



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**JOHN BEN SHEPPERD  
ATTORNEY GENERAL**

February 2, 1955

Hon. Crawford C. Martin, Chairman  
Senate Finance Committee

Hon. Max C. Smith, Chairman  
House Appropriations Committee

Fifty-fourth Legislature  
Austin, Texas

Letter Opinion No. MS-169

Re: Form and legality of  
Legislative Budget  
Board draft of appro-  
priations bill for  
biennium beginning  
September 1, 1955

Gentlemen:

You have requested our advice, comments and suggestions in general on the Legislative Budget Board draft of the biennial appropriations bill for the fiscal years beginning September 1, 1955. In particular you have directed our attention to (1) the adequacy of the caption, (2) the validity of the special and general provisions, and (3) to the form of organization of the bill. In connection with Item "(2)" above you state:

"Especial attention will also be helpful to the provisions of Article V, Sec. 2, (p. 149) respecting the appropriation of so-called 'local funds' to the respective agencies of higher education. During the current biennium, some uncertainty developed as to the clear intent of Sec. 2, Article V, of the present general appropriations act (H.B. 111 or Chap. 81, Acts of the 53rd Legislature, Regular Session), especially when read in conjunction with the last sentence of Article VI, Sec. 17-q. An effort has been made to correct the ambiguity in the attached draft, but that effort has not yet had a review by your staff."

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You will recall that a similar request was submitted to us two years ago regarding the Legislative Budget Board draft of the general appropriation bill for the two years beginning September 1, 1953, and that in response thereto we issued our Letter Opinion No. MS-06 on March 5, 1953. A copy is attached for your reference. (Copies of other opinions referred to are also attached.)

In view of the close similarity in subject matter and questions asked, we deem it appropriate to repeat here certain precautionary statements made in that opinion which should be borne in mind in connection with the present opinion:

"In the beginning, we desire to point out that time will not permit us to study every phase of the proposed Act. Consequently, we have not undertaken to determine whether all of the appropriations therein made are authorized by provision of a valid general law. Nor have we made any study from which we could advise on whether State functions not supported by any appropriation herein should be or could be included.

"What we have attempted to do in this opinion is to treat your particular inquiries as thoroughly as possible and, in addition, to raise such other points as have come to our attention which may cause or tend to cause problems in executing the proposed Act. But it would be presumptuous to assume that, within the time devoted, we have discovered all possible trouble spots. Therefore, we earnestly invite you to forward to us further particular questions on any matter not discussed herein about which you have any doubts.

"We also want to point out that all of the opinions herein expressed are necessarily based upon the proposed Act in its present form. Changes in the form of this draft may cause us to revise our opinions about various questions discussed herein as well as questions passed on but not discussed. Matters discussed by us, including your particular questions, will be taken up, in so far as possible, in the order in which they appear in the proposed Act."

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(1) Adequacy of the Caption

Two years ago the Legislative Budget Board draft contained a caption which was identical with that of the present draft. We advised in Opinion No. MS-06 that said caption was, in our opinion, legally sufficient, but that a few minor changes would strengthen and improve it. For the same reasons given at pages 2-4 of Opinion No. MS-06, and the additional reasons stated in Assistant Attorney General Robinson's letter to Chairmen Smith and Lock, dated March 25, 1953, it is still our suggestion that the caption be modified to read as follows:

"An Act appropriating money for the support of the judicial, executive, and legislative branches of the State Government, and for State aid to designated public junior colleges for the two-year period beginning September 1, 1953, and ending August 31, 1955; authorizing and prescribing conditions, limitations, rules, and procedures, for allocating and expending the appropriated funds; and declaring an emergency."

(2) Validity of the Special and General Provisions

On page 4, Items 15 and 16 dealing with "Judicial Retirement" are left blank. Of course, these blanks and other "blanks" appearing in the 1955 draft must be filled in and completed in order to constitute effective appropriations for the purposes named.

On pages 39 and 40 the provisions or special "riders" pertaining to the State Auditor's appropriations are in all important respects identical to those contained in the 1953 draft at pages 31 and 32. In Opinion MS-06 we expressed the view that the prescribed continuing fiscal supervision over the State Auditor (a member of the executive branch of the government) by the Legislative Audit Committee (a part of the legislative branch of the government) violated Article II, Sec. 1 of the Texas Constitution requiring separation of powers of the three branches of government. Our reasons will not be restated here. Our opinion is the same as that previously expressed.

On page 57, the next to the final sentence regarding the appropriations to the Texas Employment Commission is

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ineffective insofar as it attempts to confer on the Governor a power to "suspend" any of the requirements of the appropriation act which are contrary to the terms of Federal legislation or regulations under which monies are granted to the Texas Employment Commission by the Federal Government. Att'y Gen. Op. No. S-100, p. 3. Article I, Sec. 28 of the Texas Constitution provides: "No power of suspending laws in this State shall be exercised except by the Legislature." This prohibition applies to all "laws" -- general legislation and appropriation bill riders alike. Consequently, we recommend that the sentence referred to be deleted from the draft.

On page 119, the final rider concerning discretionary delays in transferring unexpended balances from the Securities Act Fund is ineffective. So far as we can find Section 36 of the Securities Act has not been amended. Therefore, we repeat the advice given on page 13 of Opinion MS-06 which was as follows:

" . . . the final rider, in purporting to vest in the Comptroller a discretionary power to delay the transfer of unexpended balances from the Securities Act Fund, is clearly at variance with the mandatory transfer language of the general law referred to (which is codified as Article 600a, Section 36, V.C.S.)."

On page 128, Section 2 of the special provisions relating to Article III and, on page 160, sub-section "p" of Section 17 of the special provisions pertaining to Article V, appear two riders prohibiting payment of alien employees for longer than ninety days from appropriated funds. The first of these two riders is identical with, and the second is substantially the same as, riders contained in the 1953 draft. In Opinion MS-06 at pages 13-14 we expressed doubt toward the validity of these provisions as appropriation bill riders. For the reasons there stated we still entertain the same opinion.

On page 130, Section 7 of Article III prohibits expenditure of money by certain named state departments for storage of records and states the "policy of the Fifty-fourth Legislature" in regard to processing, cataloging, and storing of all state records by the State Library. In connection with the formulation of this important policy, we suggest that the Legislature further authorize the State Librarian to formulate and enforce certain basic rules and regulations under which

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his responsibility will be exercised. This suggestion is predicated on our belief that some standardization of procedures for storing of records by the various agencies is imperative, and that such standardization will require the cooperation of all state agencies. Our experience in searching, often without success, for important state records of the various state agencies has convinced us that a standardized record storage policy can and should be devised.

On page 134, Section 8 of Article IV is identical with Section 9 of Article IV as it appeared in the 1953 draft. In Opinion MS-06 at page 15 we expressed the opinion that the general law duties of the Legislative Audit Committee could not be validly amended by such an appropriation bill rider and we adhere to that view. To this may be added the serious question of whether such judicial, quasi-judicial, or administrative fact finding duties could be constitutionally conferred on a legislative committee even by general law. Tex. Const. Art. II, Sec. 1. Cf. Railroad Commission v. Shell Oil Co., 161 S.W.2d 1022, 1028-1029 (Tex. Sup. 1942).

With respect to your specific question about Section 2 of Article V, on page 149, which appropriates all balances and all income accruing to institutional funds during the biennium "for the operation, maintenance, and improvement of the respective State institutions," we note that this section is identical with the same numbered section in the 1953 draft and in the current Act, namely, Chapter 81, Acts of the 53rd Legislature, Regular Session. We have not been able to find the "ambiguity" to which you refer. We have considered all related riders in the present draft (Article V, Sections 17m, 17q, 17r) and in the 1953 draft and current Act (Article V, Sections 28, 30 and 29), and we have noted the change in sub-title and the deletion of the final sentence in what is now Section 17q. We think these provisions were reasonably clear before and are even more so now (except for the fact that they are separated from each other in the present draft).

On page 154, the single exception provided in the initial paragraph of Section 17 of Article V is not entirely clear although we are inclined to the view that it is the intent thereof to except from the "Special Provisions Generally Applicable" bequests and gifts specifically conditioned in some way which conflicts with the "Special Provisions." If this is the intent, we suggest the exception be re-phrased as follows: "Except bequests and gifts specifically designated to be in some manner handled otherwise."

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At this point it is appropriate to observe that under the 1955 and 1953 drafts, and to some extent previously, the general appropriations act has included a great many provisions and riders which are not properly "appropriation" matters but which are simply matters of state fiscal policy. The point is that actual appropriations in the constitutional sense relate to and concern only expenditure of money which is deposited in the State Treasury and which must be appropriated every two years in order to get it out. Obviously, money that is not required to be deposited "in" the State Treasury need not be appropriated by the Legislature in order to be available for expenditure. For instance, local or institutional funds not required to be kept in the State Treasury are, unless otherwise restricted, available to their owner without being appropriated each biennium. But, while the funds of public agencies which are not deposited in the State Treasury need not be appropriated in the constitutional sense, these funds are none the less subject to legislative control and in our opinion the biennial appropriation act is an entirely proper vehicle by which the Legislature can exercise its authority over all matters of state fiscal policy and control. Cf. Att'y Gen. Op. No. MS-13, p. 3, note 3 (1953).

On page 168, the last sentence of Sub-section "e" purports to create a ground for cancelling a transportation agency's charter for "extending" franking privileges to state employees, and directs the Attorney General to institute proper proceedings against offending agencies. It is our opinion that the provisions of this final sentence are not valid as an appropriation bill rider because not "necessarily connected with and incidental to the appropriation and use of funds" and because of possible conflict with general legislation. See Att'y Gen. Op. No. V-1254 (1951), p. 8; Art. 1658a, V.P.C.

On page 170, the second paragraph of Section 10, dealing with authority to "waive the requirements of bidder's bond and performance bonds, otherwise required" in negotiating purchases from the Federal Government, is, of course, invalid to the extent that it may be intended to amend any requirements imposed by general law on such purchases. Att'y Gen. Op. No. V-1254 (1951), p. 8.

### (3) Form and Organization of Subject Matter

Our view about the general form and organization of the 1955 draft is the same as we expressed in Opinion MS-06 regarding the 1953 draft, namely:

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". . . We think it is logical and well planned. Obviously, this proposed Act represents the fruit of much hard work. We think the draft reflects recognition of the ordinary rules of construction that general provisions will be governed to the extent of conflict by special provisions, and that special provisions in each article will be governed to the extent of conflict by 'extra-special' provisions appearing in the body of the article in connection with particular appropriations."

Because of the time factor, we have avoided suggestions which might be thought of purely as involving a choice between forms of expression. We do not understand your request to ask for literary criticism. But in this connection we would say that this draft, like any other major piece of draftsmanship, might be refined and made more precise in its manner of expression in numerous particulars. We feel that these matters of precision of language are the business of the drafter and the sponsor rather than of the Attorney General.

We have observed that numerous changes have been made in this draft in the use of lump sum appropriation items where previously a line item system was used. The lump-sum form of appropriation affords a maximum of flexibility and power in the executive or administrative officer responsible for budgeting and spending the money appropriated, with a consequent lessening of legislative power over the use of the money. Of course, either method is permissible, and the choice, being a matter of fiscal policy, is entirely the business of the Legislature.

We also have noted that the 1955 draft incorporates many of the changes suggested in our Opinion MS-06. We feel that those changes, with many others made by the Legislative Budget Board itself, have contributed much to the improvement of this draft over the 1953 draft. It is our hope that the present opinion will be partially responsible for further improvements in the form and content of the present draft.

Yours very truly,

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General

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