Mr. Cecil Bolinger  
Executive Secretary  
Public Employes' Retirement Fund  
707 Board of Trade Building  
Indianapolis 4, Indiana

Dear Mr. Bolinger:

I have your recent letter which reads as follows:

"In our administration of Chapter 313 of the Acts of 1951 allowing municipalities to participate in the Federal Old-Age and Survivors' Insurance Program, we find that whether a certain governmental activity is a proprietary or nonproprietary function is very important in determining the rights and duties of the municipality. This is a matter of state law and the Federal Government classifies proprietary and nonproprietary functions by the law in each state.

"We therefore ask your official opinion on the following questions:

"1. Are Housing Authorities proprietary functions of the city that created them or are they individual municipalities?

"2. Is a General Hospital operated by a County, City or other municipality a proprietary function?

"3. Is a hospital that specializes in the treating of some special disease such as tuberculosis a proprietary function if operated by a city, county or other municipality?

"4. Is a school cafeteria or lunch program a proprietary function?"

By way of preliminary observation, I desire to point out that the antonym of proprietary is governmental. In Department of Treasury v. City of Evansville (1945), 223 Ind. 435, 60 N. E. (2d) 952, a leading Indiana case, it is stated as follows:

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"The rule is universally recognized that municipal corporations exist and act in a dual capacity—one public or governmental and the other private or proprietary. In its public or governmental capacity, it acts as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of its inhabitants, rather than for the good of the state at large, the city is spoken of as acting in a private or proprietary capacity."

The courts have, from time to time, experienced considerable difficulty in applying this rule to particular factual situations. See:

City of Kokomo v. Loy (1916), 185 Ind. 18, 112 N. E. 994;

City of Indianapolis v. Butzke (1940), 217 Ind. 203, 26 N. E. (2d) 754;

Trenton v. New Jersey (1923), 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937;

Department of Treasury v. City of Linton (1945), 223 Ind. 363, 60 N. E. (2d) 948;

Department of Treasury v. City of Tipton (1945), 223 Ind. 373, 60 N. E. (2d) 957;

Department of Treasury v. City of Michigan City (1945), 223 Ind. 432, 60 N. E. (2d) 947;

Department of Treasury v. City of Evansville, supra.

Van Gilder v. City of Morgantown (1949), — W. Va. —, 68 S. E. (2d) 746, involved the rental of hangar space by a city to a private individual for storage of a private airplane at an airport operated by the city. The court stated that if it were at liberty to decide the matter under the common law principle distinguishing between proprietary and governmental functions, it would have held such rental to be a proprietary function; however the court pointed out that the statute expressly made the operation of airports a governmental function and held accordingly. It also held that in the absence of a showing of arbitrariness, the power of the Legislature to
The Housing Authorities Act was enacted by the Acts of 1937, Ch. 207, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-8101 et seq. Section 8 of said Act states that a housing authority “shall constitute a public body corporate and politic, exercising public and essential governmental functions.” (Our emphasis.) Section 2 of said Act indicates that the purpose of such Act was to eradicate specified conditions which cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state and impair economic values. Related legislation, known as the Housing Cooperation Act, is found in Acts of 1937, Ch. 209, Burns' Indiana Statutes (1950 Repl.), Section 48-8201 et seq. Section 2 of this Act provides in part as follows:

“It is hereby found and declared that the assistance herein provided for the remedying of the conditions set forth in the Housing Authorities Law constitutes a public use and purpose and an essential governmental function for which public moneys may be spent, and other aid given; that it is a proper public purpose for any state public body to aid any housing authority operating within its boundaries or jurisdiction or any housing project located therein; as the state public body derives immediate benefits and advantages from such an authority or project; and that the provisions herein-after enacted are necessary in the public interest.” (Our emphasis)

Another related Act concerning housing authorities, Acts of 1937, Ch. 81, Sec. 1, Burns' Indiana Statutes (1951 Repl.), Section 64-216, provides in part as follows:

“It has been found and declared in the Housing Authorities law and the Housing Cooperation Law * * * (d) that such housing projects are for public uses and purposes and are governmental functions of state concern * * *.” (Our emphasis)

Each of the three (3) Acts last cited contains a legislative declaration that housing authorities exercise governmental
functions. The constitutionality of these Acts was upheld in Edwards et al. v. Housing Authorities of the City of Muncie et al. (1939), 215 Ind. 230, 19 N. E. (2d) 741.

In view of this express legislative declaration, I am of the opinion that the activities of housing authorities created under the Housing Authorities Act of Indiana must be considered to be governmental in nature and not proprietary. In reaching this conclusion, I have given consideration to 1942 O. A. G., page 15 and 1952 O. A. G., page 248, No. 64. However, I am not in disagreement with 1952 O. A. G., page 248, No. 64, insofar as such opinion concludes that housing authorities are to be treated as city departments for the purpose of inclusion under the social security program. I invite your attention also to the case of Lloyd v. Twin Falls Housing Authority (1941), 62 Idaho 592, 113 P. (2d) 1102, 171 A. L. R. 750, in which it was held that a housing authority was not a county, city, town, township, Board of Education, School District, or other subdivision. Acts of 1951, Ch. 313, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1901 et seq., authorizes participation of municipal employes in the Federal Social Security Program; after considering Sections 2 (f), 2 (h) and 7 of said Act and the Housing Authorities Act, supra, I agree with the statement in 1952 O. A. G., page 248, No. 64, that "A general study of the various acts dealing with housing authorities shows a very close link between the housing authority and the regular political subdivision with which they are associated." One example of this is found in Section 14 of the Housing Authorities Act, supra, the same being Burns' Indiana Statutes (1950 Repl.), Section 48-8114, which requires that bond issues of a housing authority must be approved by the City Council, Town Board or County Council, as the case may be. Therefore, my answer to your first question is that housing authorities exercise governmental and not proprietary functions and that for purposes of inclusion in the Federal Social Security Program a housing authority is to be considered as exercising governmental functions of the associated municipality.

Your questions numbered 2 and 3 require only brief treatment. A municipality in operating a hospital exercises a governmental function. This has been specifically held by the Indiana Supreme Court.
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Department of Treasury v. City of Evansville, supra.

Therefore, the answer to your questions numbered 2 and 3 is that these hospitals are not proprietary functions of the municipality.

With regard to your question number 4, it has also been held specifically in Indiana that the conduct of schools is a governmental activity.

Department of Treasury v. City of Evansville, supra.

Your question relates to school lunch programs, and I assume that you have reference to the school lunch program established by the Acts of 1947, Ch. 305, the same being Burns' Indiana Statutes (1948 Repl.), Section 28-5146 et seq.; Section 10 of said act provides in part as follows:

“All school cities, school townships, school towns, and joint districts are hereby authorized to establish, equip, operate and maintain school kitchens and school lunch rooms, for the improvement of the health of the school children attending school therein, and for the advancement of the educational work of their respective schools * * *.” (Our emphasis)

In 18 McQuillen on Municipal Corporations (3rd Edition), Section 53.29, p. 215, it is stated that:

“However, there is a wide divergence in the decisions as to what functions are governmental or public and what are private or corporate, and functions held to be governmental in some jurisdictions are held to be corporate in others.”

And further that:

“If there be uncertainty as to the classification into which a particular activity falls, the doubt should be resolved in favor of its being governmental rather than proprietary.”

It has also been held that the operation of an outside incinerator by a Board of Education is a governmental function.
It is, therefore, my opinion that the operation of a school lunch program or cafeteria pursuant to the Acts of 1947, Ch. 305, *supra*, is a governmental function for purpose of coverage under the social security program when such school lunch program or school cafeteria is operated directly by the school corporation through school corporation employes. The Federal Act of August 28, 1950, Ch. 809, Sec. 106, as found in 42 U. S. C. A., Sec. 418 (b) (5), established a classification of coverage groups for the purpose of including state and municipal employes within the Federal Social Security Program; this Federal Act classifies employes and the various coverage groups depending upon whether the particular employee is engaged in a proprietary or governmental function. I am of the opinion that for the purposes of inclusion within a particular group under the Federal Social Security Program, school employes engaged in the operation of a school lunch program or school cafeteria under the Indiana act above-cited should not be differentiated from other school employes who by all known tests are concededly engaged in a governmental activity.

Therefore, in accordance with the foregoing, I am of the opinion that:

1. Housing authorities exercise governmental and not proprietary functions, and for purposes of inclusion within the Federal Social Security Program they are to be considered as exercising functions of the associated municipality.

2. A General Hospital operated by a county, city or other municipality exercises a governmental and not proprietary function.

3. A hospital that specializes in the treating of some special disease such as tuberculosis exercises a governmental and not proprietary function if such hospital is operated by a city, county or other municipality.

4. For purposes solely of inclusion within a particular group under the Federal Social Security Program, a school lunch program or school cafeteria operated under Section 10 of the Acts of 1947, Ch. 305, *supra*, exercises a governmental and not proprietary function.