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The answer to your third question is contained in the above answer.

In conclusion, and by way of summary, in my opinion the answer to your questions are as follows:

1. The Commission on Public Records does continue in existence; however, the powers and duties of said commission have been reduced to reviewing all public records to prevent the inadvertent destruction of documents of less obvious official uses or historical worth;

2. The State Library has been affected by the Administration Act of 1961, in reference to public records, with the powers and duties of the State Library being limited to:

- (a) The management of the state archives devoted to historical documents, and
- (b) The examination and classification of the documents and records of the various departments which are no longer of immediate use for the inclusion in the historical files of the state; and

3. In answer to your final question, relative to the powers and duties of the Administration Department under the Acts of 1961, as they relate to the previous acts, it is my opinion that the provisions of the 1925 and 1935 Acts, *supra*, which do not conflict with the Acts of 1961, *supra*, should be worked into a harmonious system of standards and procedures which will give full force and effect to the intent of the General Assembly.

OFFICIAL OPINION NO. 24

March 26, 1962

Mr. B. B. McDonald
State Examiner
Indiana State Board of Accounts
912 State Office Building
Indianapolis 4, Indiana

Dear Mr. McDonald:

This is in reply to your letter requesting an Official Opinion on the following four questions involving the purchase of tax favored annuities for school teachers by school corporations:

- “1. Since the statute provides that a teacher’s contract shall show the total amount of the salary to be paid, can such contract be amended to provide a certain amount of the salary to be made in cash payments and the balance of the salary used by the school corporation in the purchase of an annuity for such teacher?
- “2. If your answer to question number 1 is in the affirmative, would the school corporation report to the Federal Government on form W-2 the gross salary paid to the teacher including the cost of purchase of the annuity and make federal withholding tax deductions from such gross salary?
- “3. If your answer to question 1 is in the affirmative, would the school corporation withhold for social security at the current rate on the first \$4,800.00 paid, including cash payments and the cost of purchase of the annuity?
- “4. If your answer to question 1 is in the affirmative would the school corporation report to the Indiana Gross Income Division on form WH-2 the gross salary paid to the teacher including the cost of the purchase of the annuity, and make gross income tax deductions from such gross salary?”

Following the receipt of your request, this office received a letter from the Honorable William E. Wilson, State Superintendent of Public Instruction, requesting an Official Opinion as to the legality of a proposed amendment to the standard Indiana teacher’s contract form which would authorize payment of a part of a teacher’s salary direct to an insurance company for the purchase of a nonforfeitable annuity contract for such teacher. Inasmuch as Mr. Wilson’s request and the first question set out above involve the same problem, we have consolidated the requests, with your approval, and will attempt to answer both in this Opinion.

The matter of public school teachers’ contracts is regulated by various statutory provisions in this state. The Acts of 1899, Ch. 111, Sec. 1, as found in Burns’ (1948 Repl.), Section 28-4302, requires all teachers’ contracts to be in writing. Sec-

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tion 2 of that Act, as found in Burns' (1948 Repl.), Section 28-4303, provides all such contracts are to be "carefully worded under the direction of the superintendent of public instruction." The Acts of 1921, Ch. 91, Sec. 1, as found in Burns' (1948 Repl.), Section 28-4304, provides:

"All contracts hereafter made by and between teachers and school corporations shall be in writing; shall state the date of the beginning of the school term, the number of months in the school term, the total amount of the salary to be paid during the school year, and the number of payments that shall be made during the school year: Provided That, in this act, a month shall mean not more than twenty [20] school days."

The Acts of 1899 and 1921, referred to above, were considered in the case of *Hall v. Delphi-Deer Creek Township School Corporation et al.* (1934), 98 Ind. App. 409, 189 N. E. 527, wherein the court determined the acts could be construed together and were in harmony, the later one not repealing the earlier.

✓ The Acts of 1927, Ch. 97, Sec. 1, as amended, as found in Burns' (1948 Repl.), Section 28-4307, requires all teachers' contracts in school city or town corporations to be uniform and of the form and wording as prescribed by the State Superintendent of Public Instruction. That section also provides that "* * * teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract * * *"

The most recent and explicit provisions regarding teachers' contracts are those found in the Acts of 1943, Ch. 202, Sec. 1, as found in Burns' (1948 Repl.), Section 28-4330. This section provides that the uniform teachers' contract form provided for in the Acts of 1927, Ch. 97, immediately above, shall hereafter be prescribed by the State Superintendent of Public Instruction in two alternate forms, one for regular and the other for temporary teachers. The salary of the temporary teacher shall be not less than that salary provided for in the Minimum Salary Law of the state, or by a locally adopted

salary schedule not less remunerative, and both types of contracts are to contain the following provisions:

"The regular teacher's contract which shall be used uniformly throughout the state as prepared by the state superintendent of public instruction without amendment shall contain as its valid terms the date of the opening of school, the number of months the school shall be in session, the rate, amount, and manner of payment of salary, and only such other provisions relating to the government of the school as shall be prescribed and included in such contract by the state superintendent of public instruction. * * *

Burns' 28-4330, *supra*, continues by providing that all public school teachers, except certain casual substitutes, shall be employed on the terms of the contract as described therein. The section concludes:

"* * * Observance of the provisions of this act shall be one of the prerequisites for the classification of schools by the state board of education.

"It shall be the duty of the state superintendent of public instruction to prescribe the forms as referred to herein and to furnish to all the school corporations of the state a copy of said forms and to require that each school corporation include in its semiannual report on average daily attendance a statement that all provisions of this act have been complied with."

The first question of your request, set out above, asks whether a teacher's contract can be amended to provide that a certain amount of the salary be paid in cash to the teacher and the balance used by the school corporation to purchase an annuity for the teacher. Burns' 28-4330, *supra*, requires that the standard form of teacher's contract as prescribed by the State Superintendent of Public Instruction must be used *without amendment* to employ all public school teachers, except certain casual substitutes. Therefore the school corporation and the teacher could not amend such form to provide for something different from that provided in the contract form. However, the state superintendent, who must prescribe the

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note!
form, could himself change the form to be used, and thus the question for determination is whether the state superintendent can prescribe a form providing for the payment of salaries in such manner.

Upon construing all the pertinent statutory provisions together, it becomes apparent that the uniform teacher's contract form is to prescribe the rate, the total amount of the salary to be paid during the school year, and the manner of payment of salary, which would include the number of payments that should be made during the school year. In the Acts of 1945, Ch. 231, Sec. 1, as last amended in 1959 and found in Burns' (1961 Supp.), Section 28-4332, the Legislature has prescribed the basic minimum *salaries* which must be paid to teachers in the public schools. Under the Acts of 1945, Ch. 231, Sec. 2, as found in Burns' (1948 Repl.), Section 28-4333, the trustee or board of education is empowered to adopt a salary schedule not less remunerative, which shall then be effective as a minimum schedule for all teachers within that system during the years for which it is adopted. [Note that 1959 O. A. G., page 168, No. 35, determined this section was not repealed and is still effective.]

In 1954 O. A. G., page 180, No. 49, I considered the question of whether municipal, county or state agencies or institutions were authorized to procure group insurance or annuity plans for their employees and pay the premiums in whole or in part out of public funds. I concluded, as follows, on page 187:

“Any agency, municipality or political subdivision of government having the power to fix, increase and decrease wages, may, as a part of that power, provide group and annuity insurance for such employees. Where, however, the compensation of any employee is fixed by law absolutely at a specific figure, then such insurance could not be provided for such an employee; the power to fix, increase and decrease wages would be absent in such case. I recognize in giving this opinion that the opposite result may be reached by a court to which it is submitted as it is a question of first impression in this state and a close question.”

I concluded that Opinion by warning that the only really safe method was to obtain legislative sanction and authority

for such contracts of insurance. [In 1957 such legislation was enacted providing for group insurance.] I also stated on page 183:

“I am impressed by the above authorities, but the danger lies in the extent to which it can be carried. If insurance can be purchased as a wage increase, why could not houses be purchased and furnished as wage increases, or groceries or other such items purchased as wage increases. * * *”

It has been pointed out that school corporations may adopt salary schedules to pay amounts above those minimums prescribed by statute. Thus the school corporation can fix or increase wages above the basic statutory minimum, and could, under the 1954 Opinion, put the increase of wages in the form of group and annuity insurance for its teachers. Again, however, I would point out that the only really safe protection for such a contract of insurance or annuity is to obtain legislative sanction and authority therefor. There is already express legislative authority to withhold a requested amount of money from the salary of a teacher and to pay such amount to an insurance company for “insurance protection,” but this is limited to group insurance by the title of the act. [See: Acts of 1945, Ch. 84, Sec. 1, as found in Burns’ (1948 Repl.), Section 28-4331.]

Since that amount of a teacher’s salary which is over and above the basic minimum prescribed by statute could be paid in the form of insurance or an annuity, the State Superintendent of Public Instruction could prescribe a contract form giving the election to the teacher to choose between two alternative forms of payment for that portion of the salary—either (1) the entire salary to be paid in cash direct to the teacher, or (2) at least the required statutory minimum paid direct and the balance, or part thereof, used to purchase the annuity for the teacher.

The following amendment to be inserted in the standard Indiana teacher’s contract form has been submitted by Mr. Wilson, State Superintendent of Public Instruction:

“Said employer further agrees to pay the said teacher for his or her services under this contract as

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.....of said school cor-
 (State Assignment)
 poration the sum of.....dollars per year for the
 period of contract. Said sum shall be deemed to con-
 stitute the annual compensation of the teacher as
 referred to in Chapter 329 of the Acts of 1955 as
 amended, the same being the teachers' supplemental
 retirement benefit system. Of said sum referred to
 above \$..... shall be paid in scheduled install-
 ments (semi-monthly) (monthly) as follows.....
and the balance \$..... due under
 this contract shall be paid by.....
 (Name of School Corporation)
 to purchase from the.....
 (Name of Annuity Company or Agency)
 a non-forfeitable annuity contract providing for pay-
 ments in amounts, on dates and to payee designated by
 the employee. The employer shall continue to maintain
 such teacher, so long as regularly employed, on not
 less than the compensation as provided by any locally
 adopted salary and compensation schedule that may be
 in force and effect."

The proposed amendment provides for the insertion of the rate and the total amount of the salary to be paid during the school year. The submitted form provides an extended space for use in specifying the dates, manner, and number of payments of the salary. Also, the form of contract presented for consideration contains blank spaces to be filled in if the teacher voluntarily desires to have deductions made for the purchase of an annuity. If the teacher does not desire such annuity, the spaces will be left blank at the time the contract is signed. It would therefore appear that the amendment to be inserted in the standard form of teacher's contract meets the statutory requirements and is legally acceptable.

It should be noted here that the second sentence in the proposed alteration for the standard teacher's contract form is new and does not appear in the contract form in current use. That sentence reads as follows:

"Said sum shall be deemed to constitute the annual compensation of the teacher as referred to in Chapter 329 of the Acts of 1955 as amended, the same being the teachers' supplemental retirement benefit system."

The Acts of 1955, Ch. 329, as amended, as found in Burns' (1961 Repl.), Section 60-1911 *et seq.*, is the Indiana Public Employees Social Security Integration and Supplemental Retirement Benefits Act, and, among other things, does provide for supplemental retirement benefits for members of the Indiana State Teachers' Retirement Fund. Burns' 60-1924, *supra*, prescribes the contributions which employees are required to make, and provides:

"* * * All employees shall contribute 3% of their *compensation* not in excess of eighty-five hundred dollars [\$8,500] per annum in addition to their contributions for social security. Such contributions shall be made in the form of a deduction from compensation and shall be made notwithstanding that the compensation paid in cash to such employee shall be reduced below the minimum prescribed by law. * * *" (Our emphasis)

The act does not define the term "compensation," and thus such term must be given its ordinary and usual meaning. Black's Law Dictionary, Fourth Edition, page 354, defines "compensation" as "the remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument." Webster's Third New International Dictionary defines it as "payment for value received or service rendered." In Words and Phrases, Perm. Ed., Vol. 8, p. 308, is the following:

"The word 'compensation' accurately used means payment in money or other benefits which will compensate in the strict sense, that is, make even, or be measurably the equivalent of that for which it is given.
* * *"

It is therefore my opinion that the term "compensation" as used in Burns' 60-1924, *supra*, would include that part of a teacher's salary paid in some other form as well as that amount paid in cash. Thus the entire contract amount, including any amounts paid direct to an insurance company for an annuity for the teacher, should be included in the amount of compensation upon which the 3% contribution for the Teachers' Retirement Fund is based. In this situation, the actual compensation received by the teacher remains the same, although

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the teacher has elected to receive a part of it in some form other than direct cash payment.

The second and third questions in your letter involve the amount of salary upon which federal income taxes and social security contributions must be paid in the event a part of the teacher's salary is paid by the school corporation directly into an annuity for the teacher. Section 403(b) of the Internal Revenue Code [26 U. S. C. A., § 403(b)], referred to in your letter, provides that if an annuity contract is purchased for an employee of an educational institution by an employer which is a state, a political subdivision of a state, or an agency or instrumentality of one or more of the foregoing, and the employee's right under the contract are nonforfeitable, except for failure to pay future premiums, then amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such amounts does not exceed the exclusion allowance for such taxable year.

Whether or not the proposed plan, whereby school corporations would pay amounts direct to insurance companies for annuities in accordance with the terms of the submitted amendment to the standard teacher's contract, would qualify for the tax exemption set out in Section 403(b) of the Internal Revenue Code, or whether social security deductions would be withheld on the entire amount or only on that amount directly received currently by the teacher, are matters for the proper federal authorities concerned to determine. These are federal questions which can only be decided by the appropriate federal authorities and not by the state.

Your final question asks whether the school corporation purchasing an annuity for a teacher would report to the Indiana Gross Income Division on form WH-2 the gross salary paid to the teacher including the cost of the purchase of the annuity, and make gross income tax deductions from such gross salary.

The Acts of 1933, Ch. 50, Sec. 2, as amended, as found in Burns' (1961 Repl.), Section 64-2602, provides as follows for the levy of a gross income tax against all persons:

“There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the state of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided.”

The Gross Income Tax Act of 1933 defines the term “gross income” as follows in the Acts of 1933, Ch. 50, Sec. 1, as amended, as found in Burns’ (1961 Repl.), Section 64-2601(m) :

“(m) The term ‘gross income,’ except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as *compensation for personal services*, including but not in limitation thereof, wages, bonuses, salaries, fees, commissions, gratuities (including the value of living expenses and/or rental of quarters furnished to the taxpayer) and the gross receipts of the taxpayer received from trades, businesses, or commerce, including admission fees or charges, and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets, or from the assignment or sale of rights, *all receipts received from the performance of contracts*, all receipts received as prizes and premiums, all receipts received from insurance, all amounts received as alimony, damages, or judgments, and all receipts received by reason of the investment of capital, including but not in limitation thereof, interest, discounts, rentals, royalties,

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dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, *and all other receipts of any kind or character received from any source whatsoever*, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: * * *” (Our emphasis)

The Indiana Gross Income Tax Regulations adopted in 1956 by the Indiana Department of State Revenue contain Instruction 1-15 on page 13, which reads as follows:

“INSTRUCTION 1-15. INCOME CONSTRUCTIVELY RECEIVED THROUGH DEDUCTIONS FROM SALARIES OR WAGES.

“When deductions are taken from salaries, wages, or other earnings for the establishment of pension or retirement funds, or any fund in which the employee may have a future interest, or for the payment of his taxes, other expenses or debts, all amounts so deducted are constructive receipts of the employee and he must report for gross income taxation at the rate of 1½% (Sec. 3(g)) the full amount of such salary, wages or other earnings without any reduction whatsoever. This includes deductions for Federal Tax or any other authorized deduction. (See Inst. 2-27 concerning taxability of pensions, also see Insts. 4-127 and 4-130.)”

Instruction 4-72 on page 153 of the 1956 Regulations provides:

“INSTRUCTION 4-72. TRANSFER OF PROPERTY TO INSURANCE COMPANIES FOR AN ANNUITY POLICY.

“Persons, resident or nonresident, transferring real property located in Indiana or personal property having a legal situs in Indiana to insurance companies in

exchange for an annuity contract, are taxable on the value of the annuity contract at the applicable rate or rates as stated in Instruction 4-71, at the time of the transfer and thereafter Indiana residents are taxable at 1½% on amounts received pursuant to the annuity contract to the extent that such amounts exceed the value upon which the tax was originally paid. (See References under Inst. 4-71.)”

The amendment for the standard form of teacher's contract as submitted by the State Superintendent of Public Instruction contemplates the receipt of compensation by the teacher for personal services pursuant to the written contract. The contract provides that the annuity premiums shall be taken out of the total compensation, designated as receipts for services rendered. It is my opinion that the amount authorized by the teacher to be paid to purchase an annuity would be within the definitions of "gross income" as used in the act, as "compensation for personal services," as "all receipts received from the performance of contracts," and as "all other receipts of any kind or character received from any source whatsoever." Since such amounts paid for an annuity would be within the term "gross income" as used in the Gross Income Tax Act of 1933, the gross salary paid to the teacher under the submitted form of contract, including the cost of the purchase of the annuity, must be reported to the Indiana Gross Income Division, and gross income tax deductions withheld from the gross amount of the salary contracted for. The amounts received ultimately by the teacher under the annuity contract at maturity will be subject to gross income taxation only to the extent that such amounts exceed the total of premiums paid to the insuring company upon the contract. [See: Instructions 2-25 and 4-164 of the Indiana Gross Income Tax Regulations adopted in 1956.]

In conclusion, and by way of summary, it is my opinion that:

1. The State Superintendent of Public Instruction may amend the standard form of teacher's contract to provide an alternate to payment in cash of that part of a teacher's salary over and above the minimum amount prescribed by statute, as for example, providing for at least the statutory minimum

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to be paid in cash payments and the balance of the salary used by the school corporation in the purchase of an annuity for such teacher.

2. Whether or not amounts paid direct by a school corporation for an annuity for the teacher, under the form of contract submitted, would be taxable for federal income tax and social security purposes are questions for federal determination, and accordingly have not been answered in this Opinion.

3. The gross salary paid to the teacher under the submitted form of contract, including the cost of the purchase of the annuity, must be reported to the Indiana Gross Income Division, and gross income tax deductions withheld from the gross amount of the salary contracted for.

This Opinion is based on the form of contract as submitted, and in the event a different arrangement is used in purchasing an annuity, a different result might conceivably be reached.

OFFICIAL OPINION NO. 25

March 29, 1962

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis 4, Indiana

Dear Mr. Utterback:

This is in response to your recent request for an Official Opinion, which reads, in part, as follows:

“May a teacher who is receiving a monthly retirement benefit from the Teachers' Retirement Fund waive his rights to the post increase benefits granted retired teachers by the 1961 General Assembly?”

* * *

“Assuming the teacher is permitted to waive his rights and not receive an increase,