STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 89-7

TO: Honorable Myron Jones
State Representative, District 29
Malad Summit
Malad, ID 83252

Honorable Ron Vieselmeyer
State Representative, District 2
4050 Sky Harbor Drive
Coeur d'Alene, ID 83814

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Is it lawful to use tax dollars for the lobbying efforts of a private association?

2. Are the Idaho Association of Counties and the Association of Idaho Cities private or public?

3. If the associations are "public" are their financial and deliberative records open to the public?

4. Is it lawful for elected officials to discuss and determine public policy at private (association) meetings?

CONCLUSIONS:

1. Payment of dues to municipal leagues or associations by cities and counties is an expenditure for a public purpose permitted by the Idaho Constitution and statutes. The use of those dues for lobbying efforts is permissible if the lobbying is for an appropriate public purpose.

2. As nonprofit corporations, the Association of Idaho Cities and Idaho Association of Counties are private entities. However, the validity of these entities has been recognized by the

legislature by their inclusion in the Idaho public employee retirement system.

3. Association records are not public records. However, records from the association maintained by city and county officials are public records.

4. Elected officials may discuss potential public policy issues and determine association policy at association meetings. But local public policy must be determined and adopted only after compliance with Idaho law.

ANALYSIS:

I. PARTICIPATION IN A MUNICIPAL LEAGUE

You have asked several questions concerning a city's or county's participation in a municipal league such as the Association of Idaho Cities (AIC) or Idaho Association of Counties (IAC). In order to address your questions, it is necessary to raise and discuss the more basic question of the ability of cities and counties to become members of municipal leagues or associations and to pay membership fees or dues from public funds. The analysis of this question requires a review of Idaho's constitution, statutes and case law as well as of the purposes of these associations. However, there are no Idaho cases directly on this point and it will be necessary to review case law from other jurisdictions that have addressed this issue.

Two issues must be considered for a determination that expenditure of funds for membership dues is lawful. First, the purpose for the expenditure must be a public purpose. City of Glendale v. White, 194 P.2d 435, 437 (Arizona 1948). Second, the action must be taken pursuant to powers expressly granted by the state or necessarily implied from express grants of power. Id. See, Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980); State v. Frederic, 28 Idaho 709, 715, 155 P. 977, 979 (1916).

A. Public Purpose

The expenditure of public money by a city or county is addressed by Idaho Constitution art. 12, § 4, which provides:

> No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company,

> corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association . . . .

Under this provision it has been held that city and county expenditures are appropriate for purposes which are "public", as opposed to "private". School District No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917). The power of municipal corporations is limited to those "functions and purposes which are municipal and public in character as distinguished from those which are private in character and engaged in for private profit." Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 346, 353 P.2d 767 (1960). A "public purpose" is defined as "an activity that serves to benefit the community as a whole and which is directly related to the functions of government." Idaho Water Resource Board v. Kramer, 97 Idaho 535, 559, 548 P.2d 35 (1976).

The Idaho courts on many occasions have applied the general notion of a "public purpose" to specific fact situations to determine whether the governmental appropriation or expenditure in question was for a public purpose. Thus, expenditures have been held to be for a public purpose when made for highways and public safety, Ada County v. Wright, 60 Idaho 394, 92 P.2d 134 (1939), and Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966); general education and college dormitories, Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955); and water and hydroelectric development, Idaho Water Resource Board v. Kramer, supra. To the contrary, expenditures for payment of dues to a fire insurance association for the benefit of private citizens, School District No. 8 v. Twin Falls County Mutual Fire Ins. Co., supra, and issuance of municipal bonds for acquisition of industrial and commercial concerns for lease and use by a private company, Village of Moyie Springs v. Aurora Mfg. Co., supra, are not for a public purpose, and are thus in violation of the Idaho Constitution. The court also has given some general guidance as to what constitutes a public purpose by commenting favorably on expenditures for sewer and water facilities, urban renewal, crime prevention and other acts for the protection of the public health, safety and welfare. Id.

Thus, the question is whether an expenditure by a city or county for membership in an organization such as AIC or IAC is for a public purpose. To answer this question it is necessary to review the purposes of these organizations.

The AIC and IAC are incorporated under the laws of the state of Idaho as nonprofit corporations. The purposes of these organizations, as set forth in their articles of incorporation on file with the secretary of state, include providing programs, information and a forum for exchange of ideas to assist city and county officials in the performance of their duties, making recommendations to the governor and legislature on issues affecting city and county government, and providing litigation assistance. Thus, the purposes of these private entities clearly are designed to assist city and county governments to carry out their duties.

Furthermore, the state legislature has chosen to recognize these organizations as "governmental entities" by defining them as an employer for public employment retirement purposes. In Idaho Code § 59-1302(15), "employer" is defined as:

> the state of Idaho, or any political subdivision or governmental entity, provided such subdivision or entity has elected to come into the system. Governmental entity means any organization composed of units of government of Idaho or organizations funded only by governmental or employee contributions or organizations who discharge governmental responsibilities or proprietary responsibilities that would otherwise be performed by government. All governmental entities are deemed to be political subdivisions for the purpose of this act. [Emphasis added.]

This provision was added specifically so that employees of the AIC, IAC and similar organizations could participate in the state retirement system. Currently, employees of the AIC and IAC take advantage of this program.

In Hays v. Kalamazoo, et al., 316 Mich. 443, 25 N.W.2d 787, 169 ALR 1218 (1947), the Michigan Supreme Court specifically cited the purposes of the municipal leagues as appropriate and consistent with the public purpose doctrine. The Michigan Municipal League had as its purposes:

> The improvement of municipal government and administration through co-operative effort; and this purpose shall be advanced by the maintenance of a central bureau of information and research; by the holding of annual conventions, schools and short courses; by the publication of an official magazine;

> by the encouraging of legislation beneficial to the municipalities of Michigan and the citizens thereof; by the rendering of such special and general services as may be deemed advisable; and by the fostering of municipal education and a greater civic consciousness among the citizens of the municipalities of Michigan.

25 N.W.2d at 789. The Michigan Supreme Court found that the city:

> had the right to join the Michigan Municipal League, to avail itself of the services rendered thereby, and to expend money out of public funds in payment therefor. The record fully justifies the conclusion that the welfare of the city was thereby served and, hence, that the purpose was a city public purpose.

Id. at 792. The court found that the cost of the services received was reasonable if not nominal and that to prevent the city from receiving the services:

> would, obviously, result in preventing it from availing itself of services well adapted to promote the efficiency of the functioning of the municipal government.

Id. at 793.

In City of Glendale, et al. v. White, supra, the Arizona Supreme Court addressed the issue of whether a city could pay dues to a municipal league which provided services to member cities similar to those provided by the AIC and IAC. In construing the Arizona constitutional provision substantially similar to art. 12, § 4, of the Idaho Constitution, the court found that the payment of dues from government funds constituted an expenditure for a public purpose:

> We do not believe that a municipal corporation ought to be required to exist in an intellectual vacuum bereft of the power to expend some of its funds in a reasonable effort to learn the manner in which complex municipal problems, arising from the operations involving both its governmental and proprietary capacities, are being solved in sister cities of the state, thereby improving the quality of service it renders its own taxpayers. Nor can we subscribe to the naive view . . . that every public official and employee assumes his office completely equipped with

> adequate knowledge of the manner in which his duties may best be performed. This is an unwarranted assumption based upon a false premise and is contrary to a realistic view of public administration.

194 P.2d at 441. Thus, while the cities did not have specific constitutional or statutory authority to become members of municipal leagues, the implied powers granted to cities and the nature of the services provided to the cities by the leagues, provided the basis for finding that the expenditure of funds was for a public purpose and permissible under Arizona law.

Early cases which held that expenditure of public funds for membership dues in municipal leagues or similar organizations were unauthorized have been overruled. Thomas v. Semple, 112 Ohio 559, 148 N.E. 342 (1925), overruled, State v. Hagerman, 155 Ohio 320, 98 N.E.2d 835, 839 (1951); Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944); overruled, City of Glendale v. White, 194 P.2d at 441. As the Glendale court stated four decades ago:

> We have reached the conclusion that the majority opinion in the Michael case forbidding municipalities in all events from availing themselves of the services of the Arizona Municipal League is wrong as it represents an ultra conservative view of the actualities confronting municipalities in these modern times.

Id.

It is our opinion that a similar result would be reached by the Idaho Supreme Court. The purposes of the AIC and IAC clearly are to assist cities and counties in carrying out their functions. As such, the expenditure of funds in this manner should be construed as for a public purpose.

A more specific question you pose is whether it is appropriate for the AIC and IAC to use membership fees paid by cities and counties to make recommendations to or to lobby the legislature or other governmental officials or agencies. In Hays v. Kalamazoo, supra, the Michigan Supreme Court specifically held that lobbying by cities and municipal leagues was permissible and was an appropriate expenditure for a public purpose. The court reasoned that it was proper for a city or municipal league to:

> place before members of the legislature, including appropriate committees, views and information designed to aid deliberate and considered action, to the end that the interests of constituent municipalities may be properly protected, and the performance of the municipal functions contemplated by pertinent constitutional and statutory provisions may be aided, by appropriate and expedient legislation.

25 N.W.2d at 796. The AIC and IAC provide the same assistance to cities and counties in providing information to the legislature concerning problems affecting their respective jurisdictions and citizens. As long as the lobbying meets this criteria, we view the conduct as consistent with the "public purpose" doctrine. See generally, McQuillin on Municipal Corporations, § 39.23.

B. Express or Implied Powers

In addition to the requirement that city and county expenditures be for a public purpose, any action taken by a city or a county must be pursuant to the powers expressly granted by the state or necessarily implied from the express grants of power. See Caesar v. State, 101 Idaho at 160, 610 P.2d at 519; State v. Frederic, 28 Idaho at 715, 155 P. at 979. The powers granted to Idaho cities are enumerated in Idaho Code §§ 50-101 et seq. In addition to the specific powers granted to cities by the legislature, "Cities governed by this act . . . [may] contract . . . and [may] exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho." Idaho Code § 50-301. The powers granted to Idaho counties are enumerated in Idaho Code §§ 31-101 et seq. A county has the power, "[t]o make such contracts . . . as may be necessary to the exercise of its powers," Idaho Code § 31-604(3), and "[t]o do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government." Idaho Code § 31-828. Therefore, cities and counties have the power to expend funds for membership in the AIC and IAC. The Georgia Supreme Court considered the question whether use of tax funds to support lobbying by the Georgia Municipal Association and Association of County Commissioners was authorized and concluded:

> Among the functions of officers of municipal corporations or counties is to represent the views of

> the constituents to law-making bodies in regard to pending issues affecting the political subdivision. Since it is the responsibility of the government entities to represent the views of their constituents in this manner, it is proper to carry out this function in concert with officials of other governmental bodies. If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box.

Peacock v. Georgia Municipal Association, 247 Ga. 740, 279 S.E.2d 434, 438 (1981). As long as the activities of the AIC and IAC are limited to those matters which cities and counties are authorized to participate in by Idaho law, Idaho cities and counties have the power to expend funds for membership in these organizations and support their lobbying activities.

II. PRIVATE CORPORATIONS

Although the AIC and IAC are considered "governmental entities" for public employment retirement purposes, they clearly are private corporations because they are not subject to governmental control:

> The most important distinction between public and private corporations is with respect to governmental control. Public corporations, being mere instrumentalities of the state, are subject to governmental visitation and control, whereas the charter of a private corporation is a contract between the state and the corporation or incorporators, which, under the clause of the constitution of the United States prohibiting state laws impairing the obligation of contracts, renders such corporations not subject to visitation, control, or change by the state, except in the exercise of the police power.

18 C.J.S. Corporations, § 18 (1939); see also, 18 Am.Jur.2d. Contracts § 30 (1985). The test of a public corporation is whether the government has the sole right to regulate, control and direct the corporation. Trustees of Columbia Academy v. Board of Trustees, 262 S.C. 117, 202 S.E.2d 860, 864 (1974). Both the AIC and IAC are nonprofit corporations established pursuant to the Idaho Nonprofit Corporation Act, Idaho Code §§ 30-301 et seq. Pursuant to § 30-314 their affairs are managed by a board of directors. Their respective boards are composed of private individuals, who happen to be elected officials, but these

organizations are not controlled by any government. Therefore, the AIC and IAC are private corporations.

III. RECORDS

As private associations the financial and deliberative records of the AIC and IAC are not open to inspection by the public as public records; however, if the records are kept in the office of a city or county officer, they become open to inspection. Idaho Code § 59-1009 provides:

> The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state.

"A public record is a ready and convenient means of information on all matters required to be of record." Moore v. Pooley, 17 Idaho 57, 62, 104 P. 898, 900 (1909). The term "public records" includes a list of names obtained by an agency in the normal course of carrying out its duties, Dalton v. Idaho Dairy Products Comm'n, 107 Idaho 6, 10, 684 P.2d 983, 987 (1984); the records of a court of record, Evans v. District Court, 50 Idaho 60, 64, 293 P. 323, 325 (1930); and the results of a coroner's inquest which is a public hearing, Stattner v. City of Caldwell, 111 Idaho 714, 716, 727 P.2d 1142, 1144 (1986). Financial and deliberative records of the AIC and IAC are not records that public officers are required to keep or obtain in the course of their official duties; thus, they are not "public records." Records do not have to be "public records" to be open to inspection by the public. Pursuant to § 59-1009 citizens are authorized to inspect "other matters in the office of any officer." Therefore, if an officer keeps the financial and deliberative records within his public office, they are open to inspection by citizens.

IV. POLICY DISCUSSIONS

Finally, you ask whether it is lawful for elected officials to discuss and determine public policy at association meetings. To the extent that information is presented to officials at association meetings for consideration as potential public policy issues or for future inclusion in current public policy, nothing in the law prevents officials from discussing the information at association meetings. To prohibit discussion of the information obviously would obstruct and limit a primary purpose of the associations, i.e., exchanging ideas between members.

However, this does not mean that city and county officials may discuss and deliberate towards a decision that would be effective in their respective jurisdictions. In order for each city or county to adopt public policy, compliance with Idaho law is mandatory. Thus, the elected officials must meet in their respective jurisdictions to deliberate on the policy issues, comply with the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347, and all other applicable laws in titles 31 or 50, Idaho Code, in order to give local effect to the policy.

CONCLUSION:

Based upon the foregoing analysis, it is appropriate for Idaho cities and counties to expend public funds for memberships in private organizations such as the AIC and IAC and to lobby or make recommendations to the legislature for a public purpose either as individual cities or counties or as an association; to discuss public policy and adopt association positions at association meetings; to make available to the public the records of association business maintained by them; and to adopt policy recommended at association meetings in accordance with Idaho law.

AUTHORITIES CONSIDERED:

1. Constitutions:

   Idaho Constitution art. 12, § 4.

2. Statutes:

   Idaho Code §§ 30-301, et seq.
   Idaho Code §§ 31-101, et seq.
   Idaho Code § 31-604.
   Idaho Code § 31-828.
   Idaho Code §§ 50-101, et seq.
   Idaho Code § 50-301.
   Idaho Code § 59-1302.
   Idaho Code § 59-1009.
   Idaho Code §§ 67-2340 through 67-2347.

3. Idaho Cases:

   Caesar v. State, 101 Idaho 158, 610 P.2d 517.

   State v. Frederic, 28 Idaho 709, 155 P. 977 (1916).

School District No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917).

Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Ada County v. Wright, 60 Idaho 394, 92 P.2d 134 (1939).

Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966).

Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955).

Moore v. Pooley, 17 Idaho 57, 104 P. 898 (1909).

Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 684 P.2d 983 (1984).

Evans v. District Court, 50 Idaho 60, 293 P. 323 (1930).

Stattner v. City of Caldwell, 111 Idaho 714, 727 P.2d 1142 (1986).

4. Cases From Other States:

Hays v. Kalamazoo, et al., 316 Michigan 443, 25 N.W.2d 787 169 ALR 1218 (1947).

City of Glendale, et al. v. White, 194 P.2d 435 (Ariz. 1948).

Thomas v. Semple, 112 Ohio 559, 148 N.E. 342 (1925).

State v. Hagerman, 155 Ohio 320, 98 N.E.2d 835 (1951).

Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944).

Peacock v. Georgia Municipal Association, 247 Ga. 740, 279 S.E.2d 434 (1981).

Trustees of Columbia Academy v. Board of Trustees, 262 S.C. 117, 202 S.Ed.2d 860 (1974).

5. Other Authorities:

McQuillin on Municipal Corporations, § 39.23.

18 C.J.S. Corporations, § 18 (1939).

18 Am.Jur.2d. Contracts, § 30 (1985).

DATED this 19th day of July, 1989.

JIM JONES
Attorney General
State of Idaho

JIM JONES

Analysis by:

Daniel G. Chadwick
Deputy Attorney General
Chief, Intergovernmental Affairs Division

Barbara Jo Reisner
Legal Intern

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library
Association of Idaho Cities
Idaho Association of Counties