STATE OF WISCONSIN

Assembly Journal

Eighty-Third Regular Session

WEDNESDAY, December 13, 1978.

The chief clerk makes the following entries under the above date:

ADMINISTRATIVE RULES

Read and referred:

Administrative Rule 2

Relating to requiring the Department of Industry, Labor and Human Relations to establish administrative rules for certifying alternative energy systems. (Chapter 313, Laws of 1977).

Submitted by Department of Industry, Labor and Human Relations.

To committee on Revenue.

COMMUNICATIONS

State of Wisconsin
Department of State
Madison

To Whom It May Concern:

Dear Sir: Acts, joint resolutions and resolutions, deposited in this office, have been numbered and published as follows:

Bill, Jt. Res. or Res.	Enrolled No.	Publication date
Assembly Jt Res 72	17	Not Published

DOUGLAS LaFOLLETTE
Secretary of State

Notice of Intent received from Department of Health and Social Services to apply for Federal Assistance for Statewide Drug Abuse Treatment Services Contract.

Comments due by December 15, 1978.

To committee on Health and Social Services.

Notice of Intent received from Department of Health and Social Services to apply for Federal Assistance for Senior Community Services Employment Program, FY '79 (Supplemental).

Comments due by December 15, 1978.

To committee on Health and Social Services.

November 27, 1978

The Legislature of Wisconsin

State Capitol Building

Madison, Wisconsin 53702

Members of the Legislature:

On behalf of the 11,300 members of the International Association of Chiefs of Police, I am pleased to forward several resolutions to you, unanimously adopted at our 85th Annual Conference, October 1978, in New York, New York.

We thought that you would be particularly interested in this action of the Association.

Sincerely,

GLEN D. KING

Executive Director

Received and placed on file in the office of the chief clerk. The resolutions cover the following topics: criminal intelligence, flashing warning lamps on tow trucks, shipment of hazardous materials, certified training requirements for private security employment and traffic law enforcement in construction zones.

September 13, 1978

The Honorable Bronson C. La Follette

Attorney General, State of Wisconsin

Room 114 East, State Capitol

Madison, Wisconsin 53702

Dear Mr. La Follette:

Upon the direction of the Committee on Assembly Organization, I am submitting to you a request for your opinion relating to the effect of the Federal Equal Credit Opportunity Act on the Wisconsin veterans' loan program as specified in the letter from Speaker Ed Jackamonis.

EVERETT E. BOLLE

Assembly Chief Clerk

October 5, 1978

The Honorable Bronson C. La Follette

Attorney General, State of Wisconsin

Room 114 East, State Capitol

Madison, Wisconsin 53702

Dear Mr. La Follette:

Upon the direction of the Committee on Assembly Organization, I am submitting to you a request for your opinion as to the constitutionality of 1977 Assembly Bill 1207, relating to optional "land value taxation" of real estate as outlined in the letter from Representative Gary K. Johnson.

EVERETT E. BOLLE

Assembly Chief Clerk

OPINION OF THE ATTORNEY GENERAL

OAG 13-78

February 21, 1978

Committee on Assembly Organization
Wisconsin Legislature
Assembly Chamber
Madison, Wisconsin 53702

Dear Representatives:

You ask whether a portion of **Assembly Bill 894** is constitutional.

Assembly Bill 894 provides for a state waterfowl hunting stamp costing $3 which must be purchased and affixed to a hunting license before the licensee may hunt waterfowl during the designated waterfowl hunting season. Assembly Bill 894 proposes in part as follows:

"SECTION 2. 29.102 of the statutes is created to read:

"*29.102 WATERFOWL HUNTING STAMP.* (1) Except as otherwise provided, no person may hunt waterfowl unless he or she has a waterfowl hunting stamp affixed by the stamp's adhesive to the hunting license permitting the hunting of small game. The waterfowl hunting stamp shall be issued by the department and its agents and by county clerks. The fee for the waterfowl hunting stamp shall be $3. The waterfowl stamp shall be designed and produced by the department and shall expire annually on the same date each year that all hunting licenses expire. Any person who is exempt from payment or charge for a small game hunting license is also exempt from the fee under this subsection.

"(2) (a) The department shall expend $2 of the $3 fee received from the sale of a waterfowl stamp for developing, managing, preserving, restoring and maintaining wetland habitat and for producing waterfowl and ecologically related species of wildlife.

"(b) The department shall expend $1 of the $3 fee received from the sale of a waterfowl stamp for the development of waterfowl propagation areas within Canada which will provide waterfowl for this state and the Mississippi flyway. Money for the development of waterfowl propagation areas shall be provided only to nonprofit organizations. Before providing any money the department shall obtain

evidence that the proposed waterfowl propagation project is acceptable to the appropriate provincial and federal governmental agencies of Canada."

The precise question presented is whether $1 of the $3 waterfowl hunting stamp can be spent for the development of waterfowl propagation areas in Canada by allowing one-third of the stamp fees collected to be given to non-profit organizations devoted to such Canadian development. Assembly Bill 894 makes mandatory the expenditure of one-third of the stamp fees collected for development of Canadian propagation areas.

What is the waterfowl hunting stamp, a tax or a license? It is my opinion that said stamp is a license or a part thereof, no different than the separate hunting licenses required for deer, bear or bowhunting under secs. 29.104-29.109, Stats. The nature of such licenses is not to tax but to regulate under the police power. Further, the license fee is imposed to pay for the regulation. In *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 288-290, 268 N.W. 238 (1936), the court stated:

"...The distinction between taxes and fees is quite clear. 'Taxes,' it was said in *Fitch v. Wisconsin Tax Comm.* 201 Wis. 383, 230 N. W. 37, 'are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. The state demands and receives them from the subjects of taxation within its jurisdiction that it may be enabled to carry into effect its mandates and perform its manifold functions, and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society.' Taxes must rest on a state-wide constitutional purpose and must fall within the constitutional scope of the term 'expenses of state,' as used in sec. 5, art. VIII, of the constitution. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N. W. 331. Taxes are imposed for the purpose of general revenue. License and other fees are ordinarily imposed to cover the cost and expense of supervision or regulation. *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, 133 N. W. 593. See also *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247; *United States v. Butler* (AAA decision), 297 U. S. 1, 56 Sup. Ct. 312. The distinction between a tax and an imposition under the police powers is well stated in 4 Cooley, Taxation (4th ed.), p. 3511:

" 'The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power. ...

"(p. 3513) 'Only those cases where regulation is the primary purpose can be specially referred to the police power. If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax, although if the imposition clearly and materially exceeds the cost of regulation, inspection or police control, it is generally held to be a tax or an illegal exercise of the police power. ...

"(p. 3528) 'The power of a state to require a license fee in the exercise of the police power is inherent, subject to the limitations upon the police power in general and to any constitutional limitations which may exist; but constitutional limitations on the power to tax have no application.' (Citing *State v. Anderson*, 144 Tenn. 564, 234 S. W. 768, 19 A. L. R. 180.)"

The court reaffirmed the *Wisconsin Constructors* case in *State v. Jackman*, 60 Wis.2d 700, 707, 211 N.W.2d 480 (1973), where the boat license statute, sec. 30.51(1), Stats., was challenged as contrary to Wis. Const. art. IX, sec. 1. The court stated (60 Wis.2d at p. 707):

"... In respect to tax, impost or duty, it is generally recognized that charges exacted in the exercise of the police power are not taxes and are not subject to constitutional limitations which apply to the exercise of the power to tax. 1 Cooley, *Taxation* (4th ed.), p. 94, sec. 26; 4 Cooley, pp. 3509-3516, secs. 1784-1786; *Morrill v. State* (1875), 38 Wis. 428, 20 A. R. 12. This court has made a distinction between taxes and fees. A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation. *State ex rel.*

Attorney General v. Wisconsin Constructors (1936), 222 Wis. 279, 268 N. W. 238; *Fitch v. Wisconsin Tax Comm.* (1930), 201 Wis. 383, 230 N. W. 37. ..."

In accord: *State ex rel. Fairchild v. Wisconsin Auto. Trades Asso.*, 254 Wis. 398, 401, 37 N.W.2d 98 (1949). 61 Op. Att'y Gen. 180, 183-184 (1972).

In addition, it is my opinion that AB 894 does not pledge the credit of the state or create a debt contrary to the limitations imposed by Wis. Const. art. VIII, secs. 3 and 7. See *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis.2d 464, 235 N.W.2d 648 (1975); *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 208 N.W.2d 780 (1973); *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 277 N.W. 278, 280 N.W. 698 (1938).

A constitutional examination of AB 894 also requires evaluation under the public purpose doctrine. In *State ex rel. Warren v. Nusbaum, supra*, at pp. 413-415, the court discussed the public purpose doctrine:

"While no specific clause in the constitution can be acclaimed as the genesis of the public purpose doctrine, it is a 'well-established constitutional tenet.' Public funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin.

"What constitutes public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight. *Hammermill, supra*; *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 170 N. W. 2d 790; *State ex rel. Bowman v. Barczak, supra*; *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 66 N. W. 2d 362. If any public purpose can be conceived which might rationally be deemed to justify the act or serve as a basis for the instant expenditure, the test is satisfied and the court cannot further weigh the adequacy of the need or the wisdom of the method. *State ex rel. Singer v. Boos* (1969), 44 Wis. 2d 374, 171 N. W. 2d 307; *State ex rel. Zillmer v. Kreutzberg* (1902), 114 Wis. 530, 90 N. W. 1098. The court in *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 377, 159 N. W. 2d 36, stated:

" '... Only if it is "clear and palpable" that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists. ...'

"In *Hammermill, supra*, pages 48 and 49, this court stated:

" 'What constitutes a public purpose is in the first instance a question for the legislature to determine. This court in *State ex rel. La Follette v. Reuter, supra*, at pages 114 and 115, stated:

" ' "The rule for determining the public purpose for expenditure of public funds is set forth in *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 207, 215, 216, 60 N. W. 2d 763:

" ' " 'The general rule as to the public purpose of the expenditure of public funds is stated in 81 C. J. S., States, p. 1149, sec. 133, as follows:

" ' " ' "Generally, in connection with the validity of the expenditure of state funds, what is ... a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. ... Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation, ..." '

" ' "The *Thomson Case* (1953), *supra*, at page 216, cited with approval, *Carmichael v. Southern Coal & Coke Co.* (1937), 301 U. S. 495, 57 Sup. Ct. 868, 81 L. Ed. 1245, which states:

" ' " ' "... The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, the *modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiarly within the knowledge of the legislature*, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. [Citations.] As with expenditures for the general welfare of the United States [Citations], *whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.* [Citations.]" ' " ' "

Waterfowl are migratory birds subject to regulation and control of the national government through treaties with Great Britain and Mexico, 16 U.S.C.A. sec. 715j. A Migratory Bird Conservation Commission, chaired by the Secretary of the Interior, administers 16 U.S.C.A. sec. 715 *et seq.* enacted pursuant to treaty obligations. Each year the Secretary of the Interior issues general regulations and quotas for each state for the taking of waterfowl by hunting in its five designated flyways, including the Mississippi flyway. See 16 U.S.C.A. secs. 715i and 715n. Thereupon, the states determine their bag limits and quotas for the hunting season. 16 U.S.C.A. sec. 715h. A federal hunting stamp is required to hunt any waterfowl. 16 U.S.C.A. sec. 718 *et seq.*

The federal government by direct appropriation acquires and maintains waterfowl refuges. 16 U.S.C.A. secs. 715k and 721. The states receive payments from the operation of national wildlife refuges. 16 U.S.C.A. sec. 715s. The states also receive payments from the sale of the federal hunting stamp. 16 U.S.C.A. sec. 718. In addition, Wisconsin participates in the wildlife restoration program set forth in 16 U.S.C.A. sec. 669 *et seq.* by enabling legislation contained in sec. 29.174(13), Stats.

Scientific evidence has established the importance of water conditions in the prairie provinces of Canada and the North Central prairies of the United States to waterfowl population in the Mississippi flyway. In *Waterfowl Tomorrow*, U.S. Department of Interior, U.S. Government Printing Office 1964, LC #64-60084, the Secretary of the Interior reports at p. 39:

> "PRAIRIE POTHOLES are the backbone of duck production in North America. Filled with water, they constitute the most fruitful duck producing medium in the world. Given a few wet years, the prairie country can pyramid duck numbers to startling proportions. Several successive drought years bring an inevitable crash. Populations dwindle almost in direct proportion to the decline in water. For some species intimately tied to prairie habitat, it means dangerously low numbers and tightened hunting regulations.
>
> "The prairie pothole region makes up only 10 percent of the total waterfowl breeding area of this continent, yet it produces 50 percent of the duck crop in an average year -- more than that in bumper years.
>
> "This region covers about 300 thousand square miles in south-central Canada and north-central United States. ..."

The Mississippi flyway is the most important flyway of the five designated by the Department of Interior for administrative purposes. It also is the corridor used by most of the ducks bred in the prairie regions of the United States and Canada. The Secretary of Interior reports further in *Waterfowl Tomorrow* at pp. 185-186:

> "MISSISSIPPI meant big river to the Ojibway Indians and 'big' is the word we can use for the waterfowl flyway that bears its name. Besides having the grandaddy of all rivers, three of the five largest lakes of the world, and the number one inland waterway, this Flyway also has other 'king-size' features suited to the needs of waterfowl and people.
>
> "The Mississippi Flyway States are Minnesota, Wisconsin, Michigan, Ohio, Indiana, Illinois, Iowa, Missouri, Kentucky, Tennessee, Arkansas, Louisiana, Mississippi, and Alabama. They embrace 742 thousand square miles, one-fourth the area of the 48 adjoining States.
>
> "These 14 States contain more than half the acreage of wetlands classified as having significant value to waterfowl in the 48 contiguous States. Their residents buy 40 percent of the duck stamps sold and kill nearly 40 percent of the total ducks taken in the United States.
>
> "The Mississippi Flyway draws from breeding grounds that reach northward to the Mackenzie River Delta and Alaska in the west and to Hudson Bay and Baffin Island in the east. It includes most of the productive prairie pothole region.
> ...
>
> "We [Mississippi Flyway] boast 11.5 million acres of wetlands of high or moderate value and 20 million acres of lesser importance. Grainfields provide additional waterfowl range. This flyway in 1960 included the four leading soybean producing States, three of the four top rice producers, and one of the four top barley producers. Two-thirds of the Nation's corn crop is grown here. In short, the flyway is big in the things that count for the birds and for people who enjoy having them around. ..."

The national value of migratory birds was declared by the U.S. Supreme Court in *Missouri v. Holland*, 252 U.S. 416, 435 (1920), which involved a challenge to the constitutionality of the Migratory Bird Conservation Act soon after its adoption pursuant to the treaty with Great Britain. The Court stated at p. 435:

"Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. ..."

Certainly this national policy declaration applies validly to a well-established state policy to preserve and protect migratory birds and waterfowl in Wisconsin. It is entirely consistent also with the state's waterfowl conservation programs, its cooperative programs with the federal government and with scientific fact. It is my opinion that AB 894 as drafted violates no constitutional provision, policy or doctrine.

Sincerely yours,
BRONSON C. La FOLLETTE
Attorney General

CAPTION:

Assembly Bill 894 as drafted is constitutional and allows the state to contribute $1 of the $3 fee collected from a state waterfowl hunting stamp to private nonprofit organizations for development of waterfowl propagation areas in Canada.

OPINION OF THE ATTORNEY GENERAL

OAG 16-78

February 23, 1978

The Honorable Edward Jackamonis, Chairman
Assembly Committee on Organization
211 West, State Capitol
Madison, Wisconsin 53702

Dear Representative Jackamonis:

You have asked me to answer several questions concerning 1977 **Assembly Bill 500**. You are concerned with the following section of the Bill:

"SECTION 3. 20.255 (6) of the statutes is created to read:

"20.255 (6) ACCEPTANCE OF FUNDS. (m) *Federal aid.* Notwithstanding s. 20.865 (4) (m), moneys received by the state under the federal elementary and secondary education act of 1965 (P.L. 89-10) shall not be paid into the state treasury and shall not be subject to the laws, rules and regulations governing payments made by the state treasury, but shall be deposited in and constitute the separate nonlapsible fund which is created and designated as the federal educational assistance trust fund. There is appropriated from the federal educational assistance trust fund to the department all federal moneys received under the federal elementary and secondary education act of 1965, as authorized by the governor under s. 16.54, to carry out the uses and purposes of that act."

Your questions, the analysis by the Legislative Reference Bureau and the fiscal note all indicate that the purpose of this legislation is to put funds received under the Elementary and Secondary Education Act of 1965 (ESEA) beyond the effect of Wis. Const. art. I, sec. 18. This section provides:

"**Freedom of worship; liberty of conscience; state religion; public funds.** Section 18. The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

A brief discussion of art. I, sec. 18 is given at this time in order to serve as background for the balance of the opinion.

A detailed interpretation of art. I, sec. 18 was first made by the Wisconsin Supreme Court in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890). In this case parents of Roman Catholic faith brought suit to prevent the reading of the St. James version of the Bible in public school where their children were in attendance. In holding that the reading of the Bible violated art. I, sec. 18 as well as art. X, sec. 13 the court wrote "Wisconsin ... has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union." 76 Wis.

at 207-208, 217-221. In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), the court reaffirmed the position taken in the *Weiss* case regarding the interpretation of art. I, sec. 18.

In question 1. a. you ask:

> "a. Did the drafters of the Wisconsin Constitution intend that art. I, s. 18, Wis. Const., prohibit the administration and management by state officials of *any* moneys that would benefit religious societies or religious or theological seminaries? In other words, was the prohibition intended to prevent the 'entanglement' of the state in the affairs of such societies and seminaries or merely to prevent the use of funds drawn from the State Treasury to support such institutions?"

The answer to this question is yes. The phrase in art. I, sec. 18 "nor shall any money be drawn from the treasury" means those monies of which the state has taken possession pursuant to law. Those monies are public funds. 63 Am. Jur. 2d *Public Funds et seq.* This is true even though they are held for a special purpose. In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 165-166 (1962), the Wisconsin Supreme Court held that a statute providing for the transportation of parochial students was unconstitutional because it was "in direct violation of that portion of sec. 18, art. I of the Wisconsin constitution, which prohibits the expenditure of *any public funds* 'for the benefit of religious societies, or religious or theological seminaries.' " (Emphasis added.) Furthermore, in *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 414, 14 N.W.2d 428 (1944), the court stated:

> "... whether the funds be granted to the board of regents, or to the university, or to the state as grantee, the state in any case becomes the owner of the fund as both the board of regents and the university are agencies of the state to whom the administration of state functions is intrusted."

Section 34.01(5), Stats., dealing with public deposits provides:

> " 'Public moneys' shall include all moneys coming into the hands of the state treasurer or the treasurer of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, by virtue of his office without regard to the ownership thereof."

The proscription in Wis. Const. art. I, sec. 18, against drawing money from the treasury actually amounts to a proscription against using public monies. "[N]or shall any money be drawn from the treasury" is an artful phrase stating the proscription.

In *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 43, 72 N.W.2d 577 (1955), the supreme court stated:

> "The relator submits that once the money is paid into the state treasury it becomes state money and can be paid out by the state treasurer only in pursuance of an appropriation by law (as provided in sec. 2, art. VIII, Const.). He contends that merely because it is handled on a revolving basis does not change its character or give rise to any special or trust fund. We consider that the relator's position in this regard is correct. ..."

In *State ex rel. Thomson v. Giessel*, 262 Wis. 51, 53 N.W.2d 726 (1952), the court had under consideration legislation providing additional benefits for retired teachers. The court held that the legislation was subject to the constraints of art. V, sec. 26 and rejected the argument that the transfer of the funds from the general fund to the contingent fund, to the annuity reserve fund, and then to the teacher altered the public character of the money.

The proposed legislation admits of the fact that the money is public money since the proposal actually appropriates the money. The legislation states: "There is appropriated from the federal educational assistance trust fund to the state department." If the money were not state public money, it could not be appropriated by the Legislature.

In conclusion, in answering 1. a., Wis. Const. art I, sec. 18 was intended to prohibit the administration and management by state officials of any public funds in a manner that would benefit religious societies or religious or theological seminaries. The Legislature, by appropriating and delegating further responsibility for funds to another public entity, cannot thereby insulate those funds from Wisconsin's constitutional restrictions on state intervention in religious affairs.

I am aware that courts in some other states have reached somewhat different results. See, for example, *In re Proposal C*, 384 Mich. 390, 185 N.W.2d 9 (1971). But in view of the precedent established in Wisconsin concerning Wis. Const. art I, sec. 18, I believe our supreme court would hold sec. 3 of AB 500 unconstitutional.

Question 1. b. reads:

> "By stating that ESEA funds are not to be paid into the State Treasury but into the federal education assistance fund, does A.B. 500 have the effect of causing such funds not to be part of the State Treasury for the purposes of the prohibition of art. I, s. 18, Wis. Const.?"

By virtue of my answer to question 1. a., the answer to this question is no.

Questions 1. c. read:

> "Who would (or could) be responsible for receiving and disbursing money from the federal education assistance fund established by A.B. 500? Who would (or could) sign the checks? To what extent can routine procedures for receiving, disbursing, investing and auditing the use of such funds be followed without violating the Wisconsin Constitution? Are there any limitations on the activities of state officials which would be necessary to avoid violating the Constitution?"

These questions assume the constitutionality of sec. 3 of 1977 AB 500. Since sec. 3 is, in my opinion, unconstitutional and because of the constitutional prohibition against the use of public funds for the purposes set forth in AB 500, it is unnecessary to answer these questions.

Additionally, some of the questions are very generally propounded and are incapable of meaningful response in the absence of an actual proposal to consider. Any proposed legislation in this field must at least comport with the following pronouncement of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971):

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 US 236, 243 (1968); finally, the statute must not foster an excessive government entanglement with religion. [Walz v. Tax Commission, 397 US 664, 674 (1970)]"

Question 1. d. reads:

> "Can moneys which are outside of the State Treasury, pursuant to A.B. 500, be subject to legislative appropriations and become part of the state budget, as is done in A.B. 500?"

This question assumes sec. 3 of AB 500 would accomplish something that it does not. As already stated, the constitutional proscription is against the use of state public monies. The monies would be subject to legislative appropriation.

My answers to these questions are contrary to the opinion stated in 56 Op. Att'y Gen. 135 (1967). However, since the authorities relied on in that opinion do not support the conclusions reached, it is not controlling here. In view of this fact and my response to question 1 it would appear unnecessary to answer question 2.

I would offer here that it is highly questionable whether legislation establishing a separate fund that would still be subject to some legislative or executive control would be constitutional. Whether legislation creating a separate fund beyond governmental control to be administered by an independent entity would satisfy federal requirements in administering ESEA funds is beyond the scope of this opinion.

In your final question you ask:

> "Under the present method of receiving and disbursing federal ESEA funds, is it constitutionally permissible for the Department of Public Instruction to approve the rental of space by the public school district in a nonpublic school building for the provision of programs funded with ESEA funds? Further, if such a rental program is not currently permissible under the Wisconsin Constitution, and if A.B. 500 is enacted, would it become permissible for the Department of Public Instruction to approve such rentals for programs funded from the federal education assistance fund established by A.B. 500?"

Both of these questions will be answered in an opinion to Superintendent of Public Instruction Barbara Thompson, which will be issued shortly.

Sincerely yours,
BRONSON C. La FOLLETTE
Attorney General

CAPTION:

Wisconsin Constitution art. I, sec. 18, prohibiting the drawing of money from the treasury for the benefit of religious societies, or

religious or theological seminaries is a proscription against using public monies for such purpose. Section 3 of 1977 Assembly Bill 500 which purports to establish a separate fund outside of the state treasury if enacted would not avoid this prohibition since the public nature of the money is not changed.

OPINION OF THE ATTORNEY GENERAL

OAG 84-78

December 6, 1978

Committee on Assembly Organization
Wisconsin Legislature
Assembly Chamber
Madison, Wisconsin 53702

Dear Representatives:

You ask whether the State Auditor can audit student records under sec. 13.94, Stats., to determine whether full-time equivalency reports submitted by the University of Wisconsin are accurate. Certain legislative appropriations to the University of Wisconsin System are based on full-time equivalency reports.

Initially, the State Auditor wants a preliminary sample of eighty students to determine the ultimate sample size. The final audit will require examining many student records. The State Auditor must secure the name of each student or his identification number (*i.e.*, his social security number) for his audits in order to comply with professional auditing standards. The University points out that the Family Education Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. sec. 1232g, prevents the University of Wisconsin from disclosing student records by name or identification number without the consent of each student. The University must comply with this act or jeopardize several millions of federal dollars in student aids.

Specifically, the State Auditor needs the following information to perform his audit of full-time equivalency reports:

1. Student's identifying number or name.
2. Unit, Division, Department, Subdepartment number of each course registered for and the discipline group to which it is assigned.

3. Number of credits assigned to each course for which a student is registered.

4. Student's assigned level and class standing.

5. Graduate degree sought.

6. Degree earned this term.

7. Date of withdrawal.

Title 20 U.S.C. sec. 1232g provides in part as follows:

> "(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following-
>
> "....
>
> "(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974."

You have secured legal opinions from the Department of Health, Education and Welfare which say that if in the opinion of the Wisconsin Attorney General sec. 13.94, Stats., predated November 19, 1974, and applied to student records before that date, the State Auditor can examine such records without violating 20 U.S.C. sec. 1232g.

Section 13.94(intro.), Stats., was created by ch. 659, Laws of 1965. Only minor revisions have been made since its enactment. The underscored portion of sec. 13.94(1), Stats., *infra*, was added by ch. 224, Laws of 1975. Section 13.94, Stats., does not specifically provide for examination of student records in the University of Wisconsin System. Nevertheless, the scope of the auditing authority includes the University System. Secs. 13.94(4), 15.02(2) and 15.91, Stats.

The State Auditor in fact has examined University student records since the creation of his position by ch. 9, Laws of 1947. Section 13.94, Stats., provides in part:

"**13.94 Legislative audit bureau.** There is created a bureau to be known as the 'Legislative Audit Bureau', headed by a chief known as the 'State Auditor' outside the classified service. The bureau shall be strictly nonpartisan. Subject to s. 16.30 (4) (a) and (f), the state auditor or designated employes shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by such departments and relating to their expenditures, revenues, operations and structure. In the discharge of any duty imposed by law, the state auditor may subpoena witnesses, administer oaths and take testimony and cause the deposition of witnesses to be taken as prescribed for taking depositions in civil actions in circuit courts.

"(1) Duties of the bureau. The legislative audit bureau shall be responsible for conducting postaudits of the accounts and other financial records of departments to assure that all financial transactions have been made in a legal and proper manner. In connection with such postaudits, the legislative audit bureau shall review the performance and program accomplishments of the department during the fiscal period for which the audit is being conducted to determine whether the department carried out the policy of the legislature and the governor during the period for which the appropriations were made. *In performing postaudits under this subsection, the legislative audit bureau shall not examine issues related to academic freedom within the university of Wisconsin system. A postaudit shall not examine into or comment upon the content of the various academic programs, including degree requirements, majors, curriculum or courses within the university of Wisconsin system, nor shall any such postaudit examine into the manner in which individual faculty members or groups of faculty members conduct their instructional, research or public service activities. This subsection does not preclude the bureau from reviewing the procedures by which decisions are made and priorities set in the university of Wisconsin system, or the manner in which such decisions and priorities are implemented within the university of Wisconsin system, insofar as such review is not inconsistent with s. 36.09. ...*"

Section 36.09, Stats., contains the responsibilities and duties of the Board of Regents and others in the governance of the University System. Nothing therein prohibits or allows audits by the State

Auditor. No cases or opinions exist under sec. 13.94, Stats. Therefore, I must construe sec. 13.94, Stats.

Section 13.94(intro.), Stats., gives the State Auditor authority to examine all books, records and other documents of all departments relating to departmental expenditures, revenues, operations and structure. Section 13.94(1), Stats., grants specific authority to conduct postaudits of departments to assure that (1) financial transactions were legal, (2) program goals were met and (3) legislative and executive policies were carried out. These provisions have remained substantially unchanged since enactment by ch. 659, Laws of 1965.

Section 13.94(1), Stats., then provides that when conducting postaudits, the Legislative Audit Bureau shall not examine the following in the University of Wisconsin System: (1) academic freedom, (2) content of academic programs, (3) degree requirements, (4) majors, curriculum or courses and (5) methods of faculty teaching, research or public service activities. These provisions were added by ch. 224, Laws of 1975.

Finally, sec. 13.94(1), Stats., states that the following audit reviews in the University of Wisconsin System are not precluded: (1) reviews of decision making procedures of the University of Wisconsin System and (2) reviews of the way decisions or priorities are implemented -- as long as such audit reviews are not inconsistent with sec. 36.09, Stats. These provisions were added by ch. 224, Laws of 1975.

Unquestionably the records sought do relate to the University's expenditures, revenues, operations and structure inasmuch as they are original evidence of the University's full-time equivalency reports on which funding is based. In addition, the unvarying administrative practice since the inception of the Auditor's office in 1947 has been to examine these records. Thus, the statute on its face and the long-standing administrative practice persuade me that the Auditor has lawful access to these records.

The amendments by ch. 224, Laws of 1975, protecting against the use of audits to infringe on academic freedom, do not warrant a contrary interpretation. Although it is conceivable that these records might be misused to contravene the purpose of ch. 224, the presumption of good faith of public officials prevents an assumption that they will be so misused. The Auditor's entitlement to these records will remain so long as the Auditor proceeds with the purpose of verifying the University's full-time equivalency reports by

examination of the original record data as contained in these documents.

Although I conclude that the Auditor has access to these records, the Auditor's public use of personally identifiable information is a different matter. Of course, the Auditor may use this information internally as may be necessary to prepare a responsible audit. Any public disclosure of personally identifiable information, however, raises different issues concerning the privacy rights of students. Although the Auditor could disclose this underlying data to the legislative body to which he reports, if necessary to persuade that body of the integrity of the audit report, before making such disclosure, however, the Auditor first should explore the alternative methods of assuring the integrity of the reports, *e.g.*, by coded identification.

My caution that the Auditor ordinarily should exercise care in making a public disclosure of personally identifiable student records rests on the growing public policy securing individual right of privacy. The Family Education Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. sec. 1232g, attests to congressional sensitivity to the "release of educational records" except to officials to whom reports are "required." Although this provision is not controlling here because of its inapplicability to statutes such as sec. 13.94, Stats., which antedate November 19, 1974, the policy expression against unnecessary disclosure should not be disregarded. In addition, I note that the Legislature has given life to the common law right of privacy. Ch. 176, Laws of 1977.

While in most circumstances the public's interest in disclosure probably will outweigh any privacy interests, in this context I believe the rule is otherwise. For the public interest in the audit concerns the accuracy of the University's full-time equivalency reports, not the personally identifiable information of students. It is only when the accuracy of the University's report compels reference to the personally identifiable information that its disclosure is warranted.

In summary, it is my opinion sec. 13.94, Stats., allows the State Auditor to make audits or postaudits at the University. The State Auditor has audited student records before since 1947 when his position was created. Section 13.94, Stats., in part, does set forth, however, what the State Auditor may and may not examine in an audit or postaudit in the University of Wisconsin System. None of the student records needed by the State Auditor trammel the items of academic freedom set forth in sec. 13.94(1), Stats., or conflict with any provision of sec. 36.09, Stats. It is therefore my further opinion

that those provisions of sec. 13.94(intro.) and (1), Stats., as enacted by ch. 659, Laws of 1965, always have contained the authority for the proposed audit. Further, the Family Education Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. sec. 1232g(b)(1)(E), permits the State Auditor to examine such student records without student consent.

Sincerely yours,
BRONSON C. La FOLLETTE
Attorney General

CAPTION:

Section 13.94, Stats., contains authority for the State Auditor to secure certain information from student records for the purpose of auditing full-time equivalency reports submitted by the University of Wisconsin.