certain additional facts, which we will discuss later in this opinion. We cannot, however, determine factual matters in an opinion. See 61 IAC 1.5; 1972 Op. Att'y Gen. 686, 687. We thus cannot say with any certainty which public entity controls the funds. We can only set forth the applicable law for determining who may control them.

I.

Iowa Code chapter 80D (1997), entitled "Reserve Peace Officers," permits a county to establish a unit of reserve deputy sheriffs. Reserve deputies receive minimum compensation of one dollar a year, and, at the discretion of the county sheriff, they participate on a regular basis in crime prevention and control, preservation of the peace, and law enforcement. See Iowa Code §§ 80D.1, 80D.1A, 80D.6, 80D.8; Bahr v. Council Bluffs Civil Service Comm'n, 542 N.W.2d 255, 257-58 (Iowa 1996); 1996 Op. Att'y Gen. ___ (#96-10-2(L)). Each county sheriff has discretion to appoint reserve deputies, who voluntarily serve "on the orders of and at the discretion of" each county sheriff. Iowa Code § 80D.6.

II.

A.

You have indicated that the reserve unit has received money in return for providing security services to cities within the county. Whether the reserve unit could distribute this money to charitable organizations or other reserve units depends upon the agreement underlying the provision of such services and the contracting status of the reserve unit.

Cities generally cannot delegate or contract their law enforcement authority to a private concern and its employees. 1984 Op. Att'y Gen. 53, 54, 55. Nevertheless, this general prohibition

> does not mean that no services which are traditionally performed by police departments can be provided by contracts with private concerns. A small city could conceivably enter into a contract with a private security agency for a night watchman to patrol the streets watching for signs of trouble. . . . Contracts could be entered into with private concerns for support services to the police department.

Id. at 55. See generally 1984 Op. Att'y Gen. 167, 169-70.

With regard to a county's public funds, Iowa Code section 331.902(1) provides: "Unless otherwise specifically provided by statute, the fees and other charges collected by the Auditor, Treasurer, Recorder, and Sheriff, and their deputies or employees, belong to the County." See 1970 Op. Att'y Gen. 390, 391 (only those fees and charges collected for "official service" belong to county); see also 1968 Op. Att'y Gen. 458, 460; 1962 Op. Att'y Gen. 165, 167; 1912 Op. Att'y Gen. 209, 211. Read in context, the terms "deputies" or "employees" in section 331.902(1) appear broad enough

to encompass persons serving as reserve deputy sheriffs in the office of the county sheriff. See Iowa Code § 80D.11 (while performing official duties, each reserve officer "shall be considered an employee of the governing body which the officer represents"); Webster's Ninth New Collegiate Dictionary 370 (1979) ("employee" means one employed by another usually for wages or salary and in a position below the executive level). See generally Iowa Code § 4.1(38) (undefined words and phrases in statutes shall be construed according to context and approved English usage); State v. Bush, 518 N.W.2d 778, 780 (Iowa 1994).

If, then, the reserve unit rendered such services to the cities as part of its official duties prescribed by the county sheriff, see generally Iowa Code §§ 28E.21-.30, 80D.1(3), 80D.6; 1978 Op. Att'y Gen. 19, 19, it appears that the money constitutes public funds, that the county owns it pursuant to section 331.902(1), and that the reserve unit could only act as a custodian over it on behalf of the county. (An agreement between the county and the county sheriff may determine which of those two offices has control over the money. See 1992 Op. Att'y Gen. 41 (#91-9-2(L)) (county, with participation of county sheriff, may contract to provide law enforcement services to city); see also 1980 Op. Att'y Gen. 187 (#79-5-30(L)) (county sheriff may contract to provide law enforcement services to federal agency).)

If, however, the reserve unit properly contracted in a private capacity with the cities for the provision of security services during off-duty hours, see Iowa Code ch. 80A; 1984 Op. Att'y Gen. 53, 54-55; 1982 Op. Att'y Gen. 451, 452-53; 1978 Op. Att'y Gen. 337, 338-43, it appears that the money does not constitute public funds, that the county does not own it, and that the reserve unit has discretion over its distribution. As another Attorney General has opined, "When funds are independently raised by police-related organizations, state law does not require their deposit and control in the [public] treasury." 1992 La. Op. Att'y Gen. 91-568 (1992 WL 610757). See generally 1993 La. Op. Att'y Gen. 92-737 (1993 WL 185113) (police reserve unit may generate private funds during off-duty hours, and police chief may keep funds in separate account).

We issue one caveat regarding our analysis: the reserve unit "may be held to an accounting of profits earned in the outside employment if it is later determined that [it] was acting `under color of office,' . . . that is, receiving compensation for services which [it] was required by law to perform in [its] official capacity." 1978 Op. Att'y Gen. 337, 340. See Iowa Code § 68B.2A(1) (imposing restrictions upon outside employment). Thus, when members of a reserve unit "act as private security guards, they might be considered to be supplying services normally provided by the county and thus be required to account for any compensation received from the private employer." 1978 Op. Att'y Gen. 337, 340.

B.

You have also indicated that the reserve unit has received cash donations through fund-raising activities. Whether the reserve unit could distribute this money to charitable organizations or other reserve units again depends, in large part, on whether the reserve unit received it in a private capacity. Cf. Burlingame v. Hardin County, 180 Iowa 919, 164 N.W. 115, 117 (1917) (county's right to demand and receive money received by clerk of court "depends solely upon the question whether such money has been received by him in an official capacity").

Such a circumstance might provide the reserve unit with discretion over distributing the money. See State v. Hinshaw, 197 Iowa 1265, 198 N.W. 634, 636 (1924) (game warden, in private capacity, may accept voluntarily proferred cash from fishermen, keep it in a separate account, and use it to improve public lake as long as executive council gives its approval and game warden continues to perform official duties and exercise official powers fairly and impartially). Cf. Burlingame v. Hardin County, 164 N.W. at 119 (clerk of court "not disqualified from performing extraofficial service and receiving payment therefor in his individual right, so long as the thing done by him is not incompatible with the duties which he assumed in taking the office"); 1970 Op. Att'y Gen. 390, 391 (deputy sheriff, in private capacity, may receive fee from private person for performing service not prescribed by law: there is an "obvious dichotomy between fees earned for services related to official duties and those received for unrelated services"); 1934 Op. Att'y Gen. 283, 284 (clerk of court, in private capacity, may receive fee from private person for performing service not prescribed by law).

III.

Whether a unit of reserve deputy sheriffs has any control over money received in return for providing security services and money received as donations depends upon the particular facts and circumstances. A reserve unit may have control over the money, for example, if it received the money in a private capacity.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Department of Economic Development. Iowa Code §§ 260E.2, 260E.3, 260E.7 (1997). The Department of Economic Development has rule-making authority to define the word "business" in Iowa Code section 260E.2(9) so long as the rule does not contravene the legislative intent underlying Iowa Code chapter 260E, the Industrial New Jobs Training Act, which makes available courses for job training at community colleges and provides for certain funding mechanisms. A court would likely affirm a rule that construes "business" in section 260E.2(9) to include the operations of a federal governmental agency to the extent that agency engages in an activity described in section 260E.2(9). (Kempkes to Lyons, Director, Department of Economic Development, 3-4-97) #97-3-1(L)

March 4, 1997

Mr. David J. Lyons
Director, Department of Economic Development
200 E. Grand
Des Moines, IA 50309

Dear Mr. Lyons:

You have asked for an opinion about Iowa Code chapter 260E (1997), the "Industrial New Jobs Training Act," which the Department of Economic Development helps coordinate. See Iowa Code §§ 15.101, 260E.7; 261 IAC 5.2. Among other things, chapter 260E authorizes a community college to make available courses relating to certain industries wishing to begin or expand their operations within the state and provides for certain funding mechanisms. See Iowa Code §§ 260E.2-.7. According to the Department, the purpose of chapter 260E "is to provide training for employees in new jobs with industries locating or expanding operations in Iowa and an incentive to industries considering locating or expanding operations in Iowa." 261 IAC 5.2.

Two questions regarding section 260E.2(9) -- which uses the word "business" in part to define "industry" -- appear in your opinion request: (1) whether the Department has authority to

define "business" by administrative rule; and (2) whether "business" in section 260E.2(9) includes the operations of a federal governmental agency. We conclude that the Department has authority to define the word "business" by administrative rule so long as the definition does not contravene the legislative intent underlying chapter 260E and that a court would likely construe "business" in section 260E.2(9) to include the operations of a federal governmental agency to the extent it engages in an activity described in that section.

I.

You have asked whether the Department has authority to define the word "business," as used in section 260E.2(9), by administrative rule. The Department, we note, has already promulgated rules that define other words and phrases used in chapter 260E. See 261 IAC 5.3. In fact, it has already defined "business" in part to mean "a company." See 261 IAC 5.3. See generally Webster's Ninth New Collegiate Dictionary 228 (1979) (defining "company").

Section 260E.7 expressly provides the Department with rule-making authority. The Department thus has authority to define "business" further by administrative rule so long as the definition does not contravene the legislative intent underlying chapter 260E. See Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d 907, 910 (Iowa 1979).

II.

Your other question directly implicates that legislative intent. In light of negotiations with a federal governmental agency that apparently wants to employ more persons within the state, you have asked whether "business" in section 260E.2(9) includes the operations of such an agency in this statutory context. In other words, we must determine how a court would likely construe the word "business" if presented with a question about its applicability to an agency of the federal government. See generally Iowa Code § 17A.19(8); 61 IAC 1.5; 1988 Op. Att'y Gen. 1, 2. We begin our analysis by reciting the pertinent statutes.

Section 260E.3(1) provides that a community college may enter into an agreement to establish a project. Section 260E.2(1) simply defines "an agreement" as the agreement between an employer and a community college concerning a project; section 260E.2(15) defines "a project" as a training arrangement that is the subject of an agreement entered into between the community college and the employer; and section 260E.2(7) defines "employer" to mean "the

person" providing new jobs in the area served by the community college and entering into an agreement.

Section 260E.2(10) generally defines "new job" as a job in a new or expanding industry. Of importance to this opinion, section 260E.2(9) defines "industry" to mean

> a business engaged in interstate or intrastate commerce for the purpose of manufacturing, processing, or assembling products, conducting research and development, or providing services in interstate commerce, but excludes retail, health, or professional services. "Industry" does not include a business which closes or substantially reduces its operation in one area of the state of Iowa and relocates substantially the same operation in another area of the state of Iowa. This subsection does not prohibit a business from expanding its operations in another area of the state provided that existing operations of a similar nature are not closed or substantially reduced.

(emphasis added). See generally 261 IAC 5.3 ("industry" means a single, corporate entity or operating subdivision).

We construe the word "business" in light of other words and phrases within chapter 260E. See generally Iowa Code § 4.2. Our goal in construing section 260E.2(9) is to further the legislative intent underlying chapter 260E. See generally Iowa Code § 4.1; Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995).

The word "business" has no single meaning. 1982 Op. Att'y Gen. 453, 454. In a narrow sense, the word may indeed signify private enterprises only. 12A C.J.S. Business 476 & n. 79 (1980). In common usage, however, "business" has broad application and does not exclude the operations of public enterprises. Id. at 465-68; see Brown v. Wood, 575 P.2d 760, 767 (Alas. 1978) ("business" includes a public university for purposes of equal-pay-for-women act); Tschetter v. Dolan Bd. of Education, 302 N.W.2d 43, 47 (S.D. 1981) ("business" includes a public school for purposes of business-records exception to hearsay rule); see also Rowley v. City of Cedar Rapids, 203 Iowa 1245, 212 N.W. 158, 159 (1927). The word "is a very comprehensive term." Flint v. Stone Tracy Co., 220 U.S. 107, 171, 31 S. Ct. 342, 55 L. Ed. 389 (1910). "It has even been said that a mother of several children is engaged in the business of rearing future citizens." 12A C.J.S. Business 478 & n. 17 (1980).

According to one philologist, "business" simply signifies that which makes busy. See Crabb's English Synonyms 133 (1917); see also Black's Law Dictionary 179 (1979); Webster's, supra, at 148. See generally Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to approved English usage). The United States Supreme Court has similarly observed that "business" embraces everything about which a person can be employed. See Flint v. Stone Tracy Co., 220 U.S. at 171. Consistent with these common definitions, the Supreme Court of Iowa has construed "business" in its legal and commercial sense to mean that in which one engages for purposes of a livelihood, profit, or the like. See In re Colburn's Estate, 186 Iowa 590, 173 N.W. 35, 39 (1919); Beickler v. Guenther, 121 Iowa 419, 96 N.W. 895, 896 (1903).

We believe that the General Assembly did not intend "business" to have the narrow signification of private enterprises only and that, as commonly, legally, and commercially understood, the word includes public enterprises and thus the operations of a federal governmental agency for purposes of chapter 260E. Four arguments support this belief.

First: In section 260E.2(7), the General Assembly simply defined "employer" within an industry as the person entering into an agreement with a community college. Although chapter 260E provides no definition for the word "person," chapter 4 sets forth definitions of general applicability, see 1980 Op. Att'y Gen. 802, 802; 1978 Op. Att'y Gen. 758, 759. Those definitions apply to a statute "[u]nless [it] would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute . . . ." Iowa Code § 4.1. Section 4.1(20) specifies that "[u]nless otherwise provided by law," the word "person" includes a governmental agency. See 1978 Op. Att'y Gen. 758, 760 ("person," in precursor to section 4.1(20), encompasses private and public entities).

In addition, the General Assembly did not choose to use the phrase "private person" in section 260E.2(7) to define "employer." It has, however, used "private person" in other statutes. See, e.g., 1978 Op. Att'y Gen. 758, 758-60 (Iowa Code section 455B.88 (1977) permitted "private person" to operate nuclear waste disposal site: adjective "private" denotes meaning distinct from "public" and "governmental" and thus phrase "private person" excludes federal and state agencies). The General Assembly also did not use the phrase "private employer" or other similar language in section 260E.2(7). Cf. 29 U.S.C.A. § 1501 et seq. ("private industry councils" in Job Training Partnership Act, composed of members of the "private sector," defined as owners, chief executives, or chief operating officers of "private for-profit employers"). As we reasoned in a related context, if the General Assembly "meant to include only private employers [it] could have done so by saying

`[private employer]' instead of `[employer]'." 1968 Op. Att'y Gen. 715, 717.

Second and similarly: Other chapters enacted by the General Assembly indicate it recognizes a distinction between the word "business" and the narrower phrase "private business." See generally Iowa Code § 4.6(4) (statutory construction may involve consideration of statutes upon same or similar subjects). The General Assembly has linked the adjective "private" with "business" in its statutes. See Iowa Code §§ 256A.5, 307.10(2); see also Iowa Code § 241.2(1)(b)(1) ("public and private employers"), § 235B.16(5) (employee of "public or private facility"), § 232.69(3) (employee of "public or private institution"). See generally Green v. Frazier, 176 N.W. 11, 17 (N.D. 1920) (noting distinction between "private business" and "public business").

Third: Nothing within the four textual corners of chapter 260E suggests the General Assembly intended to exclude a federal governmental agency from entering into an agreement with a community college. See generally Iowa Code § 4.1(38) (technical words and phrases shall be construed according to their peculiar and appropriate meaning in law). Chapter 260E uses "industry," "employer," "person," "interstate or intrastate commerce," "manufacturing, processing, or assembling," "products," "research and development," and "services in interstate commerce." Not one of these words and phrases necessarily implicates private enterprises or excludes public ones. See, e.g., Gardiner v. Ottumwa Church Trustees, 244 N.W. 667, 669 (Iowa 1932) ("industry" means an enterprise conducted as a means of livelihood or for profit); Webster's, supra, at 223-24 ("commerce" means the exchange or buying and selling of commodities on a large scale involving transportation from place to place); see also Whisman v. Roberts, 55 F.3d 1140, 1148-49 (6th Cir. 1995) (noting that federal regulations regarding employment act "do not specifically exclude governmental business from the definition of industry").

Fourth: A broad definition of "business" certainly comports with the express purpose of chapter 260E: to create jobs. See generally Iowa Code § 4.6(1) (statutory construction may involve consideration of legislative object); Bewley v. Villisca Community School Dist., 299 N.W.2d 904, 906 (Iowa 1980); 1988 Op. Att'y Gen. 70, 71. The status of those new jobs as public or private in nature simply does not appear to have been a legislative concern in enacting chapter 260E. Compare Iowa Code ch. 260E with 1986 Op. Att'y Gen. 19, 20 (statutory precursor to Iowa Code chapter 15E (1995) established Development Commission to use governmental resources for aiding private economic development in the state).

In our construction of section 260E.2(9), we also take into account the passage in 1992 of an act entitled "State Assistance

for Federal Project." 1992 Iowa Acts, 74th G.A., ch. 1223. In the 1992 act, the General Assembly found that the United States Department of Defense planned to consolidate certain of its services at a few sites around the country, that such consolidation at a site within or adjacent to Iowa would have the effect of creating jobs for Iowans, and that financial assistance from Iowa might aid in procuring such a site within the Quad Cities area. 1992 Iowa Acts, 74th G.A., ch. 1223, §§ 1-2. The 1992 act mentioned the need for entering into an agreement with the "employer of the individuals for the federal project" and certain funding mechanisms for such project similar to those in chapter 260E. 1992 Iowa Acts, 74th G.A., ch. 1223, §§ 2-3. The 1992 act provided for its own repeal on January 1, 1996, in the absence of an agreement. 1992 Iowa Acts, 74th G.A., ch. 1223, § 4.

The 1992 act only involved a single project of a single federal agency that potentially affected a single area within or adjacent to Iowa. The 1992 act -- unlike other similar legislation for creating jobs, see 1985 Iowa Acts, 71st G.A., ch. 235, § 9 -- did not mention chapter 260E in any of its provisions. It did not mention a role for community colleges regarding job creation. Chapter 260E and the 1992 act, which created and provided for the repeal of Iowa Code section 15A.6 (1993), do not appear identical in scope, import, and purpose. We therefore do not believe that passage of the 1992 act or its subsequent repeal by operation of its "sunset clause" has any bearing upon the construction of section 260E.2(9).

Accordingly, we conclude chapter 260E does not per se preclude a federal governmental agency that wishes to create or expand operations within this state from entering into an agreement with a community college. We note, however, that chapter 260E does require each business entering into an agreement to undertake an activity described in section 260E.2(9), viz., to engage in "interstate or intrastate commerce for the purpose of manufacturing, processing, or assembling products," conduct "research and development," or provide "services in interstate commerce, but [not] retail, health, or professional services." See 261 IAC 5.3 ("industry" means "a business engaged in activities described as eligible [in chapter 260E] rather than the generic definition encompassing all businesses in the state doing the same activities").

We also note that the Department has authority to promulgate administrative rules defining these specified activities or otherwise explaining the applicability of section 260E.2(9) to the activities of various industries and businesses. See generally Iowa Code § 260E.7. Such rules carry a presumption of validity. Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 909; 1980 Op. Att'y Gen. 904. A successful legal

challenge to their validity would require a clear and convincing showing that the administrative body acted ultra vires ("without authority"). Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911, 913 (Iowa 1979).

III.

In summary: The Department of Economic Development has authority to define by administrative rule the word "business," as used in section 260E.2(9), so long as the definition does not contravene the legislative intent underlying chapter 260E, the Industrial New Jobs Training Act. A court would likely construe "business" in section 260E.2(9) to include the operations of a federal governmental agency to the extent it engages in an activity described in that section.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES; NEWSPAPERS: Official publications. Iowa Code §§ 349.1, 618.3(1) (1997). A newspaper that has been published within the area for more than two years, but has changed its post office of entry to a different post office of entry within its subscription area during that same time period, remains eligible for publishing a county's official matters. (Kempkes to Houser and Drake, State Representatives, 4-24-97) #97-4-1(L)

April 24, 1997

The Honorable Hubert Houser and
The Honorable Jack Drake
State Representatives
State Capitol
LOCAL

Dear Representatives Houser and Drake:

You have both requested an opinion on Iowa Code chapter 618 (1997), entitled "Publication and Posting of Notices," which applies to county boards of supervisors and other governing bodies. See generally Iowa Code § 349.1; Albia Publishing Co. v. Klobnak, 434 N.W.2d 636, 637 (Iowa 1989). We understand that a newspaper has been published in the area for more than two years, but has not been regularly mailed through the same "post office of entry" during that same time period. We also understand that the two post offices of entry regularly mailing the newspaper during that time period lie within the newspaper's subscription area.

You have asked whether this particular newspaper may publish a county's official matters. Although we cannot provide a definite answer to your question, we can say that such a newspaper remains eligible to publish a county's official matters.

I.

The attorney for a governing body may provide advice on applying section 618.3 to a particular newspaper. 1988 Op. Att'y Gen. 116 (#88-12-3(L)). The county attorney has, in fact, provided an answer to the county supervisors on the specific question whether the newspaper that changed its post office of entry has

fulfilled statutory requirements. We, however, cannot provide an answer to such a question:

> [T]his office does not determine whether a particular newspaper meets statutory requirements for designation as an official newspaper. That issue is ultimately a question of fact which cannot be resolved . . . in an opinion. The factual determination is to be made by the governing body in question, subject to review by a court. Our response is therefore limited to questions of law.

See id. (citations omitted). Accord 1974 Op. Att'y Gen. 102, 103-04.

II.

Section 618.3 provides in part:

> For the purpose of establishing and giving assured circulation of all notices and reports of proceedings required to be published within the state, if newspapers are required to be used, only a newspaper which meets all of the following requirements shall be designated for official publication purposes:
>
> (1). Is a newspaper of general circulation issued at regular frequency that has been published within the area and regularly mailed through the post office of entry for at least two years.
>
> . . .

(emphasis added). See generally Iowa Code § 4.1(30)(a) ("shall" in statute normally imposes a requirement).

Chapter 618 does not define the phrase "post office of entry." It appears to signify the particular post office where, pursuant to the dictates of federal law, periodicals such as newspapers have been officially delivered to the postal system for circulation. See U.S. Postal Service, Domestic Mail Manual 001, D210.2.0 (January 1, 1997); see also Dow Jones & Co. v. U.S. Postal Serv., 379 F. Supp. 1167, 1169-71 (D. Del. 1974). See generally Albia Publishing Co. v. Klobnak, 434 N.W.2d at 638-40; 1988 Op. Att'y Gen. 116 (#88-12-3(L)); 1986 Op. Att'y Gen. 133 (#86-12-12(L)); Annot., "Newspaper Publication Notice," 85 A.L.R.4th 581 (1991).

The specific phrase "post office of entry" has only existed in section 618.3(1) since 1986. The original provision, enacted in 1933, did not require the regular mailing of a newspaper for any length of time through a post office of entry. See 1933 Iowa Acts, 45th G.A., ch. 102, § 1. After its amendment in 1939, the provision required the regular mailing of a newspaper for at least two years through "the post office of current entry." See 1939 Iowa Acts, 48th G.A., ch. 241, § 1. See generally 1962 Op. Att'y Gen. 138, 139-40. In 1961, this office concluded that a newspaper that had not been mailed through the same post office of current entry for more than two years could not undergo selection as an official newspaper under Iowa Code section 618.3 (1958). 1962 Op. Att'y Gen. 138, 139-40. In 1986, twenty-five years after this opinion, the General Assembly again amended section 618.3. See 1986 Iowa Acts, 71st In 1986, the General Assembly again amended section 618.3. See 1986 Iowa Acts, 71st G.A., ch. 1183, § 4. It did so by omitting the word "current" from section 618.3(1).

III.

The 1961 opinion has little if no value to our analysis of your question, because the General Assembly subsequently changed the language of section 618.3(1). See generally 1994 Op. Att'y Gen. 102 (#94-5-8(L)); 1992 Op. Att'y Gen. 179, 182; 1988 Op. Att'y Gen. 116 (#88-12-4(L)). We therefore proceed to analyze your question in light of well-established principles of statutory construction.

First: The General Assemby has used the adjectives "same" or "current" to precede nouns in other statutes. See, e.g., Iowa Code §§ 2C.17, 7C.10, 8.6(13), 9C.4, 237.13(1)(b), 422.12E, 487.104A(1), 490.502, 511.8(15)(b)(1). In contrast, section 618.3(1) does not require mailing of a newspaper through "the same post office of entry" or "the current post office of entry" or even, as it existed before 1986, "the post office of current entry." See generally Iowa R. App. P. 14(f)(13) (statutory construction focuses upon what legislature actually wrote, not what it might or should have written). A principle of statutory construction forbids supplying additional words such as "same" or "current" to a statute under the guise of construing it. See State v. Byers, 456 N.W.2d 917, 919 (Iowa 1995); 1996 Op. Att'y Gen. ___ (#96-10-1).

Second: Section 618.3(1) simply requires mailing of a newspaper through "the post office of entry." The article "the" does not necessarily signify "one" or "a single" post office of entry. It is true that "the" does import something definite and that it commonly particularizes the subject it precedes. Lowry v. City of Mankato, 42 N.W.2d 553 (Minn. 1950). It is also true that "the" does not have a fixed meaning and that its import often depends on context and statutory purpose. Anundsen v. Standard Printing, 129 Iowa 200, 105 N.W. 426, 428 (1905). Courts have thus

construed "the" to mean something indefinite, such as "a," "an," or "any." See, e.g., Dedes v. Asch, 521 N.W.2d 448, 490 (Mich. 1994) ("the proximate cause" in statute construed to mean "a proximate cause" and not "the sole proximate cause").

Third: Construing section 618.3(1) to require mailing of a newspaper through "the same" or "the current" post office of entry carries with it potentially undesirable consequences. See generally Iowa Code § 4.6(5) (statutory construction may involve consideration of particular construction's consequences). In the case of a newspaper that has satisfied every other requirement imposed by section 618.3, such a construction could have a punitive or inequitable effect. Forces totally outside of such a newspaper's control -- for example, post office regulations or procedures, or post office closures or consolidations -- may result in the newspaper acquiring a different post office of entry within its subscription area. Implying the words "same" or "current" in section 618.3(1) would, in such circumstances, have the result of striking that newspaper from the list of ones eligible to publish a county's official matters, even though that newspaper may have been regularly published within the same area for dozens and dozens of years. A principle of statutory construction, however, suggests avoidance of any construction that leads to unjust or unreasonable results. See Iowa Code § 4.4(3) (in enacting a statute, legislature presumably intends just and reasonable result).

In view of the foregoing, we conclude a newspaper that has been published within the area for at least two years, but has changed its post office of entry to a different post office of entry within its subscription area during that same time period, remains eligible for publishing a county's official matters. We emphasize, however, that the newspaper must fulfill all other requirements in section 618.3 in order for the county to select it to publish the county's official matters. See generally Iowa Code § 618.3(2)-(4).

IV.

A newspaper that has been published within the area for at least two years, but has changed its post office of entry to a different post office of entry within its subscription area during that same time period, remains eligible for publishing a county's official matters. See generally Iowa Code § 618.3(1) (1997).

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

OPEN MEETINGS: Compensation Commission. Iowa Code §§ 6B.1, 6B.2, 6B.3, 6B.8, 6B.9, 6B.35, 6B.49, 21.2(1) (1997). A compensation commission is not a governmental body expressly created by statute and, therefore, is not subject to the Open Meetings law. (Pottorff and Kempkes to Schultz, Clinton County Attorney, 5-2-97) #97-5-1(L)

May 2, 1997

Mr. Lawrence H. Schultz
Clinton County Attorney
P.O. Box 2957
Clinton, IA 52733-2957

Dear Mr. Schultz:

You have requested an opinion on whether the Open Meetings law, Iowa Code chapter 21 (1997), applies to the deliberations of an entity historically known as a "sheriff's jury," see Mill v. City of Denison, 237 Iowa 1335, 25 N.W.2d 323, 326 (1946), and currently known as a "compensation commission." This commission has a factfinding role in the initial part of the process known as "eminent domain" -- the sovereign power to take property from private owners and the corresponding obligation to pay monetary damages for that taking. See 1978 Op. Att'y Gen. 525, 525. "[T]he only question to be determined [by a compensation commission] is the question of damages" that result from taking the property. 1930 Op. Att'y Gen. 59, 60. We conclude that the Open Meetings law does not apply to this entity.

The General Assembly has provided a statutory procedure for determining the damages that result from condemnations by federal or state governments, counties, cities, and other entities. See Iowa Code §§ 6B.1, 6B.9; see also Iowa Code ch. 6A ("Eminent Domain Law"), § 331.304(8); State v. Johann, 207 N.W.2d 21, 24 (Iowa 1973). See generally 1990 Op. Att'y Gen. 81 (#90-7-7(L)) (counties may condemn property and pay damages pursuant to provisions in chapter 306 as well as chapter 6B). The proceedings begin with an application, filed with the chief judge of the judicial district in which the condemned property is located, and service of process upon interested parties. Iowa Code §§ 6B.3, 6B.49.

The application must set forth a request for the appointment of a commission to appraise the damages. Iowa Code § 6B.3(5). This commission provides an opportunity to reduce the time and expense associated with the condemnation process. 6 Nichols on Eminent Domain § 26.33, at 26-441 (1996); Note, 54 Iowa L. Rev. 813, 823 (1969); see Paul, "Condemnation Procedure Under Federal Rule 71A," 43 Iowa L. Rev. 231, 236, 238 (1958). See generally

Myers v. Chicago, Nw. Ry., 118 Iowa 312, 91 N.W. 1076, 1078 (1902) (proceeding before sheriff-appointed commissioners "not a suit at law, but in the nature of an inquest to ascertain its value").

Chapter 6B delineates the process by which a compensation commission is formed. Annually, the board of supervisors appoints twenty-eight residents of the county eligible to serve as members of a compensation commission and the names are placed on a list. From the twenty-eight, one-fourth "shall be owner-operators of agricultural property"; one-fourth "shall be owners of city property"; one-fourth "shall be licensed real estate sales persons or real estate brokers"; and one-fourth "shall be persons having knowledge of property values in the county by reason of their occupation." Iowa Code § 6B.4. Accordingly, there are seven eligible persons in each of four categories.

In order to initiate condemnation proceedings, the attorney for the appropriate governmental entity seeking condemnation[1] must file a written application with the chief judge of the judicial district in which the land is located. Iowa Code § 6B.3. This application must include "a request for a commission to appraise the damages." Iowa Code § 6B.3(5).

Upon receipt of the written application, the chief judge of the judicial district "shall select by lot six persons" from the list of the twenty-eight who are eligible. The composition must include either two persons from the seven owner-operators of agricultural property if the property in issue is agricultural property or two persons from the seven owners of city property if the property in issue is other than agricultural property. The additional four members of the commission are to be drawn two each from the remaining two groups of seven. Iowa Code § 6B.4. The six, selected by lot in this manner, must qualify by filing a written oath with the sheriff before proceeding with the assessment. Iowa Code § 6B.7.

The Chief Justice of the Supreme Court of Iowa prepares written instructions for compensation commissions. Iowa Code § 6B.43; see "Instructions to Condemnation Commissioners From the Chief Justice of the Iowa Supreme Court" (filed Sept. 13, 1994). After hearing arguments and deliberating on the amount of damages, the compensation commission provides a written decision to the county sheriff that sets forth its assessment. Iowa Code

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[1]Condemnation proceedings are conducted by: the Attorney General when damages are payable from the State treasury; the county attorney when damages are payable from funds disbursed by the county, township, or school corporation; or the city attorney when damages are payable from funds disbursed by the city. Iowa Code § 6B.2(1)-(3).

§§ 6B.5, 6B.14, 6B.18; see Eminent Domain in Iowa 7-8 (Iowa Att'y Gen. 1980). The assessment "shall be final" unless appealed to the district court. Iowa Code §§ 6B.17, 6B.21; see Iowa Code §§ 6B.23, 6B.25, 6B.36(1). See generally Thornberry v. State Board of Regents, 186 N.W.2d 154, 156 (Iowa 1971); In re Proposed Farragut Community School Dist., 250 Iowa 1324, 98 N.W.2d 888, 890-91 (1959).

Prior to enactment of the Open Meetings law, it appears that compensation commissions deliberated in private. See generally, Aplin v. Clinton County, 256 Iowa 1059, 1065, 129 N.W.2d 726, 729 (1964)(recitation of facts discloses that the compensation commission proceeded to assess condemned property "when the interested parties departed . . . ."). According to one authority, the deliberations "are always closed to the public," a practice that insulates a compensation commission "from outside pressures in determining its award." Note, 54 Iowa L. Rev. 737, 822 (1969). See generally A. Jahr, Law of Eminent Domain § 184, at 303 (1953).

With enactment of the Open Meetings law, the compensation commission would be required to comply with chapter 21 if it is a "governmental body" within the meaning of this chapter. Section 21.3 provides:

> Meetings of governmental bodies shall be preceded by public notice . . . and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Compliance with the Open Meetings law would include holding deliberations in open session in the absence of a provision of law authorizing the commission to close the session for this purpose. See generally Iowa Code § 4.1(30)(a) ("shall" in statute normally imposes a duty), § 21.2(2) ("meeting" means a formal or informal gathering of a majority of members comprising a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties), § 21.2(3) ("open" means that all members of the public have access); 1980 Op. Att'y Gen. 430, 432 ("closed session" means a meeting to which any member of the public is denied access by a governmental body).

Section 21.2(1) sets forth eight definitions of the term "governmental body," but only one of these eight definitions potentially encompasses compensation commissions. Section 21.2(1)(a) defines "governmental body" to include "[a] board, council, commission or other governing body expressly created by the statutes of this state . . . .".

Generally bodies that are "expressly created" by statute spring into being by operation of law. An analysis of the process by which they are formed is not necessary to determine the applicability of the Open Meetings law. See e.g., 1993 Op. Att'y Gen. 26 (State Board of Education "expressly created" under Iowa Code § 256.3); 1993 Op. Att'y Gen. 8 (city hospital board of trustees "expressly created" under Iowa Code § 392.6); 1990 Op. Att'y Gen. 65 (county board of supervisors "expressly created" under Iowa Code chapter 331); 1989 Op. Att'y Gen. 37 (county magistrate nominating commission "expressly created" under Iowa Code § 602.6501); 1982 Op. Att'y Gen. 205 (inmate transfer board "expressly created" under Iowa Code § 217.22). The formation of the compensation commission, by contrast, requires further analysis.

In determining whether the compensation commission is "expressly created" by statute, the legislative history of this language is particularly helpful. The statutory predecessor to chapter 21, chapter 28A, originally applied to "[a]ny board, council, or commission created or authorized by the laws of this state." Iowa Code § 28A.1(1) (1977). Analyzing this provision in Greene v. Athletic Council, 251 N.W.2d 559, 561-62 (Iowa 1977), the Iowa Supreme Court concluded that the Iowa State Athletic Council was "authorized" by the laws of this state and, therefore, subject to the Open Meetings Law because it carried out the statutory power of the Board of Regents through subdelegation.

In the wake of the Greene decision, the legislature revised the statute in 1978. The term "authorized" was deleted. 1978 Iowa Acts, ch. 1037, § 3. In its stead, the legislature provided that a governmental body must be expressly created by statute or be formally and directly created by another governmental body which is itself subject to the Open Meetings Law. Id. In light of this change, a body is not subject to the Open Meetings Law merely because it is "authorized" by law to form.

Analyzing the statutory predecessor to chapter 21, chapter 28A, our opinions have refined the meaning of the terms "expressly created" by statute. In 1979, we examined the meaning of this phrase as applied to a peer review committee of a professional licensing board. Noting that a statute gave the board the power to establish peer review committees, Iowa Code § 258A.3(1)(h) (1979), we concluded that the committee itself was not "expressly created" by the statute. "A statute which does not itself 'constitute' the committee, but merely permits the board, in its discretion, to form peer review committees, does not 'expressly create' them as those terms are employed . . . " in the statute. 1980 Op. Att'y Gen. 148, 149-50. See also 1980 Op. Att'y Gen. 183 (agricultural associations and societies recognized by statute not "expressly created" for purposes of the Open Meetings law).

The difficulty in applying this section of the Open Meetings law lies in determining the status of bodies which do not spring into being from the statute, yet are more than merely authorized or permitted by law to form. We have analyzed bodies that fall into this gray area on several occasions. In 1979 we determined that a statute which requires a non-profit corporation to form a board of directors does not itself trigger the Open Meetings law. Iowa Code § 504A.17 (1979)("the affairs of a corporation shall be managed by a corporation of one or more directors."). "While a board of directors for a non-profit corporation is authorized and required by § 504A.17, the board of directors for each non-profit corporation is not 'expressly created' by the statute, which is essential to bring it under the requirements of chapter 28A." 1980 Op. Att'y Gen. 167 (emphasis in original). Shortly thereafter, however, we opined that the Soybean Promotion Board and the Corn Promotion Board were "expressly created" by statute where formation of the boards is mandatory upon passage of a referendum by voters. 1980 Op. Att'y Gen. 183.

Later, in 1986, we considered bodies that are required to form in order to receive grant funds for economic development. Where regional coordinating councils were required for an area in order to receive certain grant funds from the Department of Economic Development to establish satellite marketing centers, we determined that the councils were "expressly created" within the meaning of the Open Meetings law. We noted that the creation of the council was a condition precedent to receipt of the grant funds. Although the councils came into being only if the regional delivery area wished to seek these funds and establish a satellite marketing center, we decided that the Open Meetings law applied based on the statutory language which dictated size, representation and membership of the body. 1986 Op. Att'y Gen. 133.

Synthesizing these authorities, we can distill some parameters for determining whether a body is "expressly created" by statute under these circumstances. Opinions in which we have found a body to be "expressly created" turn on satisfaction of a condition precedent. Upon an application for grant funds or the passage of a voter referendum, the regional coordinating council or the promotion board - respectively - must form by operation of law. A board of directors of a non-profit corporation, by contrast, is required but does not form by operation of law. The board must be formed by the separate action of an individual in the event a non-profit corporation is established. The significance of requiring further action to implement the statute is consistent with our view that "formal and direct" creation of a subcommittee by a governmental body does not occur - and the Open Meetings law does not apply - if the body appoints through an intermediary. See 1980 Op. Att'y Gen. 148, 150-51 (appointment by an executive director insufficient to constitute "formal and direct" creation of a body under section 21.2(1)(c)).

Applying these principles to the compensation commission, we do not believe the commission is "expressly created" by statute. Chapter 6B requires formation of a compensation commission upon filing of a written application, but the statute is not self-executing. The chief judge of the judicial district must draw six lots from the pool of twenty-eight eligible residents. More importantly, the statute does not resolve the composition of the six to be drawn. The chief judge must refer to the written application to determine whether agricultural land is in issue. If so, two of the six must be owner-operators of agricultural property. If not, two of the six must be owners of city property. Iowa Code § 6B.4. The necessity of drawing lots the composition of which is based on the nature of the property in issue indicates that the body is not "expressly created" by the statute itself.

This conclusion is consistent with the transitory nature and limited function of the compensation commission which distinguish it from other, more common "governmental bodies" subject to the Open Meetings law. The pool of twenty-eight eligible residents from which the compensation commission is drawn is not itself a "governmental body." Decision-making or policy-making power is an essential element of a governmental body under section 21.2(1)(a). See 1980 Op. Att'y Gen. 148, 151. The appointment of twenty-eight residents annually is mandatory and the pool may be "expressly created" under section 6B.4; however, this "body" has no decision-making or policy-making power. Indeed, the "body" has no function whatsoever, except as a pool from which a commission may be constituted by lot.

In contrast to the larger pool of eligible residents, the compensation commission does have decision-making power. Commissions formed under chapter 6B, however, form only in the event a written application is filed. If no written application is filed, no commission will form at all. Even if a commission is formed, it exists as a body only with respect to specifically assigned cases. When its work is complete, the "body" dissolves and a new one formed by lot in the event another written application is filed. While not statistically impossible, it is improbable that the same "body" would be formed by lot on more than one occasion.

Significantly, exclusion from the Open Meetings law does not mean that proceedings of a compensation commission will be cloaked in secrecy. Notice of assessment of the property is separately provided by law. Iowa Code §§ 6B.8, 6B.9. A written report is filed with the sheriff and made public. Iowa Code §§ 6B.14, 6B.35(3).

In light of our prior opinions and the nature of the compensation commission, we cannot conclude that chapter 6B "expressly creates" the compensation commission for purposes of

section 21.2(1)(a). Accordingly, it is our opinion that the compensation commission is not subject to the Open Meetings law.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Deputy Attorney General

Bruce Kempkes

BRUCE KEMPKES
Assistant Attorney General

COUNTIES: Health department employees. Iowa Code §§ 20.9, 137.2(5), 509A.1 (1997). The county board of health has authority to determine whether board of health employees shall receive health insurance benefits through collective bargaining agreements or otherwise. In the absence of action by the board of health or on request of the board of health, the board of supervisors may provide health insurance coverage to board of health employees. (Osenbaugh to Spurrier, Ringgold County Attorney, 6-17-97) #97-6-1(L)

June 17, 1997

Clinton L. Spurrier
Ringgold County Attorney
111 S. Fillmore Street
Mount Ayr, IA 50854

Dear Mr. Spurrier:

You have requested an opinion of the Attorney General concerning whether county public health nurses are entitled to county health insurance benefits.[1]

You ask whether persons hired by the board of health are county employees. As previously provided to you, decisions of the Public Employment Relations Board have concluded that health department employees are employees of the county board of health, rather than employees of the county board of supervisors. In re Polk Co. Bd. of Supervisors et al., PERB Case Nos. 120, 227, 276, 339, Nov. 24, 1975, p. 25-26; In re Black Hawk County et al., PERB Case Nos. 48 & 57, Sep. 11, 1975, p. 15. This office has similarly opined that the board of health has the authority under Iowa Code section 137.2(5) to set raises for county health department employees. 1990 Op. Att'y Gen. 37 (#89-8-3(L)). Thus, the board of health is the employer for collective bargaining purposes and would determine employee benefits within its budgetary authority.

Insurance benefits are a mandatory subject of bargaining under Iowa Code section 20.9. 1980 Op. Att'y Gen. 304; Charles City Community School Dist. v. PERB, 275 N.W.2d 766 (Iowa 1979). If there is a collective bargaining agreement, that would determine the entitlement of the nurses to health insurance benefits.

Iowa Code section 509A.1 authorizes the "governing body . . . of any institution supported in whole or in part by public funds [to] establish plans for and procure group insurance . . . for employees . . . ." In 1994 Op. Att'y Gen. 83 (94-1-4(L)), this office opined that the board of supervisors is authorized to

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[1]We assume for purposes of this opinion that the public health nurses are employees hired by the board of health, rather than independent contractors.

provide group insurance plans to county officers and employees under chapter 509A, which governs the provision of group insurance to non-unionized county employees and those officers and employees who are exempt from collective bargaining. 1994 Op. Att'y Gen. 83 (94-1-4(L)), 1980 Op. Att'y Gen. 304. The county plan should be examined to determine whether it provides for inclusion of board of health employees.

Board of health employees, although under the jurisdiction of the board of health for collective bargaining purposes, nonetheless are county employees for certain purposes. For example, this office previously opined that county board of health employees are protected by the county indemnification fund for medical malpractice unless the personnel are actually independent contractors rather than employees. 1978 Op. Att'y Gen. 463. As board of health employees are also county employees, inclusion in a county health insurance plan may be the most practical means to provide health insurance coverage. See 1990 Op. Att'y Gen. 37 (#89-8-3(L)).

In conclusion, the county board of health has authority to determine whether board of health employees shall receive health insurance benefits through collective bargaining agreements or otherwise. In the absence of action by the board of health, the board of supervisors may provide health insurance coverage to board of health employees.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Solicitor General

EMO:cw

COUNTIES: Ambulance service for townships. Iowa Code § 34.1, 34.2, 34A.1, 34A.3, 331.381, 331.382, 359.42, 357B.7 (1997). A county has no duty to provide ambulance service for its townships. (Kempkes to Crowl, Pottawattamie County Attorney, 6-20-97) #97-6-2(L)

June 20, 1997

Mr. Rick Crowl
Pottawattamie County Attorney
227 S. 6th St.
Council Bluffs, IA 51501-4293

Dear Mr. Crowl:

You have requested an opinion on the issue whether a county or a township has a duty to provide ambulance service for its townships. We conclude that both the county and the township have authority to provide ambulance service but neither is expressly required to provide this service.

I.

Iowa Code chapter 331 (1997) generally governs counties and the powers and duties of county boards of supervisors. Sections 331.381 and 331.382 expressly set forth the many duties, powers, and limitations with regard to various county services. See generally Mandacino v. Kelly, 158 N.W.2d 754, 758 (Iowa 1968). No provision in chapter 331 expressly mentions emergency medical or ambulance services.

Townships are governmental subdivisions of counties. State ex rel. Iowa Attorney General v. Terry, 541 N.W.2d 882, 886 (Iowa 1995); see Iowa Code § 359.1. Iowa Code chapter 359 governs township trustees and invests them with certain powers and duties. See generally 1986 Op. Att'y Gen. 54 (#85-8-8(L)); 1942 Op. Att'y Gen. 197, 197 (township trustees do not have home rule authority; they "have only such authority as is expressly given by the Legislature or as is necessarily implied from the express grant"). One provision in chapter 359, section 359.42, mentions fire protection and emergency medical services for townships:

> The trustees of each township shall provide fire protection services for the township, exclusive of any part of the township within a benefited fire district and

> may provide emergency medical service. The trustees may purchase, own, rent, or maintain fire protection service or emergency medical service apparatus or equipment or both kinds of apparatus or equipment and provide housing for the equipment . . . . The trustees may contract with a public or private agency under [Iowa Code] chapter 28E for the purpose of providing any service or system required or authorized under this section.

(emphasis added). See generally Iowa Code § 4.1(30) (in statutes, normally word "shall" imposes a duty and word "may" confers a power), § 357B.7 (township trustees may exchange territory with trustees of benefited fire district to provide fire protection services by agreement). Section 359.43(1) provides that township trustees may levy an annual tax "for the purpose of exercising the powers and duties specified in section 359.42." See generally 1976 Op. Att'y Gen. 576, 576.

II.

Private as well as public entities may provide ambulance service. See generally Neyens v. Roth, 326 N.W.2d 294, 295 (Iowa 1982); 1968 Op. Att'y Gen. 342, 343. In addition to townships, other public entities have express statutory authority to provide such service. See, e.g., Iowa Code § 29A.79 (National Guard), § 347.14(14) (county hospitals), § 384.24(3)(l) (city hospitals); see also Neyens v. Roth, 326 N.W.2d at 295 (city fire department); City of Clinton v. Property Owners, 191 N.W.2d 671, 678 (Iowa 1971) (volunteers). You have specifically asked, however, whether a county has a duty to provide ambulance service for its townships.

Counties once lacked authority to provide ambulance service. 1964 Op. Att'y Gen. 72, 73. In 1967, the General Assembly gave counties statutory authority to do so. In an act "to permit county boards of supervisors to provide ambulance service," the General Assembly allowed them "[t]o purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service." See 1975 Iowa Acts, 62nd G.A., ch. 293, § 1. This statutory provision was repealed after the constitutional grant of home-rule to counties. See generally Iowa Const. Amend. 37 (1978).

No constitutional provision appears to impose a duty upon a county to provide ambulance or other emergency service. See Culver-Union Township Ambulance Serv. v. Steindler, 629 N.E.2d 1231, 1235 (Ind. 1994); see also 1964 Op. Att'y Gen. 72, 73. Similarly, chapter 331 does not expressly or impliedly impose a duty upon a county to provide this service. Counties in other jurisdictions do not have a duty to provide it. See, e.g., Culver-

Union Township Ambulance Serv. v. Steindler, 629 N.E.2d at 1232-35; XVI Kan. Op. Att'y Gen. 92 (1982).

Chapter 359 imposes certain duties upon county supervisors with regard to townships. See, e.g., Iowa Code §§ 359.28, 359.46(1). It does not impose any duties upon them with regard to ambulance or other emergency services. Chapter 359 does set forth various duties and powers of township trustees. Two of those have some bearing on the provision of ambulance service for townships.

First, in its use of "shall," section 359.42 requires township trustees to provide fire protection services for the township. 1976 Op. Att'y Gen. 774, 775. See generally 1975 Iowa Acts, 66th G.A., ch. 194, § 6. Section 359.42 does not define "fire protection services," but, as a matter of fact, some fire departments in the past have transported persons by rescue vehicle or ambulance. See, e.g., Neyens v. Roth, 326 N.W.2d at 295 (city fire department provided ambulance service for city); 1982 Op. Att'y Gen. 512, 512-13; 1978 Op. Att'y Gen. 784, 784; 1978 Op. Att'y Gen. 791, 791.

A question exists whether "fire protection services" encompasses ambulance service. Compare 1994 Ohio Op. Att'y Gen. 94-076 (township fire department, which has express authority to provide fire protection services, has implied authority to provide emergency medical services; providing such services is a legitimate function of township fire department); 1962 Ohio Op. Att'y Gen. 793, 795 (township fire department has implied authority to purchase and use ambulance for use in emergencies unconnected with fires) with 1968 Op. Att'y Gen. 342, 342-43 ("[t]he authority which is available to the township trustees under [section] 359.42 to enter into agreements with cities or towns for furnishing services for the extinguishing of fires . . . is not available for the establishment of a township ambulance service"). Cf. Iowa Code § 85.61(11) ("volunteer ambulance driver" means a person performing services "at the request of the person in charge of the fire department or ambulance service of the municipality"), § 102.2 (fire chief or other authorized officer of fire department in charge of a fire scene that involves protection of life or property "may direct an operation as necessary to . . . perform a rescue operation . . . or take any other action as deemed necessary in the reasonable performance of the department's duties"). We do not, however, have to decide whether "fire protection services" necessarily includes some form of ambulance service in order to answer your specific question. See generally 61 IAC 1.5(3)(d).

Second, in its use of "may," section 359.42 permits township trustees to provide emergency medical service for the township. Section 359.42 does not define "emergency medical service," but, on a purely textual basis, the phrase appears to include the

transportation of persons by ambulance. See Iowa Code § 147A.1(6) ("emergency medical services" includes transportation of persons by ambulance); see also Iowa Code § 34.1(4) ("public safety agency" means unit that provides fire fighting, law enforcement, ambulance, medical, "or other emergency services"), § 34A.2(10), § 321.1(5) ("ambulance" means a motor vehicle "used to transport sick and injured persons who require emergency medical care"). See generally Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to text and approved English usage). This textual analysis coincides with prior versions of section 359.42, which gave township trustees express authority to provide ambulance service. See, e.g., Iowa Code § 359.42 (1985) (township trustees "may provide ambulance service" in counties not providing ambulance services); see also 1986 Op. Att'y Gen. 54 (#85-8-8(L)) ("because the legislature has expressly authorized the township trustees to provide [ambulance service pursuant to Iowa Code section 359.42 (1985)], it is our opinion that trustees have been granted the implied authority to exercise their discretion in defining what these services will consist of"). See generally Iowa Code § 4.6(4) (statutory construction may involve consideration of former statutory provisions).

Section 331.301(1) codifies the constitutional grant of county home-rule, which provides that a county "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 . . . ." By virtue of home-rule, a county now has discretionary authority to provide ambulance service for its townships. See generally 1964 Op. Att'y Gen. 72, 73.

We also note that chapters 34 and 34A establish the Emergency Telephone Number System ("911") and the Enhanced 911 Emergency Telephone System. Chapter 34A requires each county to establish a joint 911 service board to develop an enhanced 911 service plan for the county. Iowa Code § 34A.3(1). "Each political subdivision of the state having a public safety agency serving territory in the county," and "[e]ach private safety agency operating in the area" has representation on the joint 911 service board. Iowa Code § 34A.3(1). The 911 service is capable of transmitting requests for law enforcement, fire fighting, and emergency medical and ambulance services to a public safety answering point, which "directly dispatches emergency response services or relays calls to the appropriate public or private safety agency." Iowa Code § 34A.1(4), (11); see Iowa Code § 34.2(4).

III.

We conclude that either a county or a township has authority to provide ambulance service but neither has a mandatory obligation to do so.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

JUVENILE LAW: Detention of Juveniles Charged with Forcible Felonies; Sight and Sound Separation. Iowa Code §§ 232.8(1)(c), 232.22(6) (1997). The exercise of original jurisdiction by the district court over a juvenile charged with a forcible felony is the equivalent of a waiver to district court for purposes of determining whether the juvenile may be held in a county jail pursuant to Iowa Code section 232.22(6). Juveniles over the age of sixteen years may be held in adult jails for forcible felony charges only after the district court has formally asserted its jurisdiction. Deviation from the requirement of sight and sound separation is permitted only when impracticable or unreasonable in light of concerns with public safety, protection of children, and other competing interests. (Marek to Crowl, Pottawattamie County Attorney, 6-20-97) #97-6-3(L)

June 20, 1997

Mr. Rick D. Crowl
Pottawattamie County Attorney
227 South 6th Street
Council Bluffs, IA 51501-4293

Dear Mr. Crowl:

You have requested an opinion of the Attorney General interpreting Iowa Code section 232.22(6) (1997). That provision permits the placement of juvenile defendants in adult jail facilities when the juvenile court has waived jurisdiction pursuant to section 232.45 or section 232.45A for the alleged commission of a forcible felony. Section 232.22(6) also provides that such juveniles, if held in adult facilities, shall be held "wherever possible" in sight and sound separation from adults.

You have asked two specific questions. First, does Iowa Code section 232.22(6) apply in cases where the district court has original jurisdiction pursuant to section 232.8(1)(c) (1997) (excluding certain felony offenses committed by juveniles from the jurisdiction of the juvenile court)? Second, in situations where juveniles are placed in a county jail pursuant to section 232.22(6), under what circumstances may a county determine that the requirement of sight and sound separation from adults is inapplicable?

We conclude that the exercise of original jurisdiction by the district court over a juvenile charged with a forcible felony is the equivalent of waiver to district court for purposes of determining whether the juvenile may be held in a county jail pursuant to Iowa Code section 232.22(6), but that a juvenile over the age of sixteen years may be held in adult jails for forcible felony charges only

after the district court has formally asserted its jurisdiction. Additionally, we conclude that deviation from the requirement of sight and sound separation is permitted only when impracticable or unreasonable in light of concerns with public safety, protection of children, and other competing interests.

In general, both state law and federal law prohibit the placement of juveniles in adult jails. See, e.g., Iowa Code § 232.22(2)(c)(4) (1997) (requiring that children in confinement be held in a separate room from detained adults); Iowa Code § 356.3 (1997) (requiring officers to hold juvenile prisoners separate from adult prisoners); 42 U.S.C. § 5633(14) (1995) (prohibiting juveniles from being detained or confined in adult jails or lockups).

Both state and federal law make exceptions to the general rule and permit juveniles under the jurisdiction of criminal courts for certain felony offenses to be held in adult jails. See Iowa Code § 232.22(6) (1997) (permitting juveniles facing forcible felony charges following waiver of juvenile court jurisdiction to be held in jail); Iowa Code § 356.3 (1997) (allowing juveniles to be held in adult facilities under direct supervision, in suitable facilities, or when they would otherwise exert "immoral influence" over other juveniles); 28 C.F.R. § 31.303(e)(2) (1995) (permitting juveniles in the jurisdiction of criminal court for felony charge to be held in jail).

Finally, in those exceptional circumstances where the placement of juveniles in adult jails is permitted, both state and federal law require that steps be taken to minimize contact and communication between adults and juveniles. See Iowa Code § 232.22(6) (1997) (requiring sight and sound separation from adults "wherever possible"); Iowa Code § 356.3 (requiring officers to prevent communication between juveniles and adults); 28 C.F.R. § 31.303(d)(1)(ii) ("the State must set forth the procedures for assuring no regular sight and sound contact between such juveniles and adults").

I.

Given the legal framework concerning placement of juvenile offenders in adult jails, your questions concerning Iowa Code section 232.22(6) necessarily require the additional consideration of federal authority. Iowa participates in the federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 et seq., in which states are eligible to receive formula grant funding when they

comply with certain requirements for the detention of juveniles.

Under the Act, each participating state must submit a plan and annual performance reports to the administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP). 42 U.S.C. § 5633(a). Among other requirements, the Act requires states to certify that their statutes prohibit juveniles from being detained or confined in adult jails or lockups. 42 U.S.C. § 5633(14). The Act authorizes the administrator of OJJDP to promulgate rules establishing exceptions to the prohibition of confinement of juveniles in adult facilities. Id. See also 28 C.F.R. pt. 31.

One exception to the removal of juveniles from adult jails and lockups applies to "those juveniles formally waived or transferred to criminal court and against whom criminal felony charges have been filed, or juveniles over whom a criminal court has original or concurrent jurisdiction and such court's jurisdiction has been invoked through the filing of criminal felony charges." 28 C.F.R. § 31.303(e)(2).

The exception in the federal regulations for juveniles who have felony charges pending in criminal court conforms to the legislative intent at the time the amendments to the Juvenile Justice and Delinquency Prevention Act were written. "If a juvenile is formally waived or transferred to criminal court by a juvenile court and criminal charges have been filed or a criminal court with original or concurrent jurisdiction over a juvenile has formally asserted its jurisdiction through the filing of criminal charges against a juvenile, the section 223(a)(14) prohibition no longer attaches." House Report on the Juvenile Justice Amendments of 1980, House Report No. 96-946, May 13, 1980 (the House bill, which included the section 223(a)(14) amendment, became law).

II.

In light of the state and federal restrictions on the placement of juveniles in adult jails, we now consider your specific questions. In enacting Iowa Code section 232.8(c) in 1995, the legislature excluded forcible felonies and several other criminal offenses committed by juveniles over the age of sixteen from the jurisdiction of the juvenile court. That sub-section provides in pertinent part:

> Violations by a child, age sixteen or older, which . . . constitute a forcible

> felony are excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause.

Iowa Code § 232.8(c) (1997).

Prior to the implementation of section 232.8(1)(c), the juvenile court exercised exclusive original jurisdiction over proceedings concerning juveniles alleged to have committed forcible felonies. See Iowa Code § 232.8(1)(a) (1995). For a juvenile to be prosecuted for a forcible felony offense in district court, the juvenile court first had to waive jurisdiction following a hearing on a motion for waiver from the county attorney or the juvenile. See Iowa Code § 232.45 (1995). Once the juvenile court had waived jurisdiction and a juvenile had been convicted of a felony in district court, the district court retained jurisdiction for any subsequent felony offenses committed by that juvenile. Iowa Code § 232.45A. Significantly, the Code referred to this retention of jurisdiction by the district court as a "waiver." See Iowa Code § 232.22(6)(1995) ("If the court has waived its jurisdiction . . . pursuant to . . . section 232.45A . . . .") (emphasis added).

Once a juvenile over the age of sixteen and accused of a forcible felony was waived to district court, counties had the option of placing that juvenile in jail pursuant to section 232.22(6). You ask whether, for purposes of determining eligibility of a juvenile accused of a forcible felony to be held in county jails pursuant to section 232.6, the exercise of original jurisdiction by a district court pursuant to section 232.8(1)(c) is the equivalent of a waiver of juvenile court jurisdiction following a motion and hearing pursuant to section 232.45 or the automatic waiver provisions of section 232.45A. We conclude that it is. To find otherwise would lead to an illogical result.

Because the 1995 enactment of section 232.8(1)(c), in effect, replaced the waiver procedure for sixteen-year-olds and seventeen-year-olds facing forcible felony charges with original jurisdiction in district court, section 232.22(6) would be meaningless if interpreted literally. Rules of statutory construction provide that the Code should be "liberally construed with a view to promote its objects . . . ." Iowa Code § 4.2 (1997). The manifest intent of the Legislature prevails over the literal interpretation of the

words used in a statute. Whelp v. Iowa Dep't of Revenue, 333 N.W.2d 481, 483 (Iowa 1983).

Of the several state and federal provisions concerning placement of juveniles in adult facilities, Iowa Code section 232.22 is the most recently enacted. The 1988 amendment to section 232.22(4), permitting the temporary commitment of juvenile offenders to adult facilities under certain circumstances, appears to have been enacted in order to take advantage of the regulatory exceptions allowed under the administrative rules promulgated under the amendments to the Juvenile Justice and Delinquency Prevention Act. See 28 C.F.R. § 31.303(e)(2).

The federal regulatory exceptions treat juveniles waived to district court the same as juveniles over whom the district court has asserted original or concurrent jurisdiction. 28 C.F.R. § 31.303(e)(2). The legislative grant of original jurisdiction to the district court for certain serious felonies committed by juveniles, Iowa Code section 232.8(1)(c) (1997), presumably was made with an awareness of the other relevant statutory and regulatory provisions. See Lamb v. Kroeger, 233 Iowa 730, 736, 8 N.W.2d 405, 408 (1943) (proper statutory interpretation is one that is consistent with other relevant provisions).

The conclusion that the legislature intended the exercise of original jurisdiction in district court to have the same effect as waiver to district court from juvenile court is also supported by the language of section 232.22(6). That section refers to retention of jurisdiction by the district court for subsequent offenses committed by a juvenile as a form of waiver. Compare Iowa Code § 232.22(6)("If the court has waived its jurisdiction . . . pursuant to section 232.45A . . . .") with Iowa Code § 232.45A(2)("all criminal proceedings against the child for any aggravated misdemeanor or felony occurring subsequent to the date of the conviction of the child shall begin in district court . . . .").

That the exercise of original jurisdiction by the district court is the equivalent to waiver from juvenile court does not completely answer the question whether juveniles facing forcible felony charges may be held in adult jails. As noted above, federal restrictions on the housing of juveniles in adult jails also may apply.

The regulations promulgated under the amendments to the Juvenile Justice and Delinquency Prevention Act permit juveniles under criminal court jurisdiction to be held in adult jails, but only in limited circumstances. See 28

C.F.R. § 31.303(e)(3). When a criminal court has original jurisdiction over a juvenile, the juvenile may be held in an adult jail only "after such court's jurisdiction has been invoked through the filing of criminal felony charges." Id.

Pursuant to Iowa Code section 232.8(1)(c), the district court has jurisdiction over sixteen-year-olds and seventeen-year-olds facing forcible felony charges. Section 232.22(6) permits such juveniles to be held in adult jail facilities. Federal regulations applicable to states receiving funding through the Juvenile Justice and Delinquency Prevention Act, however, provide for the placement of such juveniles in adult jails only after charges have been filed so as to cause the district court to exercise jurisdiction. 28 C.F.R. § 31.303(e)(3).

Typically, such an exercise of district court jurisdiction would first occur at initial appearance.[1] A juvenile arrested without a warrant for a forcible felony is not subject to the jurisdiction of the district court, and therefore may not be held in an adult jail until charges have been filed with the court.[2] Non-compliance by county jails would jeopardize the state's grant funding from the Office of Juvenile Justice and Delinquency Prevention.[3] Non-compliance might also implicate the state Jail Inspection Standards. See, e.g., 201 IAC 50.13(1)(requiring detention of juveniles in jails to conform to applicable statutes).

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[1]. See Iowa R. Crim. P. 2.1. Jurisdiction of the district court might also first occur with the issuance of an arrest warrant upon a finding of probable cause by a magistrate. See Iowa Code § 804.1 (1997).

[2]. Juveniles alleged to have committed delinquent acts may be "placed in a jail or lockup for up to six hours from the time they enter a secure custody status . . . ." 28 C.F.R. § 31.303(e)(2). This six hour exception would apply to juveniles over the age of sixteen who are alleged to have committed a forcible felony.

[3]. The Office of Juvenile Justice and Delinquency Prevention applies a numerical de minimis standard when incidents of noncompliance "do not exceed an annual rate of 9 per 100,000 juvenile population of the State." 28 C.F.R. 31.303(f)(6)(iii)(B)(2)(i).

III.

We turn now to your second question. Iowa Code section 232.22(6) provides that juveniles, if held in adult facilities, shall be held "wherever possible" in sight and sound separation from adults. You ask whether that provision allows waiver of the requirement of sight and sound separation if a suitable facility is not available in the county or, alternatively, the judicial district. You point out that there is no uniform policy among counties as to how far juveniles must be transported to alternate facilities in order to achieve sight and sound separation. Finally, you note that counties may be at risk of exposure to liability for failure to comply with the requirement of sight and sound separation.

The adverbial phrase "wherever possible" is used throughout the Code to indicate that exceptions are allowed to a general rule if the facts of a particular case show that compliance is not possible. See, e.g., Iowa Code § 18.18(3) (state procurement specifications shall eliminate, wherever possible, discrimination against items manufactured with reclaimed materials or soy-based inks); Iowa Code § 49.74 (election boards shall cause persons waiting on premises at time polling place is to close, "wherever possible," to move inside of structure so doors can be closed); Iowa Code § 308A.1 (recreational bikeways "shall be routed, wherever possible, to allow the enjoyment of scenic views . . ."); Iowa Code § 321E.28 (a permit for moving of mobile homes, "wherever possible," shall specify routes with a width of at least 24 feet); Iowa Code § 354.1(1) (purpose of platting is to prevent, wherever possible, land boundary disputes).

To our knowledge, the phrase "wherever possible," as used in Iowa Code section 232.22(6) and elsewhere, has not been construed by an Iowa appellate court. The word "wherever" has been interpreted as meaning that deviation is permitted at points of impracticability or unreasonableness. Hanson v. Iowa State Commerce Comm'n, 227 N.W.2d 157, 163 (Iowa 1975). In some contexts, the Code uses the term "feasible" synonymously with the word "possible." See, e.g., Iowa Code § 49.74 (equating possible with feasible).

When identical language is used in several places, it is presumed to have the same meaning in each context. Beer Glass Co. v. Brundige, 329 N.W.2d 280, 286 (Iowa 1983). Clearly, the use of the phrase "wherever possible" in Iowa Code section 232.22(6) indicates that the legislature envisioned circumstances in which the strict requirement of sight and sound separation of juveniles from adults in the

jail population would be impractical, unreasonable, or infeasible.

To determine under what circumstances sight and sound separation might not be required, we must examine the purpose of the requirement. Statutes relating to the same subject matter must be considered in light of their common purpose. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981). The juvenile justice sections of the Iowa Code are liberally construed "to serve the child's welfare and the best interest of the state." Iowa Code § 232.1.

As noted in division II, supra, the separation of juveniles from adults in jail populations has precedent in both federal and state law. The movement to separate juveniles from adults in jails dates back to the late nineteenth century, when it was a reaction to the perceived abuse of children. See generally 1982 Op. Att'y Gen. 323, 323. Given that the motivation for sight and sound separation is protection of juveniles, and that -- as you point out in your opinion request -- failure to comply with the requirement may subject a county to a liability risk, no hard and fast rule is possible. We cannot say, for example, in every case where a county has determined that no facility affording sight and sound separation is available within the judicial district, that the section 232.22(6) requirement does not apply. Instead, deviation from the requirement of sight and sound separation is permitted only when impracticable or unreasonable in light of the competing interests of public safety, protection of children, and all other relevant factors.

Whether separation of juveniles from adults is possible and whether an action taken by a county is valid in any particular case would, of course, depend upon the facts and circumstances. See generally 1980 Op. Att'y Gen. 751, 758. We may not resolve such issues of fact in an opinion. See 61 IAC 1.5(3); 1992 Op. Att'y Gen. 55, 59-60. It is not difficult to imagine, however, circumstances that would lead to the conclusion that strict compliance with the requirement for sight and sound separation is infeasible. Unreasonable travel times or inadequate access to legal counsel, for example, might outweigh the benefits of sight and sound separation if available only at a very remote location. Nevertheless, each situation must be considered separately, and counties must attempt to achieve sight and sound separation.

Reasonable reliance on an opinion of the Attorney General generally demonstrates good faith. 1984 Op. Att'y

Gen. 66, 69. No county can be shielded from liability, however, by the terms of an Attorney General's opinion.

IV.

In summary, the exercise of original jurisdiction by the district court over a juvenile charged with a forcible felony is the equivalent of waiver to district court for purposes of determining whether the juvenile may be held in a county jail pursuant to Iowa Code section 232.22(6). Juveniles over the age of sixteen years may be held in adult jails for forcible felony charges only after the district court has formally asserted its jurisdiction. Deviation from the requirement of sight and sound separation is permitted only when impracticable or unreasonable in light of concerns with public safety, protection of children, and other competing interests.

Finally, it is important to note that the statutes on which this opinion is based have been the subject of numerous recent attempts at legislative amendment. E.g., H.R. 3876 (U.S. 1996) (would permit jailing of juveniles with adults without sight and sound separation in some circumstances); H.R. 3565 (U.S. 1996) (would increase numbers and types of offenses for which juveniles could be charged as adults); S. 1952 (U.S. 1996) (would ease the federal mandates on states, including the restrictions on jailing of some juveniles); S.F. 2435 (Iowa 1996) (would amend Iowa Code sections 232.22 and 356.3). In establishing policies for the jailing of juvenile offenders, one must be mindful of amendments to the authorities on which this opinion is based.

Sincerely,

DOUGLAS R. MAREK
Deputy Attorney General

DRM:cw

LOBBYING; COUNTY ATTORNEYS: Registering and reporting as lobbyists. Iowa Code §§ 68B.2, 68B.36, 68B.37 (1997). County attorneys who seek to influence legislation on behalf of the Iowa State Association of Counties or the Iowa County Attorneys Association do not need to register and report as lobbyists if lobbying constitutes part of their official duties and responsibilities. The question whether lobbying for any particular piece of legislation falls within the "duties and responsibilities" of county attorneys raises factual questions that an opinion cannot resolve. (Kempkes to Riepe, Henry County Attorney, 6-24-97) #97-6-4(L)

June 24, 1997

Mr. Michael A. Riepe
Henry County Attorney
Courthouse
P.O. Box 69
Mt. Pleasant, IA 52641-0069

Dear Mr. Riepe:

You have requested an opinion involving Iowa Code chapter 68B (1997), the "Iowa Public Officials Act," and the scope of its requirements for lobbyist registration and reporting. Under section 68B.2(13)(b)(3), these requirements do not apply to a federal, state, or local elected official "while performing the duties and responsibilities of office."

Initially, you pose the broad question whether "a local governmental official lobbying on behalf of any state governmental organization in which a political subdivision is a member, or any state governmental organization whose membership is primarily composed of local governmental officials, constitutes "'performing the duties and responsibilities of office' under section 68B.2(13)(b)(3)." In view of the broad range of duties and responsibilities that attach to the various offices comprising local government, however, our response will focus upon the specific examples you pose: whether county attorneys seeking to influence legislation must register and report as lobbyists when acting on behalf of either the Iowa State Association of Counties (ISAC) or the Iowa County Attorneys Association (ICAA). See generally 61 IAC 1.5(2), 1.5(3)(d).

We can only conclude that county attorneys who seek to influence legislation on behalf of the ISAC or the ICAA do not need to register and report as lobbyists if lobbying constitutes part of their official duties and responsibilities. The question whether lobbying for any particular piece of legislation falls within the "duties and responsibilities" of county attorneys raises factual questions that an opinion cannot resolve. See generally 61 IAC 1.5(3)(c).

I.

Preliminarily, we observe that the ethics committees of the General Assembly have authority to adopt rules regarding lobbyists and lobbying activities. See Iowa Code § 68B.31(4)(b). This office, in contrast, does not have any rule-making authority to make policy in applying chapter 68B. 1992 Op. Att'y Gen. 199, 201. In issuing an opinion, we must follow the principles a court would employ in construing and interpreting statutes. Id. Thus, we can only examine chapter 68B as written and cannot re-write it to conform our views to what might be considered wise public policy. Id.

We also note that a violation of chapter 68B may lead to criminal penalties. See Iowa Code § 68B.25 (violation of chapter 68B constitutes a serious misdemeanor). We therefore emphasize that this opinion does not purport to decide the criminality of any particular action or inaction. See 1994 Op. Att'y Gen. 24, 24. An opinion from this office

> can only address those matters which may be determined as a matter of law. Ultimately, application of [chapter 68B] to specific facts requires adjudication, either through the complicated processes in [chapter 68B] 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'y Gen. 686.

1992 Op. Att'y Gen. 199, 201.

II.

Sections 68B.36(1) and 68B.37(1) require all lobbyists who seek to influence legislation to register and file reports with the General Assembly. The reports must disclose clients, campaign contributions and recipients, and expenditures made for lobbying purposes. Iowa Code § 68B.37(1). Section 68B.2(13) defines who is a "lobbyist" as well as who is not a "lobbyist."

Section 68B.2(13)(a) provides that "lobbyist" means an individual who, by acting directly, engages in one of four specified activities. 1992 Op. Att'y Gen. 199, 202. Under section 68B.2(13)(a)(3), "lobbyist" includes a person who "represents the position of a federal, state, or local government agency, in which the person serves or is employed as the designated representative, for purposes of" influencing legislation. See generally Iowa Code § 68B.36(5) ("[a]ll federal, state, and local officials or employees representating the official positions of their departments, commissions, boards, or agencies shall, when lobbying the general assembly, present . . . a letter of authorization from their department or agency heads prior to the commencement of their lobbying").

Section 68B.2(13)(b) provides that "lobbyist" does not mean an individual who comes within one of eight specified categories, either due to a particular status or activity. See generally 1994 Op. Att'y Gen. 14, 21. Under section 68B.2(13)(b)(3), "lobbyist" does not include a federal, state, or local elected official "while performing the duties and responsibilities of office." (emphasis added). See generally Iowa Code § 68B.2(15). And, under section 68B.2(13)(b)(7), "lobbyist" does not include an individual

> who is a member, director, trustee, officer, or committee member of a business, trade, labor, farm, professional, religious, education, or charitable association, foundation, or organization who either is not paid compensation or is not specifically designated as provided in [section 68B.2(13)(a)(1)-(2)].

(emphasis added). See generally Iowa Code § 68B.2(13)(a)(1)-(2) ("lobbyist" includes an individual who "[r]eceives compensation to encourage the passage, defeat, . . . or modification of legislation" and an individual who "[i]s a designated representative of an organization which has as one of its purposes the encouragement of the passage, defeat, . . . or modification of legislation").

III.

(A).

Under section 68B.2(13)(b)(3), a "lobbyist" does not include a federal, state, or local elected official while performing the "duties and responsibilities of office." We construe the phrase "duties and responsibilities of office" according to context and approved English usage, and we liberally construe chapter 68B with a view to promote its objects. See Iowa Code § 4.2.

The General Assembly has infrequently used the phrase "duties and responsibilities" in describing the functions of various public offices. See, e.g., Iowa Code §§ 263B.2, 441.10, 455A.7(3), 475A.3(2). We presume that each word in section 68B.2(13)(b)(3) -- "duties" and "responsibilities" -- means something different than the other. See George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 500 (Iowa 1983); State v. Hauan, 361 N.W.2d 336, 339 (Iowa App. 1984).

The word "duty" may signify an obligation of performance, care, or observance that rests upon a person in an official capacity. Black's Law Dictionary 453 (1979). Synonyms include "office," "responsibility," "obligation," "function," and "business." E. Ordway, Synonyms and Antonyms 88 (1913). A "duty" commonly means either a legal or a moral obligation. Webster's Ninth New Collegiate Dictionary 352 (1979).

For purposes of public office, however, the word "duty" has a special meaning that appears targeted toward law and not morals: it signifies an express or necessarily implied obligation imposed upon a public officer or employee by a constitution, statute, court rule, or other law. See, e.g., Bloss v. Williams, 166 N.W.2d 520, 523 (Mich. App. 1968). Iowa Code section 331.756 generally lists many of the duties of county attorneys, but does not specifically mention "lobbying." See generally Dubuque County v. Fitzpatrick, 144 Iowa 86, 121 N.W. 15, 17 (1909); 1994 Op. Att'y Gen. 21 (#93-6-4(L)). Nevertheless,

> it has been observed that [statutes defining the duties of public officers] seldom, if ever, define with precise accuracy the full scope of such duties.
>
> . . .
>
> Generally the duties of a public officer include those lying fairly within [the scope of statutes], those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principle purpose. . . . [A]s a general rule the duties imposed by law on public officers are functions and attributes of the office . . . .

1977 N.D. Op. Att'y Gen. (January 3, 1977).

The word "responsibility" appears to have a somewhat different application than the word "duty." It may mean "[t]he state of being answerable for an obligation, and includes judgment, skill,

ability and capacity." Black's, supra, at 1179. It commonly signifies "the quality or state of being responsible" (as in "moral, legal, or mental accountability") or the bearing of a burden. Webster's, supra, at 979. Synonyms of the word "responsible" include "accountable," "answerable," and "liable." J. Fernald, Synonyms, Antonyms, and Prepositions 366 (1947). Unlike "duty," the word "responsibility" does not appear to have a special meaning in law for purposes of public office, and no statute generally lists the "responsibilities" of county attorneys.

Whatever the exact parameters of section 68B.2(13)(b)(3) as they relate to county attorneys, we construe the phrase "duties and responsibilities of office" as encompassing the act of influencing legislation so long as it directly relates to their official duties and responsibilities. Public officials

> are elected by the voters for the purpose of performing certain public functions. Among the functions of officers of municipal corporations and counties is to represent the views of the constituents to law-making bodies in regard to pending issues affecting the political subdivision. Since it is the responsibility of the [governmental] entities to represent the views of their constituents in this manner, it is proper to carry out this function in concert with officials of other governmental bodies. If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box.

Peacock v. Georgia Municipal Ass'n, 279 S.E.2d 434, 437-38 (Ga. 1981). Accord 1989 Idaho Op. Att'y Gen. 61. See generally Iowa Code of Prof. Resp. for Lawyers EC 8-2 (if a lawyer "believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law"; a lawyer "should encourage the simplification of laws and the repeal or amendment of laws that are outmoded").

Our construction of section 68B.2(13)(b)(3) generally comports with federal law on lobbying registration and reporting. See generally Iowa Code § 4.6(4) (statutory construction may involve consideration of laws on same or similar subjects); 1994 Op. Att'y Gen. 1, 5-6 (referring to federal law on lobbying in examining the parameters of the IPOA). Under federal law, "lobbying contact" that generally requires a person to register and report as a lobbyist does not include a communication made by a public official "in the public official's official capacity." See 2 U.S.C. § 1602(8)(B)(i) (1995).

Our construction also comports with the apparent purpose of chapter 68B with regard to lobbyist registration and reporting. See generally Iowa Code § 4.6(1) (statutory construction may involve consideration of legislative object). In addition to advancing governmental interests in avoiding corruption (or the appearance of corruption) and preserving public confidence in governmental processes, lobbyist registration and reporting requirements

> foster a strong governmental interest in enabling representatives to make more rational decisions in the public interest. . . . Similarly, . . . acceptance of the government's interest in disclosing "who is being hired, who is putting up the money, and how much," parallels [the idea of] the electorate's right to know "where political campaign money comes from and how it is spent."

Note, "Federal Lobbying Disclosure Reform Legislation," in 1 Sutherland's Statutory Construction 875, 888 (1994) (footnotes omitted). See 1994 Op. Att'y Gen. 14, 15-16; Annot., "Lobbying Regulations," 42 A.L.R.3d 1046, 1048-50 (1972). None of these concerns appears implicated when county attorneys -- properly identified, see Iowa Code of Prof. Resp. for Lawyers EC 8-4 -- seek to influence legislation directly related to their official duties and responsibilities.

Regarding county attorneys who seek to influence legislation on behalf of the ISAC or the ICAA, we note that the General Assembly has not expressly created or authorized the creation of either of these associations by statute. The General Assembly has, however, provided the ISAC with authority to participate in government, including matters relating to rural health, emergency medical care, housing, medical assistance, roadside management, and mental health, see, e.g., Iowa Code §§ 135.107(1), 135C.2(5)(f)(6), 147A.2, 255A.5, 314.22(3)(a)(8), 331.438(4)(b)(1); it has provided the ICAA with similar authority to participate in government, including matters relating to the Prosecuting Attorneys Training Council, child support, and criminal justice, see, e.g., Iowa Code §§ 13A.3(2), 13A.6, 252B.18(1)(a), 804.31.

We have construed 68B.2(13)(b)(3) as encompassing the act of influencing legislation so long as it directly relates to the official duties and responsibilities of county attorneys. Whether county attorneys must register and report as lobbyists when seeking to influence legislation on behalf of the ISAC or the ICAA will normally depend upon the particular initiative or change under legislative consideration. Legislation affecting the criminal justice system serves as one example of a matter that may directly

relate to the official duties and responsibilites of county attorneys. County attorneys -- charged with duty of prosecution -- possess substantial knowledge, information, and experience in criminal law and procedure that may aid the General Assembly in assessing the worth of legislative initiatives or changes in those areas. See T. Susman, The Lobbying Manual 154 (1993); see also 1 Sutherland's, supra, § 13.08, at 672.

(B).

Under section 68B.2(13)(b)(7), a "lobbyist" does not include an individual who is a member, officer, or committee member of a "professional association" or "professional organization" and "who either is not paid compensation or is not specifically designated as provided in [section 68B.2(13)(a)(1)-(2)]." See generally Iowa Code § 68B.2(13)(a)(1)-(2) ("lobbyist" includes an individual who "[r]eceives compensation to encourage the passage, defeat, . . . or modification of legislation" and an individual who "[i]s a designated representative of an organization which has as one of its purposes the encouragement of the passage, defeat, . . . or modification of legislation").

We believe that this exception may apply to county attorneys who are members of the ICAA and who are seeking to influence legislation on its behalf. It appears likely that the ICAA constitutes such a "professional association" or "professional organization." See Black's, supra, at 991, 1089-90 ("organization" includes an association and any other legal or commercial entity; "profession" -- historically limited to law, theology, and medicine -- means a vocation or occupation requiring special education and skill; "professional association" means a group of individuals organized for education, social activity, lobbying, and the like); see also Cummins v. Pennsylvania Fire Ins. Co., 153 Iowa 579, 134 N.W. 79, 82 (1912).

We emphasize, however, that determining the exact status of the ICAA would require additional factual information about this entity and its governing charter or bylaws. We cannot make factual determinations in an opinion. See 1972 Op. Att'y Gen. 686, 687; see also 61 IAC 1.5(3). We also note that the ICAA may not need to take any formal action specifically designating a county attorney as one of its representatives, given the purposes of chapter 68B. See generally 1994 Op. Att'y Gen. 146, 150 ("lobbyists are primarily defined [in chapter 68B] by their direct activities"); 1994 Op. Att'y Gen. 1 (#93-1-3(L)) ("lobbyist" under previous statute included person who "[r]epresents on a regular basis an organization"). Last, we point out that if a county attorney has been specifically designated as a legislative representative of the ICAA, the exception in section 68B.2(13)(b)(7) would not apply and the county attorney would have to register and report as a lobbyist unless another exception applies.

IV.

County attorneys who seek to influence legislation on behalf of the ISAC or the ICAA do not need to register and report as lobbyists if lobbying constitutes part of their official duties and responsibilities. The question whether lobbying for any particular piece of legislation falls within the "duties and responsibilities" of county attorneys raises factual questions that an opinion cannot resolve.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Transportation's development of "access Iowa highways." Iowa Code §§ 307A.2(12), 313.2A (1997); 1997 Iowa Acts, 77th G.A., ch. __, § 12 (S.F. 391); 1996 Iowa Acts, 76th G.A., ch. 1218, § 51 (H.F. 2421). Session laws are valid laws, whether or not placed in the Iowa Code; the law of the State of Iowa therefore includes 1996 Iowa Acts, 76th G.A., chapter 1218, section 51(2), a session law that involves the development of "access Iowa highways." Pursuant to that law, the Iowa Department of Transportation should act with reasonable dispatch in developing access Iowa highways. (Kempkes to Halvorson, State Senator, 7-8-97) #97-7-1(L)

July 8, 1997

The Honorable Rod Halvorson
State Senator
Statehouse
LOCAL

Dear Senator Halvorson:

You have requested an opinion on two legislative acts as they relate to the Iowa Department of Transportation and the Iowa State Transportation Commission. First, the General Assembly in 1996 passed a "session law," House File 2421. See 1996 Iowa Acts, 76th G.A., ch. 1218. Part of House File 2421, section 51(2), created the "access Iowa plan" for developing "access Iowa highways." Second, the General Assembly in 1997 passed Senate File 391. Senate File 391 struck one part of House File 2421 that involved the access Iowa plan; however, it did not strike section 51(2).

You ask whether section 51(2) of House File 2421 "is Iowa law" and, if so, what duty is imposed by this law upon the Department. We conclude that session laws are valid laws, whether or not placed in the Iowa Code, and that House File 2421 is thus part of Iowa law. We also conclude the Department, pursuant to that law, should act with reasonable dispatch in developing access Iowa highways.

I.

(A).

Iowa Code chapter 306 (1997) governs the establishment of state highways. Section 306.4(1) generally vests the Department with jurisdiction over them. See generally Iowa Code § 306.3(8). Chapter 307 generally governs the Department. Section 307.2 places responsibility with the Department for planning, developing, regulating, and improving transportation within the state as provided by law. See generally Iowa Code §§ 307.10, 307.22, 307.24, 307.2(12).

Chapter 307A generally governs the Commission. Section 307A.2(12) requires the Commission to prepare a long-range program for the primary road system that shall cover a period of at least five years, undergo yearly revision and republication, and list definite projects in order of urgency. Under section 307A.2(15), the Commission must identify a network of "commercial and industrial highways" and include proposed improvements to this network in its long-range program.

Chapter 313 governs the primary road system. Section 313.2A, like section 307A.2(15), directs the Commission to identify a network of commercial and industrial highways to enhance opportunities for the development and diversification of the state's economy and sets forth criteria for the Department in establishing priorities for improving those highways. Section 313.8 provides that the Department shall proceed to improving the primary road system "as rapidly as funds become available therefor" and that improvements "shall be made and carried out in such a manner as to equalize the condition of the primary roads and accessibility for commercial and industrial economic development purposes, as nearly as possible, in all sections of the state."

(B).

House File 2421 dates from 1996. Among other things, the title to House File 2421 revealed that it appropriated money to the Department out of the General Fund, the Road Use Tax Fund, and the Primary Road Fund for various projects. See 1996 Iowa Acts, 76th G.A., ch. 1218. In section 51, House File 2421 addressed the access Iowa plan:

> (1). It is the intent of the general assembly to formulate an access Iowa plan which shall designate portions of the commercial and industrial network of highways as access Iowa highways. The goal of the access Iowa plan shall be to enhance the existing Iowa economy and ensure its

> continuing development and growth in the national and global competitive marketplace by providing for early completion of the construction of the most important portions of the Iowa highway system. These portions of the system shall be those that are essential for ensuring Iowans direct access to the nation's system of interstate highways and transportation services.
>
> The general assembly's past actions are consistent with the access Iowa plan. The general assembly has set general policy guidelines for the [Commission's] planning and programming development . . . .
>
> (2). The [Department] shall designate portions of the commercial and industrial network of highways as access Iowa highways and shall expedite and accelerate development of access Iowa highways. . . .
>
> (3). The [Department] shall provide a report to the general assembly by January 15, 1997, designating which portions of the commercial and industrial network of highways the department determines to be access Iowa highways. . . .

(emphasis added).

The Governor signed House File 2421 on May 30, 1996; his item vetoes did not affect section 51. See Governor's Veto Message following 1996 Iowa Acts, 76th G.A., ch. 1218. No effective date being specified for section 51, see 1996 Iowa Acts, 76th G.A., ch. 1218, § 71, it took effect on July 1, 1996. See generally Iowa Const. art. III, § 26 (1857); Iowa Code § 3.7.

In the interim between the 1996 and 1997 legislative sessions, the Department filed its "Report to the General Assembly, Chapter 1218, Section 51(3), of the 1996 Session Laws (January, 1997)." As indicated by the report's title, the Department filed this report pursuant to section 51(3) of House File 2421. After acknowledging that "[t]he legislative directive was 'to enable the early, rapid, expedited, and accelerated completion of the development of access Iowa highways,'" the Department stated in the report that "[t]he time frame considered for the purposes of this report is ten years, the minimum amount of time required to place projects on a 'fast-track' from concept development to complete paving.'"

According to the Department report, "[t]he costs of four-laning all the [1,313] miles identified as potential access Iowa routes are about $ 1.66 billion." The Department addressed three options it faced in implementing the access Iowa plan in conjunction with its other projects. One option placed access Iowa improvements on the same priority schedule as other primary road improvements, which would, however, prevent completion within ten years of some access Iowa highways. A second option involved obtaining revenues, in the amount of $ 455 million, specifically for developing access Iowa highways. A third option "would delay other non-access Iowa projects beyond the ten-year period in order to fund access Iowa." The Department expressly rejected the third option on the ground it would adversely affect other projects involving the primary road system; it did not expressly approve or reject the first and second options.

Senate File 391 dates from 1997. Among other things, the title to Senate File 391 revealed that it, too, appropriated money to the Department out of the General Fund, the Road Use Tax Fund, and the Primary Road Fund for various projects. See S.F. 391 (p. 1, ll. 3-13). In section 12 of Senate File 391, the General Assembly amended House File 2421 by striking section 51(3), which required the Department to report on the designation of commercial and industrial highways by January 15, 1997. In lieu of section 51(3), the General Assembly provided:

> The [Commission] shall make a presentation to the joint appropriations subcommittee on transportation, infrastructure, and capitals not later than February 1, 1998, regarding the effect that complying with subsection 2 will have on the [Commission's compliance with section 313.2A, which relates to identification and improvement of commercial and industrial highways] . . . .
>
> This section is repealed effective July 1, 2000.

S.F. 391, § 12. The Governor signed Senate File 391 on May 19, 1997; his item vetoes did not affect section 12. Senate File 391 became effective on July 1, 1997. See Iowa Code § 3.7(1). See generally S.F. 391 (p. 8, ll. 32-35; p. 9, ll. 1-2).

II.

(A).

You have asked whether section 51(2) of House File 2421 "is Iowa law." Section 51(2) provides that the Department "shall

designate portions of the commercial and industrial network of highways as access Iowa highways and shall expedite and accelerate development of access Iowa highways. . . ."

House File 2421 is a "session law" and is not published in the Iowa Code. Compare Iowa Code § 2B.10 with Iowa Code § 2B.12. Enacted by a state legislature at one of its annual or biennial sessions, session laws stand in contrast with "compiled laws" or "revised statutes" of the state. Black's Law Dictionary 1230 (1979). Session laws are "[p]ublished laws of a state enacted by each assembly and separately bound for the session and extra sessions. The session laws are normally published on a periodic basis, in a pamphlet, throughout the legislative session and then at the end of the session are bound into a more permanent form." Id.

Iowa Code chapter 2B, entitled "Legal Publications," governs the publication of session laws as well as the publication of the Iowa Code and Iowa Code Supplement. See Iowa Code §§ 2B.10, 2B.12; see also Iowa Code §§ 2.42(11), 2B.6(2), 3.3. Section 2B.17 provides for the proper citation to "official statutes," which expressly include session laws. Section 2B.17(3) provides in part that the official printed versions "of the Iowa Code, Code Supplement, and session laws published under authority of the state are the only authoritative publications of the statutes of this state."

In view of the foregoing, we conclude that session laws are valid laws, whether or not placed in the Iowa Code, and that section 51(2) of House File 2421 is thus part of Iowa law. Our conclusion effectively reaffirms this office's statement in 1937 that "[t]he laws enacted by the legislature and carried only in the session laws and not in the Code have just as much validity and effect as those carried in the Code." 1938 Op. Att'y Gen. 360, 361.

(B).

You have also asked about the impact of section 51(2) upon the Department. You point to the statutory requirement that the Department expedite and accelerate development of access Iowa highways. You specifically ask what practical steps the Department must take in order to comply with this requirement as the Department formulates its plan known as "Iowa in Motion." This plan, which predates the legislation on access Iowa highways, identifies the Department's goals up to the year 2020; it has not yet reached the stage of assigning priorities to projects. You believe that "Iowa in Motion" must encompass the development of access Iowa highways in order for the Department to comply with section 51(2).

Section 51 does not set forth a specific deadline or timetable for developing access Iowa highways. Section 51(1) does, however, provide that "[t]he goal of the access Iowa plan shall be to enhance the existing Iowa economy and ensure its continuing development and growth . . . by providing for early completion of the construction of the most important portions of the Iowa highway system." See generally Iowa Code § 4.6(1) (statutory construction may involve consideration of legislative object), § 4.6(7) (statutory construction may involve consideration of legislative preamble or statement of policy). Section 51(2) also provides that the Department "shall expedite and accelerate" the development of access Iowa highways. See generally Iowa Code § 4.1(30)(a) (if not otherwise specifically provided, word "shall" in statutes imposes a duty).

We note that the General Assembly has used "expedite" (or "expeditiously") and "accelerate" in other statutes calling for the taking of particular actions. See, e.g., Iowa Code §§ 6B.54(1), 16.15(1), 28A.23, 42.3, 42.6(4)(a), 266.36, 314.22(1)(g). Some of these statutes do not necessarily negate the possibility of some delay. See, e.g., Iowa Code § 28A.23 (to act "as expeditiously as possible"), § 42.6(4)(a) (to act "as expeditiously as reasonably possible"). In contrast, one law specifically provides that persons "expedite without delay" in taking action. See Iowa Probate R. 4.1(a)(3).

To "expedite" commonly means to hasten, to make haste, or to speed, Black's Law Dictionary 518 (1979), and to "accelerate" similarly means to bring about at an earlier time, to cause to move faster, or to hasten the progress or development of, Webster's Ninth New Collegiate Dictionary 6 (1979). See Crabb's English Synonyms 403-04 (1917) ("accelerate" signifies literally to quicken for a specific purpose, while "expedite" expresses a process, a bringing forward to an end).

When the General Assembly imposes a duty upon administrative agencies similar to section 51(2), it intends for them to act reasonably in compliance with that duty. See 1996 Op. Att'y Gen. ___ (#96-10-8); 1988 Op. Att'y Gen. 116 (#88-12-1(L)); see also 1994 Op. Att'y Gen. 136 (#94-8-6(L)). Under section 51(2), then, the Department should act with reasonable dispatch in developing access Iowa highways. Although we do not view section 51 as requiring assignment of the highest priority to developing access Iowa highways in any particular plan, we believe that such assignment would certainly comport with section 51(2). See generally 1996 Op. Att'y Gen. ___ (#96-10-8). In any event, the Department -- pursuant to the letter and spirit of section 51 -- should make a good-faith effort to achieve substantial compliance with section 51(2) by proceeding with reasonable dispatch to develop access Iowa highways. See 1988 Op. Att'y Gen. 37 (#87-4-4(L)); 1984 Op. Att'y Gen. 138, 138-39; 1980 Op. Att'y Gen.

435 (#79-10-2(L)); see also 13 E. McQuillin, The Law of Municipal Corporations § 37.16, at 65, § 37.99, at 280-81 (1997). See generally Iowa Code § 4.2 ("provisions [of Iowa Code] and all its proceedings under it shall be liberally construed with a view to promote its objects").

What length of time signifies reasonable dispatch and substantial compliance, however, amounts to a question of fact. See 1980 Op. Att'y Gen. 323, 327-28. We do not decide issues of fact in an opinion. 1992 Op. Att'y Gen. 55, 59-60. Accordingly, we cannot provide a definite answer to your question about the practical steps the Department must take in order to comply with section 51(2). We can only say that determining the Department's compliance with the duty imposed by section 51(2) would, at any one point in time, necessitate a consideration of all the Department's statutory duties, its budget and projected budgets, and its projects and proposed projects competing for priority with the access Iowa plan.

In assessing its duty under section 51(2) to expedite and accelerate such development, the Department has stated that "ten years [is] the minimum amount of time required to place [access Iowa] projects on a 'fast-track' from concept development to complete paving.'" See Iowa Dep't of Transp., "Report to the General Assembly, Chapter 1218, Section 51(3), of the 1996 Session Laws (January, 1997)." See generally Iowa Code § 4.6(6) (statutory construction may involve consideration of administrative construction of statutory language). We cannot opine as a matter of law, however, exactly how the Department must treat access Iowa highways within the "Iowa in Motion" plan. That task would require consideration of all relevant factors -- including balancing of the Department's other statutory duties, as well as factual information about "Iowa in Motion" and the Department's other plans -- to determine priorities for planning and constructing various highway projects. The responsibility to exercise that judgment lies with the Commission and the Department. Nevertheless, treatment of access Iowa highways within the Department's plans clearly amounts to a significant factor in determining whether the Department has met its duty under section 51(2). See generally Iowa Code § 4.2 (statutes shall be liberally construed with a view to promote their objects), § 4.4(3) (statutory construction presumes that legislature intended just and reasonable result), § 4.4(4) (statutory construction presumes that legislature intended a result feasible of execution).

III.

To summarize: Session laws are valid laws, whether or not placed in the Iowa Code, and 1996 Iowa Acts, 76th G.A., chapter 1218, section 51(2), is thus part of Iowa law. Pursuant to that

law, the Iowa Department of Transportation must act with reasonable dispatch in developing "access Iowa highways."

Sincerely,

Bruce Kempkes
Assistant Attorney General

COMMUNITY COLLEGES; SCHOOL DISTRICTS; CONFLICT OF INTEREST: Contracts with corporations in which directors of community college have ownership interests. Iowa Code § 279.7A (1997). Section 279.7A, which generally prohibits directors of a school corporation from contracting with the school corporation, applies to directors of a community college and the community college. Section 279.7A applies to directors of a community college who may only have an ownership interest in a corporation contracting with a community college. Section 279.7A applies to placement of a newspaper advertisement in return for consideration such as a fee or charge. Section 279.7A applies to the placement of such advertisements on an as-needed basis. Section 279.7A excepts purchases made by a community college from one of its directors when they do not exceed a cumulative total purchase price of $1,500 in a fiscal year. Section 279.7A excepts purchases made by a community college from one of its directors when they result from the competitive bidding process. (Kempkes to Thomas, State Representative, 7-8-97) #97-7-2(L)

July 8, 1997

The Honorable Roger Thomas
17658 Domino Road
Elkader, IA 52043

Dear Representative Thomas:

You have requested an opinion on a conflict-of-interest statute, Iowa Code section 279.7A (1997). In essence, section 279.7A prohibits a board director of a school corporation from having an interest in contracts with the school corporation unless the benefit to the director does not exceed $1,500 in a fiscal year or the contracts result from competitive bidding. You mention that a director for a merged area community college has a substantial ownership interest in a corporate newspaper in which the community college has advertised job openings. You also mention that the

community college has not sought competitive bids for such advertisements, because no other newspaper similarly circulates within all of the counties served by the community college.

With these circumstances in mind, you ask several questions about section 279.7A: (a) whether placement of a newspaper advertisement constitutes a contract; (b) whether placement of newspaper advertisements on an as-needed basis constitutes a contract; (c) whether placement of each newspaper advertisement constitutes a separate contract; (d) whether cumulative total purchase price represents the basis for calculating the $1,500 amount; and (e) whether the community college may forgo competitive bidding, contract directly with the newspaper for the advertisements, and still fall within the competitive-bid exception. We will answer these six questions in Division II after setting forth some statutory background in Division I.

I.

Iowa Code chapter 260C, formerly chapter 280A, is entitled "Community Colleges." The General Assembly enacted its provisions in 1965. See 1965 Iowa Acts, 61st G.A., ch. 247. Chapter 260C provides for the creation of a community college. See Iowa Code §§ 260C.1, 260C.3, 260C.6; see also Stanley v. Southwestern Community College, 184 N.W.2d 29, 36 (Iowa 1971). It also provides for the creation of a "merged area," which means "an area where two or more school systems or parts of school systems merge resources to operate a community college." Iowa Code § 260C.2(4). Chapter 260C provides that "[t]he governing board of a merged area is a board of directors composed of one member elected from each director district in the area by the electors of the respective district." Iowa Code § 260C.11.

Chapter 279 is entitled "Directors -- Powers and Duties." The General Assembly added section 279.7A to this chapter in 1990. See 1992 Op. Att'y Gen. 77 (#92-2-4(L)). Section 279.7A provides:

> A member of the board of directors of a school corporation shall not have an interest, direct or indirect, in a contract for the purchase of goods, including materials and profits, and the performance of services for the director's school corporation. A contract entered into in violation of this section is void. This section does not apply to contracts for the purchase of goods or services, which benefit a director, if the benefit to the director does not exceed [$1,500] in a fiscal year, and contracts made by a school board, upon competitive bid in writing, publicly invited and opened.

Section 279.7A partially codifies the common law. 1992 Op. Att'y Gen. 77 (#92-2-4(L)); see Note, "Public Contracts," 10 Drake L. Rev. 53, 65 (1960). See generally Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972, 973 (1902) ("the policy of the [common] law forbids a member of the board of directors [for a school district from] becoming a party to, or [receiving] the benefit of, any contract made by such board"); Weitz v. Independent Dist. of Des Moines, 78 Iowa 37, 42 N.W. 577, 577-78 (1889); 1990 Op. Att'y Gen. 37 (#89-8-2(L)); 1938 Op. Att'y Gen. 185, 187; 1936 Op. Att'y Gen. 660, 662.

II.

We need to address whether section 279.7A applies to directors of community colleges and whether section 279.7A applies to directors who have an ownership interest in corporate entities.

First: Section 279.7A expressly applies to directors of a "school corporation." Whatever the meaning of the phrase "school corporation" in this particular context, see generally Iowa Code 260C.16, directors of community colleges must comply with section 279.7A pursuant to a provision in chapter 260C. That provision, section 260C.14(3), specifies that directors of each community college "shall . . . [h]ave the powers and duties with respect to community colleges, not otherwise provided in [chapter 260C], which are prescribed for boards of directors of local school districts by chapter 279 . . . . See generally Iowa Code § 4.1(30)(a) ("shall" in statutes normally imposes a duty). Chapter 260C does not otherwise provide any duties relating to contractual conflicts-of-interest, and thus directors of community colleges must comply with the duties set forth in section 279.7A.

Second: For conflicts-of-interest purposes, the common law distinguishes between a director of a school district who either sits on a corporation's board of directors or takes part in the active management of the corporation and a director who merely owns stock in the corporation. The first director has a conflict of interest in contracts between the corporation and the school district; the second director does not, because "the individual is far enough removed from any controlling interest in such corporation . . . ." See 1938 Op. Att'y Gen. 185, 187. The common law, however, only extends to "direct" interests in contracts. See, e.g., Bluffs Development Corp. v. Board of Adjustment, 499 N.W.2d 12, 15 (Iowa 1993); 1994 Op. Att'y Gen. 119, 122. Unlike section 279.7A, which generally prohibits directors from having a direct or indirect interest in certain contracts, the common law does not encompass "indirect" interests.

We therefore believe that section 279.7A applies to directors of community colleges who have an ownership interest in corporations. Cf. 1994 Op. Att'y Gen. 119, 122 (city officers or

employees have indirect interest in contracts involving their minor children or spouses). Whether such an interest falls within the prohibition of section 279.7A is a question of fact for a court's determination and a proper subject for legal advice from the director's or community college's lawyer.

(A).

You have asked whether the general contractual prohibition in section 279.7A applies to placement of a newspaper advertisement. Under section 279.7A, the general prohibition applies to "a contract for the purchase of goods, including materials and profits, and the performance of services." Other conflict-of-interest statutes expressly except certain contracts with newspapers from general contractual prohibitions. See, e.g., Iowa Code §§ 68B.3(1), 331.342(5), 362.5(6); see also Kaplan & Lillich, "Municipal Conflicts of Interest," 58 Colum. L. Rev. 157, 172 & n. 90 (1958). Although section 279.7A provides two exceptions to its general contractual prohibition, neither exception mentions anything about contracts with newspapers.

The terms "contract," "purchase," "goods," and "services" -- all undefined by the General Assembly in chapter 279 -- "shall be construed according to the context and the approved usage of the language." Iowa Code § 4.1(38). We believe that these terms clearly encompass the placement of a newspaper advertisement in return for consideration such as a fee or charge. See, e.g., Hunter v. Union State Bank, 505 N.W.2d 172, 177 (Iowa 1995) ("contract" means making of an offer, its acceptance, and exchange of consideration); Black's Law Dictionary 624 (1979) ("good" means all tangible items), 1110-11 ("purchase" includes any taking by sale), 1227 ("services" means duties or labors). Compare Kagy v. Independent Dist. of West Des Moines, 89 N.W. at 973-74 (common law forbids contract for printing, not awarded through competitive bidding, between school district and business in which director is engaged or employed) with Bloomquist v. Isanti County, 188 N.W. 64, 65 (Minn. 1922) (statute requiring advertisement of competitive bids for "work and labor" does not require bids for newspaper publications); Annot., 92 A.L.R. 835, 837 (1934). Section 279.7A has no ambiguity in this regard and requires no construction. See generally Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995).

(B).

You have asked whether placement of newspaper advertisements on an as-needed basis constitutes a contract for purposes of section 279.7A. We do not believe that section 279.7A has any ambiguity in this regard. See generally Farmers Co-op Co. v. DeCoster, 528 N.W.2d at 537. The degree of formality or the manner in which a contract may arise is immaterial to application of

section 279.7A; the mere existence of a legally binding contract is the determinative factor in its application. See generally Hunter v. Union State Bank, 505 N.W.2d at 177.

(C).

You have asked whether placement of each newspaper advertisement constitutes a separate contract under section 279.7A, which excepts from its general prohibition those "contracts for the purchase of goods or services, which benefit a director, if the benefit to the director does not exceed [$1,500] in a fiscal year." We do not believe that section 279.7A, which uses "contracts" as opposed to "contract" or "each contract," has any ambiguity in this regard. See generally Farmers Co-op Co. v. DeCoster, 528 N.W.2d at 537. The number of contracts that may arise in a fiscal year is immaterial to application of the exception; that a director simply benefits in excess of $1,500 -- from a single contract or from multiple contracts -- is the determinative factor in its application.

(D).

With regard to the exception for contracts totaling less than $1,500, you have asked about the meaning of "benefit to the director" as it applies to a director of a community college who has a substantial interest in the ownership of a corporate newspaper. Section 279.7A does not distinguish part ownership in a business, such as holding some shares in a corporation, from full ownership of a business. Other conflict-of-interest statutes expressly provide an exception to general contractual prohibitions for de minimus ownership of corporate stock upon the occurrence of certain conditions. See, e.g., Iowa Code §§ 331.342(4), 362.5(5).

We begin our analysis by examining similar conflict-of-interest statutes, which existed at the time the General Assembly enacted section 279.7A. See generally Iowa Code § 4.6(4) (statutory construction may involve consideration of statutes upon same or similar subjects). Section 331.342, which applies to counties, and section 362.5, which applies to cities, set forth general contractual prohibitions for their officers and employees. Sections 331.342(10) and 362.5(10) except from their prohibitions those contracts that benefit an officer or employee if the "cumulative total purchase price" does not exceed $1,500 in a fiscal year. As a specific example, section 331.342(10) excepts contracts by a county that benefit a county officer or employee "if the purchases benefitting that officer or employee do not exceed a cumulative total purchase price of [$1,500] in a fiscal year."

Section 279.7A fails to set forth any basis for calculating its $1,500 contractual amount. See generally 2B Sutherland's Statutory Construction § 55.02, at 277-78 (1992) ("it is not

practical or convenient, perhaps even possible, to specify all of the detailed operational effects that an enacted rule or principle should have in all of the various circumstances to which it may pertain"). When faced with a statute failing to provide certain particulars necessary for determining its application, courts may turn to an analogous statute and apply the particulars expressed in it to the "incomplete" statute. See, e.g., DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983); Norton v. Adair County, 441 N.W.2d 347, 355 (Iowa 1989); see also 1988 Op. Att'y Gen. 5, 9; 2B Sutherland's, supra, § 53.05, at 238 ("[h]armony and consistency are positive values in a legal system," and "[c]onstruing statutes by reference to others advances those values"; in fact, "courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done"). Application of this principle appears most appropriate when more than one analogous statute exists for reference purposes. 2B Sutherland's, supra, § 53.05, at 238.

Sections 331.342(10) and 362.5(10) appear as the most analogous statutes providing a reference for calculating the $1,500 amount in section 279.7A. Both provide an exception to a general contractual prohibition for purchases under $1,500 by a public officer or employee in a fiscal year, and both use "cumulative total purchase price" as the basis for calculating that amount. Accordingly, we believe that the second exception in section 279.7A also permits purchases by a community college from one of its directors when they do not exceed a cumulative total purchase price of $1,500 in a fiscal year.

We recognize that contracts with a cumulative total purchase price in excess of $1,500 in a fiscal year might not result in a "benefit to the director" in excess of $1,500. In other words, the peculiar language of section 279.7A suggests a focus upon the benefit to the director in a fiscal year, rather than upon the cumulative total purchase price of the goods or services provided by the director. We believe, however, that a court might well conclude that such benefit equates with cumulative total purchase price. This conclusion would harmonize section 279.7A with sections 331.342(10) and 362.5(10), which apply to county and city officers and employees, and provide a definite "bright-line" test for directors and community colleges. See generally 2B Sutherland's, supra, § 53.05, at 238.

We suggest that a director and community college proceed with great caution in contracting with each other on the basis that the benefit to the director is less than $ 1,500 per fiscal year, even though the purchase price is more than $ 1,500 per fiscal year. We recommend against proceeding with a contract or contracts in the absence of prior, written, legal advice. We also suggest that the director and community college consider the possibility that a

court might invalidate any contract between them if the other exception in section 279.7A -- contracts competively bid -- did not apply.

(E).

Section 279.7A does not provide any requirement of competitive bidding. Section 279.7A does provide, however, that the general contractual prohibition has no application to a contract resulting from a "competitive bid in writing, publicly invited and opened." Noting that only the one newspaper has a circulation within all of the counties served by the merged area, you ask whether the director having a substantial ownership interest in that newspaper and the community college would come within this exception if the community college forwent any public invitation for bids and contracted directly with the newspaper to publish the advertisements on its job openings. This question simply involves the community college's decision to publish matters of business unconnected with its official proceedings and thus does not implicate the selection of a newspaper, for the purpose of publishing official proceedings, pursuant to the requirements in section 279.36. See generally 1988 Op. Att'y Gen. 116 (#88-12-3(L)).

Section 279.7A does not contain any ambiguity in this regard. See generally Farmers Co-op Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995). According to its terms, the general contractual prohibition "does not apply to . . . contracts made by a school board, upon competitive bid in writing, publicly invited and opened." This exception does not have any exceptions. Compare Iowa Code § 279.7A with Iowa Code § 142B.2(1). Cf. In re Estate of Mills, 374 N.W.2d 675, 677 (Iowa 1985) (where statute enumuerates certain exceptions, legislature presumably intended no others). See generally State v. Pilcher, 242 N.W.2d 348, 359-60 (Iowa 1976) (general principle of statutory construction forbids extending or enlarging statutory terms). The director having an ownership interest in the newspaper would thus come within the exception for competitive bidding only if the contracts for the newspaper advertisements resulted from the competitive bidding process.

III.

In conclusion: Section 279.7A, which generally prohibits directors of a school corporation from contracting with the school corporation, applies to directors of a community college and the community college. Section 279.7A applies to directors of a community college who have a substantial ownership interest in a corporation contracting with a community college. Section 279.7A applies to placement of a newspaper advertisement in return for consideration such as a fee or charge. Section 279.7A applies to the placement of such advertisements on an as-needed basis.

Section 279.7A excepts purchases made by a community college from one of its directors when they do not exceed a cumulative total purchase price of $1,500 in a fiscal year. Section 279.7A excepts purchases made by a community college from one of its directors when they result from the competitive bidding process.

We have examined section 279.7A in light of other statutes governing contracts between political subdivisions and one of their officers or employees. The General Assembly might well consider harmonizing these statutes in order to provide common, easily understood tests for all such contracts.

Sincerely,

Bruce Kempkes
Assistant Attorney General

ASSESSORS; COUNTIES AND COUNTY OFFICERS; COUNTY ATTORNEYS: Powers and duties involving county conference boards, county assessors, and county attorneys. Iowa Code §§ 66.1, 331.756, 441.8, 441.9, 441.13, 441.17, 441.41 (1997). A conference board's job description for an assessor may not impose any duties beyond those required by statute. A conference board may evaluate an assessor with regard to the handling of personnel matters that may, in some way, adversely affect the operation of the assessor's office. A conference board may evaluate an assessor's job performance on an annual basis. An assessor's mishandling of personnel matters may, depending upon the facts and circumstances, equate with misconduct, nonfeasance, malfeasance, or misfeasance in office. A county attorney should consult various statutes and ethical considerations in deciding which entity to represent in the event of a dispute between the county board of supervisors, the conference board, and the assessor. (Kempkes to Martens, Iowa County Attorney, 7-9-97) #97-7-3(L)

July 9, 1997

Mr. Kenneth R. Martens
Iowa County Attorney
1017 Court Ave.
Marengo, IA 52301

Dear Mr. Martens:

You have requested an opinion about Iowa Code chapter 441 (1997) ("Assessment and Valuation of Property") as it relates to the powers and duties of county conference boards, county assessors, and county attorneys. You ask (a) whether statutory provisions exclusively set forth the duties of assessors; (b) whether conference boards may evaluate the job performance of assessors regarding their handling of personnel matters; (c) whether conference boards may evaluate assessors on an annual basis; (d) whether assessors may be removed from office for mishandling personnel matters; and (e) whether county attorneys represent county supervisors, conference boards, or assessors in the event of conflicting positions between them. We will answer these questions ad seriatim in Division II of this letter after setting forth the applicable provisions of chapter 441 in Division I.

I.

Chapter 441 creates the office of the county assessor, Iowa Code § 441.1, who has the duty in the first instance of valuing property within the county for the purpose of determining property taxes, see Iowa Code §§ 441.17(2), 441.31, 441.35, 441.37, 441.38, 441.42, 441.43. It also creates the county conference board, which consists of the mayors of all the incorporated cities within the county whose property undergoes assessment by the assessor; one representative from the board of directors of each high school district in the county who resides within the county; and members of the county board of supervisors. Iowa Code § 441.2.

The voters do not select a person to serve as assessor; the conference board appoints one. Iowa Code §§ 441.3, 441.6. Section 441.8 provides that an assessor serves a six-year term and that appointments

> for each succeeding term shall be made in the same manner as the original appointment except that not less than ninety days before the expiration of the term of the assessor the conference board shall hold a meeting to determine whether or not it desires to reappoint the incumbent assessor to a new term.
>
> . . .
>
> If the incumbent assessor is not reappointed as above provided, then not less than sixty days before the expiration of the term of said assessor, a new assessor shall be selected as provided in section 441.6.

Section 441.9 provides that an assessor

> may be removed by a majority vote of the conference board, after charges of misconduct, nonfeasance, malfeasance, or misfeasance in office shall have been substantiated at a public hearing, if same is demanded by the assessor by written notice served upon the chairperson of the conference board.

See generally Iowa Const. art. III, § 20 (1857); Iowa Code § 441.52.

Various provisions in chapter 441 set forth responsibilities of the assessor. See, e.g., Iowa Code §§ 441.18, 441.19, 441.23, 441.28, 441.30. Section 441.2, for example, provides that the

assessor has the duty of serving as clerk of the conference board. It is section 441.17, however, that primarily sets forth the duties of the assessor.

Sections 441.10 and 441.11 provide for the position of deputy assessor, and section 441.13 provides:

> Other office personnel shall be appointed by the assessor subject to the limitations of the annual budget as hereinafter provided. The assessor shall select field persons, so far as possible, from the eligible list of deputy assessors. Their compensation shall be fixed as provided in section 444.16. They shall serve at the pleasure of the assessor.

II.

(A)

You have asked whether statutory provisions exclusively set forth the duties of assessors. You indicate that conference boards may wish to impose additional duties upon assessors via job descriptions.

A conference board clearly has "an immediate and direct role" in the operations of an assessor's office. 1990 Op. Att'y Gen. 13, 15. A conference board appoints and removes the assessor, reviews proposed budgets, authorizes the number of deputies and other personnel, and determines the compensation for the assessor and any support staff. Id.; see 1998 Op. Att'y Gen. ___ (#97-2-2(L)). Particularly in light of its appointive power, a conference board thus appears to have authority to prepare or arrange for the preparation of a job description for the position of assessor.

Such duties, however, could not contravene statutory provisions. The General Assembly has prescribed the duties of assessors, see, e.g., Iowa Code § 441.17, and has not delegated that task to conference boards. As the Supreme Court of Iowa has observed about a city assessor: "[H]is duties are fixed by statute, and when these are performed, he is not required to do more." Polk County v. Parker, 178 Iowa 936, 160 N.W. 320, 321 (1916). See 1994 Op. Att'y Gen. 21 (#93-6-4(L)) (county attorney "cannot be required to perform any duty not requested by law"). See generally 1990 Op. Att'y Gen. 65 (#90-2-7(L)) (voters may seek to combine the position of county assessor with other county positions pursuant to Iowa Code section 331.323); 1982 Op. Att'y Gen. 119, 119-20; 1968 Op. Att'y Gen. 370, 370, 372; 1966 Op. Att'y Gen. 456, 461. We therefore conclude that a conference board's job description may not impose any duties upon an assessor beyond those required by statute.

We emphasize that this conclusion only concerns the authority on the part of conference boards over their assessors. We recognize that the electors of a county may seek to combine the duties of the county assessor with the duties of other specified positions pursuant to section 331.323(1). See 1998 Op. Att'y Gen. ___ (#97-2-2(L)) (Iowa Code sections 331.323(1), 335.9, and 44.17(1) (1997) do not, per se, preclude a county from combining the position of county assessor with the position of county zoning administrator); 1968 Op. Att'y Gen. 370, 370-72 (one person may serve simultaneously as county assessor and county civil defense director as long as he or she devotes "full time" to the duties of county assessor's office).

(B)

You have asked whether conference boards may evaluate the job performance of assessors regarding their "handling of personnel matters." You indicate that persons who worked in an assessor's office until their discharge have certain complaints against their former employer and that section 441.13 may have some bearing on your question. Section 441.13 provides that personnel appointed by the assessor "shall serve at the pleasure of the assessor." See generally 1950 Op. Att'y Gen. 99, 102. Your question appears targeted toward personnel matters that might have an impact upon the operations of an assessor's office.

A conference board has an immediate and direct role in those operations. 1990 Op. Att'y Gen. 13, 15. We conclude that section 441.13 does not preclude a conference board from evaluating its appointee with regard to the handling of personnel matters if they, in some way, adversely affect the operation of the assessor's office. Cf. Sieg v. City of West Des Moines, 342 N.W.2d 824, 829 (Iowa 1983) (peace officer's vulgar comments and bellicose conduct toward fellow officer, while occurring outside presence of public, nonetheless "reflect poorly on [his] ability to meet the public" and may support his dismissal); State ex rel. Fletcher v. Naumann, 213 Iowa 418, 239 N.W. 93, 98 (1931) ("all public officers should so conduct their official duties as to be like Caesar's wife, 'above suspicion' of irregularities in the administration of their offices").

(C)

You have asked whether conference boards may conduct annual "evaluations" of assessors, which we assume does not signify anything more than appraisals of their job performance. You make reference to section 441.8. Section 441.8 specifies that an assessor shall serve a term of six years and that appointments

> for each succeeding term shall be made in the same manner as the original appointment except

> that not less than ninety days before the expiration of the term of the assessor the conference board shall hold a meeting to determine whether or not it desires to reappoint the incumbent assessor to a new term.

We do not believe that section 441.8 means anything more than what it says: that an assessor shall serve a term of six years and that a conference board shall hold a meeting for the purpose of deciding whether to reappoint an incumbent at some time not less than ninety days before expiration of the six-year term. See generally State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990) (generally impermissible to extend terms of statute under guise of statutory construction).

We therefore conclude that section 441.8 does not preclude a conference board from evaluating its appointee's job performance on an annual or periodic basis. Again, such evaluations fall within a conference board's immediate and direct role in the operations of an assessor's office. See 1990 Op. Att'y Gen. 13, 15. See generally Vance v. Chester County, 504 F.2d 820, 825 (4th Cir. 1974) ("government must have a wide discretion and control over the management of its personnel and internal affairs"). They could, for example, aid the conference board in determining whether to reappoint the incumbent pursuant to the provisions of section 441.8. See generally 1980 Op. Att'y Gen. 69 (#79-4-8(L) (conference board has discretion to set standards for reappointing assessor; section 441.8 -- which requires that "[t]he physical condition, general reputation of the applicants [for the position of assessor], and their fitness for the position as determined by the examining board [see Iowa Code § 441.3] shall be taken into consideration" by conference board -- only sets forth minimum criteria).

(D)

You have asked whether assessors may be removed from office for "mishandling personnel matters." Section 441.9 specifies four grounds for removing assessors: "misconduct, nonfeasance, malfeasance, or misfeasance in office." See generally 4 E. McQuillin, The Law of Municipal Corporations § 12.232, at 378 (1992). Section 441.9 does not define these four grounds in any way, and we therefore resort to the dictionary to aid in determining their scope. See Iowa Code § 4.1(38).

"Misconduct" generally means "[a]ny unlawful behavior by a public officer in relation to the duties of his office, willful in character," and "embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act." Black's Law Dictionary 901

(1979). See Iowa Code § 721.2 ("official misconduct" includes knowing failure to perform any duty required by law). "Nonfeasance" generally means the "omission of an act which a person ought to do"; "malfeasance" generally means the "doing of an act which a person ought not to do at all"; and "misfeasance" generally means the "improper performance of some act which a man may lawfully do." Black's, supra, at 902. See Moore v. Murphy, 254 Iowa 969, 119 N.W.2d 759, 761 (1963); Montanick v. McMillin, 225 Iowa 1159, 280 N.W. 608, 616 (1938); Proksch v. City of Bettendorf, 218 Iowa 1376, 257 N.W. 383, 384 (1934). "Misconduct," which "is necessarily a broad term," Sieg v. City of West Des Moines, 342 N.W.2d 824, 829 (Iowa 1983), may overlap in whole or in part the other three grounds in section 441.9, see 4 McQuillin, supra, § 12.237, at 410.

Whether "mishandling personnel matters" can eqûate with any of the grounds listed in section 441.9 would necessitate a determination of the particular facts in light of the surrounding circumstances. Cf. State v. Bartz, 224 N.W.2d 632, 634 (Iowa 1974) (removal of officer pursuant to chapter 66 necessitates factual review). We cannot, however, determine facts in an opinion. See 61 IAC 1.5(3)(c). Similarly, we cannot identify in an opinion all the facts that could lead to the removal of an assessor pursuant to the grounds listed in section 441.9. See 61 IAC 1.5(3)(a); 1964 Op. Att'y Gen. 139, 140.

In view of these circumstances, we can give no definitive answer to your question. We can only say that, as a matter of law, we do not preclude the possibility that facts and circumstances surrounding the mishandling of personnel matters could equate with "misconduct, nonfeasance, malfeasance, or misfeasance in office" for purposes of section 441.9. See generally 4 McQuillin, supra, § 12.229, at 354, § 12.237.10, at 415-16, § 12.239, at 431.

Nevertheless,

> [laws] providing for the removal of unfaithful public officers are not designed . . . as a pitfall into which an honest and sincere public official might be plunged if he unintentionally erred in the discharge of his duties; the law presumes that a public official conducts himself in good faith, the burden resting upon a complainant to show the contrary to be true.

Id. § 12.237, at 411 (footnotes omitted). See Black's, supra, at 901 (defining "misconduct" as willful behavior).

A showing of "misconduct" often involves evidence of willful or intentional wrongdoing. Iowa Code chapter 66 may provide some

insight into applying section 441.9 in a particular case. Cf. State v. Bartz, 224 N.W.2d 632, 638 (Iowa 1974) (section 66.1(3) read in pari materia with section 741.1). See generally Iowa Code § 4.6(4) (statutory interpretation may involve consideration of statutes upon same or similar subjects). Similar to section 441.9, section 66.1 provides for the removal of appointed officers by courts for "willful misconduct or maladministration in office."

In a removal action based upon a violation of section 66.1, "the burden rests on the petitioner to sustain the allegations of a petition by evidence that is 'clear, satisfactory and convincing.'" State v. Bartz, 224 N.W.2d at 638 (citations omitted). "[A] showing is required the alleged misconduct was committed willfully and with an evil purpose." Id. (citations omitted). "[A]cts which are simply irregular, even if violative of statutes, are not in themselves grounds for removal from office unless an evil and corrupt motive on the part of the officeholder is shown." Id. (citations omitted). Removal from public office "is drastic and penal. The object 'is to rid the community of a corrupt, incapable or unworthy official.'" State v. Callaway, 268 N.W.2d 841, 842 (Iowa 1978) (citations omitted). Officers "must necessarily be vested with some discretion." State v. Roth, 162 Iowa 638, 144 N.W. 339, 345 (1913) (members of city council could not be removed for allowing Sunday baseball when its illegality in dispute). A "technical" violation thus will not warrant removal; a violation arises only when "administration of the office is marked by such grave misconduct or such flagrant incompetency as demonstrates . . . unfitness for the position." State ex rel. Crowder v. Smith, 232 Iowa 254, 4 N.W.2d 267, 271 (1942).

(E)

You have asked whether county attorneys represent county supervisors, conference boards, or assessors in the event of conflicting positions between them on unknown matters. Among other things, any answer to your question again would necessitate a determination of the particular facts in light of the surrounding circumstances, which precludes us from giving a definitive answer to your question. We can only set forth the applicable statutory provisions and professional considerations for guidance. See generally 1990 Op. Att'y Gen. 7 (#89-2-2(L)).

Section 331.756(65) provides that a county attorney shall represent the county assessor and the board of review "in legal proceedings relating to assessments as provided in section 441.41." Section 441.41 provides that a county attorney shall represent the assessor and board of review "in all litigation dealing with assessments" and that a conference board may employ special counsel "to assist" the county attorney "as the case may be." Section 441.41 does not relieve a county attorney from any of the duties specified in chapter 331. 1990 Op. Att'y Gen. 7 (#89-2-2(L)). It

does allow a conference board to hire its own counsel to assist the county attorney. Id. It also may allow a conference board to hire counsel to represent the assessor. See Polk County Conference Board v. Sarcone, 516 N.W.2d 817, 818, 821 (Iowa 1994).

Section 331.756(6) provides that a county attorney shall prosecute and defend "all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party." Such actions include those filed against a conference board. 1990 Op. Att'y Gen. 7 (#89-2-2(L)); see 1982 Op. Att'y Gen. 188 (#81-7-29(L)). Similarly, section 331.756(16) provides that a county attorney shall prosecute actions to remove public officers "as provided in [section] 66.11."

Section 331.756(7) provides that a county attorney shall give advice or opinions to county supervisors and other county officers upon "any matters in which [the county] is interested" or "relating to the duty of the officer in any matters in which [the county] may have an interest." Such county officers include the members of a conference board. 1990 Op. Att'y Gen. 7 (#89-2-2(L)).

The Iowa Code of Professional Responsibility acknowledges that

> there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that the lawyer can retain independent judgment on behalf of each client . . . .

Iowa Code of Professional Responsibility EC 5-15.

> [I]t is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if desired. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.

Id. at EC 5-16.

Should you wish assistance in applying these statutes and ethical considerations to specific factual situations, you may telephone 515/281-5164 to reach Ms. Heather Adams, the Assistant

Attorney General who provides information on various matters to county attorneys. Similarly, the Iowa Supreme Court Board of Professional Ethics and Conduct, 521 E. Locust St., Des Moines, IA 50309, issues its own opinions on conflicts-of-interest. County attorneys may obtain further guidance on such matters by requesting opinions from that board.

III.

In summary: A conference board's job description for an assessor may not impose any duties beyond those required by statute. A conference board may evaluate an assessor with regard to the handling of personnel matters that may, in some way, adversely affect the operation of the assessor's office. A conference board may evaluate an assessor's job performance on an annual basis. An assessor's mishandling of personnel matters may, depending upon the facts and circumstances, equate with misconduct, nonfeasance, malfeasance, or misfeasance in office. A county attorney should consult various statutes and ethical considerations in deciding which entity to represent in the event of a dispute between the county board of supervisors, the conference board, and the assessor.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

ETHICS; UTILITIES: Conflict of interest prohibitions applicable to utilities board members. Iowa Code §§ 7E.2(3), 7E.2(5), 7E.3, 7E.4(9), 17A.2(3), 17A.11(1), 17A.15, 68B.2(1), 68B.2(13), 68B.2(17), 68B.3(1), 68B.5A, 68B.6, 68B.7, 68B.35, 474.1, 476.1, 546.2, 546.7 (1997). State board and commission members are not per se subject to all restrictions on lobbying and post-employment activities imposed on "executive or administrative heads" of agencies in chapter 68B. Unless a board member also fits the definition of "executive or administrative head," the board member is subject to the more narrow limitations applicable to all "officials" or specifically applicable to members of boards or commissions in chapter 68B. Code chapters 474 and 546 designate the chairperson of the utilities board as the "executive or administrative head" of the utilities division. Other utilities board members are not the "executive or administrative head" of a state agency for purposes of chapter 68B. (Osenbaugh to Boyd, Utilities Division, 7-25-97) **#97-7-4(L)**

July 25, 1997

Nancy S. Boyd
Utilities Division
Lucas Building, 5th Floor
L O C A L

Dear Ms. Boyd:

You have requested an opinion of the Attorney General concerning whether each member of the Utilities Board (or only the board chair) is an "executive or administrative head" of an agency in order to determine which limitations in Iowa Code chapter 68B apply to board members.

If the board member was found to be an "executive or administrative head" of an agency for purposes of Code sections 68B.5A and 68B.6 (1997), the board member would be subject to a total ban on lobbying for two years after termination of employment and during employment unless designated as a lobbyist by the agency and also subject to a broader prohibition against appearance or rendition of services against the interest of the State. If the phrase "executive or administrative head" includes all members of state boards or commissions, financial disclosure would be required of members of many other boards not expressly listed in section 68B.35.

It is clear that the Utilities Board is the multi-membered "head" of the agency for rulemaking and adjudicatory functions under Iowa Code sections 17A.2(3), 17A.11(1), 17A.15, 474.1, and 476.1. The Utilities Board is the "policymaking body" for the Utilities Division, § 474.1, and is granted the authority to "regulate the rates and services of public utilities" in section 476.1.

Treatment of Board or Commission Members

The initial question is whether the phrase "executive or administrative head" of an agency includes members of state boards or commissions with rulemaking or adjudicatory authority. We conclude that members of boards or commissions are not necessarily the "executive or administrative head" of an agency. The "executive or administrative head" of an agency is the person who supervises the executive functions of the agency as described in sections 7E.2 and 7E.3 and the enabling acts of the agency in question.[1]

In several respects, chapter 68B treats "executive or administrative heads" of agencies as a separate category than members of boards or commissions. The legislative history of these sections indicates legislative intent to narrow the scope of the ban on lobbying to the individual in each agency who has administrative management authority.

In 1993 the legislature amended chapter 68B to specify which categories of "officials" were subject to each limitation within the chapter. In 1992 the legislature adopted limitations on lobbying and requirements for financial disclosure. 1992 Iowa Acts, ch. 1228, §§ 5, 17. Those provisions applied to all "officials." See § 68B.2(17). As a result, in 1992 Op. Att'y Gen. 154, we opined that then section 68B.5 imposed a two-year post-employment lobbying ban on members of boards because the ban applied to all "officials," including board members. That opinion held that financial disclosure requirements also applied to board members. In 1992 Op. Att'y Gen. 192, we opined that an accountant member of the accountancy examining board was barred from attempting to influence the Department of Revenue and Finance on behalf of a client because that activity fell within the lobbying

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[1]"Agency" is specially defined for chapter 68B.

> "Agency" means a department, division, board, commission, bureau, or office of the executive or legislative branch of state government, the office of attorney general, the state board of regents, community colleges, and the office of the governor, including a regulatory agency, or any department, division, board, commission, bureau, or office of a political subdivision of the state, but does not include any agricultural commodity promotional board, which is subject to a producer referendum.

Iowa Code § 68B.2(1).

ban under section 68B.5A(1). In January 1993, this office further opined that the two-year total prohibition on lobbying, as applied to all "officials," including all state employees, would likely be held unconstitutional as an overly broad restriction on First Amendment activity. 1994 Op. Att'y Gen. 1.

At the subsequent legislative session, the legislature revised section 68B.5A. 1993 Iowa Acts, ch. 163, § 4. The total lobbying ban during a term and for two years following employment in section 68B.5A(1) is now limited to certain classes of officials; members of boards or commissions are not expressly listed.[2] Sections 68B.6(1) and 68B.35 were also revised in 1993 to enumerate specific categories of officials, rather than applying to all "officials." 1993 Iowa Acts, ch. 163, §§ 5(1), 21(2).

While there were other significant revisions, including revision of the definition of "lobbyist," review of the 1993 act shows deliberate legislative choices concerning which officials were subject to each requirement.[3]

We conclude that board and commission members are not per se subject to all of the restrictions imposed on "executive or administrative heads" of agencies in chapter 68B. Unless a board member also fits the definition of "executive or administrative head," the board member is subject to the more narrow limitations applicable to all "officials" or specifically applicable to members of boards or commissions.[4] We believe that the legislature expressly resolved the question whether board members should be subject to the broader limitations imposed on "executive or administrative heads." (The legislature may have been concerned that imposing broad limitations on part-time volunteer board members would be overly broad and discourage willingness to serve.)

"Executive or Administrative Heads" Defined

Having concluded that members of state boards with

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[2]The definition of "lobbyist" *vis-a-vis* state agencies is also now limited to persons advocating the adoption, modification, or repeal of rules. Iowa Code § 68B.2(13).

[3]Another example is that the legislature narrowed the prohibition on sales to the state by board members to those sales within the subunit of the department in which the person serves. § 68B.3(1).

[4]For example, section 68B.7 limits certain activities within the two-year post-employment period by persons who have served on a commission or board of a regulatory agency.

policymaking authority are not necessarily the "executive or administrative heads" of agencies, we must determine whether each member of the Utilities Board is the "executive or administrative head" of that agency. The enabling acts governing the utilities division of the department of commerce indicate that the legislature designated the chairperson of the utilities board as the administrative head of that division.

Iowa Code section 546.2(2) states:

> The chief administrative officer of the department [of commerce] is the director. The director shall be appointed annually by the governor from among those individuals who serve as heads of the division within the department. * * *

Subsection 546.2(4) lists the administrative responsibilities of the director of the department of commerce. Subsection 546.2(5) lists the administrative authorities of the "chief administrative officer of each division." Section 546.7 states that the Utilities Division ". . . is headed by the administrator of public utilities who shall be appointed by the governor pursuant to section 474.1."[5]

Section 474.1 states in relevant part:

> A utilities division is created within the department of commerce. The policymaking body for the division is the utilities board. . .
>
> * * *
>
> Subject to confirmation by the senate, the governor shall appoint a member as the chairperson of the board. The chairperson shall be the administrator of the utilities division . . .

It therefore appears that the chairperson of the Utilities Board is the "executive or administrative head" of the Utilities Division for purposes of chapter 68B. Other board members are not.

Conclusion

We therefore conclude that members of the utilities board,

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[5]Chapter 7E uses the term "head" to describe the administrative officer in charge of a department or division. Iowa Code §§ 7E.2(3)(c), 7E.2(5), 7E.4(9).

other than the chair, do not fit within the phrase "executive or administrative head" of an agency for purposes of chapter 68B. Utilities board members are subject to all requirements of that chapter applicable specifically to that board or to "officials" or to members of boards or commissions.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:cw

GOVERNOR; NATIONAL GUARD; LAW ENFORCEMENT: Eligibility of Iowa Army National Guard to share in drug forfeiture assets. 21 U.S.C. § 881; Iowa Const. art. VI, §§ 7, 9 (1857); Iowa Code § 29A.7 (1997). The Iowa Army National Guard is a "State law enforcement agency" for purposes of 21 U.S.C. section 881(e)(1)(A) when the Governor employs its members to assist in enforcing Iowa law and is thus eligible under 21 U.S.C. section 881(e)(1)(A) to receive forfeited assets arising out of drug-related investigations involving Iowa law. (Kempkes to Lawson, Adjutant General of the Iowa Army National Guard, 8-12-97) **#97-8-1(L)**

August 12, 1997

Adjutant General Warren G. Lawson
Iowa Army National Guard
Camp Dodge
7700 Northwest Beaver Dr.
Johnston, IA 50131

Dear Adjutant General Lawson:

You have requested an opinion about forfeited assets seized as a result of drug-related investigations that involve federal and state authorities. Both the federal government and the states have authority to enact criminal and civil laws relating to drugs, and they have created joint task forces for investigating and enforcing those laws. See United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984).

You indicate that the State of Iowa -- similar to other states, e.g., United States v. Benish, 5 F.3d 20, 25-26 (3d Cir. 1993) (Pa.); 1987 Ark. Op. Att'y Gen. 183; 1991 Miss. Op. Att'y Gen. (May 3, 1991); 1996 Mo. Op. Att'y Gen. (April 22, 1996); 1989 Tex. Op. Att'y Gen. LO-66 -- has developed a plan for using national guard members to assist in the enforcement of state drug laws. You ask whether the Iowa Army National Guard may receive forfeited assets, arising out of its participation in drug-related investigations, pursuant to a federal law that permits their distribution to "any Federal agency" or to "any State or local law enforcement agency." 21 U.S.C. § 881(e)(1)(A). See generally 32 U.S.C. § 112(c).

We conclude that the Guard is a "State law enforcement agency" for purposes of the federal forfeiture law when the Governor employs its members to assist in enforcing Iowa law and that the Guard is thus eligible under the federal forfeiture law to receive forfeited assets arising out of its participation in drug-related investigations involving Iowa law.

I.

In the United States Code, subchapter I of Title 21 governs drug-abuse control and enforcement. Section 881 applies to forfeitures of property and provides that property seized pursuant to subchapter I "shall be deemed to be in the custody of" the United States Attorney General. 21 U.S.C. § 881(c). According to section 881(e)(1)(A), the United States Attorney General may retain the property for official use or "transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property . . . ." (emphasis added).

II.

Section 881(e)(1)(A) uses the phrases "any Federal agency" or "any State or local law enforcement agency." Congress did not define either phrase in chapter 881. Whether either of them encompasses the Guard depends upon the purposes of section 881(e)(1)(A) and its underlying Congressional intent. See South Central Iowa Prod. Credit Ass'n v. Scanlan, 380 N.W.2d 699, 701 (Iowa 1986).

Preliminarily, we note that Congress certainly contemplated use of national guards to assist in certain drug-related investigations. See generally United States v. Benish, 5 F.3d at 25-26. Section 112 of Title 32 in the United States Code, which generally governs national guards, provides for the transfer of federal funds to a governor who submits to the United States Secretary of Defense a "state drug interdiction and counter-drug activities plan." 32 U.S.C. § 112(a). Such a plan must specify "how personnel of the National Guard of that State are to be used in drug interdiction and counter-drug activities" and certify "that any activities included in the plan that are carried out in conjunction with Federal law enforcement agencies serve a State law enforcement purpose." 32 U.S.C. § 112(c)(1), (5).

(A)

Regarding the distribution of forfeited assets to "any Federal agency," we note that a state's national guard actually serves two masters: its own state government when in state service, and the federal government when in federal service. See Perpich v. United States Dep't of Defense, 496 U.S. 334, 345, 110 S. Ct. 2418, 110 L.

Ed. 2d 312 (1990) (the "National Guard" is actually composed of "two overlapping but distinct organizations -- the National Guard of the various States and the National Guard of the United States"). This hybrid federal-state service means that the national guard occupies "a distinct role in the federal structure that does not fit neatly within the scope of either state or national concerns." Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 767 (7th Cir. 1993), cert. denied, 510 U.S. 933. Accord Charles v. Rice, 28 F.3d 1312, 1315 (1st Cir. 1994); New Jersey Air Nat'l Guard v. Federal Labor Relations Auth., 677 F.2d 276, 278-79 (3d Cir. 1982), cert. denied, 459 U.S. 988; see Gilligan v. Morgan, 413 U.S. 1, 7, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973). "In each state the National Guard is . . . under state authority or control. At the same time, federal law accounts, to a significant extent, for the composition and function of the Guard." Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d at 767.

We do not believe that "any Federal agency" in section 881(e)(1)(A) encompasses the Guard. We recognize that the Guard has federal duties and that various federal entities -- including the United States Department of Defense, the Secretary of the Army, and the National Guard Bureau -- all have authority over it. See 32 U.S.C. § 110. Nevertheless, the Guard directly arises under Iowa law and thus, for purposes of section 881(e)(1)(A), appears more "state" than "federal" in nature. See Ellis v. Hanson Nat. Resources Co., 1995 WL 710508 (9th Cir. 1995) (Oregon National Guard "is not a federal agency; rather, it is an agency of the State of Oregon"); Petr v. Delaware Air Nat'l Guard, 1995 WL 579634 (D. Del. 1995) ("[a]lthough federal law plays a significant role in the functioning of the National Guard, each state's National Guard itself is a state agency"). Cf. Maryland v. United States, 381 U.S. 41, 48, 85 S. Ct. 1293, 14 L. Ed. 2d 205 (1965) ("civilian as well as military personnel of the Guard are to be treated for the purposes of the [Federal] Tort Claims Act as employees of the States and not of the Federal Government"). See generally Iowa Code ch. 29A (creating Iowa National Guard). This conclusion seems even more warranted in a situation in which the Guard, outside the realm of federal service, assists in the enforcement of state law.

(B)

Regarding the distribution of forfeited assets to "any State or local law enforcement agency," we note that Congress did not list in section 881(e)(1)(A) the types of agencies eligible to share in the distribution of forfeited assets. Nor did it use other and perhaps more narrow language, such as "police" or "police organizations," which it had used in other statutes. See, e.g., 23 U.S.C. § 321(a)(2), 26 U.S.C. § 5853(a). See generally Palmore v. U.S., 411 U.S. 389, 395, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973) (noting that Congress could have chosen different statutory language if it had actually intended a particular meaning); 1998

Op. Att'y Gen. ___ (#97-3-1(L)). Rather, Congress used broad language in section 881(e)(1)(A): "any" state or local "law enforcement agency." See Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf, 241 Iowa 358, 41 N.W.2d 1, 4-5 (1950) ("any" is a synonym of "all" and commonly means without limitation or restriction).

We believe that the Guard, as an arm of our state's government, is clearly a "State agency" for purposes of section 881(e)(1)(A). See 1997 Kan. Op. Att'y Gen. 7 (Kansas National Guard is a state agency for purposes of 21 U.S.C. § 881(e)(1)(A)); see also Ellis v. Hanson Nat. Resources Co., 1995 WL 710508 (9th Cir. 1995) (Oregon National Guard "is an agency of the State of Oregon"); Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d at 767 ("[i]n each state the National Guard is a state agency"); Petr v. Delaware Air Nat'l Guard, 1995 WL 579634 (D. Del. 1995) ("each state's National Guard itself is a state agency"); Introini v. South Carolina Nat'l Guard, 828 F. Supp. 391, 392 (D.S.C. 1993) (South Carolina National Guard is "an agency of the State of South Carolina"). Cf. Morrison v. State, 179 N.W.2d 439, 440 (Iowa 1970) (Iowa National Guard is a "state agency" for purpose of state tort claims act); Tulppo v. Ontonagon County, 523 N.W.2d 883, 886 (Mich. App. 1994); 1979 Fla. Op. Att'y Gen. 152.

We must, however, also determine whether the Guard is a "State law enforcement agency" for purposes of section 881(e)(1)(A). See generally City of Lincoln v. Ricketts, 297 U.S. 373, 376, 56 S. Ct. 507, 80 L. Ed. 724 (1935) (undefined words and phrases in statute ordinarily have their common meanings). The answer to that question hinges upon state law. See 32 U.S.C. § 112(c).

Iowa Code chapter 29 creates the Iowa Department of Public Defense, composed of an Emergency Management Division and a Military Division. Iowa Code §§ 29.1, 29.2, 29.3, 29C.5. The Governor has the power to appoint the Adjutant General, who directs the Department and administers the Military Division. Iowa Code §§ 29.1, 29.2; see 32 U.S.C. § 314. Iowa Code chapter 29A creates the Iowa National Guard, composed of the Iowa Army National Guard and the Iowa Air Force National Guard. Iowa Code § 29A.2. The Iowa National Guard and the state militia constitute "the military forces of the state of Iowa . . . ." Iowa Code § 29A.6; see Iowa Const. art. VI (1857). Section 29A.7 provides that the Governor "is the commander in chief of the military forces" and may employ them for the protection of life and property, the management of emergencies resulting from public disaster or disorder, the defense or relief of the state, and the "enforcement of its laws." See generally Iowa Const. art. VI, § 7 (1857) (Governor "shall be commander in chief of the militia, the army, and navy of this State"); Iowa Const. art. VI, § 9 (1857) (Governor "shall take care that the laws are faithfully executed"); Iowa Code ch. 29C; F.

Stimson, Law of Federal and State Constitutions § 298, at 247 (1908).

We believe that the Guard is a "State law enforcement agency" for purposes of the federal forfeiture law if the Governor employs its members to assist federal and state law enforcement officers in drug-related investigations involving Iowa law. See Wallace v. State, 933 P.2d 1157, 1160 (Alas. App. 1997). Cf. 1995 Ga. Op. Att'y Gen. 29 (pursuant to state statute, governor may specifically direct Georgia National Guard to provide assistance in drug interdiction; it is thus a state law enforcement agency for purposes of the federal forfeiture law); 1997 Kan. Op. Att'y Gen. 7 (pursuant to state statute, governor may specifically direct Kansas National Guard to provide support in drug interdiction; it is thus a state law enforcement agency for purposes of the federal forfeiture law); 1996 Mo. Op. Att'y Gen. (April 22, 1996) (pursuant to state statute, governor may specifically direct Missouri National Guard to provide assistance in drug interdiction; it is thus a state law enforcement agency for purposes of the federal forfeiture law).

We emphasize, however, that rendering such assistance does not necessarily transform individual Guard members into "certified law enforcement officers" with, for example, powers of arrest or interrogation. See generally Iowa Code § 80B.3 ("law enforcement officer" means "an officer appointed by the director of the department of natural resources, a member of a police force or other agency or department of state, county or city regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the [Iowa Law Enforcement Academy Council], who by the nature of their duties may be required to perform the duties of a peace officer"); 501 IAC 3.1 ("[a]ll law enforcement officers must be certified through the successful completion of training"). Although the Guard may assist in enforcing state law, it "is not a substitute for civilian authority." 1995 Ga. Op. Att'y Gen. 29 n. 1.

We also emphasize that the Guard only has a supportive or ancillary role in drug-related investigations conducted by federal and state law enforcement officers. See 1995 Ga. Op. Att'y Gen. 29 n. 1 ("National Guard members need not qualify as peace officers in order to assist law enforcement agencies or peace officers"). Cf. Iowa Code § 80.27 (Iowa Department of Public Safety primarily responsible for enforcing state drug laws), § 124.501; Dunahoo, "The Iowa Uniform Controlled Substances Act," 21 Drake L. Rev. 77 (1971). See generally United States v. Benish, 5 F.3d at 25-26 (noting that Pennsylvania National Guard used only to provide support in drug investigation); Wallace v. State, 933 P.2d at 1161 (noting that Alaska National Guard used only to aid police officers in drug investigation); Chester v. State, 26 Cal. Rptr. 575, 577

(App. 1994) (noting that California National Guard used only to support federal and state law enforcement agencies in drug investigation); 1991 Miss. Op. Att'y Gen. (May 3, 1991) (opining that Mississippi National Guard has authority to provide support to law enforcement agencies); 1989 Tex. Op. Att'y Gen. LO-66 (opining that Texas National Guard may assist customs agents in drug interdiction activity).

Construing "State law enforcement agency" to include the Guard when it assists in drug-related investigations involving Iowa law appears consistent with the legislative history of section 881(e)(1)(A) and furthers at least one of its underlying purposes. See generally Thornburg v. Gingles, 478 U.S. 30, 43 n. 7, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (legislative history may shed light on statutory meaning); United States v. One 1972 Datsun, 378 F. Supp. 1200, 1205 (D.N.H. 1974) (courts should take into account construction of statute that furthers its underlying purpose). That specific phrase dates to 1984, when Congress passed the Comprehensive Crime Control Act to enhance the use of forfeiture as a law enforcement tool to combat drug trafficking. See 4 U.S.C.C.A.N. 3374 (1984). In doing so, Congress noted the significant assistance often given by state and local law enforcement agencies in drug investigations that result in forfeitures to the federal government and the significant financial burden placed upon such agencies in pursuing forfeiture cases. Id. at 3380, 3399. See generally 10 U.S.C. § 381; Iowa Code ch. 80E, § 124.504; 1 D. Smith, Prosecution and Defense of Forfeiture Cases § 1.01, at 8-9 (1996). By amending section 881 to permit the transfer of forfeited assets to state and local law enforcement agencies, Congress apparently provided those agencies with an opportunity to recoup all or part of their expenses arising out of drug investigations that resulted in the seizure of assets or their forfeiture to the federal government. See generally 4 U.S.C.C.A.N. 3374, 3399 (1984). National guards having the power under state law to assist in drug investigations certainly stand on the same level, regarding their expenditures, as more "typical" law enforcement agencies.

Moreover, the amendment creating section 881(e)(1)(A) related only to the distribution of already-forfeited assets by making a specific grant to state and local law enforcement agencies, subject to the discretion of the United States Attorney General, to receive a fair share of those assets as a form of repayment for participating in joint drug investigations. Such a remedial provision normally implicates a broad construction of its language. See International Nutrition, Inc. v. United States Dep't of Health & Human Serv., 676 F.2d 338, 341 (8th Cir. 1982); 3 Sutherland's Statutory Construction § 60.01, at 147, § 60.02, at 152-54 (1992). In other words, no reason exists to construe state "law enforcement agency" narrowly and exclude those national guards providing law enforcement assistance within the boundaries of their states.

III.

The Iowa Army National Guard is a "State law enforcement agency" under the federal forfeiture law when the Governor has employed its members to assist in enforcing Iowa law and is thus eligible under the federal forfeiture law to receive forfeited assets arising out of drug-related investigations involving Iowa law. See 21 U.S.C. § 881(e)(1)(A).

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; PUBLIC RECORDS: E911 Address Information. Iowa Code §§ 22.2, 22.3, 34A.5, 34A.8 (1997). County E911 address information is a nonconfidential public record unless or until it is integrated with telephone numbers obtained from local service providers. Subscriber information obtained from local telecommunications service providers, including all names, addresses, and telephone number information concerning subscribers served by the E911 system, is confidential and may be used only for the purpose of providing E911 emergency telephone service. (Scase to Schroeder, 9-22-97) #97-9-1(L)

SEP 24 1997

John E. Schroeder
Keokuk County Attorney
101 South Main
P. O. Box 231
Sigourney, Iowa 52591

September 22, 1997

Dear Mr. Schroeder:

You have requested an opinion from this office regarding the dissemination of E911 address information by a county. Specifically, you ask the extent to which the name and address information contained in the E911 data base is confidential. We conclude that the county E911 address information is a public record which is open to the public unless or until it is integrated with telephone numbers obtained from local service providers.

As you indicate in your request letter, rural addressing has been taking place in counties across Iowa to allow the provision of enhanced 911 [E911] emergency telephone service. Prior to the advent of E911 systems, the majority of rural residences in Iowa were identified by the postal service by rural route and/or box number addresses. In order to effectuate the delivery of E911 emergency response service, it has been necessary for counties to implement a more precise addressing system. E911 service, by definition, must include a system automatically displaying the name, address, and telephone number of an incoming 911 call on a video monitor at the public safety answering point. See Iowa Code § 34A.2(4)(b) (1997).

Rural addressing commonly entails the designation of street names and house numbers for all roads and residences in a county. The process of address development is generally accomplished by the county or the local joint 911 service board, either directly or indirectly by contracting for the service. The cost of rural addressing is recognized as a legitimate nonrecurring expense of developing the E911 system and may be paid from the E911 service fund. Iowa Code §§ 34A.2(6)(e)(1), 34A.7(4) (1997). Following the assignment of an E911 address to each rural residence, this information is combined with the name and telephone number of the resident, as well as other information which may assist first

responders in the event of an emergency call from the location, to form the E911 data base.

Development of the E911 data base is a joint project, requiring the integration of address information developed by the county or E911 board and telephone subscriber information provided by local exchange service providers. Each telecommunications service provider operating within the E911 service area is required to provide the E911 service provider with "all names, addresses, and telephone number information concerning its subscribers which will be served by the E911 system." Iowa Code § 34A.8(1) (1997). Information regarding private listing subscribers, those with nonlisted or unpublished telephone numbers, is to be provided by the telephone service provider for inclusion in the E911 service data base. See Iowa Code § 34A.5 (1997). Section 34A.8 contains the following provision specifically designating local exchange service information as confidential:

> Subscriber information remains the property of the local exchange provider.
> The joint E911 service board, the designated E911 provider, and the public safety answering point, their agents, employees, and assigns shall use local exchange service information provided by the local exchange service provider solely for the purposes of providing E911 emergency telephone service, and it shall otherwise be kept confidential. A person who violates this section is guilty of a simple misdemeanor.

Iowa Code § 34A.8 (1997).

In order to resolve your inquiry, we must examine the interaction of section 34A.8 with our public records law. Pursuant to Code chapter 22, all records held by governmental bodies are considered public records which, unless designated as confidential by section 22.7 or another provision of law, may be examined and copied by citizens. Iowa Code §§ 22.1, 22.2 (1995). Records concerning a county's assignment of street names and house numbers to rural residences are public records under chapter 22. No provision of law restricts disclosure of these records; however, when the address information is provided to a telephone service provider and the provider integrates customer telephone numbers into the address information, the "subscriber information" provided back to the county, including the "names, addresses, and telephone number information" concerning the

service provider's customers, is designated as confidential by section 34A.8(2). Under the terms of this section the county may use this information "solely for the purpose of providing E911 emergency telephone service." Section 34A.8(2) does not allow for use of subscriber information for any other purpose, even if the proposed alternate use would serve a public purpose.

Accordingly, if a county utilizes subscriber information obtained from its local telephone exchange providers to update address information in its E911 data base, the updated data base may not be used for purposes other than providing E911 emergency telephone service. If, however, the county maintains a separate address data base, updating address and resident information based upon records obtained from sources other than the local telephone exchange provider, the county's address data base remains a public record.

To the extent that the data base is a public record, the address information must be made available to anyone who requests access to the information, regardless of their intended use of the information. "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." Iowa Code § 22.2(1) (1997). The lawful custodian of the records "may charge a reasonable fee" for providing access to and copies of the information, but "the fee for copy service as determined by the lawful custodian shall not exceed the cost of providing the service." Iowa Code § 22.3 (1997). See 1996 Op. Att'y Gen. [#96-2-1 (Kempkes to Angrick)] (addressing the fee which a county may charge to provide a copy of a computerized public record).

In summary, we conclude that county E911 address information is a public record open to the pubic unless or until it is integrated with telephone numbers obtained from local service providers. Subscriber information obtained from local telecommunications service providers, including all names, addresses, and telephone number information concerning subscribers served by the E911 system, is confidential and may be used only for the purpose of providing E911 emergency telephone service.

Sincerely,

Christie J. Scase

Christie J. Scase
Assistant Attorney General

CJS/cs

SCHOOLS; COUNTIES; CITIES: Expenditure of local option sales and services tax. Iowa Code §§ 28E.12, 422B.12 (1997). If there is a chapter 28E contract between the school district and a city or county under which the school district is entitled to receive revenues from a local option sales and services tax, the school district would be a secondary recipient for purposes of section 422B.12(1)(c). If consistent with the chapter 28E agreement and with the uses of the local option tax approved by the voters, then a school district could use the local option tax proceeds for retiring school bonds. (Mason to Larson, Shelby County Attorney, 9-24-97) #97-9-2(L)

September 24, 1997

Jeffrey L. Larson
Shelby County Attorney
Larson, Childs, Hall & Christensen, P.C.
1005 Seventh Street
P. O. Box 726
Harlan, Iowa 51537

Dear Mr. Larson:

You have requested an opinion of the Attorney General regarding the use of local option tax revenue for retiring school bonds. Specifically, you asked whether the definition of a secondary recipient set forth in Iowa Code section 422B.12(1)(c) (1997) includes a public school district. Section 422B.12(1)(c) defines a "secondary recipient" as "a political subdivision of the state which is to receive revenues from a local option sales and services tax over a period of years pursuant to the terms of a chapter 28E agreement with one or more cities or counties." Your second question, based on a public school district being a secondary recipient, was whether the proceeds from a local option tax can be designated for retiring either an existing or a future school bond.

It is our opinion that a public school district is a "political subdivision of the state." See 1988 Op. Att'y Gen. 116; Graham v. Worthington, 259 Iowa 845, 854, 146 N.W.2d 626, 633 (1966); Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947); Kincaid v. Hardin County, 53 Iowa 430, 432, 5 N.W. 589, 590 (1880). Therefore, a public school district satisfies the first requirement of the definition of a secondary recipient.

In order for the public school district to satisfy the remainder of the definition of a secondary recipient, there must be a chapter 28E agreement between it and at least one city or county under which it is entitled to receive revenues from a local option sales and services tax. Iowa Code § 422B.12(1)(c). By being political

subdivisions of the state, public school districts, cities and counties are all "public agencies" for purposes of Iowa Code section 28E.12. 1972 Op. Att'y Gen. 110, 111; Iowa Code § 28E.2. Section 28E.12 authorizes the exercise by one public agency of the power of another public agency in accordance with the chapter 28E contract. 1974 Op. Att'y Gen. 678, 679; 1970 Op. Att'y Gen. 92, 98. The contract must be for the performance of a "governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform." Iowa Code § 28E.12. If, but only if, there is a chapter 28E contract between the school district and a city or county under which the school district is entitled to receive revenues from a local option sales and services tax over a period of years, the school district would be a secondary recipient for purposes of section 422B.12(1)(c).

If a school district is a secondary recipient, then the school district is also a "bond issuer" or "issuer" for purposes of Iowa Code section 422B.12. See Iowa Code § 422B.12(1)(a). Under section 422B.12(2), as an "issuer of public bonds which is a recipient of revenues from a local option sales and services tax," a public school district "may issue bonds in anticipation of the collection of one or more designated portions of the local option sales and services tax and may pledge irrevocably an amount of the revenue derived from the designated portions for each of the years the bonds remain outstanding to the payment of the bonds." The "designated portion" means the portion of the local option sales and services tax revenues authorized to be spent for certain purposes under an adopted public measure. See Iowa Code § 422B.12(1)(b). Also, the bonds "may be issued only for one or more purposes set forth on the ballot proposition concerning the imposition of the local option sales and services tax." Iowa Code § 422B.12(2). The procedures set forth in section 422B.12 would have to be followed in issuing the bonds. Bonds issued pursuant to section 422B.12 are not subject to the provisions of other laws or charters relating to the authorization, issuance, or sale of bonds. Iowa Code § 422B.12(6).

Iowa Code section 422B.12(5) states:

> A city or county, jointly with one or more other political subdivisions as provided in chapter 28E, may pledge irrevocably any amount derived from the designated portions of the revenues of the local option sales and services tax to the support or payment of bonds of an issuer, issued for one or more purposes set forth on the ballot proposition concerning the imposition of the local option sales and services tax or a political subdivision may apply the proceeds of its bonds to the support of any such purpose.

Therefore, the city or county with which the school district has a chapter 28E contract could, jointly with the school district pursuant to that contract, pledge a portion of the local option sales tax to pay the school district's bonds issued for purposes set forth on the tax imposition ballot proposition.

Proceeds from a local option sales and services tax which were pledged for retiring future school bonds, under either 422B.12(2) or 422B.12(5), can necessarily be used for retiring those bonds when the proceeds are received. The question becomes whether other proceeds received by a school district from a local option sales and services tax may be used for retiring bonds not issued in anticipation of the collection of a portion of the local option sales and services tax.

A school district's powers are those either expressly granted it or necessarily implied from the statutes by which it is governed and restrained in the exercise of its powers in performance of its duties. Silver Lake Consol. Sch. Dist. v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947). Local sales and services tax revenue received by a city or a county "may be expended for any lawful purpose of the city or county." Iowa Code § 422B.10(6). By its definition of "secondary recipient," section 422B.12(1)(c) necessarily implies that it would be lawful for a county or city to enter into a chapter 28E contract under which a political subdivision, such as a school district, would receive revenue from a local option sales and services tax.[1] Also, it is our opinion that helping schools fulfill their obligation to educate children serves a public purpose, i.e., a lawful purpose of the city or county.

Section 422B.12(2) sets forth one alternative for a secondary recipient's use of the local option sales and services tax revenue. The anticipated revenue **may** be pledged for paying bonds issued for purposes set forth on the tax imposition ballot proposition. The pledging of the revenue for future bonds is not required by section 422B.12, nor is it stated to be the only use which can be made by a recipient of the revenues. The fact that school districts may be recipients of local sales and services tax revenue and are not **required to** pledge the use of the revenue to payment of bonds issued for purposes approved when the tax was imposed necessarily implies that other uses can be made of the revenue. As stated above, the 28E agreement could be for the purposes of performance of a "governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform." Iowa Code § 28E.12. Certainly, a school district is authorized by law to retire its bonds and other indebtedness. In fact, it is required to establish a

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[1]School districts cannot receive revenue from a local option vehicle tax, because their receipt of such a tax is not included in the purposes for which the tax is to be used, as set out in Iowa Code section 422B.3.

debt service fund into which moneys available to service the debt will be placed and from which payment of the debt shall be made. See Iowa Code § 298A.10. School districts are also authorized to accept and administer gifts. Iowa Code § 565.6.

The ballot proposition for the imposition of the local option tax must specify the approximate amount of the tax revenues to be used for property tax relief and the specific purposes for which the revenues will otherwise be expended. Iowa Code § 422B.1(5). If the local option tax is imposed, a later election may be held for voting on the question of changing the use of the tax revenues. See Iowa Code § 422B.1(6). The receipt by the school district of the tax revenue pursuant to a chapter 28E contract would have to be consistent with the use for the tax approved by a majority of the electors.

In summary, it is our opinion that a school district could use local option tax proceeds for retiring school bonds as long as that use is consistent with the chapter 28E agreement the school district has with either a city or county under which it is to receive local option tax revenues and with the uses of the local option tax approved by the voters.

Sincerely,

Marcia Mason

MARCIA MASON
Assistant Attorney General

MM:cml

LICENSING; EDUCATIONAL EXAMINERS; PUBLIC RECORDS: Settlement of complaints and access to investigatory reports. Iowa Code §§ 22.7, 272.2(4), 272.2(8), 272.2(14), 272.2(15), 272.13, 910A.13 (1997). A rule requiring Board approval of a settlement agreement between the complainant and respondent would be contrary to express statutory direction under section 272.2(15), but the Board could initiate a disciplinary proceeding based upon the same factual circumstances even though the licensee and the complainant have reached a resolution of the private dispute between the parties. The Board's investigative report is a public record which must be disclosed on request to any person, including the respondent and complainant, unless one of the disclosure exceptions of section 22.7 or another provision of law designates some of the information confidential. Confidential information included in the investigative report may be withheld from the public, but should be provided to the respondent upon a Board finding of probable cause for further action by the Board. If the investigative report contains confidential information which should be withheld from the complainant, the Board should arrange to have the complaint prosecuted by a lawyer for the Board or from the office of the Attorney General. (Scase to Kruse, 9-30-97) **#97-9-3(L)**

September 30, 1997

Anne Kruse
Executive Director
Board of Educational Examiners
Grimes State Office Building
L-O-C-A-L

Dear Dr. Kruse:

Your predecessor, Dr. Orrin Nearhoof, requested an opinion of the Attorney General regarding implementation of Iowa Code subsection 272.2(15)(1997). This subsection, which was enacted in 1996,[1] establishes additional criteria for the procedural rules of the Board of Educational Examiners:

> The board of educational examiners is created to exercise the exclusive authority to:
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> . . .
>
> 15. Adopt rules that require specificity in written complaints that are filed by individuals who have personal knowledge of an alleged violation and which are accepted by the board, provide that the jurisdictional requirements as set by the board in

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[1] 1996 Iowa Acts, ch. 1215, § 46; amending 1996 Iowa Acts, ch. 1189, § 1.

> administrative rule are met on the face of the complaint before initiating an investigation of allegations, provide that any investigation be limited to the allegations contained on the face of the complaint, provide for an adequate interval between the receipt of a complaint and public notice of the complaint, permit parties to a complaint to mutually agree to a resolution of the complaint filed with the board, allow the respondent the right to review an investigative report upon finding of probable cause for further action by the board, require that the conduct providing the basis for the complaint occurred within three years of discovery of the event by the complainant unless good cause can be shown for an extension of this limitation, and require complaints to be resolved within one hundred and eighty days unless good cause can be shown for an extension of this limitation.

Iowa Code § 272.2(15)(1997)(emphasis added).

Focusing on the provisions underscored above, your agency has posed the following inquiries with respect to their rule making power: 1) Could the Board require that any resolution mutually agreed upon by the parties also be approved by the Board before reaching a disposition on the complaint? and 2) Could the Board provide that both parties in a contested case have the right to review the investigative report? We conclude that a rule requiring Board approval of a settlement agreement would be inconsistent with the legislative mandate under this section, but that the Board can initiate a disciplinary proceeding based upon the same factual circumstances even though the licensee and the complainant reach a resolution of the private dispute between the parties. Further, we conclude that the Board must develop rules allowing the respondent access to investigatory reports upon initiation of a contested case and may adopt rules allowing the complainant access to investigative reports if steps are taken to shield confidential information contained in the report.

We begin our analysis by examining the basic principles governing rule making by administrative agencies. The Iowa Administrative Procedure Act requires all state agencies to "[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency." Iowa Code § 17A.3(1)(b)(1997).

> An agency rule is presumed valid and the burden is on the party challenging it to demonstrate that a 'rational agency' could not conclude the rule was within the agency's delegated authority. [Iowa-Ill. Gas & Elec. v. Iowa State Commerce Comm'n, 334 N.W.2d 748, 751-52 (Iowa 1983)]. The rule would be beyond the scope of delegation if it is at variance with the enabling act or if it amends or nullifies legislative intent. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 475 (Iowa 1983).

Elliot v. Iowa Dept. of Transportation, 377 N.W.2d 250, 254 (Iowa App. 1985). "Thus, even though [the court] will hold that a rule is within the agency's power if a rational agency could so conclude, the exercise of the agency's expert discretion is limited." Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d at 475, citing Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d 907, 910 (Iowa 1979).

In light of these principles, we must determine the scope of the rule making authority delegated to the Board. Your first inquiry concerns adoption of a rule requiring Board approval of a settlement agreement submitted by the parties. Subsection 272.2(15) requires the Board to adopt rules which "permit parties to a complaint to mutually agree to a resolution of the complaint filed with the board." No direct authorization to review and approve or reject a settlement agreement is given to the Board either in this subsection or elsewhere in chapter 272. The question which we must resolve, therefore, is whether a rule requiring Board approval of settlement agreements submitted by the parties to a complaint would be consistent with the language of subsection 272.2(15).

The procedural rules adopted prior to the enactment of subsection 272.2(15) did not provide for settlement of a complaint by the parties. The rules did allow for amendment or withdrawal of a complaint under limited circumstances: "[a] complaint or any specification therein may be amended or withdrawn by the complainant at any time prior to notification of the respondent, and thereafter at sole discretion of the board." 282 IAC 11.4(4). In practice, this rule created a mechanism through which the Board could refuse to accept an agreement of the parties for resolution of a complaint by refusing to allow the complainant to withdraw the complaint. The provision in subsection 272.2(15) regarding settlement agreements revises this practice by requiring the Board to promulgate rules permitting the parties to mutually agree to resolve a complaint which has been filed with the Board. The adoption of a rule requiring

Board approval of these settlement agreements would be at variance with the statutory language. Therefore, we conclude that such a rule would exceed the Board's rule making authority and be invalid.

We note, however, that a state agency deciding a contested case affecting the public interest is not generally bound by a settlement agreement between the parties to the case. See e.g. Crescent Chevrolet v. Iowa Dept. of Job Service, 429 N.W.2d 148, 150 (Iowa 1988) (holding that an agency's authority to hear and decide contested cases cannot be "waived" by the parties). This issue arises because of the peculiar procedures utilized by the Board of Educational Examiners, in which private complainants actually prosecute contested cases, and by the express statutory language concerning acceptance of settlements in section 272.2(15).

The effect of a settlement between the parties is shaped by the existing procedural rules. Under the current rules, the complainant files with the Board a formal document that must be properly captioned, must contain a concise statement of the facts that establish the alleged violation of professional ethics and practices and must include a specific request for relief. 282 IAC 11.4(2). Further, the complainant must file sufficient copies to allow service on the respondent and provide copies for the Board. 282 IAC 11.4(3). Under these circumstances, it is clear that the complaint drafted by the complaining party is intended to be the form in which a contested case is initiated. In this context, settlement of the dispute between the complainant and the respondent would, necessarily, result in dismissal of the complaint itself.

Although section 272.2(15) clearly permits the parties to a complaint to agree to a resolution of the complaint, this does not mean that the Board is bound by that settlement. We believe a court would construe chapter 272 as authorizing the Board to proceed with a disciplinary hearing on the same facts alleged in the complaint, even though the complainant has settled the private dispute with the licensee. We recognize that the Board's current administrative rules do not provide for Board initiation

of complaints.[2] The Board should, however, revise its rules to provide for this procedure.[3]

The function of licensee disciplinary proceedings is not simply to determine the private rights of the complainant and the licensee. Indeed, the primary function is to protect the public by assuring that children are taught by qualified, ethical teachers. Erb v. Iowa State Board of Public Instruction, 216 N.W.2d 339, 344 (Iowa 1974) (noting that the "sole purpose of the board's power [to suspend or revoke teacher's licenses] is to provide a means of protecting the school community from harm"). In most professional licensing proceedings, the public is represented by an assistant attorney general who prosecutes the

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[2] Pursuant to 282 IAC 11.4(1), complaints may be initiated by:

a. Licensed practitioners employed by a school district or their educational entity or their recognized local or state professional organization.

b. Local boards of education.

c. Parents or guardians of students involved in the alleged complaint.

[3] Subsection 272.2(15) limits investigation of complaints filed by an individual to the allegations contained on the face of the complaint. This requirement appears to be intended to stop board investigators from exploring matters unrelated to the allegations made by a complainant. We do not believe that this provision should be interpreted as prohibiting expansion of the scope of an investigation if necessary to pursue issues legitimately uncovered during investigation of the complainant's allegations. For example, if during the investigation of a complaint alleging abuse of a student the board investigator discovers evidence of additional instances of student abuse, we believe the Board is not precluded by subsection 272.2(15) from authorizing an investigation based upon the additional information preparatory to a board-initiated disciplinary proceeding. While a prohibition upon groundless expansion of investigations can readily be justified as protecting licensees from unwarranted inquiries, interpreting section 272.2(15) as precluding follow-up investigation of legitimate information leads would in no way further the public interest. Review of the information obtained during investigation of the allegations set forth in the complaint by the Board prior to expansion of the scope of an investigation can serve to balance the interests of the licensee and the public, providing a means for the Board to fulfill its ultimate function -- protecting the school community from harm.

proceeding. See Fisher v. Board of Optometry Examiners, 476 N.W.2d 48, 50 (Iowa 1991)(recognizing that prosecution by an assistant attorney general in licensee disciplinary hearing is a common practice of licensing boards); Hartwig v. Board of Nursing, 448 N.W.2d 321, 324 (Iowa 1989). The Board has chosen a method of practice in which the complainant actually prosecutes the complaint. However, the Board is not bound to follow that practice in every case.

Iowa Code section 272.13 makes it clear that the Board can initiate a contested case based upon investigative information by providing "[t]he board may subpoena books, papers, records, and any other real evidence necessary for the board to decide whether it should institute a contested case." (emphasis added); see also Iowa Code § 272.2(4)(board authorized to enforce its rules through revocation or suspension of practitioner's license). Subsections 272.2(4), (8), and (14) grant the Board of Educational Examiners the power to deny, suspend, or revoke licenses. We do not believe the Board can waive that authority or delegate it to private complainants. Cf. Bunger v. Iowa High School Athletic Association, 197 N.W.2d 555, 559-60 (Iowa 1972) (holding that rule-making authority statutorily delegated by the legislature to school boards could not be further delegated by a school board).

Construing section 272.2(15) as authorizing an individual complainant to bind the Board by execution of a private settlement in licensee disciplinary proceedings would raise serious problems. First, that construction would seriously weaken the public purposes served by chapter 272. In Woodbury County Soil Conservation District v. Ortner, 279 N.W.2d 276, 279 (Iowa 1979), the Iowa Supreme Court construed a statute providing for enforcement of soil loss limits on complaint of injury to an adjacent landowner to also permit the commissioners to take independent action. In so doing, the Court held without merit an argument that the statute served no public purpose because it was designed solely to further private interests, rather than the public interests in soil conservation. Second, permitting third parties to dictate the scope of any complaint, investigation, and disciplinary sanctions against a licensee could encourage collusion or extortion and would impermissibly exclude the Board from the decision-making process. In light of these concerns and the broad authority granted the Board by chapter 272, we believe that a court would uphold rules allowing the Board to initiate proceedings to discipline a licensee even though the licensee and the complainant have reached a resolution of the private dispute between the parties.

The second inquiry involves disclosure of the Board's investigative reports. Subsection 272.2(15) requires the Board

to adopt rules to "allow the respondent the right to review any investigative report upon a finding of probable cause for further action by the board." Your agency asks whether a Board rule may provide that both parties have the right to review the investigative report.

We begin our analysis of this issue by noting that with the exception of the above-quoted language within subsection 272.2(15), chapter 272 does not address access to the Board's investigative reports.[4] Subsection 272.2(15) does not directly provide that the Board's investigative report is confidential. We must, therefore, turn to other applicable law to determine whether the Board's investigative report is a confidential record.

The Public Records Law, Iowa Code chapter 22, governs access to records belonging to state agencies. Pursuant to section 22.1(3), "all records, documents, tape, or other information" of or belonging to an agency of the state are, by definition, public records. Section 22.2(1) provides that "[e]very person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein." The Iowa Supreme Court in a recent case applying chapter 22 stated:

> We have found the purpose of this statute to be 'to open the doors of government to public scrutiny to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.' Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981). Similarly, chapter 22 'establishe[s] a liberal policy of access from which departures are to be made only under discrete circumstances.' City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 526 (Iowa 1980). Accordingly, there is a presumption of openness and disclosure under this chapter.

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[4] This is in contrast to chapter 272C, which expressly designates "all complaint files, investigative files, other investigative reports, and other investigative information in the possession of a [chapter 272C] licensing board" as "privileged and confidential." Iowa Code § 272C.6(4) (1997). We have, however, previously opined that the Board of Educational Examiners is not subject to the provisions of chapter 272C. 1992 Op. Att'yGen. 44 [#91-9-5(L)].

Gabrilson v. Flynn, 554 N.W.2d 267, 271 (Iowa 1996). A governmental body covered by chapter 22 may withhold from public inspection only those records specifically designated as confidential records within section 22.7 or another provision of law. Exceptions to disclosure of public records are to be construed narrowly. Gabrilson v. Flynn, 554 N.W.2d at 571 (section 22.7 exceptions narrowly construed).

None of the thirty-six enumerated categories of confidential records set forth within section 22.7 directly applies to the Board's investigative reports. Although we recognize that some of the information within an investigative report may be confidential pursuant to one of the section 22.7 exceptions or another provision of law[5], section 22.7 does not provide a basis for treating the entire investigative report as confidential.

Nor do we believe that the language within subsection 272.2(15), which requires rules providing for disclosure of the Board's investigative report to the respondent, can be construed to create an inference that the report is confidential as to other persons. We have recognized that statutory specification of particular parties who have a right of access to a record may imply that others do not share that right of access. See 1982 Op. Att'y Gen. 51 [#81-3-5(l)](child support record book accessible by parties and attorneys). The directive to promulgate rules on access by the respondent, however, falls short of that principle and substantially parallels the right of access already provided in Iowa Code chapter 17A. Iowa Code § 17A.13(2) (1997) ("Identifiable agency records that are relevant to disputed material facts involved in a contested case, shall, upon request, be made available to a party unless the requested records are expressly exempt from disclosure by Constitution or statute.").

In the absence of a provision of law designating the Board's investigative report as confidential, the report is a public record.[6] As a public record, the report must be disclosed on

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[5] For example, the investigatory report may contain personal information gathered from a licensee's personnel file, which may be kept confidential pursuant to subsection 22.7(11) (1997), or information identifying a minor who is the victim of sexual abuse, which must be kept confidential pursuant to section 910A.13 (1997).

[6] The Board may wish to pursue legislative amendment of chapter 272 to add a provision mirroring Code section 272C.6(4), which designates the investigatory files of other professional licensing boards as confidential and prohibits use of the information therein in a judicial or administrative proceeding

request to any person, including the respondent and complainant, unless one of the disclosure exceptions of section 22.7 or another provision of law designates a portion of the information confidential. Iowa Code § 22.2 (1997). If the report is requested by a member of the pubic, confidential information contained in the report should be redacted and the remaining portion of the report made available as a public record. In an appropriate case, the Board could pursue an injunction restraining examination of the report, pursuant to Iowa Code section 22.8, if public disclosure of the investigative report would not be in the public interest and would irreparably injure any person or persons. See Iowa Code § 22.8 (1997).

In the event the Board determines that confidential information is included in its investigative report, the question becomes whether the Board may make the entire report available to the respondent and complainant. Pursuant to Iowa Code section 17A.13(2), supra, those portions relevant to disputed material facts involved in the disciplinary proceeding must be made available to the respondent, unless exempt from disclosure by Constitution or statute. Where disclosure of otherwise confidential information is required, the Board should consider whether to issue a protective order to shield the information from further release. See e.g., Iowa Civil Rights Commission v. City of Des Moines, 313 N.W.2d 491 (Iowa 1981)(agency authorized to issue protective order to protect rights of persons whose medical records are sought).[7] The complainant should be provided with the investigator's report unless it contains confidential information provided by a source other than the complainant. If the investigative report contains information which should be kept confidential from the complainant, the Board

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other than the proceeding involving licensee discipline. The rationale of this section, "to assure a free flow of information" during the investigation, is certainly applicable to the proceedings of the Educational Examiners. See Doe v. Iowa State Board of Physical Therapy Examiners, 320 N.W.2d 557 (Iowa 1982).

[7] We note, however, that neither section 272.2(15) nor section 17A.13(2), requires the Board to provide all information within its entire investigatory file to the respondent. The file may contain information which is not included in the investigator's report to the Board or witness statements, the disclosure of which would be inappropriate, such as information which would identify a confidential informant. If this circumstance arises, Board investigatory staff should seek legal advice to determine if information in the investigatory file may be withheld from the parties to a disciplinary proceeding.

should arrange to have the complaint prosecuted by a lawyer for the Board[8] or from the office of the Attorney General.

In summary, a rule requiring Board approval of a settlement agreement between the complainant and respondent would be contrary to the express statutory direction under section 272.2(15), but the Board could initiate a disciplinary proceeding based upon the same factual circumstances even though the licensee and the complainant have reached a resolution of the private dispute between the parties. The Board should adopt rules to specify the process which will be utilized if it desires to initiate disciplinary proceedings. Further, we conclude that the Board's investigative report is a public record which must be disclosed on request to any person, including the respondent and complainant, unless one of the disclosure exceptions of section 22.7 or another provision of law designates some of the information confidential. Confidential information included in the investigative report may be withheld from the public, but should be provided to the respondent upon a Board finding of probable cause for further action by the Board. If the investigative report contains confidential information which should be withheld from the complainant, the Board should arrange to have the complaint prosecuted by a lawyer for the Board or from the office of the Attorney General.

Sincerely,

Christie J. Scase
Assistant Attorney General

CJS/cs

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[8] The Board is authorized by Iowa Code section 272.2(7) (1997) to hire legal counsel.

PUBLIC RECORDS; CITIES; PUBLIC UTILITIES: Public access to water usage information generated by municipal water utility. Iowa Code §§ 22.1, 22.2, 22.7 (1997). A city clerk's office, as part of city government, is a "government body" for purposes of Iowa Code chapter 22 (1997), the Public Records Law. A municipal water utility's records on its customers' water usage are "public records" for purposes of chapter 22. A city could reasonably find that disclosure of those records serves a public purpose; if so, they would not be exempt from disclosure under section 22.7(6) as "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose." (Kempkes to Koenigs, State Representative, **10-22-97) #97-10-1(L)**

October 22, 1997

The Honorable Deo A. Koenigs
State Representative
Statehouse
LOCAL

Dear Representative Koenigs:

You have requested an opinion on public access to certain data generated by a municipal water utility. You ask about a right of access to information on a business's water usage pursuant to Iowa Code chapter 22 (1997), the "Public Records Law." We understand that the owner of a car wash has requested access to information about a competitor's water usage, that the city council acts as the governing body of the municipal water utility, and that the city clerk's office possesses such information for billing purposes.

We conclude that, for purposes of chapter 22, a city clerk's office is a "government body" and that a municipal water utility's records on its customers' water usage are "public records." We also conclude that a city could reasonably find that disclosure of those records serves a public purpose; if so, they would not be exempt from disclosure as "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

I.

Chapter 22 governs public access to the "public records" of a "government body" in possession of a "lawful custodian." Section

22.1(1) defines "government body" to include any city and any of its departments, boards, bureaus, commissions, councils, or committees. Section 22.1(3) defines "public records" to include "all records, documents, tapes, or other information, stored or preserved in any medium . . . ." Section 22.1(2) defines "lawful custodian" as "the government body currently in physical possession of the public record."

Section 22.2 provides that "[e]very person shall have the right to examine and copy public records . . . ." See generally Iowa Code § 4.1(30)(a) ("shall" in statute imposes a duty). That general rule of disclosure, however, has certain specified exceptions within chapter 22. Section 22.7 sets forth thirty-six categories of records that "shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information . . . ." One category, section 22.7(6), includes "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

II.

You have asked about the disclosure of water usage information to an owner of a car wash about a competing business.

(A)

A "government body" includes a city and any of its departments, boards, bureaus, commissions, councils, or committees. Iowa Code § 22.1(1). We believe that a city clerk's office, as part of city government, is clearly a "government body" for purposes of chapter 22. See Iowa Code § 372.13(3) (city clerk appointed by city council to maintain city records and perform other duties required by law). See generally Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833, 835 (1967) (deciding that particular record possessed by city clerk was not a "public record").

(B)

"Public records" includes all records, documents, or other information "of or belonging to" a city. Iowa Code § 22.1(3). This definition broadly encompasses "writings held by public officers in their official capacities regardless of origin." 1994 Op. Att'y Gen. 46, 46.

Iowa Code chapter 384 governs city finance. Section 384.85(1) provides that "[t]he governing body of each city utility . . . being operated on a revenue basis shall maintain a proper system of books, records, and accounts." See generally Iowa Code §§ 476.9(3), 476.73(1). A proper system would necessarily include customers' water usage in order to calculate accurate billings.

Authority from other states indicates that water usage information from a municipal water utility is a public record. See 1996 Ky. Op. Att'y Gen. ORD-176 (customer's municipal water bills are public records under Kentucky open records law); 1985 Tenn. Op. Att'y Gen. 161 (utility district records are public records under Tennessee open records law). Cf. 1980 Op. Att'y Gen. 24, 24-25 (assessment book, assessment roll, and property record cards in county assessor's office are public records).

Accordingly, we believe that a municipal water utility's records on its customers' water usage are "public records" for purposes of chapter 22.

(C)

A public record is not necessarily an open record: either chapter 22 or some other law may exempt public records from public disclosure. 1994 Op. Att'y Gen. 46, 47. Section 22.7 exempts one category of public records from public disclosure that possibly prevents access by an owner of a car wash to a competitor's water usage information. Section 22.7(6) defines those exempt public records as "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose." See generally 1982 Op. Att'y Gen. 538, 545; Annot., "Freedom of Information Act -- Records," 27 A.L.R.4th 680 (1984).

We cannot say as a matter of law that a municipal water utility's records on water usage information come within the ambit of section 22.7(6). Applying section 22.7(6) in a particular instance requires a consideration of all the facts and circumstances by the lawful custodian, which we may not do in an opinion. See 1982 Op. Att'y Gen. 512, 516; see also 1994 Op. Att'y Gen. 46, 47 (noting that lawful custodian has discretion to determine whether public record falls within section 22.7). See generally 61 IAC 1.5(3)(c). In Craigmont Care Center v. Iowa Department of Social Services, 325 N.W.2d 918 (Iowa App. 1982), the only reported case applying section 22.7(6), the Iowa Court of Appeals considered whether semi-annual cost reports filed with the Iowa Department of Social Services by health care facilities were open records. The Court held that their release would serve a public interest even though they might give an advantage to competitors. 325 N.W.2d at 920-21. This holding, however, rested upon several factual findings.

Disclosure of public records is the general rule, with a presumption in favor of disclosure. Craigmont Care Center v. Iowa Department of Social Services, 325 N.W.2d at 921; 1984 Op. Att'y Gen. 70, 72; see Iowa Code § 22.8(3) (free and open examination of public records under chapter 22 generally promotes the public interest). In addition, section 22.7(6) "is construed narrowly." 1984 Op. Att'y Gen. 70, 72; see DeLaMater v. Marion Civil Serv.

Comm'n, 554 N.W.2d 875, 878 (Iowa 1996) (legislature intended narrow interpretation of confidentiality exceptions in chapter 22); 1982 Op. Att'y Gen. 538, 540. Moreover, section 22.7(6) requires a determination "not only that release would give advantage to competitors but also that release would serve no public purpose." 1980 Op. Att'y Gen. 372, 375. To the extent a city could reasonably find that disclosure of a municipal water utility's records on water usage information serves a public purpose, section 22.7(6) thus would not prohibit their disclosure.

III.

In conclusion: A city clerk's office, as part of city government, is a "government body" for purposes of chapter 22. A municipal water utility's records on its customers' water usage are "public records" for purposes of chapter 22. A city could reasonably find that disclosure of those records serves a public purpose; if so, they would not be exempt from disclosure under section 22.7(6) as "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

Sincerely,

Bruce Kempkes
Assistant Attorney General

REAL PROPERTY; HIGHWAYS; EASEMENTS: Effect of defective notice of secondary road vacation proceedings. Iowa Code §§ 306.10, 306.12 (1975). Marketability of title to privately owned real estate is not affected by a county's failure to comply with statutory notice procedures when vacating a road and relinquishing its easement approximately twenty years in the past. Therefore, the county does not have any duty to cure alleged defects in title to privately owned real estate resulting from irregularities in the road vacation proceeding. (Smith to White, Lyon County Attorney, 11-4-97) #97-11-2(L)

November 4, 1997

Paul White
Lyon County Attorney
P.O. Box 549
Rock Rapids, IA 51246

Dear Mr. White:

You have requested an opinion of the Attorney General on the question whether a county has a duty to cure alleged defects in title to privately owned real estate resulting from a county's failure to comply with statutory road vacation notice procedures in the mid-1970s. Your letter explains that title examiners have objected to title to certain vacated road rights of way and requested that the county cure alleged title defects.

You further explained that the county published notices of hearing in the vacation proceedings and executed quit claim deeds to adjoining landowners, but failed to mail notices of hearing as required by Iowa Code section 306.12 (1975). It is our understanding that the county did not own the underlying real estate and that the quit claim deeds merely confirmed the county's relinquishment of public highway easements.

It is our opinion that marketability of title to privately owned real estate is not affected by a county's failure to comply with statutory notice procedures when vacating a road and relinquishing its easement approximately twenty years ago. Therefore, the county does not have any duty to cure alleged defects in title to privately owned real estate resulting from irregularities in the road vacation proceeding.

County's limited interest in easement roads

Our analysis begins with consideration of the county's limited interest in privately-owned real estate underlying public roads in the secondary road system. When a public highway is established outside a city the fee title to the underlying

real estate usually remains vested in adjoining landowners. See: Bangert v. Osceola County, 456 N.W.2d 183, 186 (Iowa 1990); State v. F.W. Fitch Co., 236 Iowa 208, 211, 17 N.W.2d 380, 382 (1945); Clare v. Wogan, 204 Iowa 1021, 1024, 216 N.W. 739, 740 (1927).

An easement exists distinct from ownership. Schaller v. State, 537 N.W.2d 738, 742 (Iowa 1995); Hawk v. Rice, 325 N.W.2d 97, 98 (Iowa 1982). The easement does not affect title which exists subject to the easement. Schaller, 537 N.W.2d at 742; Polk County v. Brown, 260 Iowa 301, 305, 149 N.W.2d 314, 316 (1967); Kitzma v. Greenhalgh, 164 Iowa 166, 179, 145 N.W. 505, 506 (1914). The effect of an easement is to give the public the privilege of travel and the county the right to improve and maintain the road within the easement area. Schaller, 537 N.W.2d at 742; City of Dubuque v. Maloney, 9 Iowa 450 (Iowa 1859).

County's power to vacate public roads

A county has statutory authority to vacate roads. Iowa Code § 306.10; Mulkins v. Board of Supervisors, 330 N.W.2d 258, 260 (Iowa 1983). The public does not have a vested right to keep a road open. See Schaller, 537 N.W.2d at 742; Mulkins, 330 N.W.2d at 260; Hinrichs v. Iowa State Highway Comm'n, 260 Iowa 1115, 1122, 152 N.W.2d 248, 252 (1967). Once a county vacates a road, the easement is lost, and exclusive possession is restored to the original owner. Schaller, 537 N.W.2d at 742. In contrast, if the county owns the fee title to land underlying right of way, disposal of the fee title is governed by Iowa Code sections 306.22 through 306.25.

Abutting [adjoining] landowners have a right to damages whenever their access is substantially interfered with or cut off by a road vacation. Mulkins v. Board of Supervisors, 374 N.W.2d 410, 413 (Iowa 1985) (Mulkins II). After vacation of a right of way without proper notice to an adjoining owner, such owner could seek damages from the county. Miller v. Warren County, 284 N.W.2d 190, 194 (Iowa 1979) (allowing late appeal because notice of vacation hearing was insufficient to vest jurisdiction in board of supervisors on matter of damages); Christensen v. Board of Supervisors, 251 Iowa 1259, 1266, 105 N.W.2d 102, 107 (1960) (late appeal allowed where county failed to give notice of final action in vacation proceeding). These authorities would not lend any support to an attempted collateral attack on the county's decision to vacate a road, especially after passage of two decades.

Road vacation notice defects and marketability of real estate

During the relevant period (mid-1970s), Iowa Code section 306.12 required (in addition to publication) delivery of notice of hearing on a proposed road vacation by certified mail to adjoining property owners, utility companies whose facilities adjoin the road right of way, the Iowa Department of Transportation, and any agency in control of affected state lands. Iowa Code § 306.12 (1975).

It is questionable whether failure to deliver such notice in a recent county road vacation proceeding would create a reasonable probability of litigation against the owner of the underlying real estate. Unlike a tax deed or other conveyance of fee title, a quit claim deed of a roadway in which the county held an easement merely confirms relinquishment of the easement. It is not the source of title to the underlying real estate. Moreover, an easement for a public roadway is one which generally is apparent from or which can be proved by physical evidence of its use. See Bangert, 456 N.W.2d at 188 (prescriptive highway is limited to the area actually used). Thus, the physical impacts of a road vacation decision should be apparent to any interested person much sooner than two decades after the decision.

The merchantable or marketable title concept is basic in Iowa title law. A title is merchantable if a person of reasonable prudence would accept the title in the ordinary course of business. Wilson v. Fenton, 312 N.W.2d 524, 526-27 (Iowa 1981). Marketability of title is customarily determined in accordance with the Iowa Title Standards. See Wilson, 312 N.W.2d at 527. Standard 1.1 states in part:

> To render the title to land unmarketable, there must be a reasonable probability of litigation. The mere bare possibility or remote probability that there may be litigation with respect to the title is not sufficient to render it unmarketable.

Iowa State Bar Association, Iowa Land Title Standards (7th Ed. July 1, 1993). See also G. Madsen, Marshall's Iowa Title Opinions and Standards 28-29 (2d Ed. 1978). Two decades after a county road vacation proceeding, the probability of litigation arising from defective notice of the vacation is remote.

The General Assembly has enacted a number of statutes intended to cure title defects resulting from irregularities in proceedings for disposal of real estate by counties. See Iowa Code §§ 589.12, 589.19 (sheriff's deeds); 589.14-.16A (tax

deeds); 589.28 (county surplus property). Similarly, in an apparent response to the ruling in Bangert, the General Assembly enacted a statute intended to cure defects in ancient proceedings for establishment of county roads. 1992 Iowa Acts (74 G.A.), ch. 1169 (codified as Iowa Code § 589.30 (1997)). The lack of any such curative statute for road vacation proceedings can reasonably be attributed to the invulnerability of county road vacation decisions to collateral attack. We note that the exclusivity of the record titleholder's possession of vacated right of way can easily be established by affidavit of possession filed pursuant to Iowa Code section 614.17.

In conclusion, it is our opinion that marketability of title to privately owned real estate is not affected by a county's failure to comply with statutory notice procedures when vacating a road and relinquishing its easement approximately twenty years ago. Therefore, the county does not have any duty to cure alleged defects in title to privately owned real estate resulting from irregularities in the road vacation proceeding.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

STATE OFFICERS AND DEPARTMENTS; LAW ENFORCEMENT: English-speaking interpreters. Iowa Code §§ 622A.1, 622A.2, 622A.3, 811.2, 905.1, 905.2, 905.4, 905.5, 905.7, 905.8 (1997). The Iowa Department of Public Safety must pay the cost of interpretive services needed for a criminal investigation conducted by members of the Iowa State Highway Patrol that involves non-English speakers. The appropriate Judicial Department of Correctional Services must pay the cost of such services needed for conducting a pretrial release evaluation. (Kempkes to Poppen, Wright County Attorney, **12-30-97**) **#97-12-1(L)**

December 30, 1997

Mr. Lee E. Poppen
Wright County Attorney
P.O. Box 111
Clarion, IA 50525

Dear Mr. Poppen:

You have requested an opinion about the cost of interpreters necessary for public officers and employees to communicate with non-English speakers in criminally related matters. See generally Iowa Code ch. 622A (1997). You state:

> Like many counties, Wright County is experiencing a substantial increase in the number of non-English speakers. This creates a need by law enforcement personnel to use the services of interpreters during the investigation of crimes and the processing of criminal defendants. Because these costs are increasing, the question is being raised as to which governmental entity is responsible for these costs.

You ask who must pay the cost of interpretive services needed for a criminal investigation conducted by members of the Iowa State Highway Patrol, a division within the Iowa Department of Public Safety. You also ask who must pay the cost of interpretive services needed for conducting a pretrial release evaluation.

We conclude that the Iowa Department of Public Safety pays the cost of interpretive services needed for a criminal investigation

conducted by members of the Iowa State Highway Patrol. We also conclude that the appropriate Judicial District Department of Correctional Services pays the cost of such services needed for conducting a pretrial release evaluation.

I.

Chapter 622A governs the use of English-language interpreters in legal proceedings. See generally 1970 Iowa Acts, 63rd G.A., ch. 1273, §§ 1-6. Section 622A.2 provides that "[e]very person who cannot speak the English language and who is a party to any legal proceeding . . . shall be entitled to an interpreter to assist such person throughout the proceeding." Section 622A.1 defines "legal proceeding" to include "any legal action preparatory to appearing before any court, whether civil or criminal in nature . . . ." Section 622A.3(2) provides that "[a]n interpreter shall be appointed without expense . . . [i]f the person requiring assistance is indigent and financially unable to secure an interpreter."

Chapter 905 governs "community-based corrections programs." 201 IAC 1.2. See generally 1977 Iowa Acts, 67th G.A., ch. 154, §§ 1-10. Section 905.1 defines that phrase in part as community-based correctional services for the supervision of persons who have been charged with felonies, or aggravated or serious misdemeanors. See generally Iowa Code § 811.2 (generally requiring release of criminal defendants before trial pursuant to court order).

Section 905.2 establishes in each judicial district a Judicial District Department of Correctional Services, which "shall furnish or contract for those services necessary to provide a community-based correctional program . . . ." Section 905.4 provides in part that the board of directors for each Judicial District Department shall designate a county within the district to serve as its administrative agent, "[r]ecruit, promote, accept and use local financial support for [its] community-based correctional program from private sources," and "[a]ccept and expend state and federal funds available directly to [it] for all or any part of the cost of its community-based correctional program."

Under section 905.8, the Iowa Department of Corrections shall review the community-based corrections program of each Judicial District Department and, upon approval, "shall provide for the allocation among judicial districts in the state of state funds appropriated for the establishment, operation, support, and evaluation" of community-based corrections programs. See Iowa Code § 905.9. See generally Iowa Code § 8.2(10) (defining "state funds"). In an administrative rule, the Iowa Department of Corrections acknowledges its responsibility to fund pretrial release and other correctional services provided through community-based corrections programs. See 201 IAC 1.2.

In addition, section 905.7(1) provides that the Iowa Department of Corrections shall promulgate an administrative rule requiring each Judicial District Department to provide for the pretrial release of criminal defendants. Pursuant to this directive, an administrative rule provides that each Judicial District Department "shall designate the staff responsible for providing pretrial interviews . . . ." See 201 IAC 41.1(1). See also 201 IAC 1.6(2)(b)(1) ("the following services shall be provided [by Judicial District Departments] in addition to parole and work release: [p]retrial interviews"); 201 IAC 41.(3) (Judicial District Departments "shall have policies and procedures assuring daily staff contact with all jails in the district for the purpose of determining the presence of persons eligible for a pretrial interview and shall have a policy assuring that all eligible persons are provided an interview"). See generally First Judicial Dist. of Correctional Serv. v. Iowa Civil Rights Comm'n, 315 N.W.2d 83, 84, 87 (Iowa 1982).

Section 905.5(1) addresses the public financing of the Judicial District Departments. It provides:

> The county designated under [section 905.4(3)] as administrative agent for each district department, or the district department itself, if designated as administrative agent by the district board, shall submit that district department's budget . . . to the Iowa department of corrections in accordance with the provisions of chapter 8 [which governs the Iowa department of management]. The state department shall incorporate the budgets of each of the district departments into its own budget request . . . .

II.

(A)

You have asked who must pay the cost of interpretive services needed for criminal investigations conducted by members of the Iowa State Highway Patrol. See generally Iowa Code §§ 80.4, 80.8, 80.9.

In 1991, this office addressed the question whether a county vis-a-vis a city needed to pay the cost of interpretive services for city police officers conducting a criminal investigation that resulted in the filing of state charges. See 1992 Op. Att'y Gen. 37 (#91-7-4(L)). We observed that the General Assembly had established a statutory scheme that places the financial responsibility for such costs upon the "initiating governmental subdivision" -- viz., the one that funds the law enforcement

officers investigating the particular crime and needing interpretive services -- unless otherwise excepted by law. Discovering no applicable exception, we concluded that the city must pay the cost of interpretive services needed by its police officers for conducting the criminal investigation. Cf. Iowa Code § 804.31 (interpreter provided by law enforcement officer for arrested or detained deaf person shall be paid "by the governmental subdivision funding the law enforcement agency that procured the interpreter").

Our 1991 opinion, we believe, provides the answer to your first question: the Iowa Department of Public Safety must pay the cost of interpretive services needed for criminal investigations conducted by members of the Iowa State Highway Patrol. It is the governmental subdivision which pays the law enforcement officers conducting the investigation and needing interpretive services, and it is not exempted from the responsibility of paying the cost of those needed services. See 1992 Op. Att'y Gen. 37 (#91-7-4(L)). See generally Iowa Code ch. 80. We do not, however, negate the possibility of an agreement requiring a governmental subdivision such as a county or city to pay the cost of interpretive services needed for certain investigations conducted by members of the Iowa State Highway Patrol. See generally Iowa Code § 80.9(1)(b)-(c) (members of the Iowa Department of Public Safety may exercise their general powers within the limits of any city if "request is made by the mayor of any city, with the approval of the commissioner of public safety" or if "the request is made by the sheriff or county attorney of any county with the approval of the commissioner").

(B)

You have also asked who must pay the cost of interpretive services needed for conducting a pretrial release evaluation.

Under section 905.2, each Judicial District Department has the duty to provide or contract for the provision of pretrial release and other community-based correctional services. Section 905.5(1) requires each Judicial District Department to submit a budget to the Iowa Department of Corrections, which incorporates it into its own budget request; and an administrative rule requires each Judicial District Department to designate the staff responsible for conducting pretrial interviews, see 201 IAC 41.1(1). Under section 905.8, the Iowa Department of Corrections reviews the community-based corrections program of each Judicial District Department and, upon approval, allocates state funds among the judicial districts for the provision of community-based correctional services. See 201 IAC 1.2 (Iowa Department of Corrections funds pretrial release). Section 905.4 requires each Judicial District Department to expend state funds for all or any part of the cost of its community-based corrections program.

The statutory highway for funding pretrial release evaluations thus runs full circle. Each Judicial District Department provides or arranges for the provision of pretrial release, designates the staff responsible for conducting pretrial release interviews, and submits or arranges for the submission of its budget to the Iowa Department of Corrections. That department incorporates the proposed budgets within its own budget request and, upon receipt of state funds, allocates them among the judicial districts for the provision of pretrial release and other community-based correctional services.

It thus appears that the cost of interpretive services needed for conducting pretrial release evaluations properly rests with the Judicial District Departments. They have the general duty to furnish or arrange for pretrial release and other correctional services; they have the specific duty to conduct pretrial release interviews; and their proposed budgets may include any incidental costs, such as those for interpretive services, necessary for them to fulfill that responsibility. Cf. 1980 Op. Att'y Gen. 88, 90 (regarding a statute that imposed a duty upon governmental body to provide notification and did not address its cost: "it appears that the governmental body is responsible for the necessary costs involved with providing notification in accordance with the duty imposed"; "[t]he statute requires . . . notification and the governmental body must assume the necessary costs incident to such notification"). See generally Iowa Code § 4.4 ("i[n] enacting a statute, it is presumed that . . . a just and reasonable result is intended").

III.

The Iowa Department of Public Safety must pay the cost of interpretive services needed for a criminal investigation conducted by members of the Iowa State Highway Patrol that involves non-English speakers. The appropriate Judicial Department of Correctional Services must pay the cost of such services needed for conducting a pretrial release evaluation.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General