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0272 Committees on: Senate Judiciary, Management of State Government, Local Government

Report to the Colorado General Assembly:

**RECOMMENDATIONS FOR 1983
COMMITTEES ON:**

**Senate Judiciary
Management of State Government
Local Government**



COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 272

December, 1982

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OF THE
COLORADO GENERAL ASSEMBLY

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Between sessions, the interim legislative committees concentrate on specific study assignments approved by resolution of the General Assembly or directed by the council. Committee documents, data, and reports are prepared with the aid of the council's professional staff.

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*Colorado General Assembly, Legislative Council
" Senate Committee on Judiciary.*

COLORADO LEGISLATIVE COUNCIL
" RECOMMENDATIONS FOR 1983

COMMITTEES ON:

Senate Judiciary
Management of State Government
Local Government

Legislative Council
Report to the
Colorado General Assembly

Research Publication No. 272
December, 1982

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LEGISLATIVE COUNCIL

ROOM 46 STATE CAPITOL
DENVER, COLORADO 80203
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To Members of the Fifty-fourth Colorado General Assembly:

Submitted herewith are the final reports of the interim Senate Judiciary Committee, the Committee on the Management of State Government and the Committee on Local Government. The interim Senate Judiciary Committee was appointed by the Legislative Council pursuant to Senate Resolution No. 11 to continue the inquiry into the Organized Crime Strike Force. The Committee on Management of State Government was appointed pursuant to Senate Joint Resolution No. 19 to study issues related to state operations, state employees, the state computer system, and the organizational structure of state government. The Committee on Local Government was appointed pursuant to Senate Joint Resolution No. 19 to study the immunity of political subdivisions from federal antitrust laws and the investment authority of units of local government.

At its meeting of November 29, the Legislative Council reviewed these reports and approved a motion to forward the committee's recommendations to the Fifty-fourth General Assembly.

Respectfully submitted,

/s/ John G. Hamlin
Chairman
Colorado Legislative Council

TABLE OF CONTENTS

	<u>Page</u>
Letter of Transmittal.....	iii
Table of Contents.....	v
List of Bills and Resolutions.....	vii
 Senate Committee on Judiciary	
Committee Membership.....	1
Summary of Committee Recommendations.....	3
Introduction.....	5
History of Organized Crime Strike Force.....	6
Accomplishments of OCSF.....	8
Problems With the Organized Crime Strike Force.....	11
Legal Problems.....	11
Administrative and Personnel Problems.....	13
Allegations of Improper Conduct.....	16
Budget Problems.....	19
Proposal to Transfer the OCSF to the CBI.....	20
Budget Problems.....	19
Proposal to Transfer the OCSF to the CBI.....	20
Disbandment of the OCSF by the Attorney General and Subsequent Legislative Action.....	21
Disbandment.....	21
Legislative Action.....	21
Present Effort and Functions of the OCSF.....	22
Committee Findings and Recommendations.....	24
Findings.....	24
Recommendations.....	24
 Committee on Management of State Government	
Committee Membership.....	29
Summary of Recommendations.....	31
Management of State Government.....	33

	<u>Page</u>
Matters Relating to State Employees.....	35
Three-Plus-Three Rule.....	35
Salary and Fringe Benefit Survey.....	36
Pay-For-Performance Plan.....	37
Findings of the State Personnel Board.....	38
Management of the State Computer and Automated Data Processing System.....	39
Organizational Structure of State Government.....	40
Budget Management.....	41
Committee on Local Government	
Committee Membership.....	67
Committee Recommendations.....	69
Local Government Antitrust Immunity.....	71
Federal Antitrust Laws.....	71
United States Supreme Court Decisions.....	71
Areas of Potential Exposure.....	73
Arguments For.....	74
Arguments Against.....	75
Local Government Investment Authority.....	79
Issues Raised.....	79
Committee Findings.....	81
Appendix A.....	95

Bills and Resolutions

	<u>Page</u>
Bill 1 -- Concerning the Conduct of Salary and Fringe Benefit Surveys Pursuant to Private Contract.....	51
Bill 2 -- Concerning Hearings Before the State Personnel Board Relating to Disciplinary Proceedings.....	57
Bill 3 -- Concerning Fiscal Emergencies Affecting State Government.....	59
Bill 4 -- Concerning Local Government Authority to Invest by Repurchase Agreements.....	83
Bill 5 -- Concerning Local Government Authority to Pool Funds With Other Local Governments and the State for Investment Purposes.....	89
Concurrent Resolution 1 -- Submitting to the Registered Electors of the State of Colorado an Amendment to Sections 13, 14, and 15 of Article XII of the Constitution of the State of Colorado, Concerning the State Personnel System, Eliminating the Constitutional Provisions Which Concern the Creation and the Powers and Duties of the Personnel Board, and Requiring the General Assembly to Recreate by Statute the State Personnel Board, to provide by Law for the Powers and Duties of the Board, and to Provide by Law for the Implementation of the Constitutional Provisions Governing the State Personnel System.....	43

LEGISLATIVE COUNCIL
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Sen. Robert Allshouse	Sen. Barbara Holme
Sen. James Beatty	Sen. Don MacManus

Council Staff

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SUMMARY OF COMMITTEE RECOMMENDATIONS

The purpose of the Senate Committee on Judiciary was threefold: 1) to determine if any malfeasance or improper conduct occurred on the part of investigators, attorneys, or other public officials associated with the Organized Crime Strike Force (OCSF); 2) to determine what worked well and what worked poorly in the operation of the OCSF and to find out why the OCSF was disbanded by the attorney general in March of this year; and 3) to determine the best method of restructuring the OCSF, if necessary, in order that the unit could function more effectively in the future and avoid whatever problems have occurred in the past.

With these purposes in mind, the committee heard testimony from approximately fifty individuals during twelve meetings.

The committee concluded that the primary reason for the disbandment of the OCSF was the lack of leadership on the part of the attorney general who was ultimately responsible for the direction of the activities of the OCSF. This lack of leadership was exhibited by failure to adequately resolve the personnel and management problems which existed within the internal organization of the OCSF. This lack of leadership resulted in poor morale within the organization, caused an appearance of various conflicts of interest within the unit, created a lack of credibility of the unit, and eventually caused or contributed to the demise and disbandment of the OCSF. These problems could have been overcome with effective leadership on the part of the attorney general.

The committee recommends that the OCSF be continued to provide a statewide effort to investigate, prosecute, and prevent organized criminal activity in the state of Colorado. A statewide effort is necessary to bring criminal and other sanctions to bear on the unlawful activities of those engaged in organized crime.

The committee recommends that the General Assembly consider and enact legislation to statutorily create the OCSF. Such legislation should include the following concepts and provisions:

- the OCSF be reestablished and restructured within the Office of Attorney General.
- the goals and objectives of the OCSF be specifically stated and the term "organized crime" be specifically defined.
- the OCSF be given statewide jurisdiction and be provided with interstate jurisdiction to the maximum extent possible under the constitution.
- the attorney general be permitted to contract with local district attorneys and police departments for prosecutors and investigators.

- the attorneys and investigators be physically located together and the team operation concept be emphasized.
- the advisory board be abolished.
- the OCSF be reviewed under the "Sunset Law" at the end of three years and then every six years thereafter.

INTRODUCTION

On March 22, 1982, the Senate Judiciary Committee conducted a hearing on a proposal by the Division of Criminal Justice of the Department of Local Affairs to transfer the Colorado Organized Crime Strike Force (OCSF) from the Office of the Attorney General to the Colorado Bureau of Investigation (CBI) under the Department of Local Affairs. At about this same period of time it was learned that the attorney general had issued orders to discontinue the operations of the OCSF. The disbandment of the OCSF, the only state-wide law enforcement agency responsible for investigating large drug-traffic cases and other organized criminal activity, during the middle of the fiscal year and at a time when organized criminal activity is at an all time high, raised a number of questions which warranted further hearings. First, there were a number of rumors or suspicions circulating that there may have been potential malfeasance or improper conduct on the part of public officials involved with the operation of the OCSF. Secondly, reports were circulating that the OCSF had not worked very well in recent years, that internal personality conflicts had hampered the effectiveness of the unit, and that these conflicts led to the disbandment of the unit. Also, the committee learned that budgetary restraints within the Office of the Attorney General led to the reduction of the activities of the OCSF at the direction of the attorney general. Thirdly, the proposal to transfer the OCSF to the CBI was presented to the committee and the General Assembly for consideration and action.

On April 12, the senate adopted Senate Resolution No. 10 which allowed the committee to subpoena witnesses, either with or without documents, to aid in the inquiry. Hearings were then held on April 14, 15, 16, and 22. Another hearing was held on May 24, the date of adjournment. Also on May 24, the senate adopted Senate Resolution No. 11 which requested the Legislative Council to appoint the members of the Senate Judiciary Committee to act as a committee during the legislative interim to continue the inquiry into the OCSF. This resolution was approved by the Legislative Council at the May 25 meeting. As a Legislative Council interim committee, the Senate Judiciary Committee has held hearings on June 8, 18, and 28, July 8, August 12, and October 7.

Purpose of hearings. The purpose of these hearings was: 1) to determine if any malfeasance or improper conduct occurred on the part of investigators, attorneys, or other public officials associated with the OCSF; 2) to determine what worked well and what worked poorly in the operation of the OCSF and to find out why the OCSF was disbanded by the attorney general; and 3) to determine the best method of restructuring the OCSF, if necessary, in order that the unit could function more effectively in the future and avoid whatever problems have occurred in the past.

With these purposes in mind, the committee heard testimony from approximately fifty individuals during twelve meetings. The committee

background report and the committee findings and recommendations are presented below.

HISTORY OF ORGANIZED CRIME STRIKE FORCE

The first formal organization to specialize in organized crime investigation and prosecution was the Denver District Attorney's Organized Crime Unit (DAOUCU). Established in July 1969, it consisted of a deputy district attorney, five investigators, one accountant and a secretary. It also relied on the resources and assistance of the Intelligence Bureau of the Denver Police Department. The unit's initial activities centered on gambling, loansharking, tax law violations, and the infiltration of legitimate businesses.

State efforts at combating organized crime, particularly by the Colorado Bureau of Investigation (CBI), were extremely limited prior to 1970. This was primarily due to the lack of a direct charge by the governor or the legislature in this regard. This situation was somewhat remedied by Governor Love in September, 1970, when he issued an executive order directing the CBI to "... undertake the investigation of suspected organized criminal activity in the state of Colorado ... and to bring to the attention of the appropriate prosecuting officials any violations of state law disclosed by such investigations." During the 1971 legislative session, the general assembly enacted legislation charging the CBI "...with the responsibility to investigate organized crime which cuts across jurisdictional boundaries of local law enforcement agencies, subject to the provisions of section 24-32-410 (the cited section states that CBI authority does not usurp or supercede in any way the powers of local law enforcement authorities)." Also in 1971 the legislature passed a law which permitted the empanelling of statewide grand juries. Prior to 1971 Colorado grand juries had only county-wide jurisdiction. For that reason prosecutors were seriously hampered because organized crime activities often crossed county boundaries. Under the newly enacted law in 1971, the chief judge of any district court, for good cause shown, can empanel a statewide grand jury at the request of the attorney general. In compliance with the executive order and the new legislation, the CBI began investigating organized crime on a statewide basis.

In 1972, the CBI consisted of one agent in charge, nine agents, one organized crime specialist and two secretaries. Operating independent of, but in close cooperation with the CBI, was the attorney general's Organized Crime Prosecution Unit. This unit consisted of one full-time prosecutor, a half-time law clerk and two secretaries. Some assistance was provided to the unit by other assistant attorneys general. During 1971 and 1972 a verbal agreement existed between the Denver and state organized crime units which allowed Denver authorities to have exclusive jurisdiction within the City and County. CBI and attorney general efforts focused on the other 62 counties. Federal funding assistance was being provided to

both state and Denver units. Also in 1972, the investigative capabilities of the DAOUCU were enhanced by the incorporation of the Special Narcotics Unit (SNU) of the Denver Police Department.

During the latter part of 1972, Denver and state authorities recognized the duplication of effort by their respective organized crime units. It was apparent that organized crime in Denver had contacts in other parts of the state and vice versa. Since the crime crossed boundaries, it was essential that the law enforcement agencies not be hampered by jurisdictional boundaries. For that reason, the "Cooperative Strike Force on Organized Crime" was formed on January 1, 1973. It consisted of the following units: DAOUCU, Denver Police Intelligence Bureau, CBI's Investigation Unit, the Attorney General's Prosecution Unit, and the Special Narcotics Unit.

In accordance with provisions of a LEAA grant and to assist the strike force in defining its objectives, Governor Love established by executive order the Organized Crime Advisory Council. One problem readily identified by the advisory council was the fragmented funding nature of Colorado's organized crime enforcement effort. For example, during 1971 four organizations, i.e., Department of Law, CBI, Denver Police Department, and Denver District Attorney, were receiving monies to combat organized crime through seven different LEAA grants. In the opinion of the advisory council, this fragmented funding and the resulting complexities of grant administration required an inordinate amount of staff time.

Part of the problem was remedied in December, 1972, when the Denver district attorney transferred his OCU and its supporting grant to the Denver Police Department. That action was followed in early 1973 by the Denver police receiving two grants to support the efforts of the cooperative strike force. The final step in unifying the state's organized crime enforcement effort occurred on October 1, 1973. At that time the attorney general assumed responsibility for all organized crime grants. This represented the beginning of a unified attack on organized crime by state and local authorities under the aegis of the attorney general. The attack remained a cooperative one in that strike force personnel were furnished by various agencies. For example, the OCSF in 1974 consisted of five attorneys, one legal research clerk, one CPA, fourteen investigators and four clerical employees. Three of the attorneys were furnished by the attorney general and two by the Denver district attorney. The investigative force consisted of the following:

- eight Denver police detectives.
- four CBI agents.
- one Jefferson County deputy sheriff.
- one Lakewood police agent.

By 1981 the OCSF was still a cooperative venture. It then consisted of four lawyers, three investigators and four clerical staff, all of whom were funded by the state. Additionally, the CBI and state patrol furnished one investigator each. The investigative staff was further supplemented by the following departments, who furnished eighteen investigators at no cost to the state:

- Denver police
- Pueblo police
- Colorado Springs police
- Arvada police
- Aurora police
- Northglenn police
- Grand Junction police
- Jefferson County sheriff
- El Paso sheriff

Financial support for Colorado's attack on organized crime has come from numerous sources. Between 1970 and 1977 the federal government through LEAA provided over \$1,800,000 in grant assistance to the effort. During that same time frame, state and local match dollars amounted to over \$650,000. However, the local figure does not include the salaries of investigators contributed by local police to the various organized crime units. Since 1978, the OCSF has been state funded, except for locally contributed investigators. During fiscal years 1978 and 1979 the OCSF received annual appropriations of just over \$416,000. The appropriation rose to \$443,322 in fiscal year 1980 and was supplemented by a \$64,000 grant from the federal government.

By January, 1981, the OCSF was staffed by members from nine participating agencies, including the Office of Attorney General, the police departments of Denver, Colorado Springs, Pueblo, Grand Junction, and Aurora, the sheriff's offices of Jefferson and Boulder Counties, and the CBI. Personnel assigned to the OCSF consisted of twenty-three investigative officers of various ranks, four assistant attorneys general and four and one-half support staff. The OCSF was funded approximately one-half by state funds (for the employees of the attorney general's office, other contributed state employees, and operation expenses) and one-half by the contributed salaries of officers of the various participating police agencies.

Accomplishments of OCSF

In order to obtain a better picture of OCSF's accomplishments and those of its predecessors, a review was conducted by the Division of Criminal Justice of fifteen LEAA grants which supported organized crime enforcement efforts. The quarterly and final reports for these grants, which document how grant funds were utilized, were reviewed and analyzed. The findings of the Division of Criminal Justice were reported in an April, 1982, publication "Combating Organized Crime in Colorado, 1969 to Present" and are set forth below:

Between 1970 and 1977:

- . Over 80 arrests were made on gambling charges. A 1975 investigation (Operation Little House) indicated that \$5 million is bet annually in Denver and about \$2 million in Pueblo. It was estimated that 10 percent of these amounts are profits for organized crime.
- . Over 100 arrests were made on dangerous drug charges and over 50 on marijuana charges. OCSF estimates place the street value of the confiscated drugs at over \$16 million.

The OCSF has also been involved in numerous investigations of official corruption. These investigations were conducted throughout the state. The following are some examples of OCSF efforts to investigate alleged official corruption (while each of these investigations did not necessarily confirm actual criminal conduct, they did require major investigative efforts by the OCSF).

- . Pueblo County sheriff convicted of felony theft and conspiracy in 1974.
- . Investigation of corruption, theft and narcotics trafficking by Canon City prison officials in 1973.
- . Pueblo police officer -- bribery and ticket fixing in 1972.
- . Bribery of certain city officials by Consolidated Labs of Commerce City in 1973.
- . Investigation of Lake County sheriff in 1974.
- . Corruption in Grand Junction Police Department in 1974.
- . Investigation of State Treasurer's payment of interest to highway contractors in 1975.
- . Investigation of Denver police officer's involvement in drug sales in 1974.
- . Investigation of alleged kickbacks to the Colorado Racing Commission in 1974. No substantive evidence was found. (September 30, 1974 Quarterly Report, OCSF)
- . An investigation of alleged improprieties in the Colorado Insurance Commission in August 1976.
- . Involvement of an assistant district attorney and the city attorney in a Telluride drug ring in 1975.

- . Embezzlement by a regional criminal justice planner in 1977.
- . Investigation of alleged improper expense charges by the La Plata County sheriff in 1974.

The movement of organized crime into the business community has been identified by the OCSF in a number of its investigations. Some examples of those investigations are as follows:

- . 20 major fires in non-union constructed condominiums in 1972.
- . Organized crime ties with the U.S. Sweepstakes Corporation and its efforts in 1972 to get a lottery proposal on the state ballot.
- . Stock fraud scheme leading to three arrests in 1974.
- . 1974 state grand jury investigations of profit skimming from legitimate businesses and the laundering of funds.
- . Weld County nursing home indictment for felony theft in 1974.
- . A \$30,000 attempted fraud scheme against the Alliance Mutual Insurance Company in 1975.
- . Coordination with the Revenue Department on liquor license revocation in 1975.
- . Investigation of trash-hauling practices in Jefferson County in 1973 and the infiltration of legitimate businesses.
- . A 1973 investigation of multiple ownership of several Denver restaurants and clubs.
- . A 1975 case involving the interstate transport of forged securities.
- . 1975 investigations of bankruptcy scams in organized crime-owned construction businesses.
- . Corrupt practices and extortion involving a public utility company in 1975.
- . Paper-recycling plant arson involving one death and \$700,000 in damages in 1975.
- . Hal Levine murder case in 1975 and the attempted takeover of his business interests.

- . Illegal carnival operations in the 1976 State Fair involving 21 arrests and \$10,000 seized.
- . An August 1976 attempt by organized crime to buy an insurance company.
- . A 1976 investigation of the Emprise Corporation -- its organized crime ties and its control over major pari-mutual horse track outlets in the state. (December 76 Quarterly Report, OCSF.)
- . A 1976 investigation of major land frauds in southern Colorado.
- . Advance fee swindles and loan fraud schemes against several Denver banks in 1976.

As evidenced by the preceding partial listing of OCSF investigations and prosecutions, the organized criminal element in Colorado is not limiting itself to gambling and drug operations. Rather it permeates all facets of life in the state. In that money is the guiding and controlling factor in organized crime decision making, it is readily apparent that any personal, business or political aspect of Colorado life is susceptible to organized crime infiltration and manipulation.

PROBLEMS WITH THE ORGANIZED CRIME STRIKE FORCE

In late 1981, the attorney general sought a review and analysis of the operations of the OCSF from an outside, independent source. Chief Deputy Denver District Attorney Richard Spriggs agreed to conduct such a review and performed this function in December 1981 and January 1982. An oral report was submitted to the attorney general in January 1982 and a written reconstruction of the oral report was submitted to the committee on July 1, 1982. Mr. Spriggs identified several legal and administrative problems with the OCSF which are reviewed below.

Legal Problems

Lack of statutory authority. There is no statutory basis for the existence of the OCSF. It is an ad hoc unit formed by the various participating agencies. Since its inception it has been variously funded and operated under the aegis of the Denver District Attorney's Office, the Denver Police Department, the Office of the Attorney General, and most recently, the Colorado Bureau of Investigation. Initially funded by a series of grants from LEAA, the OCSF in recent years has rested its legal existence upon (1) the state funding provided by the legislature, and (2) the definition of "peace officer"

contained in section 18-1-901, C.R.S. 1973, which includes "an authorized investigator of a district attorney or the attorney general." The various job titles within the OCSF, such as "project director," "project coordinator," and "agent in charge," exist not by statute nor by virtue of an operative personnel system, but are simply positions of authority created by virtue of agreement among the contributing state and local agencies.

Authority of OCSF personnel. The lack of statutory existence poses a problem concerning the authority of officers assigned to OCSF from contributing local agencies to conduct investigations and make arrests beyond the confines of their own jurisdictions. The concept of a statewide strike force implies that the officers be able to operate on a state-wide basis. The authority of assigned officers to make arrests upon probable cause outside of their own territorial jurisdiction was widely assumed in the OCSF by virtue of section 16-3-102, C.R.S. 1973, which provides:

16-3-102. Arrest by peace officer. (1) A peace officer may arrest a person when:

- (a) He has a warrant commanding that such person be arrested; or
- (b) Any crime has been or is being committed by such person in his presence; or
- (c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

This assumption was dispelled by the ruling of the Colorado Supreme Court late in 1981 in the case of People v. Wolf, 635 P.2d 213 (decided October 19, 1981). In that case, the court made it clear that an officer operating outside of his own jurisdiction has no authority to arrest upon probable cause, but rather has only a citizen's arrest power (which is limited to crimes committed in his presence). While upholding the arrest in that case on the basis that the crime was committed in the presence of the Denver police (the arrest occurred in El Paso County), the court added the following:

This Court cannot sanction willful and recurrent violations of the law, and thus, future violations of the statutes governing peace officers' authority to arrest may trigger application of the exclusionary rule and require suppression of evidence obtained in the course of an extra-territorial arrest.

Mr. Spriggs suggested that, in addition to the expressed threat not only of suppression of evidence but also of potential liability, the court's decision raises the question of whether officers of the OCSF would be insured against loss in the event of a suit based upon an extra-territorial arrest.

Mr. Spriggs examined the question of whether the problems posed by the lack of statutory existence and the Wolf decision could be

resolved by appointing the police officers, sheriffs' deputies and CBI agents assigned to the OCSF as attorney general's investigators. It was Mr. Spriggs opinion that this delegation of authority could not be accomplished without running afoul of the constitution and the statutes regulating the state personnel system. The constitutional and statutory framework requires that attorney general's investigators be members of the state personnel system. It was Mr. Sprigg's opinion that the power of the local officers to make arrests upon probable cause outside of their own jurisdictions could not be broadened by appointing them as attorney general's investigators.

Mr. Spriggs concluded his analysis by stating that "... the concept of the Organized Crime Strike Force has been predicated upon the voluntary, continuous cooperation and agreement of the attorney general, the legislature via the state budget, the contributing police agencies and the various district attorneys throughout the state. The unwieldiness of this arrangement, coupled with the legal problems inherent in the concept of the Organized Crime Strike Force, clearly suggests that changes be made"

Attorney General J. D. MacFarlane testified before the committee at the March 22 meeting. Mr. MacFarlane reported that the Spriggs study was conducted at his request following the announcement of the Wolf decision. Mr. MacFarlane also stated his concerns that no statutory guides have been established for the attorney general to investigate and prosecute organized criminal activity. The need for a state investigative body to investigate and prosecute major organized criminal activity in the state, particularly dangerous drug and narcotic traffic, was emphasized by the attorney general and support was voiced for the conclusion that the OCSF should not exist in the Office of the Attorney General but should be located in another state agency, particularly the CBI, since that agency now has statutory authority to use assigned officers. The attorney general expressed his support for creating in the CBI a special unit to investigate white collar crime and another special unit to investigate drug trafficking. The attorney general recommended that a prosecutorial unit should be maintained in the Office of the Attorney General to work closely with the two units in CBI.

Administrative and Personnel Problems

Testimony before the committee indicated that administrative and personnel problems within the OCSF contributed to a decline in the effectiveness of the unit in recent times. In a review of the OCSF by Mr. Spriggs, the following conclusions were reached and were explained to the committee through the July 1, 1982, letter to the attorney general and through the testimony of Mr. Spriggs on June 8, 1982:

1. The allocation of investigative personnel to the Organized Crime Strike Force was markedly uneven. The Denver Police Department had a total of ten officers assigned, including a lieutenant in the position of project

coordinator and a detective in the position of agent-in-charge. Colorado Springs contributed three officers, as did the Jefferson County Sheriff's Office, with the Pueblo Police Department contributing two investigators and other participating agencies contributing one each.

2. The placement of a Denver Police detective in the capacity of "agent-in-charge" gave rise to the anomalous situation of a detective acting as the supervisor of personnel from other departments bearing various ranks including patrolman, investigator, CBI agent, detective, lieutenant and captain. In light of the para-military structure of virtually all police organizations, it is wholly understandable that great concern was voiced about the lack of any clear chain of command.

3. The contributing police agencies, by virtue of the very nature of the Strike Force, were free to participate or not participate in the Strike Force at will. This gave rise to a certain amount of coming and going (for instance the Aurora Police Department has at various times been in, out, and back in). Moreover, each of the officers contributed to the Strike Force is subject to the personnel system, rights, privileges, and requirements of his own department rather than one unitary personnel system. As a result, the position of project coordinator which was occupied by a Denver police lieutenant had become virtually a full-time administrative job with responsibility for the operative supervision of investigations being left to the agent-in-charge (a Denver Police Department detective).

4. In theory, the overall operation of the Strike Force was the responsibility of the "project director," a position filled in recent years by an assistant attorney general. Given the variegated makeup of the investigative branch of the Strike Force, it is clear that this position carried considerable responsibility with little authority to insure that decisions are carried out. Given the friction which inevitably exists between investigative agencies and prosecuting attorneys, it was not surprising that the Strike Force developed internal conflicts which would hamper its effectiveness.

This situation had given rise to various management problems which had become critical at the time of my discussions with various members of the Strike Force. These problems can be summarized as follows:

1. It was the uniform consensus of both attorneys and investigators that the establishment of investigative priorities and the decisions regarding what should be investigated (and by whom) were made at the investigative level with little or no consultation with the legal staff.

This situation resulted in what should be regarded as undifferentiated selection of cases for investigation and allocation of investigative resources.

2. With the increase of drug abuse as a law enforcement problem, the emphasis on drug investigations became the first priority of the Strike Force. Statistics provided to me for 1980 (the last year for which the statistics were available) showed that 78 percent of the cases filed by the Strike Force were drug related matters. The staff attorneys indicated that an even greater percentage of their time was devoted to drug related matters, many of which they felt were not of sufficient magnitude to be handled at the Strike Force level.

3. As a result of the situation where judgments regarding investigative priorities and resources were being made at the investigative level, a severe schism had developed between the staff attorneys and the investigative personnel. It was the uniform view of the staff attorneys that the investigators, while by and large experienced, competent and dedicated, were, in their view, misdirected and in large measure devoting extensive resources to relatively small priority matters. On the other hand, the investigative staff appeared to consider the attorneys assigned to prosecute the cases developed by the Strike Force as inexperienced, indecisive and sometimes less than enthusiastic.

The committee also received testimony from several of the OCSF investigators that, in their opinion, the attorneys assigned to prosecute OCSF cases and to advise the investigators did not, in many instances, put forth their best effort and lacked experience in prosecuting criminal cases. Further testimony indicated a great deal of friction between the top agents and the attorney general during the period of late 1981 and early 1982. Beginning in mid-1981, a high turnover of attorneys from the Office of Attorney General began creating problems in the effective prosecution of cases; causing delays, indecision, and frustration and anger on the part of investigators. During this period of time there also seemed to be uncertainty as to who was responsible for directing the operations of the unit, the attorneys or the investigators. The appropriate roles of each seemed to comingle at times -- with attorney playing the role of police and police playing the role of attorney. The lack of direction compounded the problems in the operation for the OCSF at a time when several large cases were pending, and conflicts began to develop between members of the unit and the attorney general.

As stated in Mr. Spriggs' report, "... these administrative and management problems ... contributed to a deterioration of the situation at the OCSF. What was intended as a unified, cohesive prosecutorial and investigative approach to organized crime had developed into a freewheeling, loosely-supervised program in which the emphasis on drug investigation predominated."

Allegations of Improper Conduct

Most of the committee's time and effort was spent in attempting to determine the validity of various allegations of misconduct on the part of OCSF personnel. These allegations of misconduct concern the association of certain OCSF personnel and other top law-enforcement people with Elvis Presley at a time when he is alleged to have been heavily addicted to the use of drugs, and the acceptance of expensive gifts from Mr. Presley. Other allegations of improper conduct particularly involved the off-duty employment of Detective Ron Pietrafeso as a body guard for Mr. Michael Howard at a time when Mr. Howard was heavily addicted to the use of cocaine, and other off-duty work performed by Mr. Pietrafeso while assigned to the OCSF from the Denver Police Department.

Association with and acceptance of gifts from Elvis Presley. It was alleged by a former OCSF investigator that certain members of the unit continued to associate with Mr. Presley after it was known that Mr. Presley was the subject of a major drug investigation in California. Those OCSF personnel who associated with Presley during this period of time said that they were unaware of Presley's drug use, other than the use of sleeping pills. Other law enforcement officers also said that they were unaware of Presley's drug use.

The acceptance of expensive gifts, especially luxury automobiles, by some members of the OCSF and by certain members of the Denver Police Department, was also alleged to have been improper. Testimony before the committee indicated that the legality of those gifts were ruled not to violate city and police guidelines when their propriety was questioned before the Denver Ethics Board at the time. Testimony indicated that the acceptance of the gifts was not legally improper, although the appearance of improper conduct in the public's mind, i.e., Denver police officers being involved with Presley and receiving expensive gifts, may have undermined the public's confidence in law enforcement.

Off-duty employment -- the Howard-Pietrafeso relationship. The focus of much of the hearings and testimony before the committee turned out to involve the so-called Howard-Pietrafeso relationship. The committee learned from newspaper accounts that Mr. Pietrafeso, while assigned to the OCSF from the Denver Police Department, was employed during off-duty hours by Mr. Michael Howard as a body guard. This employment relationship occurred during the period June, 1976, until late 1977 or early 1978. The committee also learned that Pietrafeso accepted cash gifts of \$5,500 from Howard during a period from August 27, 1977 to January 18, 1978. The committee was aware from a variety of sources that Howard was a heavy user of cocaine during this period of time.

The subject of inquiry in the Howard-Pietrafeso matter before the committee was whether Pietrafeso knew that Howard was a drug user during his employment for Howard, when did he discover that Howard was a drug user, and did he continue his employment with Howard after

learning of Howard's use of drugs. Pietrafeso testified that to the best of his recollection the relationship with Howard ended with a confrontation at a dinner party at the Colorado Mine Company restaurant in early 1978 when he became aware of Howard's use of cocaine and that he severed the employment and social relationship at that time. Other witnesses supported the testimony of Pietrafeso that the dinner party and the confiscation of cocaine from Howard occurred during a period from late January, 1978, to the middle of March, 1978. However, other witnesses stated that the dinner party and the confrontation between Pietrafeso and Howard may have occurred at a similar dinner party at the same restaurant sometime in early or the middle part of 1977.

The exact date of the dinner party and the termination of the Howard-Pietrafeso relationship became a focal point of the committee inquiry. Witnesses who were reported to be present at the dinner party were examined extensively by the committee under oath and not one of them could remember the exact date of the dinner party. The committee also subpoenaed a transcript of an interview conducted by staff of the Denver Post with Howard when he was hospitalized in April, 1982. The transcript of that interview was submitted to the committee and revealed that Howard thought that Pietrafeso was aware of his drug use during his employment by Howard. Subsequent sworn testimony before the committee by Howard disclosed that Howard thought that Pietrafeso was unaware of his use of drugs prior to the confrontation at the restaurant. Continued efforts by the committee to pinpoint the exact date of the dinner party and the Howard-Pietrafeso confrontation have proved unsuccessful.

Senator Allshouse concluded, from his review of the sworn testimony, that the dinner took place between February 17 and March 15 of 1978, at least two to six weeks after Pietrafeso received his last check (a house-warming gift of \$500 on January 18, 1978) from Howard. To further examine the record as to whether Pietrafeso received any gifts or payments from Howard after the confrontation and to attempt to isolate the date of the dinner party, the committee subpoenaed the deposit records of Ron and Janice Pietrafeso from their account at Central Bank of Denver. In addition, the committee subpoenaed the bank account records of Howard from four different banks with which he carried checking accounts: Chemical Bank of New York, First National Bank of Denver, Routt County National Bank of Steamboat Springs, and Metro National Bank. The records from these accounts did not assist the committee in pinpointing the date of the dinner party and did not reflect any payments to Pietrafeso after the January 18, 1978, check for \$500 drawn on the account at Chemical Bank of New York.

Mr. Pietrafeso appeared before the committee on five different occasions to respond to questions concerning his relationship with Howard. The committee sought, without success, to subpoena Howard for a second time to inquire into conflicts between his statements to the Denver Post reporters in April and his sworn testimony before the committee on June 8, regarding the knowledge, or lack thereof, that Pietrafeso had of his use of drugs.

Mr. Pietrafeso's off-duty employment and activities with other individuals and concerns has been investigated before by the attorney general's office and by the Denver district attorney's office. In November and December, 1980, Mr. Richard Hennessey, deputy attorney general, conducted an investigation stemming from a complaint that Pietrafeso had several private business interests outside his government employment and that he had improperly used state property, personnel, and resources in the conduct of some of his private business affairs. Apparently, it was unknown at this time by either the attorney general or the Denver Police Department that Pietrafeso was employed by Howard as a bodyguard. Mr. Hennessey concluded in a report to the attorney general on November 10, 1980, that Mr. Pietrafeso did not knowingly violate any applicable statute, rule, or regulation relating to his office. However, Mr. Hennessey concluded that

... he was not diligent in determining, either by personal search or discussion with supervisors, what the applicable rules were or are. He did not take appropriate steps to assure himself and others of the propriety of his conduct of his business affairs. By failing to take these initiatives, he placed an uncomfortable burden on his supervisors to confront him about the propriety of his conduct. It is also clear that his analyses of the situation were somewhat self-serving insofar as he looked to the letter and not the spirit of the relevant rules and regulations. These are all indications that he exercised poor judgment in the situation.

In this regard, Mr. Hennessey recommended that Pietrafeso apply for approval of his private employment by the Denver Police Department and the Office of the Attorney General and that the attorney general direct the OCSF supervisors to prepare a comprehensive draft statement of policy and procedures regarding outside employment by personnel in the OCSF. Mr. Hennessey suggested that the draft consider the need for a uniform policy within the OCSF, the relevant rules of the state personnel system, an inventory of which contributing law enforcement agencies permit outside employment and a review of their respective regulations in this regard, the nature of the OCSF's policies, if any, and actual practices regarding eligibility, earning, recording, and use of compensatory time and overtime.

The Hennessey report to the attorney general on Pietrafeso's activities raised more serious questions regarding the conduct of OCSF personnel and other administrative and organizational problems. Two questions were raised: (1) what is the standard of conduct expected of personnel at the OCSF; and (2) what is expected of management and command officers in establishing, implementing and enforcing these standards of conduct. Mr. Hennessey noted that the failures of Pietrafeso "... were not countered by appropriate efforts of his immediate superiors to confront the issues, reach an appropriate determination, and impose a resolution."

Mr. Hennessey found that

... legitimate questions about conduct (of OCSF personnel) were permitted to linger and go unresolved too long, to the point that they festered and became a source of organizational disruption, affecting the internal morale and effectiveness of the unit, and the external credibility and image of the office. (T)he problems were not addressed and adequately resolved in a timely fashion. Therefore there became and remains a greater risk that the problems will be the subject of external scrutiny.

Secondly, while there seems to be a realization within the Strike Force that a unique unit like the Strike Force exists in a proverbial fishbowl, i.e., is in the public eye much more than usual, and therefore subject to a high standard, the response to that realization seems inadequate. One example has been the reluctance within the unit to, on its own initiative, objectively review the question of the appropriate extent of perquisites.

Finally, underlying the allegations herein are circumstances and instances which could have been avoided by the exercise of good judgment. Accordingly it must be a matter of your specific attention that Mr. Pietrafeso now occupies a supervisory position. Similarly it must be a matter of your specific attention that the people in your chain of command realize that you expect that these and similar problems be recognized and dealt with by them at the earliest reasonable stage. At least in retrospect it appears that more timely and complete action could have been taken by management at the Strike Force to deal with this problem.

Budget Problems

The attorney general reported to the committee on March 22 that the amount of enforcement discretionary money which had been budgeted to his office allowed only about \$195,000 in general fund money for the operation of the OCSF. This was considerably less than it had been in past years. The attorney general reported that he recently learned through a status report on the expenses of the OCSF that the office had already exceeded the appropriation amount for operation of the OCSF in fiscal year 1981-82. No effort was made to seek a supplemental appropriation. The attorney general stated that because of the legal problems with the OCSF, it was obvious to him that the OCSF had a limited time to go, namely June 30 at the maximum, in which the unit could operate under the Office of Attorney General. He also reported that, because of the budget limitations, the OCSF had been operating for the last month under orders from him not to take on new cases unless he specifically approved them. Mr. MacFarlane stated:

If there is no funding, or if the legislature does not opt to pursue the Bureau of Investigation alternative, there will not be a Strike Force after June 30 in any event. They cannot continue to exist in my office because we are way too far out on a limb legally. For the reasons I just got through testifying to.

PROPOSAL TO TRANSFER THE OCSF TO THE CBI

At the March 22 meeting, the committee was presented with a proposal by the Division of Criminal Justice to transfer the operation of the OCSF from the Office of the Attorney General to the CBI. The basis of the recommendation was a result of the legal, administrative and management problems discussed above. It was believed that some change be implemented which would provide for the continuation of the OCSF on a state-wide basis, and simultaneously alleviate both the legal problems and the deteriorating situation at the OCSF.

The options available to accomplish these purposes were very limited at that time. The governor's agenda for the 1982 legislative session did not contain any item calling for statutory modification to address the legal concerns of the attorney general. Furthermore, the fate of a bill to create a Department of Public Safety, to which the OCSF could be assigned, was uncertain at that time.

The goals of the OCSF could only be accomplished by the transfer of the OCSF functions to an existing state agency in which investigative personnel have the legal authority to conduct investigations on a state-wide basis, or to create by law a new state agency with this specific authority. The latter option, however, was not available during the 1982 session, and the decision was made to recommend a change as soon as possible rather than wait for change to occur by statute which would result in considerable delay.

The only existing state agency which possessed the ability to absorb the functions of the OCSF was the CBI. This conclusion was based on the fact that section 24-32-402, C.R.S. 1973, provides that the CBI has "...responsibility to investigate organized crime which cuts across jurisdictional boundaries of local law enforcement agencies,...." Also, the statute, 24-32-415, C.R.S. 1973, made provision for the appointment of temporary agents from the ranks of local law enforcement agencies with the approval of the local agencies. With these statutory provisions available, it was recommended that the OCSF could be transferred to the CBI without the necessity of implementing legislation.

It was also recommended that the traditional organized crime functions and the drug investigation function be administratively separated so as to prevent a tendency of drug investigations to carry more weight than other organized criminal activity. The primary intent of this recommendation was to get the investigative unit of

OCSF under an organization where clear lines of authority will be established and where the legal problems can be managed.

The recommendation called for a total budget of \$498,000 - \$263,000 for personal services (9.0 FTE) and \$220,000 for operating expenses. The nine FTE would include an agent in charge of investigations, one special agent, one crime analyst and one senior secretary in the organized crime unit, and one senior agent, three special agents, and one secretary in the narcotic and dangerous drugs section. It was anticipated that local law enforcement agencies would contribute ten police agents to work in the two units.

DISBANDMENT OF THE OCSF BY THE ATTORNEY GENERAL AND SUBSEQUENT LEGISLATIVE ACTION

Disbandment

In late March and early April the committee learned that the attorney general had ordered the disbandment of the OCSF, ordered the return of state-issued gasoline credit cards and motor vehicles, changed the locks on the offices of the OCSF, and ordered that the records of the OCSF be returned to the Office of the Attorney General. No official explanation of this action was provided to the committee by the attorney general, but the action left no doubt that the OCSF had been dissolved and disbanded. Opinions as to the reasons for the attorney general's action were solicited and received from numerous witnesses testifying before the committee.

Legislative Action

The decision by the attorney general to disband the operations of the OCSF before the close of the fiscal year and during the "Governor's Call" session of the General Assembly in which there was no agenda item by which the legislature could statutorily reorganize the OCSF, left the members of the General Assembly with a difficult decision. The General Assembly could take no action at all and leave the state without any effective organization to investigate and prosecute organized criminal activity until the 1983 session when such a unit could be statutorily created and funded, or take appropriate action to transfer the operations of the OCSF to the CBI. The latter course of action was chosen by the General Assembly and funds were appropriated to the CBI through the Long Appropriations Bill (House Bill 1284) to fund 4.0 FTE for the OCSF in the CBI. It was apparent to the General Assembly that the transfer of functions of the OCSF to the CBI could not be accomplished within the then current budgetary limits of the CBI, since the CBI had neither the authorized positions nor the budgetary capacity to absorb the functions of the OCSF. The additional appropriation to the CBI was to accomplish this purpose.

With this appropriation it was the intent of the general assembly that the CBI and the Department of Local Affairs report by February 1 of each year on the activities of the OCSF. This report is to include the following information:

- the number, location, and types of investigations undertaken.
- the number of indictments returned.
- the number, type, and status of all pending prosecutions, as well as the disposition of all concluded prosecutions.
- an organizational chart of the OCSF including departments from which officers were contributed.
- a record of funds expended during the prior fiscal year and the first half of the reporting year including the purpose of such expenditure.

It was also the intent of the General Assembly that the OCSF retain its advisory committee which is to meet on a regular basis.

It was the further hope of the General Assembly that the continued cooperation of local law enforcement agencies to supply investigative personnel would be forthcoming. It was recognized that this action did not solve all of the problems which had surfaced regarding the operation of the OCSF as it existed at the end of 1981 and early 1982, but it was the expectation of the General Assembly that efforts to investigate and prosecute organized criminal activity would continue. The prospect of any message going out to persons involved in organized crime that the General Assembly was unconcerned about their activities was not very palatable and the members of the General Assembly believed that some action was necessary to continue the OCSF.

PRESENT EFFORT AND FUNCTIONS OF THE OCSF

For the past five months the CBI has been the home of the OCSF. During this time the unit has been revamped and reorganized. Currently, there are twenty-five persons assigned to the program as follows:

<u>CBI</u>		<u>Local Officers</u>	
Agent-in-charge	1	Aurora PD	1
Senior agents	2	Colo. Spgs, PD	3
Agents	5	Denver PD	1
Analyst	1	Grand Jct. PD	1
Records clerk	1	Jefferson Co.	1
Secretaries	2	Pueblo PD	1
	<u>12</u>	Englewood PD	1
		Arapahoe Co.	1
		Boulder Co.	1
			<u>11</u>

Rocky Mountain Intelligence network

Agent	1
Secretary/Analyst	<u>1</u>

2

In addition, the Special Prosecution Section of the Attorney General's Office has these personnel assigned to the program:

Assistant attorney general's	2
Investigator	1
Paralegal Assistant	1
Secretary	<u>1</u>

5

In all, there are thirty persons working on the OCSF program. Each contributing department and the CBI have negotiated a formal agreement that clearly defines each other's expectations and responsibilities. This process defines rules and regulations, overtime policies and operating standards. The unit has an advisory board consisting of the chief administrators of the contributing local departments and the director of the CBI. The primary purpose of this board is to establish guidelines for targeting and operations and the board meets every other month or more often if necessary.

The unit is subdivided into two sections with approximately equal staffing -- Narcotics and Organized Crime. Senior agent Ralph Ruzicka supervises the Narcotics Unit and Senior agent Richard McNamee leads the Organized Crime Unit. An Intelligence Analysis Unit has also been established. All field agents have attended an in-service intelligence utilization workshop and the unit's intelligence program is based upon a suspect targeting process which has resulted in the identification of a number of major criminal targets which are now being investigated. The CBI administration is also working with the Western Slope Law Enforcement Administrators to expand and enhance the narcotic capabilities in that region of the state.

The unit has been actively involved in a wide range of investigations. These investigations, as of October 7, 1982, have resulted in the purchase or seizure of \$1,250,000 in narcotic and dangerous drug contraband, \$43,878 in recovered stolen property, and felony arrests of fifty-three individuals. The legal and investigative teams are currently processing several major cases through the State Grand Jury and the lawyers have cleared most of the backlog of previous OCSF cases.

COMMITTEE FINDINGS AND RECOMMENDATIONS

Findings

The committee finds that the primary reason for the disbandment of the OCSF was the lack of leadership on the part of the attorney general and the assignment of some inexperienced attorneys from the attorney general's office to the OCSF. The personnel, management and administrative problems in the OCSF were detailed to the attorney general in a report prepared by Mr. Richard Hennessey, deputy attorney general, at the request of the attorney general. This report indicated that the personnel and management problems within the OCSF should be of immediate concern to the attorney general and that these problems should be resolved at the earliest possible time. Resolution of the personnel and management problems detailed in the Hennessey and Spriggs reports was not forthcoming from the attorney general who was ultimately responsible for the direction of the activities of the OCSF. These personnel and management problems should have been resolved within the internal organization of the OCSF. The various competing elements of the various contributing agencies could have been overcome by strong leadership from the attorney general. However, this leadership was not exerted by the attorney general.

One of the reasons cited in the Hennessey and the Spriggs report for the personnel and management problems was the lack of guidelines concerning the off-duty employment of OCSF investigators. In this regard, most of the questions concerning the off-duty employment of law enforcement personnel assigned to the OCSF related to those officers assigned to the unit from the Denver Police Department. It was reported that the lack of guidelines on off-duty employment caused morale problems within the organization and led to an appearance of a conflict-of-interest in some situations. However, these problems were not addressed by the attorney general, the public official ultimately in charge of the operations of the OCSF. For example, between 1969 and 1980 there were no rules or guidelines concerning the off-duty employment or activities of OCSF personnel and from 1980 to 1982 there were inadequate rules concerning off-duty employment of OCSF personnel. The result of this lack of guidelines or inadequate guidelines contributed to poor morale within the organization, caused an appearance of various conflicts of interest within the unit, created a lack of credibility of the unit, and eventually caused or contributed to the demise and disbandment of the OCSF. These problems could have been overcome with effective leadership on the part of the attorney general.

Recommendations

Continuation of OCSF. The committee recognizes that organized crime in Colorado, as well as nationwide, is a highly sophisticated, diversified, and widespread activity that consumes millions of dollars locally and billions of dollars nationally from this state's and the

nation's economy through unlawful conduct and the illegal use of force, fraud, and corruption. Organized crime derives a major portion of its power through money procured from such illegal endeavors as syndicated and organized gambling, loan-sharking, the theft of property and fencing of stolen property, the illegal importation, manufacture, and distribution of drugs and other controlled substances, and other forms of social exploitation. This money and power are increasingly being used to infiltrate and corrupt our democratic processes. Organized crime activity within this state weakens the stability of the state's economy, harm innocent investors and other organizations, impedes free competition, threatens the peace and health of the public, endangers the domestic security, and undermines the general welfare of the state and its citizens.

Because of the dangers to public and private institutions and individuals from the activities of organized crime, the committee finds that it is absolutely necessary to have a public agency such as the OCSF to provide a state-wide effort to forestall, check, and prevent the encroachment of organized crime into the state of Colorado. Therefore, the committee recommends that the OCSF be continued as a statewide organization to investigate and prosecute organized crime in Colorado, to examine matters relating to law enforcement extending across the boundaries of the state into other states and consult with officers and agencies of other states with respect to law enforcement problems of mutual concern in regard to organized crime, to advise and assist other law enforcement officials in the performance of their duties, and to cooperate with departments and officers of the federal government and other agencies in investigation and the suppression of organized crime. Furthermore, the General Assembly enacted the "Colorado Organized Crime Control Act" in 1981 (Article 17 of Title 18, C.R.S. 1973) and a statewide effort is necessary to bring criminal and other sanctions to bear on the unlawful activities of those engaged in organized crime.

Statutory creation of OCSF. The committee recommends that the General Assembly consider and enact legislation to statutorily create the OCSF. It is believed that such a statute would address the legal problems encountered by the OCSF in the past, since it has operated without statutory basis. The committee recommends that such legislation include the following concepts and provisions:

- the OCSF be reestablished and restructured within the Office of Attorney General.
- the goals and objectives of the OCSF be specifically stated and the term "organized crime" be specifically defined.
- the OCSF have statewide jurisdiction and be provided with interstate jurisdiction to the maximum extent possible under the constitution.
- the attorney general be permitted to contract with local district attorneys and police departments for prosecutors and

investigators.

- the attorney general be directed to develop rules and regulations concerning off-duty employment of OCSF personnel so as to avoid conflicts of interest and the appearance of improprieties.
- the attorneys and investigators be physically located together and the team operation concept be emphasized.
- the advisory board be abolished.
- the OCSF be reviewed under the Sunset Law at the end of three years and then every six years thereafter.

The committee recognizes that sufficient salaries to attract competent and experienced prosecutors and investigators are necessary and strongly recommends that the general assembly consider and provide adequate staff and budget for the operation of the OCSF.

Wiretap statute. Law enforcement officials may obtain court approval to run a wiretap for a thirty-day period. The statute provides that only one thirty-day extension of the wiretap may be granted. In the investigation of organized criminal activity it may sometimes be necessary to conduct a wiretap for longer periods of time. Therefore, the committee recommends that the General Assembly consider legislation to provide for successive extensions of wiretap in organized crime investigations upon suitable proof of necessity.

Investigations by legislative committees. During the course of the inquiry into the operations of the OCSF, several problems were encountered which relate to the process of conducting such an inquiry by a legislative committee. For example, several subpoenaed witnesses questioned the validity and legality of subpoenas issued by the committee. In addition, the question of whether the committee had power to find a witness in contempt of the General Assembly was referred to the Legislative Drafting Office for extensive research. Although unrelated to the subject of the OCSF, the committee believes that the questions and issues raised during the legislative committee process need to be addressed by the General Assembly so that such problems will not arise in future legislative committee investigations. Therefore, the committee recommends that the General Assembly consider legislation in the following areas:

- appropriate amendments to the statutes and rules governing the issuance of subpoenas by committees of the General Assembly.
- appropriate amendments to the statutes and rules to clarify the authority of the General Assembly or committees thereof to hold a witness in contempt of the General Assembly and to specify the procedures for such action.
- appropriate amendments to the statutes and rules to clarify whether or not the General Assembly or committees thereof may

grant immunity to witnesses summoned to testify, and to specify the procedures for such action.

- appropriate amendments to the statutes and rules to clarify whether or not the General Assembly or committees thereof have authority to employ investigative staff to assist in a legislative investigation and to specify the procedures for such action.

Amendment to "Open Public Records Law." During the course of the inquiry, the committee obtained, by a subpoena duces tecum, a transcript of an interview by the Denver Post staff with Mr. Michael B. Howard which the committee believed might be relevant to certain questions raised during the committee hearings. Access to the transcript was immediately sought by members of the press. In addition, the press sought access to the return of service papers on a subpoena issued to an individual who did not wish to have his name disclosed prior to his appearance before the committee. Access to these documents were denied by the chairman of the committee, as custodian, on the grounds that the information sought was part of an investigatory file compiled for a law enforcement purpose under section 24-72-302 (3), C.R.S. 1973, and the release of such information at that time would be contrary to the public interest under section 24-72-305 (5), C.R.S. 1973. This action was immediately challenged in Denver District Court by KMGH-TV, Channel 7. On June 28, Denver District Court Chief Judge Clifton Flowers ordered the chairman of the committee to provide Channel 7 access to the subpoenaed documents.

The effect of the court order is that all subpoenaed documents which come into the possession of a legislative committee are considered to be open public records. Believing that some circumstances may exist in which a legislative committee should not release subpoenaed documents to the public, the committee recommends that the general assembly consider appropriate amendments to the Open Public Records Law which will empower a legislative committee to limit access to subpoenaed documents in particular circumstances.

Availability of committee material to Denver District Attorney and Regional United States attorney. The committee recommends that all material in the possession of the committee, including the summary of meetings, subpoenaed bank records, other documentary material, and the final report, be made available to the Denver District Attorney and the Regional United States Attorney to review for any interest they may have in the material.

LEGISLATIVE COUNCIL
COMMITTEE ON MANAGEMENT OF STATE GOVERNMENT

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SUMMARY OF RECOMMENDATIONS

COMMITTEE ON MANAGEMENT OF STATE GOVERNMENT

This committee was created by Senate Joint Resolution No. 19 for the purpose of studying the management of state government. Within that broad framework the committee was assigned the specific tasks of reviewing:

- matters relating to state employees, including management of the state personnel system, the conduct of the wage and fringe benefits survey, and wage policies;
- the management of the state computer and automated data processing systems;
- the general organizational structure of state government; and
- budget management, including revenues from all sources and expenditures for all purposes.

During the course of five meetings, the committee addressed each of the aforementioned topics. These hearings presented an opportunity for committee members to obtain valuable insights through the testimony of individuals intimately familiar with the issues.

As a result of its deliberations, the Committee on Management of State Government recommends that the Joint Budget Committee:

1. Consider increasing the amount of funds appropriated for management training, but controls should be implemented to ensure that such funds will be expended solely for management training purposes.
2. Allow state agencies to keep a portion of the savings they generate, but the purpose for which an agency can spend such monies should be specified. The committee believes that state agencies need some incentive to improve efficiency and increase productivity. It is hoped that this incentive would be provided by allowing such agencies to retain a certain portion of the savings they produce.

The committee also recommends three bills and one concurrent resolution. The bills provide for the contracting out of the salary and fringe benefits survey to the private sector; specify that the State Personnel Board must provide written findings of fact and conclusions of law for its disciplinary hearing decisions; and require the State Personnel Board to promulgate rules providing for measures, such as voluntary and mandatory furloughs and the suspension of salary survey increases, which may be implemented when a fiscal emergency is declared by the governor and the Colorado General Assembly. The concurrent resolution consists of a constitutional amendment which

removes the State Personnel Board and its rule-making authority from the constitution and requires the General Assembly to reestablish a personnel board by statute. The purpose of this resolution is to clarify that the board is subject to legislative authority and should therefore abide by legislative directives.

MANAGEMENT OF STATE GOVERNMENT

At its first meeting, the committee decided that the best method of conducting an inquiry into the broad topic of the management of state government would be to speak directly with persons in the executive and legislative branch who have major responsibilities in this field. It was hoped that such discussions would reveal where problems may exist and what actions, if any, are being taken to rectify those problems. The committee also felt that the solutions to many management problems do not lie in the passage of more bills and constitutional amendments, but rather in the creation of a dialogue between the legislative and executive branches in which potential administrative solutions to these problems are discussed and shared with each other.

Consequently, the committee invited the state auditor, the governor's executive assistant, the state personnel director, representatives of the Colorado Association of Public Employees, and others to testify on various issues related to the management of state operations. One of the issues raised at these hearings concerned central control over the functions of state government. Some committee members expressed their belief that the twenty executive departments operate to a large degree on their own with little central control or direction. The governor's executive assistant contended that strong central control does not work well when you have such a broad span of departments. Instead, directors must be given some measure of control over the operations of their respective departments. Central coordination, he explained, is provided through performance contracts between the governor and each director he appoints. These contracts consist of objectives for the upcoming calendar year. The governor gives each director a revenue estimate and prioritized list of goals to help them in the formulation of the performance contract. The governor and each director then come to an agreement on the final version of the contract. A director's progress towards attaining the goals set forth in his contract is monitored through quarterly meetings with the governor. The executive assistant added that monthly meetings with department heads also keeps the governor abreast of each department's operations.

Concerning other management problems, the state auditor testified before the committee on problems which his office identified while performing audits of various departments and state agencies. Some of the problems which these audits uncovered, such as the slow deposit of tax receipts and the recovery of indirect costs from the federal government (costs incurred while administering federal grants), have since been resolved. However, the state auditor contended that several problems still exist. He included in this category the following items which relate to the overall management of state government:

- The Department of Administration has been neglecting its statutory responsibilities regarding controls over state-owned

realty. These responsibilities include the maintenance of an inventory of state-owned realty, the development of master facility plans, the inspection of construction projects, and the annual reporting of leases to the Joint Budget Committee.

- Internal controls over data processing activities are in need of improvement in at least three installations: the Department of Labor and Employment Computer Center, the Revenue Department Computer Center and the General Government Computer Center.
- There is not an effective central control point for identifying, tracking or reporting information concerning federal funds flowing into the state.
- The actual expenditures reported to the Joint Budget Committee and the Office of State Planning and Budgeting have not agreed on occasion with the amounts shown in audited financial statements as actual expenditures.
- Performance audits for certain departments have shown that budget requests were not always related to management plans, but were sometimes requested for programs the departments believed would be funded. For instance, funding requests from the Department of Local Affairs for rural development were usually appropriated, but those funds were not always used for those purposes.
- The cost of lease purchase agreements to the state is increasing and should be reviewed. Although lease purchase agreements may make sense in the private sector where the tax benefits of such an arrangement may be a consideration, lease purchases in tax exempt operations like state government are one of the most expensive methods of acquiring assets. Less expensive ways of acquiring these assets need to be considered.

A final problem raised relating to management questions involved the training received by state supervisors and managers. Representatives of the Department of Personnel and the Colorado Association of Public Employees both agreed that more training was needed, particularly at the first supervisory level. However, the Department of Personnel representatives informed the committee that the \$70,000 (half cash funded, half general funded) appropriated for management training during the current fiscal year was only sufficient for the training of higher level managers.

The committee was also fortunate to have non-legislative members on the committee who could share with the rest of the committee the private sector's policy on management training. During this discussion with the non-legislative members, it became evident that private industry places great importance on the training of management personnel.

Committee recommendations. As a result of its discussions on the management issue, the committee has two recommendations for the Joint

Budget Committee. First, it perceives a need for increasing the amount of funds appropriated for management training, but believes that controls should be implemented to ensure that such funds will be expended solely for management training purposes. All of the testimony received by the committee on this matter seems to indicate that the present level of state funding for the training of managerial personnel is inadequate. The committee is convinced that the increases in efficiency and productivity which could result from such training would justify the increase in expenditures.

The second recommendation to the Joint Budget Committee is an outgrowth of committee deliberations on ways to improve efficiency and increase productivity. The committee believes that state agencies need some incentive in order to accomplish these two goals. This incentive could be provided by allowing state agencies to retain part of the savings achieved from the implementation of cost reduction procedures. It therefore recommends that state agencies be allowed to keep a portion of the savings generated, but the purposes for which an agency can spend such monies should be specified.

MATTERS RELATING TO STATE EMPLOYEES

The committee devoted a large part of its time to discussing matters relating to state personnel issues. These discussions focused on the following topics: the three-plus-three rule, the salary and fringe benefits survey, the newly developed pay-for-performance plan, and the content of State Personnel Board findings in disciplinary hearings. The major points raised in these discussions are described below.

Three-Plus-Three Rule

The three-plus-three rule promulgated by the State Personnel Board allows state employers to consider the top three minority and female applicants for vacant jobs, as well as the three applicants ranking highest on the eligibility lists. In 1977, the Colorado General Assembly enacted Senate Bill 548 which provided for the repeal of this rule effective January 1, 1980. However, the State Personnel Board continued the three-plus-three rule after that date. The Colorado General Assembly reacted by refusing to extend the rule in 1980. The State Personnel Board responded to the denial of extension by reinstating the rule before the date on which the rule would have expired. In subsequent years, this same scenario whereby the Colorado General Assembly refused to extend the rule and the State Personnel Board reinstated the rule was repeated.

The State Personnel Board continues to use the rule because it believes that: 1) the state is obligated to operate an affirmative action program under the fourteenth amendment to the United States Constitution; and 2) the three-plus-three plan is the only available remedy to deal with the problem of underutilization of minorities and

females in state government. A couple of committee members voiced their support for the board's position. These members stated that affirmative action programs have been determined by the United States Supreme Court to be legal under the United States Constitution; the three-plus-three rule is responsible for significantly increasing the number of minorities in state government; and the Department of Personnel has not offered another alternative to the rule because the department believes that other proposed plans would not be acceptable to the Colorado General Assembly.

The arguments offered in opposition to the State Personnel Board's actions regarding the three-plus-three rule centered on two points. First, the three-plus-three rule is in violation of the Colorado Constitution. Section 13, Article XII of the Colorado Constitution provides that persons should be chosen for state employment "...without regard to race, creed, or color, or political affiliation" and should "...be one of the three persons ranking highest on the eligible list for such position...." It was therefore contended that a rule which provides for the consideration of candidates besides the top three eligible candidates and which provides that candidates may be considered on the basis of their race and color is unconstitutional under the Colorado Constitution. Second, by continuing to reinstitute the three-plus-three rule the State Personnel Board is avoiding the specific directives of the Colorado General Assembly to eliminate the rule.

Committee recommendation. The committee believes that the State Personnel Board is violating legislative directives and the Colorado Constitution by the continued reinstitution of the three-plus-three rule. Since one of the arguments offered to explain the violation of legislative directives is that the board is a constitutionally-created body and is therefore not subject to legislative authority, the committee recommends the removal of the board's constitutional status. Concurrent Resolution 1 would accomplish this objective. This resolution provides for the removal of the State Personnel Board and its rule-making authority from the Colorado Constitution. It requires the Colorado General Assembly to create by statute a State Personnel Board composed of five members, no more than three of whom shall be of the same political party. It further requires the Colorado General Assembly to prescribe by law the powers and duties of the new personnel board and to enact provisions governing the board.

Salary and Fringe Benefits Survey

Under Section 24-50-104, Colorado Revised Statutes 1973, state employees are to receive salaries and fringe benefits at levels comparable to persons performing similar tasks in the private sector. This policy is referred to as the prevailing wage concept. In order to determine the prevailing wage, the Department of Personnel conducts an annual survey of salaries and fringe benefits paid by other public and private employers in Colorado. The method of conducting this survey was explained to the committee by representatives of the

Department of Personnel. Non-legislative members of the committee pointed out that private companies often receive this data from firms specializing in such surveys.

Committee recommendation. The committee recommends Bill 1 which requires that the state's salary and fringe benefits survey be contracted out to a private person or firm. The committee has two reasons for this recommendation:

- There are companies which have developed an expertise in the area of salary and fringe benefit surveys. Since such expertise exists, the state should avail itself of these services instead of trying to develop the data on its own.
- The results of a salary and fringe benefits survey conducted by a private firm may be more objective than a survey conducted in-house by the Department of Personnel.

Pay-For-Performance Plan

The committee also conducted extensive hearings on the new incentive pay system for state employees, commonly referred to as the pay-for-performance plan. This plan evolved out of a recommendation by the 1980 Executive Committee on Personnel Management in State Government (Dines Committee). As a result of this recommendation, a provision was included in Senate Bill 308, 1981 session, which required the state personnel director to "...establish a compensation plan which shall be based on demonstrated ability and quality of performance and which shall be operational on or after July 1, 1982." The state personnel director informed the committee that a pay-for-performance plan has been developed and will be tested during the period of July 1, 1982 to June 30, 1983. This system is first being applied to the top 350 managers, but by December 31, 1982 will be in place for all classified state personnel. The actual implementation of the program will begin in Fiscal Year 1983-84, with the first payment reward to be made in June 1984.

Under the plan which has been developed, an employee can progress through a series of salary steps in a variety of ways (on the basis of performance) until attaining a pre-determined point in the middle of the salary range. This mid-point in the salary range is referred to as the "job rate," or that rate of pay required to retain the average performing employee. The dollar value of this job rate will be determined annually based on the results of the salary survey. It is presumed that once an employee reaches the mid-point of the salary range, he has completed the learning or training period and is now an experienced employee. At this point, the employee enters the incentive side of the pay range and is eligible for an annual bonus award which is determined solely from performance evaluations. These awards will be distributed on a lump sum basis (10-15% for superior rating, 16-20% for outstanding rating) and will be non-cumulative, i.e., the award will not be added to the base salary for future years.

The only way an employee at this point in the salary range could receive any permanent addition to his base salary would be through changes in the base salary resulting from the findings of occupational studies or the salary survey.

The committee heard testimony in support of and in opposition to this plan. The chairman of the Dines Committee and a former state personnel director insisted that linking salary to performance is crucial and was the key recommendation of the Dines Committee. However, representatives of the Colorado Association of Public Employees differed with this assessment. They insisted that the newly developed pay-for-performance plan is based on two false assumptions, namely: 1) money is a prime motivator which will increase productivity; and 2) an objective performance evaluation scheme free of favoritism, cronyism and bias can be developed and used to determine cash bonuses. Other objections raised by the association's representatives included the following:

- Beyond the mid-point of the range, good performance, defined as "standard" in the plan, would not be rewarded. Only "superior" or "outstanding" performance would be eligible for a bonus. Good employees at the mid-point in the range would never receive an increase in pay, except for salary survey or occupational study adjustments.
- The distinction between "superior" and "outstanding" performance is blurred. It will be very difficult to distinguish between these two different levels of performance.
- The plan will not save the state money.
- The plan is overly complicated.
- The plan is unrealistic. To go from a system in which it was difficult to get supervisors to conduct at least one interview a year to a system which requires three interviews within a two month period (the pre-appraisal interview, the appraisal interview, and the performance planning interview) is unrealistic.
- The plan could discriminate against low level employees who are not in professional classes. When such employees reach the mid-point in the salary range, their opportunities for rewards are limited. Persons at that pay rate can only receive bonuses for superior or outstanding performance, but if you are a low level employee your ability to perform superior or outstanding work is limited by the nature of your tasks.

Findings of the State Personnel Board

The director of the Department of Health described an incident to the committee where the State Personnel Board overturned the decision

of a hearings officer who had upheld the demotion of a health department employee. The board in this instance did not give any reasons for its decision. The director of the Department of Health suggested that the State Personnel Board be required to make findings of fact in such situations.

Committee recommendation. The committee supports the recommendation to require the State Personnel Board to explain its decisions in cases involving disciplinary actions. Consequently, it recommends Bill 2. This bill requires the board to make written findings of fact and conclusions of law regarding its decisions on disciplinary actions. The findings and conclusions must be made either at the conclusion of the hearing or within seven days of that hearing.

MANAGEMENT OF THE STATE COMPUTER AND AUTOMATED DATA PROCESSING SYSTEM

In the budget hearings conducted during the past year, a request was made for a new attached computer processor to handle the increase in demand for computer time. As a result of this request, a number of questions were raised about the management of the state computer system. Several legislators were concerned about the effectiveness of both the method which is used to determine what computer data should be deleted from the data bank and the procedure which is utilized to assess requests for computer time from various state agencies. In other words, does the state really need new computer equipment or could the necessary demands for computer time be handled with the present equipment if unnecessary data is deleted and only justifiable requests for computer time are granted.

In order to find an answer to these and other questions, representatives of International Business Machines (IBM) and the directors of the Department of Administration, the Division of Automated Data Processing, and the General Government Computer Center were asked to appear before the committee. The IBM representative informed the committee that as a result of the concerns outlined above, a usage study has been started by IBM and the General Government Computer Center. This is an ongoing study to assess current workloads, forecast future needs, and establish a master plan. As part of the study, interviews are being conducted with users to weed out unnecessary programs and determine future requirements. The IBM representative also informed the committee that the best way of ensuring that unnecessary data is deleted from computer banks is to charge users for the storage of data.

Representatives of the state agencies responsible for the state computer system agreed that there may be a need for more frequent reviews of past applications for computer time to determine if such programs are still needed and whether any can be deleted from the system. They expressed hope that the usage study will help correct

this situation. As for new applications for computer time, a system is in place for reviewing such requests. Under this system, new applications are reviewed by the Division of Automated Data Processing and the Office of State Planning and Budgeting and then forwarded to the governor for his approval. This system should help screen out new applications which have a low priority.

The second concern that the committee had regarding the state computer system involved the storage of personnel and payroll data. In the past, critical information concerning state personnel was not readily available because it had not been stored on computer. The state personnel director informed the committee that the computer system for personnel data (number of employees, anniversary dates, classification, etc.) became operational in May 1982 and will be linked to payroll data in the future.

ORGANIZATIONAL STRUCTURE OF STATE GOVERNMENT

The discussion on the organizational structure of state government revolved around the creation of a Department of Public Safety and the merging of the Office of State Planning and Budgeting, the Department of Administration, and the Department of Personnel. In 1981, Senate Bill 342 was introduced which would have moved certain divisions from existing departments into a Department of Public Safety. The Department of Institutions would have been abolished so that the new department would fit within the constitutional limit of twenty departments. In the 1982 session, Senate Bill 137 proposed the establishment of a Department of Public Safety effective July 1, 1983. The original bill would have created an interim committee to determine which existing department would be abolished. However, a motion was made on the Senate floor to merge the Office of State Planning and Budgeting, the Department of Administration, and the Department of Personnel into a Department of Personnel and Administration. This bill was postponed indefinitely. The committee was informed that a new bill creating a Department of Public Safety is being prepared for introduction in the 1983 session. This bill will essentially be the Senate version of Senate Bill 137.

At several points the committee discussed the possibility of consolidating the Office of State Planning and Budgeting, the Department of Administration, and the Department of Personnel. The reasoning behind this was twofold. First, these agencies are unlike other state agencies because their role is to provide service to other state agencies rather than the public. Therefore, it may be appropriate to consolidate all of these support functions in one department. Secondly, more central control is needed over the state apparatus. This could be achieved by combining those agencies which have the responsibility of monitoring and coordinating the activities of state government.

Two arguments were offered in opposition to the merging of these three agencies. One point was that the Department of Personnel was established in the constitution and given the responsibility of administering the personnel system. The Department of Personnel must therefore remain a separate department with solely personnel functions. The second argument offered in opposition to the proposed consolidation was that it would not be right to set one department above all the others. This would happen if one large department was created with oversight functions over the other departments of state government.

BUDGET MANAGEMENT

A major concern of the committee was overexpenditures by state agencies. The committee was interested in learning about systems to ensure that spending by state agencies are within their authorized appropriations. Consequently, the state controller and the director of the Office of State Planning and Budgeting were invited to explain the state's internal control program. After the passage of the long appropriations bill, the state controller requests a monthly expenditure plan from each department indicating the amount of money to be spent each month. The controller reviews these plans and then submits them to the Office of State Planning and Budgeting for approval. It is the state controller's responsibility to see that no checks are issued unless money is available. The Office of State Planning and Budgeting tracks agency spending patterns to see that they are staying within budget.

According to the state controller, overexpenditures are usually caused by increases in costs, such as unemployment insurance and utility bills, which are difficult to anticipate. In the event that there is an overexpenditure by a department, the governor is notified of the situation and a report is required on the reason it happened and who is responsible. Future spending by such department is restricted.

Committee recommendation. An outgrowth of the committee's discussion regarding overexpenditures by state agencies is concern over possible shortfalls in anticipated state revenues. The disruption to state operations caused by such a shortfall must be minimized. As a solution to this problem, the committee recommends Bill 3. This bill requires the State Personnel Board to promulgate rules providing for measures, such as furloughs, suspension of salary survey increases, separations and hiring freezes, which may be utilized to reduce personnel expenditures in the event of a fiscal emergency. "Fiscal emergency" is defined as any crisis concerning the state's fiscal condition which is caused by a significant general fund revenue shortfall or significant reductions in federal funds or cash funds received by the state and which threatens the orderly operation of state government and the health, safety, or welfare of its citizens. A fiscal emergency must be declared by a joint resolution

adopted by the Colorado General Assembly and approved by the governor. After the adoption of the joint resolution, the head of each principal department is required to implement those measures which will enable his department to operate within available revenues.

CONCURRENT RESOLUTION NO. 1

1 SUBMITTING TO THE REGISTERED ELECTORS OF THE STATE OF COLORADO
2 AN AMENDMENT TO SECTIONS 13, 14, AND 15 OF ARTICLE XII OF
3 THE CONSTITUTION OF THE STATE OF COLORADO, CONCERNING THE
4 STATE PERSONNEL SYSTEM, ELIMINATING THE CONSTITUTIONAL
5 PROVISIONS WHICH CONCERN THE CREATION AND THE POWERS AND
6 DUTIES OF THE PERSONNEL BOARD, AND REQUIRING THE GENERAL
7 ASSEMBLY TO RECREATE BY STATUTE THE STATE PERSONNEL
8 BOARD, TO PROVIDE BY LAW FOR THE POWERS AND DUTIES OF THE
9 BOARD, AND TO PROVIDE BY LAW FOR THE IMPLEMENTATION OF
10 THE CONSTITUTIONAL PROVISIONS GOVERNING THE STATE
11 PERSONNEL SYSTEM.

Resolution Summary

(Note: This summary applies to this resolution as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Amends sections 13, 14, and 15 of article XII of the state constitution to eliminate the state personnel board as a constitutionally-created board and to eliminate constitutional provisions governing the rule-making authority of the state personnel board. Requires the general assembly to create by statute a state personnel board and to prescribe by law the powers and duties of the state personnel board. Requires the general assembly to provided by law for the implementation of the constitutional provisions governing the state personnel

system.

1 Be It Resolved by the Senate of the Fifty-fourth General
2 Assembly of the State of Colorado, the House of
3 Representatives concurring herein:

4 SECTION 1. At the next general election for members of
5 the general assembly, there shall be submitted to the
6 registered electors of the state of Colorado, for their
7 approval or rejection, the following amendment to the
8 constitution of the state of Colorado, to wit:

9 Section 13 (2), (4), (5), (6), (8), and (10) of article
10 XII of the constitution of the state of Colorado are amended
11 to read:

12 Section 13. Personnel system of state - merit system.
13 (2) The personnel system of the state shall comprise all
14 appointive public officers and employees of the state, except
15 the following: Members of the public utilities commission, the
16 industrial commission of Colorado, the state board of land
17 commissioners, the Colorado tax commission, AND the state
18 parole board; ~~and the state personnel board~~; members of any
19 board or commission serving without compensation except for
20 per diem allowances provided by law and reimbursement of
21 expenses; the employees in the offices of the governor and the
22 lieutenant governor whose functions are confined to such
23 offices and whose duties are concerned only with the
24 administration thereof; appointees to fill vacancies in

1 elective offices; one deputy of each elective officer other
2 than the governor and lieutenant governor specified in section
3 1 of article IV of this constitution; officers otherwise
4 specified in this constitution; faculty members of educational
5 institutions and departments not reformatory or charitable in
6 character and such administrators thereof as may be exempt by
7 law; students and inmates in state educational or other
8 institutions employed therein; attorneys-at-law serving as
9 assistant attorneys general; and members, officers, and
10 employees of the legislative and judicial departments of the
11 state, unless otherwise specifically provided in this
12 constitution.

13 (4) Where authorized by law, any political subdivision
14 of this state may contract with the ~~state--personnel--board~~
15 DEPARTMENT OF PERSONNEL for personnel services.

16 (5) The person to be appointed to any position under the
17 personnel system shall be one of the three persons ranking
18 highest on the eligible list for such position, or such lesser
19 number as qualify, as determined from competitive tests of
20 competence, subject to limitations ~~set-forth-in-rules-of-the~~
21 ~~state-personnel-board~~ applicable to multiple appointments from
22 any such list AS MAY BE ESTABLISHED PURSUANT TO LAW.

23 (6) All appointees shall reside in the state, but
24 applications need not be limited to residents of the state as
25 to those positions found ~~by--the--state--personnel--board~~ to
26 require special education or training or special professional

1 or technical qualifications and which cannot be readily filled
2 from among residents of this state.

3 (8) Persons in the personnel system of the state shall
4 hold their respective positions during efficient service or
5 until reaching retirement age, as provided by law. They shall
6 be graded and compensated according to standards of efficient
7 service which shall be the same for all persons having like
8 duties. A person certified to any class or position in the
9 personnel system may be dismissed, suspended, or otherwise
10 disciplined by the appointing authority upon written findings
11 of failure to comply with standards of efficient service or
12 competence or for willful misconduct, willful failure or
13 inability to perform his duties, or final conviction of a
14 felony or any other offense which involves moral turpitude, or
15 written charges thereof may be filed by any person with the
16 appointing authority, which shall be promptly determined. Any
17 action of the appointing authority taken under this subsection
18 (8) shall be subject to appeal ~~to-the-state-personnel-board~~ AS
19 PROVIDED BY LAW, with the right to be heard ~~thereby~~ in person
20 or by counsel, or both.

21 (10) The ~~state-personnel-board~~ GENERAL ASSEMBLY shall
22 ~~establish~~ PROVIDE BY LAW FOR THE ESTABLISHMENT OF probationary
23 periods for all persons initially appointed, but not to exceed
24 twelve months for any class or position. After satisfactory
25 completion of any such period, the person shall be certified
26 to such class or position within the personnel system, but

1 unsatisfactory performance shall be grounds for dismissal by
2 the appointing authority during such period without right of
3 appeal.

4 Section 14 of article XII of the constitution of the
5 state of Colorado is REPEALED AND REENACTED, WITH AMENDMENTS,
6 to read:

7 Section 14. Department of personnel - state personnel
8 director - state personnel board. (1) There is hereby
9 created the department of personnel, which shall be one of the
10 principal departments of the executive department, the head of
11 which shall be the state personnel director, who shall be
12 appointed under qualifications established by law. The state
13 personnel director shall be responsible for the administration
14 of the personnel system of the state under this constitution
15 and laws enacted pursuant thereto.

16 (2) The general assembly shall provide for the creation
17 of a state personnel board, which shall exercise such powers
18 and duties as may be prescribed by law. The state personnel
19 board created by the general assembly shall be composed of
20 five persons to be appointed by the governor, with the consent
21 of the senate. No more than three members of the state
22 personnel board shall be members of the same political party.

23 (3) The general assembly shall provide by law for the
24 implementation of this section and sections 13 and 15 of this
25 article, including but not limited to provisions concerning
26 standardization of positions, determination of grades of

1 positions, standards of efficient and competent service, the
2 conduct of competitive examinations of competence, grievance
3 procedures, appeals from actions by appointing authorities,
4 and conduct of hearings by hearing officers where authorized
5 by law.

6 (4) Adequate appropriations shall be made to carry out
7 the purposes of this section and section 13 of this article.

8 Section 15 (4) of article XII of the constitution of the
9 state of Colorado is REPEALED AND REENACTED, WITH AMENDMENTS,
10 to read:

11 Section 15. Veterans' preference. (4) The provisions
12 of this section shall be implemented in the state personnel
13 system and in each comparable civil service or merit system of
14 any agency or political subdivision of the state to assure
15 that all persons entitled to added points and preference in
16 examinations and retention shall enjoy their full privileges
17 and rights granted by this section.

18 This amendment shall take effect July 1, 1985.

19 SECTION 2. Each elector voting at said election and
20 desirous of voting for or against said amendment shall cast
21 his vote as provided by law either "Yes" or "No" on the
22 proposition: "An amendment to sections 13, 14, and 15 of
23 article XII of the constitution of the state of Colorado,
24 concerning the state personnel system, eliminating the
25 constitutional provisions which concern the creation and the
26 powers and duties of the personnel board, and requiring the

1 general assembly to recreate by statute the state personnel
2 board, to provide by law for the powers and duties of the
3 board, and to provide by law for the implementation of the
4 constitutional provisions governing the state personnel
5 system."

6 SECTION 3. The votes cast for the adoption or rejection
7 of said amendment shall be canvassed and the result determined
8 in the manner provided by law for the canvassing of votes for
9 representatives in Congress, and if a majority of the electors
10 voting on the question shall have voted "Yes", the said
11 amendment shall become a part of the state constitution.

BILL 1

A BILL FOR AN ACT
CONCERNING THE CONDUCT OF SALARY AND FRINGE BENEFIT SURVEYS
PURSUANT TO PRIVATE CONTRACT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Requires that the state personnel system's salary and fringe benefit surveys shall be conducted by a private person or firm pursuant to contract.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 24-50-104 (5), Colorado Revised Statutes 1973, 1982 Repl. Vol., is amended to read:

24-50-104. Classification and compensation. (5) Salary and fringe benefits survey. (a) To determine comparable rates for salaries and fringe benefits prevailing in other places of public and private employment, the state personnel director shall annually ~~conduct~~ CAUSE TO BE CONDUCTED, BY CONTRACT WITH A PRIVATE PERSON, a salary and fringe benefit survey. THE PERSON CONDUCTING SAID SURVEY, REFERRED TO IN THIS SUBSECTION

(5) AS THE "SURVEYOR", SHALL BE SELECTED IN ACCORDANCE WITH THE "PROCUREMENT CODE", ARTICLES 101 TO 112 OF THIS TITLE. THE CONTRACT FOR THE CONDUCT OF THE SURVEY SHALL CONTAIN SUCH TERMS AND CONDITIONS AS SHALL ENABLE THE STATE PERSONNEL DIRECTOR TO RETAIN REASONABLE SUPERVISION AND CONTROL OVER THE CONDUCT OF THE SURVEY. In conducting the survey, the ~~state personnel-director~~ SURVEYOR shall select various key classes, including, as applicable, classes at the entrance, supervisory, and management levels of occupational series within the classification plan, to be used in establishing prevailing rates for all classes and employees in the state personnel system. The ~~state-personnel-director~~ SURVEYOR shall determine the relationships between key classes and all other classes and shall publish such relationships. In addition, he shall determine any changes in such relationships and shall publish such changes whenever they occur.

(b) In order to establish confidence in the salary and fringe benefits survey, the state personnel director AND THE SURVEYOR shall meet and confer in good faith with management and employee representatives of the state for the design and methodology of the survey. The ~~state--personnel--director~~ SURVEYOR shall develop and publish a statement of policy and a manual of procedures detailing the methodology used in the selection and description of the key classes to be used in the survey, the selection of the survey sample, and the system used in the collection, tabulation, analysis, and application

of the survey data. The survey shall include a fair sample of public and private employments in what the ~~state--personnel director~~ SURVEYOR determines to be the competitive labor market area for various key classes, including areas of the state which are outside the Denver metropolitan area. The ~~state--personnel--director~~ SURVEYOR may use the results of other appropriate surveys conducted by public or private agencies. ~~and may contract with such agencies to conduct the survey:~~

(c) (I) The ~~state--personnel--director~~ SURVEYOR shall use valid statistical techniques and, after collecting all appropriate data, shall review the data and shall determine whether it is valid.

(II) Any person directly affected by the state personnel director's actions OR THE SURVEYOR'S ACTIONS pursuant to paragraph (a) or (b) of this subsection (5) or this paragraph (c) may petition the board for review of the ~~state--personnel director's~~ action within fifteen working days after the proposed pay plan has been released by the state personnel director AND THE SURVEYOR. If the board decides to review the ~~state--personnel--director's~~ action, it shall do so in summary fashion, without referring it to a hearing officer, and on the basis of written material which may be supplemented by oral argument, at the discretion of the board. The ~~state--personnel director's~~ action may be overturned only if the board finds it to have been arbitrary, capricious, unreasonable, or contrary to rule or law. Following review of the ~~state--personnel~~

director's action taken under this paragraph (c), the board may exclude any data it finds invalid and may order resurveys as necessary. When the ~~state--personnel-director~~ SURVEYOR finds that sufficient data exists, he shall relate the data to a pay plan.

(d) In the conduct of the survey of fringe benefits, the ~~state-personnel-director~~ SURVEYOR shall use valid statistical techniques in the collection and evaluation of all appropriate data. The data reported shall be presented on a basis of percentage of employers' actual payroll costs computed in the following manner: The sum of the total number of working hours per year granted for such benefits as sick leave, holidays, and vacation shall be divided by the total hours required in the normal work year by these employers. Other benefits, such as insurance and hospitalization premiums and retirement payments, that cannot be identified in terms of hours per year shall be reported in dollar amounts, percentages, or such other manner as can be identified. In comparing the average percentage costs for fringe benefits for state employment, job security, survey time lag, and other unique factors found in state employment shall be considered.

(e) The state personnel director shall, by March 1 of each year, submit to the governor his THE final salary recommendations for the ensuing fiscal year, which report shall be published and shall include a detailed explanation of the methodology and conduct of the survey. Such report shall

also include the average percentage salary increase for all employee classes as computed annually by the state personnel director. No later than the March 15 next following, the governor shall transmit the state personnel director's report and the governor's allowance for salary adjustments to the joint budget committee of the general assembly for inclusion as a separate item in the general appropriations bill, including with such transmittal all proposed reassignments of classes to pay grades, salary rates, or salary ranges as submitted by the state personnel director, which reassignments shall take effect at the start of the ensuing fiscal year. Any assignments or reassignments of classes to pay grades, salary rates, or salary ranges required by the creation of new positions or any duly authorized reorganization or change in work method shall be made effective, with the approval of the governor, on July 1. In order for the fiscal impact of any special salary survey or occupational study to be included in the annual general appropriations bill, the results of such survey or study must be submitted to the general assembly prior to March 1. Each such survey or study shall contain a detailed fiscal impact calculation by agency and department. The only exception to the July 1 date regarding assignment or reassignment of classes to pay grades, salary rates, or salary ranges, including those resulting from special salary surveys, shall be made in those urgent situations where personnel shortages will endanger the health and public safety of

residents of the state of Colorado and where special salary surveys indicate that such assignment or reassignment of classes is necessary to provide salaries comparable to those prevailing in comparable kinds of employment. In such urgent situations, upon approval by both the governor and the state personnel director, such changes shall be able to be effective on the first of the month following such approval.

(f) The state personnel director shall, by March 1 of each year, submit to the general assembly the results of the survey of fringe benefits, including those benefits which are granted by statute and those which are prescribed by rule of the board. The state personnel director shall also, by March 1 of each year, submit to the general assembly and the governor his THE final recommendations for fringe benefits for the ensuing fiscal year, which report shall be published and shall include a detailed explanation of the methodology and conduct of the survey. No later than the March 15 next following, the governor shall transmit his recommendations on fringe benefits to the joint budget committee of the general assembly for inclusion as a separate item in the general appropriations bill. No change in fringe benefits which are granted by statute shall take effect until enacted by the general assembly.

SECTION 2. Effective date. This act shall take effect July 1, 1983.

SECTION 3. Safety clause. The general assembly hereby

finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

BILL 2

A BILL FOR AN ACT

1 CONCERNING HEARINGS BEFORE THE STATE PERSONNEL BOARD RELATING
2 TO DISCIPLINARY PROCEEDINGS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Requires the state personnel board to make written findings of fact and conclusions of law when it affirms, modifies, or reverses the disciplinary action of an appointing authority.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 24-50-125 (4), Colorado Revised Statutes
5 1973, 1982 Repl. Vol., is amended to read:

6 24-50-125. Disciplinary proceedings - hearings -
7 procedure. (4) At such hearing, the employee shall be
8 entitled to representation of his own choosing at his own
9 expense. The board shall cause a verbatim record of the
10 proceedings to be taken and shall maintain such record. At
11 the conclusion of such hearing, OR WITHIN SEVEN DAYS AFTER THE

1 CONCLUSION OF SUCH HEARING, the board shall make public
2 WRITTEN findings OF FACT AND CONCLUSIONS OF LAW affirming,
3 modifying, or reversing the action of the appointing
4 authority, and the appointing authority shall thereupon
5 promptly execute the findings of the board.

6 SECTION 2. Safety clause. The general assembly hereby
7 finds, determines, and declares that this act is necessary
8 for the immediate preservation of the public peace, health,
9 and safety.

BILL 3

A BILL FOR AN ACT

1 CONCERNING FISCAL EMERGENCIES AFFECTING STATE GOVERNMENT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Requires the state personnel board to promulgate rules providing for measures (such as separations, furloughs, suspension of salary survey and merit increases, and hiring freezes) which may be utilized to reduce state personnel expenditures in the event of a fiscal emergency in state government. Defines "fiscal emergency" to include significant shortfalls of general fund revenues or cash or federal funds. Requires each principal department head, upon the adoption of a joint resolution approved by the governor which declares a fiscal emergency, to implement those measures provided for in the board's rules which he finds necessary to reduce personnel expenditures within available revenues.

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. Article 50 of title 24, C.R.S. 1973, 1982
4 Repl. Vol., is amended BY THE ADDITION OF A NEW SECTION to
5 read:

6 24-50-109.5. Fiscal emergencies - rules and regulations
7 - emergency orders. (1) As used in this section, "fiscal
8 emergency" means any crisis concerning the fiscal condition of

1 state government which is caused by a significant general fund
2 revenue shortfall or significant reductions of cash or federal
3 funds received by the state, which threatens the orderly
4 operation of state government and the health, safety, or
5 welfare of the citizens of the state, and which is declared a
6 fiscal emergency by joint resolution adopted by the general
7 assembly and approved by the governor in accordance with
8 section 39 of article V of the state constitution.

9 (2) With the advice and assistance of the state
10 personnel director and the department of personnel, the board
11 shall promulgate rules and regulations providing for measures
12 which may be utilized by each principal department to reduce
13 state personnel expenditures in the event of a fiscal
14 emergency. Such rules and regulations shall include, but need
15 not be limited to, separations, voluntary furloughs, mandatory
16 furloughs, suspension of salary and fringe benefit survey
17 increases, suspension of merit increases, early retirement
18 incentives, job sharing, hiring freezes, forced reallocation
19 of vacant positions, or a combination thereof. Such rules and
20 regulations shall be subject to the provisions of article 4 of
21 title 24, C.R.S. 1973.

22 (3) Promptly after the adoption of a joint resolution
23 declaring a fiscal emergency, the head of each principal
24 department shall order into effect, on an emergency basis and
25 in accordance with the rules and regulations promulgated by
26 the board pursuant to subsection (2) of this section, those

1 measures he finds necessary and appropriate to reduce the
2 personnel expenditures of his department to enable the
3 department to operate within available revenues. No such
4 order shall have effect beyond the time period specified in
5 the joint resolution declaring the fiscal emergency.

6 SECTION 2. 24-50-104 (5) (e), Colorado Revised Statutes
7 1973, 1982 Repl. Vol., is amended to read:

8 24-50-104. Classification and compensation. (5) Salary
9 and fringe benefits survey. (e) The state personnel director
10 shall, by March 1 of each year, submit to the governor his
11 final salary recommendations for the ensuing fiscal year,
12 which report shall be published and shall include a detailed
13 explanation of the methodology and conduct of the survey.
14 Such report shall also include the average percentage salary
15 increase for all employee classes as computed annually by the
16 state personnel director. No later than the March 15 next
17 following, the governor shall transmit the state personnel
18 director's report and the governor's allowance for salary
19 adjustments to the joint budget committee of the general
20 assembly for inclusion as a separate item in the general
21 **appropriations APPROPRIATION** bill, including with such
22 transmittal all proposed reassignments of classes to pay
23 grades, salary rates, or salary ranges as submitted by the
24 state personnel director, which reassignments shall take
25 effect at the start of the ensuing fiscal year UNLESS
26 OTHERWISE ORDERED BY THE BOARD ACTING PURSUANT TO SECTION

1 24-50-109.5. Any assignments or reassignments of classes to
2 pay grades, salary rates, or salary ranges required by the
3 creation of new positions or any duly authorized
4 reorganization or change in work method shall be made
5 effective, with the approval of the governor, on July 1. In
6 order for the fiscal impact of any special salary survey or
7 occupational study to be included in the annual general
8 ~~appropriations~~ APPROPRIATION bill, the results of such survey
9 or study must be submitted to the general assembly prior to
10 March 1. Each such survey or study shall contain a detailed
11 fiscal impact calculation by agency and department. OTHER
12 THAN AS PROVIDED IN SECTION 24-50-109.5, the only exception to
13 the July 1 date regarding assignment or reassignment of
14 classes to pay grades, salary rates, or salary ranges,
15 including those resulting from special salary surveys, shall
16 be made in those urgent situations where personnel shortages
17 will endanger the health and public safety of residents of the
18 state of Colorado and where special salary surveys indicate
19 that such assignment or reassignment of classes is necessary
20 to provide salaries comparable to those prevailing in
21 comparable kinds of employment. In such urgent situations,
22 upon approval by both the governor and the state personnel
23 director, such changes shall be able to be effective on the
24 first of the month following such approval.

25 SECTION 3. 24-50-109, Colorado Revised Statutes 1973,
26 1982 Repl. Vol., is amended to read:

1 24-50-109. Insufficient funds. Within any fiscal year,
2 no adjustment shall be made which will require expenditures
3 greater than those for which appropriations have been made.
4 EXCEPT AS OTHERWISE ORDERED PURSUANT TO SECTION 24-50-109.5,
5 should funds made available for the payment of salaries be
6 insufficient for the payment of the employees at the rate to
7 which they are entitled under this part 1, the proper salary
8 shall nevertheless be paid to all who are employed, and
9 employees shall be separated in accordance with such
10 deficiency.

11 SECTION 4. Safety clause. The general assembly hereby
12 finds, determines, and declares that this act is necessary
13 for the immediate preservation of the public peace, health,
14 and safety.

LEGISLATIVE COUNCIL
COMMITTEE ON LOCAL GOVERNMENT

Members of the Committee

Legislative Members

Rep. Frank DeFilippo, Chairman	Rep. Vickie Armstrong-Unfred
Sen. James Beatty, Vice Chairman	Rep. Gerald Kopel
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Legislative
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Staff Attorney

COMMITTEE RECOMMENDATIONS

Senate Joint Resolution No. 19 directed the Committee on Local Government to study the immunity of political subdivisions from federal antitrust laws and the investment authority of units of local government.

Antitrust immunity. With respect to local government antitrust immunity, the committee focused on whether antitrust immunity could be granted to the state's political subdivisions; the advisability of such a grant; and the effect of the state's extension of its immunity to local government entities. To this end, the committee solicited the views of private industry, local government officials, and interested citizens (see Appendix A). After reviewing the testimony all committee members agreed at the September 9, 1982 meeting that legislation immunizing local government entities from liability arising under the federal antitrust laws is not advisable. In arriving at this conclusion the committee weighed arguments supporting and opposing immunization and decided that the arguments against legislation were considerable and persuasive.

Local government investment authority. The committee recommends two bills concerning the investment authority of units of local government. Bill 4 authorizes the use of bank repurchase agreements by specified local government entities. Bill 5 enables the state, counties, municipalities, and special districts to pool monies through means of a short-term investment trust to be established through the adoption of a uniform resolution.

LOCAL GOVERNMENT ANTITRUST IMMUNITY

In the course of committee discussions regarding the immunization of local government entities from the operation of federal antitrust laws, testimony focused on several topics including pertinent federal antitrust laws, relevant United States Supreme Court decisions, and areas of potential liability for local governments. A list of arguments for and arguments against legislation immunizing local governments was consolidated and is included later in the report.

Federal Antitrust Laws

Sections 1 and 2 of the "Sherman Act" (15 U.S.C. §1, et seq.) and sections 4 and 16 of the "Clayton Act" (15 U.S.C. §12, et seq.) were commonly cited as those portions of the antitrust laws most likely to apply to local government entities.

Section 1 of the "Sherman Act" prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...." Price-fixing agreements, agreements to divide markets or to allocate customers, tying arrangements (the purchase of one commodity is dependent on the purchase of another), and unreasonable exclusive dealing are examples of activities which have been found to be per se illegal under section 1 of the act. Section 2 of the "Sherman Act" outlaws monopolies, attempts to monopolize, or conspiracies to monopolize.

The provision for awarding treble damages is found in section 4 of the "Clayton Act" (15 U.S.C. §15). The law states that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.... (emphasis added)

Finally, section 16 of the "Clayton Act" (15 U.S.C. §26) permits persons to sue for injunctive relief against a threatened loss or damage by a violation of the antitrust laws.

United States Supreme Court Decisions

In the last forty years a body of case law has evolved setting forth criteria which would enable states and local governments to claim immunity from federal antitrust laws. The most recent United States Supreme Court decision on this topic involved a Colorado

municipality and was apparently the cause of much concern among public officials of local government entities in this state and nationwide. In the case of Community Communications Company, Inc., v. City of Boulder the court ruled that Boulder's status as a home rule municipality does not qualify the city for the "state action" exemption from liability under the Sherman Act announced in Parker v. Brown. The state constitution grants to home rule municipalities the full right of self-government in local and municipal matters. The court found that this broad grant of power does not fulfill either the requirement of "clear articulation and affirmative expression" of state policy or the "state action" criterion which mandates that the city act as the state in local matters. The decision of the court in this case was based on several prior rulings of the court regarding the applicability of the federal antitrust laws to the states and units of local government.

The first relevant landmark case regarding immunity from antitrust laws was Parker v. Brown, 317 U.S. 341 (1943) wherein the question was addressed whether the federal antitrust laws prohibit a state, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. The U.S. Supreme Court found that the program in question "derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command." Thus, the "state action" exemption to the antitrust laws was enunciated based on the independent sovereignty afforded states in our federal system of government. The court's reluctance to extend complete immunity to subordinate state governmental bodies is the basis of the present controversy. However, certain requirements for immunity have been developed by the United States Supreme Court which, when present, enable political subdivisions to claim an exemption under the Parker doctrine.

Action of the state itself. Enunciated originally in Parker v. Brown, this requisite was first applied to the activities of subordinate governmental units in City of Lafayette, La. v. Louisiana Power and Light Co., 435 U.S. 389 (1978). In that instance the court concluded that the Parker doctrine would exempt the anticompetitive activities of local governments if a state policy to displace competition with regulation or monopoly public service exists. Again in Boulder, the court found that a political subdivision is immune from application of the antitrust laws if its activity "constitutes the action of the State of Colorado itself in its sovereign capacity...". This standard implies that the local government unit must be acting as a state department or agency with minimal autonomy or discretion in order to qualify for immunity.

"Clearly articulated and affirmatively expressed" state policy. This requirement stems from Lafayette and was emphasized again in the Boulder decision. This criterion indicates that state policy must go beyond mere neutrality and show that the legislature has contemplated the enactment of an anticompetitive regulatory program. That is, the state must affirmatively address the subject. The court in Boulder

found that a statutory structure wherein one city could choose free-market competition in cable television while another could choose monopoly service did not satisfy the requirement of a clear state policy to displace competition.

Active state supervision. The court, in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), emphasized the requirement that conduct qualifying for state action immunity must be actively supervised by the state. In Midcal, the court rejected a claim of state action immunity because, although a clearly articulated state policy existed, there was no active state supervision. Activity in violation of the antitrust laws cannot be immunized by "a gauzy cloak of state involvement." Id. at 106. The court in Boulder did not resolve whether this requirement was necessary for municipal immunity since the clear articulation standard was not met.

Therefore, although units of local government are not automatically exempt from the operation of the antitrust laws, not all anticompetitive activities would necessarily be subject to antitrust restraints. Anticompetitive conduct engaged in as an act of government by the state as sovereign or by its political subdivisions pursuant to clearly articulated and affirmatively expressed state policy to displace competition with corresponding active state supervision would be exempted under the Parker doctrine.

Areas of Potential Exposure

In addition to presentations concerning statutory law and case law, considerable testimony was presented concerning regulatory activities of local governments which are potential areas of exposure with respect to antitrust suit and the resulting financial ramifications.

Regulatory activities. In testimony before the committee representatives of local government entities indicated that nationwide antitrust exposure now extends into areas of cable television franchising, solid waste disposal, energy recycling, water supply, zoning to permit or restrict residential or commercial development, taxicab franchises at public airports, the supply of aircraft fuel at air terminals, concession rights at airports, public markets, recreational facilities, ambulance service, municipal hospital services, certification of physicians at public hospitals, police tow car operations, cemetery grave markers, transit service, business licensing, operation of municipal civic centers and auditoriums, and others. Four local governments in Colorado have recently been or are presently involved in litigation for alleged violations of the federal antitrust laws -- Pitkin County/Aspen (zoning), Grand Lake (zoning), City of Boulder (cable television franchising), and the City of Pueblo (fixed based operators at the municipal airport). Testimony was contradictory as to the potential future incidence of suits as a result of Boulder.

Financial exposure. It was agreed by all parties that the costs associated with antitrust litigation are high to both sides. In addition to attorney fees and court costs, persons adjudged to have suffered injury are awarded treble damages. It was pointed out that to date there has not been a damage award levied against a municipality. Local government representatives noted that ultimately the taxpayers must pay the cost of litigation; if damages are awarded the impact on local government budgets would be disastrous. Persons representing private industry asserted that consumers inevitably pay the cost of antitrust violations in higher prices, whether the anticompetitive activity is conducted by private companies or governments.

Cable television. The committee basically discussed the cable television issue in the context of antitrust immunity for local governments since cable television franchising is an increasing source of antitrust suits. The committee adopted a resolution requesting the Legislative Council to vest in the committee the power to subpoena witnesses and documents for the purposes of investigating the Denver cable television franchise award. Testimony was also presented regarding regulation of cable television systems. The committee did not spend much time on the issue and did not make a decision as to whether cable television should be classified as a public utility.

Legislation introduced during 1982 session. Three bills -- House Bills 1176, 1238, and 1258 -- concerning the exemption of local governments from antitrust liability were introduced during the 1982 legislative session. All of the bills were postponed indefinitely.

Arguments For

The committee heard testimony advocating the protection of local governments from the federal antitrust laws.

1. Local government entities are not necessarily similar to private enterprise and should not be treated as such. Political subdivisions of the state are empowered by the state with specific statutory and constitutional regulatory authorities. These regulatory activities are reasonable types of activity for local governments to engage in. The legislature should protect, through immunization, those specific activities which the state has given statutory entities the power to undertake. Public officials should have the ability to act and not be paralyzed by fear of antitrust suit.

2. Recourse to suit for violations of the antitrust laws is not the only remedy available to aggrieved parties. Other remedies such as recall, malfeasance suits, and violation of due process actions do exist.

3. Persons testifying in opposition to legislation have indicated that the courts will be flexible in applying the rule of

reason to cases involving local governments. The rule of reason sets forth factors to be considered in measuring the effect of an activity on competition. Thus far, only economic conditions have been relevant. The regulatory efforts of political subdivisions are often undertaken in the interests of protecting the public health, safety and welfare, factors which are not guaranteed to be taken into account in the rule of reason.

4. Cases involving violations of the federal antitrust laws are tried in federal court. Without action by the state, the federal courts will determine what are proper local regulatory activities in Colorado. Abdication to the courts is not an efficient way to govern.

5. The expense of antitrust litigation is prohibitive to local governments; few local government budgets have the financial resources available to defend such suits. A treble damage award levied against a local community could have disastrous effects. Ultimately the cost of antitrust litigation will be passed on to the taxpayers. Because political subdivisions fear expensive court battles, antitrust suit could be used by private industry as a sword aimed at local governments to achieve favorable settlement.

6. The general assembly should enact broad legislation immunizing local governments regardless of the specific criteria delineated by the court. Such legislation would dispel the state's "neutrality" as discussed in the Boulder decision. Also, the burden of proving a locality's activities are not protected by the state would shift to the plaintiffs in any suits for alleged violations of the federal antitrust laws.

Arguments Against

The committee heard a number of arguments in opposition to legislation immunizing local government entities from the operation of the federal antitrust laws. These arguments as set forth herein address both the concept of a broad-based or "I dub thee immune" bill and detailed legislation designed to immunize specific regulatory activities of local governments.

1. The antitrust laws establish a national policy favoring free competition in the marketplace. The importance of this policy has been repeatedly emphasized by the judiciary. For example, in United States v. Topco Associates, Inc., 405 U.S. 596 (1972), the court stated:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how

small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Application of the antitrust laws to political subdivisions can be viewed as a step in furtherance of national policy. It is likely that antitrust laws will be applied only to those local government activities which do not relate to legitimate police power objectives and which directly suppress competition in the economic sphere. Competition in the economic arena is generally beneficial to consumers as it provides an efficient means for allocating resources and encourages new competitors and entrepreneurial innovation. Application of the antitrust laws to local government entities may initiate deregulatory policies throughout the economy.

2. Broad-based legislation which generally grants immunity for the activities of subordinate governmental units would not meet the requisites set forth by the United States Supreme Court and, therefore, would be ineffectual. In order for an activity to qualify for protection under the "state action" doctrine, there must exist a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service. Such policy must be actively supervised by the state. Also, the state policy must direct or authorize governmental units to engage in specific anticompetitive actions.

The so-called "I dub thee immune" legislation would do nothing more than declare that certain regulatory activities are immune or are authorized. Because this type of legislation would not establish a comprehensive regulatory or monopoly public service program of the state in each particular area authorized, the criterion for active state supervision would not be met.

3. Any action taken by the general assembly at this time would be precipitous in light of the questions left unanswered by the court. For example, the court has never addressed the issue of what constitutes active state supervision when a suit involves a subordinate governmental entity. The courts must be given time to refine their prior decisions so that the areas of vulnerability are better defined.

4. In order to meet the criteria enunciated by the court, the immunization of local government entities would require the implementation of comprehensive state programs and an expansion of the state bureaucracy. Local governments would in effect surrender their autonomy in many areas to the state. Any law which would meet the requirements set forth by the court may alter the structure of government in Colorado unnecessarily.

5. A legislative grant of immunity could act to protect abuses by public officials.

6. Recourse to suit under the federal antitrust laws provides a reasonable and necessary mechanism to compensate aggrieved parties for the damage caused by isolated instances of unreasonable conduct taken by local government officials under the auspices of police powers. While other remedies do exist, they are inadequate to provide full compensation and should be viewed as complementary to the antitrust laws rather than as superseding them.

LOCAL GOVERNMENT INVESTMENT AUTHORITY

The committee was directed to undertake a study involving the preparation of a proposal revising and updating the Colorado statutes governing local government investments. In order to ascertain the pertinent issues, the committee requested that the various local government entities appear before the committee and discuss their concerns with the present statutory language and demonstrate why changes are needed. The counties, municipalities, and special districts, as well as the state treasurer and the banking industry, were represented and testified at the meetings. (See Appendix A for a list of persons who testified.)

The basic statutory provisions delineating the legal investments for governmental units are found in section 24-75-601, C.R.S. 1973. According to this section, governmental entities may invest eligible funds in any of the following securities:

- bonds or other interest-bearing obligations of the United States or guaranteed by the United States;
- bonds which are a direct obligation of the state of Colorado or the specified political subdivisions thereof;
- state of Colorado, state highway fund revenue anticipation warrants;
- loans, insured by the United States, made by eligible commercial lending institutions to students attending institutions of higher education in the state of Colorado; and
- notes, obligations or debentures issued pursuant to the provisions of the "National Housing Act".

It was generally agreed that there are several major criteria for public treasurers to consider when choosing an investment instrument for public funds: safety, earning potential, economic stimulation, liquidity, and legality. The safety of the investment, or the protection of public moneys, was stressed as being of primary importance. The major issues presented and recommendations offered during the meetings are highlighted below.

Issues Raised

Although local government fiscal officers discussed several issues, their major concern was a clarification of their ability to use repurchase agreements.

Bank repurchase agreements. It was the contention of the representatives of local governments that bank repurchase agreements

are a valid investment instrument for local government entities; however, the legality of this mechanism is questionable. The concerns regarding the legality of repurchase agreements for local governments stemmed from two memoranda issued from the Colorado Attorney General's Office. The first opinion, dated October 23, 1981, concluded that when the actual investment is not in the treasury note itself but in the promise of the bank to repurchase the entity's interest in that note, the repurchase agreement is not authorized by applicable investment statutes. A subsequent opinion (May 17, 1982) stated that a bank repurchase agreement is a legal investment if title to an authorized federal obligation is transferred to the investing government entity.

Basically, the term "repurchase agreement" refers to a transaction whereby a specified security is sold temporarily to a purchaser for a specific period of time at a specified rate of interest. On the due date, the original seller automatically repurchases the underlying collateral security.

Apparently, local government treasurers use this mechanism to invest tax receipts on a short-term basis prior to their distribution. Other investment instruments are not always available for such a short term with the corresponding high interest rate. For example, bank certificates of deposit have a minimum maturity period of 14 days. Local banks and financial institutions are often unable to absorb the large sums of tax money because they cannot collateralize as required by state law.

Creation of an investment council. Local government representatives recommended that an investment council composed of persons knowledgeable in investments be created by statute to serve as an advisory body for units of local government. Political subdivisions would benefit financially if fiscal officers were better educated in cash management skills and techniques. In addition, an investment council could act as a reviewing authority to advise local governments on the legality of specific types of investments, especially with the many new investment mechanisms currently available.

The committee questioned the necessity of creating another statutory agency to fulfill a function that communities could obtain from local financial institutions or investment agents.

Uniform and modernized investment law. Proponents of a uniform investment law -- a law which would be applicable to all local entities -- asserted that, by statute, the presumption cannot be made that some local government entities are more capable than others. Therefore, all entities should be vested with the same investment authority, preferably the same authority as the state treasurer. It was suggested that the uniform law be broad enough to continually accommodate a changing money market. Rather than delineating specific authorized investments, this legislation should set forth criteria for the underlying security. This would enable treasurers to compete in

the money market and use investment instruments when the money is available. A uniform investment law would also consolidate the laws into one article and clarify any existing discrepancies.

Pooled funds. Pooling, or the commingling of funds, between the state and local governments would enable local entities to take advantage of the state's efficient certificate of deposit auction; receive a higher rate of return on their investments; and offer greater stability in investments. The state also utilizes the multiple fund, multiple custodian method which is beneficial to local banking institutions because it increases federal insurance on the investments thereby reducing the need for banks to buy collateral. Legislation permitting the commingling of funds only among local government entities would permit those subdivisions with insufficient funds to invest to pool their resources with other local governments. The entity would receive a higher yield than it would have received had the money been deposited in a savings account.

The major disadvantage cited with respect to pooling is that the pooling arrangement could result in a dislocation of funds, that is, in greater allocation of liquidity to areas where the economic opportunity is greater than that of other localities. Communities would be better served by keeping the funds in the area from which they were generated.

Committee Findings

The committee concluded that, insofar as safety must be of primary importance with respect to the investment of public funds, the current local government investment statutes are generally sufficient. However, the committee decided that the position of local governments with respect to repurchase agreements should be clarified. Also, units of local government should be permitted to pool their resources for investment purposes among themselves or with the state.

The committee specifically rejected the suggestion that the investment statutes be written in so general a nature as to simply set forth the criteria for the underlying security. More liberalized investment statutes will increase the risks associated with experimentation in investments. It was generally agreed that the current economic conditions will stabilize and more normal patterns of growth emerge. The committee determined that to recommend legislation specifically designed to enable local governments to compete in today's uncertain money market would be inappropriate. Finally, the committee did not recommend legislation regarding the formation of an investment council because technical advice is presently readily available and the state should not be involved in local government investment activities.

BILL 4

A BILL FOR AN ACT

1 CONCERNING LOCAL GOVERNMENT AUTHORITY TO INVEST BY REPURCHASE
2 AGREEMENTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Authorizes counties, cities, towns, and special districts to invest through United States government obligation repurchase agreements with banks or savings and loan associations and to purchase obligations under an agreement to resell to the original seller.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Part 7 of article 10 of title 30, Colorado
5 Revised Statutes 1973, 1977 Repl. Vol., as amended, is amended
6 BY THE ADDITION OF A NEW SECTION to read:

7 30-10-708.5. Repurchase agreements. (1) The board of
8 county commissioners by written resolution adopted by a
9 majority vote of the board entered in its minutes may
10 authorize the county treasurer to invest any moneys in the
11 county treasury, which are not immediately required to be

1 disbursed, by repurchase agreements as authorized in this
2 section. In making such investments he shall use prudence and
3 care to preserve the principal and to secure the maximum rate
4 of interest consistent with safety and liquidity. The county
5 treasurer may make such arrangements for the custody,
6 safekeeping, and registration of the securities underlying
7 such short-term investment instruments as will enable him to
8 make prompt delivery thereof upon maturity or in the event of
9 sale.

10 (2) The county treasurer may in his discretion invest
11 such moneys in United States government or federal agency
12 obligation repurchase agreements with any bank or savings and
13 loan association approved and designated by the board for the
14 purposes of section 30-10-708.

15 (3) The county treasurer may engage in financial
16 transactions involving such moneys whereby any obligation
17 authorized by section 30-10-708 or section 24-75-601, C.R.S.
18 1973, is purchased with such moneys under an agreement
19 providing for the resale of such obligation to the original
20 seller at a stated price together with a payment to the county
21 treasury of interest for the period the county treasury holds
22 the obligation, but the market value of such obligation shall
23 at all times be at least equal to the total purchase price.

24 SECTION 2. Part 3 of article 20 of title 31, Colorado
25 Revised Statutes 1973, 1977 Repl. Vol., as amended, is amended
26 BY THE ADDITION OF A NEW SECTION to read:

1 31-20-303.5. Repurchase agreements. (1) The governing
2 body of a city or town by written resolution adopted by a
3 majority vote of that body entered in its minutes may
4 authorize the treasurer to invest any moneys in the treasury,
5 which are not immediately required to be disbursed, by
6 repurchase agreements as authorized in this section. In
7 making such investments he shall use prudence and care to
8 preserve the principal and to secure the maximum rate of
9 interest consistent with safety and liquidity. The treasurer
10 may make such arrangements for the custody, safekeeping, and
11 registration of the securities underlying such short-term
12 investment instruments as will enable him to make prompt
13 delivery thereof upon maturity or in the event of sale.

14 (2) The treasurer may in his discretion invest such
15 moneys in United States government or federal agency
16 obligation repurchase agreements with any bank or savings and
17 loan association approved and designated by the governing body
18 for the purposes of section 31-20-303.

19 (3) The treasurer may engage in financial transactions
20 involving such moneys whereby any obligation authorized by
21 section 31-20-303 or section 24-75-601, C.R.S. 1973, is
22 purchased with such moneys under an agreement providing for
23 the resale of such obligation to the original seller at a
24 stated price together with a payment to the city or town
25 treasury of interest for the period the treasury holds the
26 obligation, but the market value of such obligation shall at

1 all times be at least equal to the total purchase price.

2 SECTION 3. 32-1-1101, Colorado Revised Statutes 1973, as
3 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
4 read:

5 32-1-1101. Common financial powers. (6) (a) The board
6 by written resolution adopted by a majority vote of the board
7 entered in its minutes may authorize an appointed custodian of
8 the special district's moneys to invest any of these moneys,
9 which are not immediately required to be disbursed, by
10 repurchase agreements as authorized by this subsection (6).
11 In making such investments he shall use prudence and care to
12 preserve the principal and to secure the maximum rate of
13 interest consistent with safety and liquidity. The custodian
14 may make such arrangements for the custody, safekeeping, and
15 registration of the securities underlying such short-term
16 investment instruments as will enable him to make prompt
17 delivery thereof upon maturity or in the event of sale.

18 (b) The custodian may in his discretion invest such
19 moneys in United States government or federal agency
20 obligation repurchase agreements with a bank or savings and
21 loan association approved and designated by the board by
22 written resolution adopted by majority vote of the board
23 entered in its minutes.

24 (c) The custodian may engage in financial transactions
25 involving such moneys whereby any obligation authorized by
26 section 24-75-601, C.R.S. 1973, is purchased with such moneys

1 under an agreement providing for the resale of such obligation
2 to the original seller at a stated price together with a
3 payment to the special district treasury of interest for the
4 period the treasury holds the obligation, but the market value
5 of such obligation shall at all times be at least equal to the
6 total purchase price.

7 SECTION 4. Safety clause. The general assembly hereby
8 finds, determines, and declares that this act is necessary
9 for the immediate preservation of the public peace, health,
10 and safety.

BILL 5

A BILL FOR AN ACT

1 CONCERNING LOCAL GOVERNMENT AUTHORITY TO POOL FUNDS WITH OTHER
2 LOCAL GOVERNMENTS AND THE STATE FOR INVESTMENT PURPOSES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Authorizes counties, city and counties, cities, towns, and special districts to pool surplus funds amongst themselves and with the state for investment. Requires each local government desirous of pooling to cooperate in drafting a uniform resolution to establish a trust fund. Sets forth requirements to be addressed in the provisions of the resolution. Requires a separate resolution authorizing participation in the trust fund.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Article 75 of title 24, Colorado Revised
5 Statutes 1973, 1982 Repl. Vol., is amended BY THE ADDITION OF
6 A NEW PART to read:

7 PART 7

8 INVESTMENT FUNDS - INTERGOVERNMENTAL POOLING

9 24-75-701. Investment funds - intergovernmental pooling.

10 It is lawful for any county, city and county, city, town, or

1 special district to pool any moneys in its treasury, which are
2 not immediately required to be disbursed, with the same such
3 moneys in the treasury of the state or any other county,
4 municipality, or special district in order to take advantage
5 of short-term investments and maximize net interest earnings.

6 24-75-702. Local government pooling. (1) The governing
7 body of each local government entity that desires to
8 participate in pooling shall cooperate in drafting a uniform
9 resolution to be adopted by a majority vote of the governing
10 body of each participating entity. The resolution shall
11 provide for, but need not be limited to, the following:

12 (a) Establishment of a local government surplus funds
13 trust fund;

14 (b) Supervision of the trust fund by a board composed of
15 the treasurers or other local officials empowered to invest
16 local funds of each of the participating entities;

17 (c) Administration of the trust fund by an investment
18 officer and the manner of his appointment as trustee;

19 (d) An appropriation from each participating entity to
20 finance the establishment of the trust fund and the repayment
21 of the appropriations from the earnings of the trust fund;

22 (e) Payment of the expenses of administration from the
23 income received from the earnings of the trust fund;

24 (f) Limitations, if any, on the aggregate amount of
25 moneys which any participating local entity may have on
26 deposit in the trust fund at one time;

1 (g) Limitations, if any, on the period of time that the
2 funds of any participating entity may be held in trust;

3 (h) Maximum maturity dates of instruments purchased with
4 trust fund moneys;

5 (i) Penalties upon participating entities for early
6 withdrawal of funds and procedures for resolving other
7 contingencies which may jeopardize the earning potential of
8 the trust fund, but the principal of each and every account
9 constituting the trust fund shall be subject to payment at any
10 time from moneys in the trust fund;

11 (j) Distribution of the income from earnings of the
12 trust fund to participating entities on a pro rata basis;

13 (k) Maintenance of separate accounts for each
14 participating entity. Individual transactions and totals of
15 all investments, or the share belonging to each participant,
16 shall be recorded in the accounts.

17 (l) Periodic audits of trust fund management;

18 (m) Periodic reports to each participating entity
19 showing changes in investments and earnings thereon;

20 (n) Semiannual financial reporting of the details of the
21 operations of the trust fund;

22 (o) Purchase of surety and other bonds necessary to
23 protect the fund.

24 (2) By separate resolution similarly adopted, the
25 governing body of each participating local government entity
26 shall authorize investment of any moneys in its treasury,

1 which are not immediately required to be disbursed, in a
2 local government surplus funds trust fund established pursuant
3 to this section. The resolution shall name the local
4 government official, who may be the treasurer or other
5 official empowered to invest local funds, responsible for
6 deposit and withdrawal of such funds and shall state the
7 approximate cash flow requirements of the local government for
8 the surplus funds invested. In making such deposits and
9 withdrawals, such official shall use prudence and care to
10 preserve the principal and to secure the maximum rate of
11 interest consistent with safety and liquidity. The resolution
12 shall be filed with the investment officer of the trust fund.

13 (3) The investments made with trust fund moneys shall be
14 limited to those instruments which all participating local
15 government entities may individually invest in by law. The
16 trust fund shall not be used to circumvent limitations on the
17 investment authority of participating local government
18 entities.

19 (4) The trustee of any trust fund moneys authorized by
20 this section shall invest in compliance with the requirements
21 of this section and with that degree of judgment and care,
22 under circumstances then prevailing, which persons of
23 prudence, discretion, and intelligence exercise in the
24 management of their own affairs, not for speculation, but for
25 investment, considering the probable safety of their capital
26 and need for liquidity as well as the probable income to be

1 derived.

2 SECTION 2. 30-10-708, Colorado Revised Statutes 1973,
3 1977 Repl. Vol., as amended, is amended BY THE ADDITION OF A
4 NEW SUBSECTION to read:

5 30-10-708. Deposit of funds in banks and savings and
6 loan associations. (4) Subject to the requirements of part 7
7 of article 75 of title 24, C.R.S. 1973, funds of the county
8 may be pooled for investment with the funds of other
9 government entities.

10 SECTION 3. 31-20-303, Colorado Revised Statutes 1973,
11 1977 Repl. Vol., as amended, is amended BY THE ADDITION OF A
12 NEW SUBSECTION to read:

13 31-20-303. Deposits - investments - interest - no
14 liability. (4) Subject to the requirements of part 7 of
15 article 75 of title 24, C.R.S. 1973, funds of the city or
16 town may be pooled for investment with the funds of other
17 government entities.

18 SECTION 4. 32-1-1101 (5), Colorado Revised Statutes
19 1973, as amended, is amended to read:

20 32-1-1101. Common financial powers. (5) Whenever any
21 special district organized pursuant to this article has moneys
22 on hand which are not then needed in the conduct of its
23 affairs, the special district may deposit such moneys in any
24 state bank, national bank, or state or federal savings and
25 loan association in Colorado in accordance with state law.
26 For the purpose of making such deposits, the board may

1 appoint, by written resolution, one or more persons to act as
2 custodians of the special district's moneys, and such persons
3 shall give surety bonds in such amount and form and for such
4 purposes as the board may require. SUBJECT TO THE
5 REQUIREMENTS OF PART 7 OF ARTICLE 75 OF TITLE 24, C.R.S. 1973,
6 THE SPECIAL DISTRICT'S MONEYS MAY BE POOLED FOR INVESTMENT
7 WITH THE MONEYS OF OTHER GOVERNMENT ENTITIES.

8 SECTION 5. Safety clause. The general assembly hereby
9 finds, determines, and declares that this act is necessary
10 for the immediate preservation of the public peace, health,
11 and safety.

APPENDIX A

Contained herein is a list of persons who presented testimony to the Committee on Local Government. The list is divided into two parts -- those who testified with respect to local government antitrust immunity and those who addressed the local government investment authority issue.

Local Government Antitrust Immunity

Dick Brown, City and County of Denver
Perry Burnett, Colorado Counties, Inc.
William Danks
Joseph de Raismes, Boulder City Attorney
John Draper, Telecommunications, Inc.
Susan Griffiths, Colorado Municipal League
Michael Kinsley, Pitkin County Board of County Commissioners
Charles Maher, Jr., Citizens for Open Cable
Charles E. Norton, Colorado Association for Housing and Building
Gale Norton, Mountain States Legal Foundation
Duane Searles, Colorado Association for Housing and Building
Carl Williams, Televents, Inc.
Robert Youle, Colorado Community Television Association

Local Government Investment Authority

Paul Cockrel, Special District Association
Don Couch, Colorado County Treasurers Association
Marcy Dill, Deputy State Treasurer
Dodie Gale, Special District Association
Susan Griffiths, Colorado Municipal League
Eric Johanneson, City of Englewood (Revenue Chief)
Frank Kugeler, Colorado National Bank
Linda Rhea, Colorado County Treasurers Association
Roy Romer, Colorado State Treasurer
Elaine Weaver, Colorado Counties, Inc.