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OPINION	:	No. 79-706
of	:	October 5, 1979
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SUBJECT: FEDERAL DISASTER RELIEF FUNDS—State and local governmental entities may provide federal assistance to private individuals and organizations pursuant to specific sections of the Federal Disaster Relief Act of 1974. Legal proceedings would be appropriate to recoup misused funds.

The Honorable Alex R. Cunningham, Director, Office of Emergency Services, has requested an opinion on the following questions:

1. In view of (1) the recent enactment of section 16360 *et seq.* of the Government Code establishing the Federal Trust Fund in the state treasury and (2) the proscriptions of Article XVI, sections 3, 5 and 6 of the California Constitution, may the state and local governmental entitles provide federal assistance to private individuals or private institutions pursuant to sections 305, 402 and 403 of the Federal Disaster Relief Act of 1974?

2. If the state can legally administer sections 305, 402 and 403 of the Federal Disaster Relief Act, would recovery of misused funds be through withholding a subvention or through legal proceedings?

CONCLUSIONS

1. The state and local governmental entitles may provide federal assistance to private individuals and organizations pursuant to sections 305, 402 and 403 of the Federal Disaster Relief Act of 1974 despite (a) the recent enactment of section 16360 *et seq.* of the Government Code establishing the Federal Trust Fund in the state treasury and (b) the proscriptions of Article XVI, sections 3, 5 and 6 of the California Constitution.

2. Legal proceedings would be appropriate in all instances to recoup misused grant funds. Additionally, section 12419.5 of the Government Code would be available at the discretion of the Controller to offset misused grant funds against future grants.

ANALYSIS

The California Emergency Services Act (Government Code, section 8550 *et seq.*) establishes the State Office of Emergency Services (Government Code, section 8585 *et seq.*).[1] That office administers the Federal Disaster Relief Act of 1974, Public Law 93–288 (hereinafter, the Act; see §§ 8586, 8645–8654). With respect to this Act, this office has issued several opinions. In an unpublished opinion of the California Attorney General, dated December 6, 1974 (I.L. 74–207), it was concluded that grants could be made to private individuals or families to meet disaster related expenses where 75% of the grant would be from federal funding, with the remaining 25% of the funding being provided by the state. We concluded that the 25% state funding would not constitute a gift of public funds under the proscription of then Article XIII, section 25, now Article XVI, section 6,[2] of the California Constitution since a legitimate "public purpose" would be served. Shortly thereafter, in 58 Ops. Cal. Atty. Gen. 691 (1975) we concluded that the state could expend its own funds for site preparation and utility installation for disaster related temporary housing in order to qualify for federal assistance under section 404 of the Act which would provide such temporary housing. Again we concluded that as to the money the state would provide from solely state sources, there would be no violation of the constitutional "gift clause" since a proper public purpose would be served.

It is thus seen that in the administration of the Federal Disaster Relief Act there may be funds used which are derived from the federal government, and there may be funds used which have as their source purely state revenues. In our unpublished opinion I.L. 74–207, *supra*, we stated *as to the 75% federal funding:*

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[1] All section references will be to the Government Code unless otherwise indicated.

[2] "The Legislature shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever . . . ."

> " . . . we do not believe that a serious argument could be made that Article XIII, section 25 would prohibit California from paying these funds to individual flood victims. California essentially acts as only a conduit for these funds. Since the 'gift' clause is essentially a corollary of the concept that tax monies should be levied and collected only for 'public purposes' and not for the benefit of private parties, it would follow that federal tax dollars should not fall within the prohibition. Thus we need only direct our attention to the state's 25 percent share of each possible grant."

This reasoning was consistent with a similar earlier holding of this office. In 7 Ops. Cal. Atty. Gen. 58, 60 (1946) we concluded that "the state may receive from the Federal Government sums made available to nonprofit organizations for hospital construction in California; [and] that these sums may be reallocated by the designated state agency to the nonprofit organizations only as directed and prescribed by the provisions of the [federal] bill." We additionally concluded, however that "the allocation of *state funds* to a nonprofit organization for hospital construction would in effect be a gift of public funds" under the provisions of then Article IV, section 22, now Article XVI, section 3 of the California Constitution. (Emphasis added.)[3] Thus, in 7 Ops. Cal. Atty. Gen. 58 (1946), *supra*, we in effect concluded that the subsidies which had their genesis in federal funding did not fall within the proscription of what is now Article XVI, section 3 of the California Constitution.

It would also follow from the above discussed opinions of this office that similar federal funding would not fall within the proscription of present Article XVI, section 5 of the California Constitution, which prohibits the appropriation or payment of public funds for sectarian purposes, or for the support of sectarian institutions.[4]

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[3] "No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State, except that notwithstanding anything contained in this or any other section of the Constitution:

Exceptions then follow, including one subsequently added with respect to matching federal funds for private hospital construction . . . ."

[4] "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose wherever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI."

Accordingly, we conclude that Article XVI, sections 3, 5 and 6 of the California Constitution are not applicable to federal funds as to which the state acts as a mere conduit in administering federal law. (7 Ops. Cal. Atty. Gen. 58 (1946), *supra*; I.L. 74–207, *supra*.)

With this background, we reach the specific questions presented for resolution herein.

1. Federal Assistance Pursuant To Sections 305, 402 And 403 Of The Act

As material herein, section 305 of the Act provides that "[on any emergency, the President may provide assistance to save lives and protect property and public health and safety . . . [and] in any emergency, the President is authorized to provide such other assistance [that is, other than providing technical assistance and advisory personnel to state and local governments] under this Act as the President deems appropriate."

As material herein, section 402 (b) of the Act provides for aid to private institutions, and states:

> "The President is also authorized to make grants to help repair, restore, reconstruct, or replace private nonprofit educational, utility, emergency, medical, and custodial care facilities, including those for the aged or disabled, and facilities on Indian reservations as defined by the President, which were damaged or destroyed by a major disaster."

Section 402(e) of the Act provides for federal funding not to exceed 100 percent of restoration costs.

As material herein, section 403(a)(2) of the Act provides:

> "(a) The President, whenever he determines it to be in the public interest, is authorized—
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> . . . . . .
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> "(2) to make grants to any state or local government for the purpose

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It is to be noted that although a "public purpose" could possibly be found in most instances to avoid the proscriptions of Article XVI, sections 3 and 6, section 5 of that article is not a proscription as to gifts of public funds, but possibly the ultimate proscription in assuring the separation of church sod state. This provision literally applied excludes aid to sectarian institutions which would not even violate the Establishment Clause of either the state or federal Constitutions.

> of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters . . . ."

No requirement for any specific matching funds appears either in the Act, or the federal regulations adopted pursuant thereto. (See 24 C.F.R. §§ 2205.39–2205.44.)[5]

The first question presented is whether the state and local governments may provide *federal* assistance pursuant to these sections of the Act in view of (1) the provisions of Article XVI, sections 3, 5 and 6 of the California Constitution and (2) the recent enactment of section 16360 *et seq.* which establishes the Federal Trust Fund in the state treasury. The enactment of these sections was part of a comprehensive statute designed to enhance the budget process in California and provide for accurate accounting for all public funds whether derived from state sources or other sources. (See Stats. 1958, ch. 1284, § 1.)

As has been demonstrated at the outset herein, at least prior to the enactment of sections 16360 *et seq.* in 1978 (Stats. 1958, ch. 1284, § 8), Article XVI, sections 3, 5 and 6 did not prevent the state or local governments from receiving and disbursing federal funding such as is provided by the Act. Therefore, the question resolves itself into whether the enactment of the provisions for the establishment of the Federal Trust Fund have in some material effect changed the law with respect thereto. At this point we note that Article XVI, sections 3, 5, and 6 in their main operative provisions proscribe (1) the *appropriation* of public money for certain purposes (2) the withdrawal of public money *from the state treasury* for certain purposes or (3) the *gift* of public money for certain purposes.

We now examine sections 16360–16365 which establish the Federal Trust Fund. The Federal Trust Fund is "created *in the State Treasury"* [and] "consists of money which is paid into it in trust pursuant to law." (§ 16360, emphasis added.) All money received from the federal government which is administered through or by a state agency must be deposited in the fund (§§ 16360, 16362, 16363). "All money in the . . . Fund is . . . *appropriated*, without regard to fiscal year, for the purposes for which the money" was

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[5] Section 2205.44 merely provides that, with respect to major disasters, any federal-state agreement will "contain the assurance of the Governor that a reasonable amount of the funds of the State, local governments, or other agencies therein will be expended in alleviating damage caused by the disaster . . . ."

We thus do not embark herein upon an analysis of the "public purpose" doctrine which will avoid the proscriptions of Article XVI, sections 3 and 6, or whether the Article XVI, section 5's proscription is broader in scope than that of the First Amendment's proscription as to establishing religion. See generally Fox v. City of Los Angeles, (1978) 22 Cal. 3d 792, 801 *et seq.*

Also, the question presented refers solely to "federal assistance," obviating the necessity for such analysis.

made available by the federal government. (§ 16361, emphasis added.) Provision is made therein for deposits to the fund, expenditures therefrom, accounting for such funds, and transfers between the fund and the General Fund. (§§ 16360–16365 generally.) For our purposes, the salient provisions are that the fund *is in the state treasury*, is *appropriated* for the trust purposes, that is, the purposes for which received and expenditures will therefor be made *from the state treasury pursuant to appropriations*. Expenditures could, potentially include illegal *gifts*. Is this new fiscal framework for funds received pursuant to the Act different from that which existed prior to the operative date of the new law, July 1, 1959, so as to require a result different from that reached by this office in prior opinions with respect to the proscriptions of Article XVI, sections 3, 5 and 6? This is the crucial question for resolution herein.

The requester states that prior to the establishment of the Federal Trust Fund [m]onies received from the Federal Government for state and local governmental entitles under the Act were deposited in the State Treasury in a Special Deposit Account." An examination of the provisions relating to special deposit accounts, that is, those which are contained in the state's Special Deposit Fund, demonstrate a striking similarity to the provisions just discussed with respect to the Federal Trust Fund. Section 16370 states:

> "The Special Deposit Fund *in the treasury* is continued in existence. It consists of money which is paid into it in trust pursuant to law. The fund is *appropriated* to fulfill the purposes for which payments into it are made." (Emphasis added.)

Section 16371 then merely provides that agency trust funds may be deposited in the fund in trust. Section 16371 then mandates such deposits where a state agency has received funds for a specific purpose and the law does not specify a particular fund to be credited, subject to the right of withdrawal by the agency for such purposes. (See also 7 Ops. Cal. Atty. Gen. 58 (1946), *supra*, and unpublished opinion of the California Attorney General, dated August 10, 1971 (I.L. 71–148) discussing the deposit of funds received from the federal government in the Special Deposit Fund.)

In short, we perceive no material difference between the handling of federal funds received by the state pursuant to the Disaster Relief Act of 1974 before the establishment of the Federal Trust Fund and after its establishment *insofar as the proscriptions of Article XVI, sections 3, 5 and 6 are concerned.*

Accordingly, and in conclusion on the first question, it is our opinion that the state and local governmental agencies may provide federal assistance to private individuals or private institutions pursuant to sections 305, 402 and 403 of the Act despite the provisions of Article XVI, sections 3, 5 and 6 of the California Constitution, and that the enactment

of section 16360 *et seq.* establishing the Federal Trust Fund in no way affected such powers.

2. Recovery Of Misused Funds

The second question presented is whether recovery of misused funds disbursed pursuant to sections 305, 402 or 403 of the Act would be through the withholding of a future subvention, or through legal proceedings. The requester advises that the Office of Emergency Services is required to recoup misused grant funds.

Our examination of the Act and the federal regulations adopted pursuant thereto discloses nothing which would place the Office of Emergency Services in any different position than any other state agency which has a cause of action for the recovery of money. Therefore, assuming there has been a violation of a grant of disaster relief funds, legal proceedings to recover the misused funds would seem to be appropriate in any case. (§ 12418.)

Additionally, section 12419.5 provides that the Controller in his discretion may offset funds to recoup money due a state agency. It provides:

> "The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant. Whenever insufficient to offset all amounts due state agencies, the amount available shall be applied in such manner as the Controller, in his discretion, shall determine. If, in the discretion of the Controller, the person or entity refuses or neglects to file his claim within a reasonable time, the head of the state agency owing the amount shall file the claim on behalf of such person or entity; if approved by the Controller it shall have the same force and effect as though filed by such person or entity. The amount due any person or entity from the State or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided."

Assuming grant funds are legally due to a grantee who has misused prior grant funds, this section would provide authority for an offset. (See generally *Bonelli v. State of California* (1977) 71 Cal. App. 3d 459.) The debtor's right to due process, of course, would have to be considered and protected in such a summary recoupment procedure. (See, e.g., *Beaudreau v. Superior Court* (1975) 14 Cal. 3d 448; *Kruger v. Wells Fargo Bank* (1974)11 Cal. 3d 352, 360, and cases therein cited.) *****