Mr. Harold Hatcher, Director  
Fair Employment Practices Commission  
1004 Indiana State Office Building  
Indianapolis 4, Indiana

Dear Mr. Hatcher:

This is in reply to your request for an Official Opinion

"* * * as to whether this Commission has the power
to require all divisions of State government, whether
elected or appointed, to supply information requested
by this Commission to help in carrying out the purposes
of Chapter 208, Acts of 1961 * * *"

The Acts of 1961, Ch. 208, as found in Burns’ (1961 Supp.),
Sections 40-2307 through 40-2317, is the statute which created
the Indiana Fair Employment Practices Commission and defined its powers. Burns’ 40-2312, supra, reads, in part, as follows:

"The commission shall have the following powers
and duties * * *

"(d) To formulate policies to effectuate the purposes
of this act and make recommendations to agencies and
officers of the state or local subdivisions thereof to effectuate such policies. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state or any political subdivision or agency thereof shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any matter [matter] before the commission.

* * *

"(j) To hold hearings, subpoena witnesses, compel
their attendance, administer oaths, take the testimony
of any such person under oath, and require the production for examination of any books and papers relating to any matter under investigation or in question before the commission. The commission may make rules as to
the issuance of subpoena by individual commissioners. Contumacy or refusal to obey a subpoena issued pursuant to this section shall constitute a contempt punishable, upon the application of the commission by the circuit or superior court, or judge thereof, in the county in which the hearing is held or in which the witness resides or transacts business.” (Our emphasis)

It is to be seen that Burns' 40-2312(d), supra, gives the commission power to “make recommendations to agencies and officers” of the state to effectuate policies formulated by the commission to effectuate the purposes of the act, and that such subsection also directs “divisions” of the state, as well as its departments, commissions, authorities, boards, bureaus, agencies, and officers to furnish the commission, upon request, “information in their possession” relating to any matters before the commission.

By use of the mandatory “shall,” rather than the permissive “may,” it is apparent that the Legislature intended to bestow upon all named components of the state a duty to comply with a request by the commission for information relating to any matter before it, which information is in the “possession” of the part of the state to which the request is directed; however, Burns' 40-2312(d), supra, contains no authority by which the commission may do other than “request” any state department, commission, division, board, bureau, agency, or officer (without reference to whether any should have been elected or appointed) to do its duty.

On the other hand, in conjunction with its power to hold hearings, subpoena witnesses, compel attendance, administer oaths, and take testimony, the commission is empowered by Burns' 40-2312(j), supra, to “require” production of books and papers relating to any matter under investigation or in question before the commission.

Furthermore, Burns' 40-2312(j), supra, must be construed with the Acts of 1947, Ch. 365, Sec. 21, as found in Burns' (1951 Repl.), Section 63-3021, concerning the subpoena power of agencies of the state, because the Fair Employment Practices Commission is such an agency, as the term is defined by the 1947 Act. Such section, Burns' 63-3021, supra, reads as follows:

194
“An agency may issue subpoenas upon its own motion and shall issue subpoenas to any party upon request. Upon a statement or showing of general relevancy of the evidence sought to be produced, subpoenas issued by the agency may call for the production of relevant books, records and documents. Such subpoenas shall be issued by the agency and served by the sheriff of the county in which the person subpoenaed is a resident or wherein he may be found or wherein is located the principal office of such person or wherein records called for by such subpoena are located or kept or may be served as subpoenas in civil causes are served. If any person called as a witness by a subpoena shall fail to obey such subpoena to appear before the agency or its authorized representative or agent or shall refuse to testify or to answer any question or to produce any book, record, paper or other document when required so to do, such failure or refusal shall be reported to the attorney-general who shall thereupon institute proceedings in the name of the state of Indiana on the relation of the agency in the circuit or superior court of the county where such subpoena was served to compel the attendance of such witness and compliance with such subpoena. Such petition shall set forth the facts and circumstances of the failure or refusal of such witness to testify in answer to such subpoena or to produce the books, records, papers, documents or data so required by such subpoena, and such court upon the filing and docketing of such petition shall thereupon promptly issue an order to the defendant named in such petition to show cause why he should not testify concerning the matters described in such petition and/or produce forthwith before said agency, its member, agent or representative the books, records, papers, documents or other data called for in said subpoena, if the same be found to be in accordance with law. Unless such defendant shall appear in said court upon a date specified in such order not more than ten [10] days from the date of the issuance of such order, and offer under oath good and sufficient reasons why such order should not be obeyed such court shall thereupon order said defendant to appear in answer to said subpoena before
said agency, its member, agent or representative and to testify and produce such books, records, papers or other documents under penalty of punishment for contempt as failure to appear or testify in response to subpoenas of the circuit court are punished. *Nothing in this act shall be construed as making public or requiring the production of records or information which is made confidential by law.*

“This section is supplemental to the provisions of statute giving power and authority to particular agencies to issue process and compel production of books, records, papers and other data for the purpose of investigation, examination and copying and shall not supersede the same except only to the extent that it may be in direct conflict herewith.” (Our emphasis)

It is to be noted that Burns’ 40-2312(j), *supra*, and Burns’ 63-3021, *supra*, provide procedures by which the commission could require and compel production of “books and papers” (substantially the same as “records and papers” that components of government have the duty under Burns’ 40-2312(d), *supra*, to furnish the commission upon request) but neither Burns’ 40-2312(j), *supra*, nor Burns’ 63-3021, *supra*, expressly refers to “information,” although Burns’ 63-3021, *supra*, does encompass “data,” one of the synonyms for “information.”

It is apparent that a duty to furnish the commission information possessed by divisions of the state (as one of the components specified in Burns’ 40-2312(d), *supra*) is not restricted to that reduced to writing, as in the case of books, papers, records, documents, but includes knowledge by personal study and investigation or derived from reading, observation, or instruction, and also familiarity gained by actual experience, practical skill, or technical acquaintance, therefore it could be obtained from persons in such divisions of government, whether elected or appointed, which persons were subpoenaed as witnesses and required to testify under oath, giving information relating to any matter before the commission (which information is not made confidential by law).

In the event that a division of the state should fail or refuse to comply with a request by the commission for information in
its possession relating to any matter before the commission, it is my opinion that the commission may gain such information through its powers to require the production of records and papers, to subpoena persons as witnesses and to take their testimony, subject, of course, to the restrictive provisions of any statute respecting such division of government which statute makes records or information confidential by law.

OFFICIAL OPINION NO. 39

June 6, 1962

A. C. Offutt, M.D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis 7, Indiana

Dear Doctor Offutt:

This is in response to your letter of May 14, 1962, wherein you state:

"It is respectfully requested that we have your official opinion relating to the authority of the Indiana State Board of Health and for the Indiana Nursing Home Council to order the cessation of an unlicensed nursing home operation."

Administrative agencies, such as the Indiana Nursing Home Council, have no common law or inherent powers, but only such authority as is conferred upon them by valid statutory enactment. This rule was clearly announced in an industrial board case of Smith v. Thompson Construction Company et al. (1946), 224 Ind. 565, 69 N. E. (2d) 16, which held:

"* * * Since the Board derives its authority from the statutes, it can do the things authorized by the Legislature and beyond that it cannot legally go. Its authority is not expanded by the 'common law.'"

See also: 1 I. L. E. Administrative Law and Procedure, § 21.