

The Arkansas Register



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Charlie Daniels
Secretary of State
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Editor **Jon Davidson**

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Charlie Daniels

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THE ARKANSAS REGISTER

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-131

Glover, Bobby L.
State Senator

RE: Is the repair and replacement of inadequate and unequal school facilities a financial obligation of the local school district or is it an obligation of the State of Arkansas? Q2) If the financial obligation is on the State of Arkansas to repair and replace unequal school facilities in all the school districts, may the General Assembly, subject to a statewide vote of the electorate, propose a measure that would allow for the State of Arkansas to issue general obligation bonds to finance such an undertaking? Q2b) Can such a proposal be done legislatively or would there have to be a constitutional amendment proposed and adopted to accomplish such a proposal? Q3) If a proposal is before the electorate that would allow for the State of Arkansas to issue general obligation bonds to finance the repair and replacement of inadequate and unequal school facilities and it is subsequently turned down by the voters, what recourse would be available to the General Assembly? Q4) Would the General Assembly be obligated to provide funding from other revenue sources to pay for the repair and replacement of these school facilities? **RESPONSE:** 1) Ultimately, this is a responsibility of the State; 2a) Yes; 2b) There does not necessarily have to be a constitutional amendment, assuming the funding source would not require it; 3)4) The General Assembly would have to find alternate sources of funding.

Opinion No.: 2004-145

Herzfeld, Robert
Prosecuting Attorney, 22nd Judicial District

RE: Is it legal, ethical, and appropriate for governmental entities to spend taxpayer dollars in support of or in opposition to a ballot measure on public policy grounds? Q2) What are the legal and ethical reporting requirements, if any, of any governmental entity which is not a "state agency, board, or commission" (i.e., a county office or judicial district office) which expends funds in support of or in opposition to a ballot measure.

RESPONSE: Q1) The opinion sets forth the standard that applies to "government speech" offered in connection with a ballot measure. See Opinions 98-204, 2000-162 and 2001-031. Q2) A governmental entity other than a "state agency, board, or commission" is required to report to the Arkansas Ethics Commission its expenditures exceeding \$500 in support of any "legislative question" or "ballot question" as statutorily defined. A.C.A. 7-9-402 (Supp. 2003).

Opinion No.: 2004-152

Hickinbotham, Boyd
State Representative

RE: Is there a conflict of interests for an attorney to serve simultaneously as city attorney, county attorney, deputy prosecutor, and city judge in the same judicial district, and also serve on a board of directors of a bank? **RESPONSE:** My answer assumes that the question is whether any of the named officers could also serve as bank director. The answer is "yes" with regard to the city attorney, county attorney, and deputy prosecutor. The answer is "no" with regard to the city judge. See Code of Judicial Conduct, Canon 4(D)(3).

Opinion No.: 2004-154

Lamoureux, Michael
State Representative

RE: Pursuant to provisions of ACA 21-4-102(C)(1) and 21-4-104(d)(1), if an employee is called to duty in an emergency situation during a calendar year and the emergency situation continues into another calendar year, is the employee entitled to one thirty (30) day period of paid leave or two thirty (30) day periods of paid leave? **RESPONSE:** In my opinion, an employee of the state or a political subdivision who is called to duty in an emergency situation, as defined at A.C.A. 21-4-212, is entitled to one thirty-day period of paid leave, regardless of whether or not his service spans more than one calendar year. A.C.A. 21-4-102(c)(1).

ATTORNEY GENERAL OPINIONS

Opinion No.: 2004-164

Berry, Stan
State Representative

RE:In addition to regulating the rates charged by the local water and sewer commission for the sale of water by passage of an ordinance, is a city council also required to approve additional fees charged by the commission, such as a tap fee, meter deposit, returned check fee, service call, etc.? **RESPONSE:** State law does not explicitly address this question. However, the applicable statutes suggest that the commission can set fees related to water service without city council approval, but not fees related to sewer service, without city council approval.

Opinion No.: 2004-165

Martin, Jay
State Representative

RE:Whether provisions of North Little Rock City Ordinance No. 6826 provide protection for a liquor store owner who seizes the drivers' license of any person who is under the age of twenty-one and attempts to purchase an alcoholic beverage? **ANSWER:** No, as to the bare question of whether the liquor store owner is acting pursuant to the ordinance when he seizes the license of a minor who misrepresents his age to buy alcohol. Nothing on the face of the ordinance suggests that it is intended to address such a matter.

Opinion No.: 2004-168

Key, Johnny
State Representative

RE:Is a taxpayer required, pursuant to provisions of A.C.A. 26-18-404(c) and (d) or any other applicable statute, to request an extension for filing a protest within the initial 30-day period after service of the Notice of Proposed Assessment in A.C.A. 26-18-404(c) in order to be eligible for the discretionary extension period? **Q2)** Is the extension solely at the discretion

of the Director [of DF&A] without regard to any action or inaction by the taxpayer during the initial 30-day period? **RESPONSE:** Q1) Yes. Subsection (c) of this statute establishes an initial 30-day period during which a taxpayer may file a written protest or seek an extension. The provision in subsection (d) that the director may "extend" the time for protesting implies that what would otherwise have been the deadline has not yet arrived. Accordingly, I do not believe a taxpayer can seek an extension once the 30-day deadline has passed. Nothing in the statute suggests that the legislature intended to create an automatic 120-day period during which the status of tax assessments would be in limbo. **Q2)** I believe the taxpayer must either formally protest or request an extension within 30 days of service of notice of the proposed assessment or denial of a claim for refund. I do not believe the Director has the discretion to grant an extension after this 30-day period has run.

Opinion No.: 2004-171

Wooldridge, Tim
State Senator

RE:Would deeding the Greene Acres Nursing Home, a nonprofit entity operating in Paragould, to Greene County limit tort liability in the event of a lawsuit? **RESPONSE:** The opinion cross-references Opinion No. 2002-193, which discusses at length the varieties of immunity that might be available to a county-owned nursing home.

Opinion No.: 2004-173

Thomas, Lindbergh
State Representative

RE:In light of the provisions of the attached Jefferson County Ordinance No. 2003-52, which establishes the anti-nepotism policy for the county, do elected county officials have the right to hire immediate family members on a temporary basis and advise the citizens that because the immediate family member was once employed in said position, before the ordinance was

ATTORNEY GENERAL OPINIONS

passed, the elected official has every right to follow this practice? Q2) Do elected officials of Jefferson County have the right to withhold said job positions from other county citizens who might be interested in seeking this employment? RESPONSE: Declined to answer as it does not involve a question of state law, only construction of a local ordinance.

Opinion No.: 2004-177

Horn, Barbara
State Senator

RE:Who has jurisdiction over an elected county official's property purchases that have been purchased within the budget of the elected county official? Q2) Who has authority to determine who is allowed within an office of an elected county official? RESPONSE: Q1) Unless a statute expressly provides otherwise as to particular property, I believe the elected official will control the use of property purchased for official purposes so long as its use is consistent with the appropriation that authorized the purchase. As the custodian of county property, the county judge may be authorized to challenge a noncomplying use of such property. Q2) Subject to the requirement that the public be afforded access to public records under the Freedom of Information Act and so long as a policy does not keep an official from performing his job, I believe the elected official controls access to his office.

Opinion No.: 2004-181

Witherell, Stacey
Employee Services Manager., City of Little Rock

RE:Is the decision of the records custodian to release copies of any training certificates contained in the subject employee's personnel file and withhold any statements, audio or videotapes, that were made for the purposes of an investigation into allegations of a complaint of discrimination/harassment, consistent with provisions of the Freedom of Information Act (FOIA)? ANSWER: Under the facts as stated in the request, the custodian's decision is consistent with

the FOIA. The custodian is not required to compile information or create a record. A.C.A. 25-19-105(d)(2)C). Internal investigation records generated at the behest of the employer are not subject to release because there was no decision to suspend or terminate. The requester is entitled to her own statement and documents that she generated to support her allegations.

Opinion No.: 2004-201

Wisner, John C., III
Deputy General Counsel, DF&A, OCSE

RE:Is the decision of the custodian of records to release names, classifications, tenures and salaries for all attorneys employed with each Arkansas state agency and constitutional office consistent with provisions of the Freedom of Information Act (FOIA)? RESPONSE: Generally, yes.

Opinion No.: 2004-202

Andrews/O'Malley/Rinke, et
Attorneys at Law, ESD Board of Review

RE:Is all the information requested (names, classifications, tenures and salaries) available under A.C.A. 25-19-105(b)(12) or any other section of the FOIA? Q2) Assuming that the salaries of the non-elected employees of a state agency are available under the FOIA, are the names and tenures of such employees also available, either separately or linked to their salaries and/or tenures? RESPONSE: The custodian's decision to release these documents is consistent with the FOIA.

ADOPTED RULES AND REGULATIONS

ARKANSAS TEACHER RETIREMENT

Docket No.: 088.00.04--001
Effective Date: 7/1/04
Contact Person: Julie Cabe
Telephone: (501) 682-1836

Setting, Reporting and Payment of Employer Contributions

Docket No.: 088.00.04--002
Effective Date: 7/1/04
Contact Person: Julie Cabe
Telephone: (501) 682-1836

Purchase of Service Credit / Repayment of Refunds / Acceptance of Rollovers

Docket No.: 088.00.04--003
Effective Date: 6/28/04
Contact Person: Julie Cabe
Telephone: (501) 682-1836

Retirants Return to Service By Rescinding Retirement / Conditions Under Which a Retirant May Return to Service Without Rescinding Retirement / Waiver of Earnings Limitation

Docket No.: 088.00.04--004
Effective Date: 6/28/04
Contact Person: Julie Cabe
Telephone: (501) 682-1836

Membership, Age & Service Retirement, Disability Retirement, Early Retirement, Survivor Benefits, Death Benefit, and Alternate Plans

ASSESSMENT COORDINATION DEPARTMENT

Docket No.: 177.00.04--001
Effective Date: 7/20/04
Contact Person: Debra Asbury
Telephone: (501) 324-9100

Rules and Regulations

EDUCATION DEPARTMENT

Administrative Services

Docket No.: 005.01.04--001
Effective Date: 7/8/04
Contact Person: Scott Smith
Telephone: (501) 682-4227

ADE 176: Rules Governing Administrative Consolidation or Annexation of Public School Districts

Docket No.: 005.01.04--002
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 193: Rules Governing the Acquisition of Energy Conservation Measures

ADOPTED RULES AND REGULATIONS

Docket No.: 005.01.04--003
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 182: Repeal of Rules Governing the Distribution of Poverty Index Funds

Docket No.: 005.01.04--004
Effective Date: 7/1/04
Contact Person: Scott Smith
Telephone: (501) 682-4227

Emergency Rule: ADE 177 - Extension of Emergency Rules Governing Administrative Consolidation or Annexation of Public School

Financial Services

Docket No.: 005.04.04--001
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 191: Rules Governing the Process and Procedures for Best Financial Management Practices Review for Public School Districts

Docket No.: 005.04.04--002
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 192 - Rules Governing Arkansas Educational Financial Accounting and Reporting

Docket No.: 005.04.04--003
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 194: Rules Governing the Distribution of Student Special Needs Funding for School Year 2004-2005 and Additional Teacher Pay

Docket No.: 005.04.04--004
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 190: Rules Governing the Development of a Uniform Budget and Accounting System

Docket No.: 005.04.04--006
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 183: Repeal of Rules Governing the Funding of Alternative Learning Environments

Docket No.: 005.04.04--007
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 179: Repeal of Rules Governing the Distribution of Student Growth Funding

ADOPTED RULES AND REGULATIONS

Docket No.: 005.04.04--008
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 181: Repeal of Rules Governing the Distribution of Revenue Loss Funding

Docket No.: 005.04.04--009
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 180: Repeal of Rules Governing the Distribution of General Facilities Funding

Docket No.: 005.04.04--010
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 184: Repeal of Rules Governing Needs Assessment of School District Facilities

Docket No.: 005.04.04--011
Effective Date: 7/17/04
Contact Person: Patricia Martin
Telephone: (501) 682-5124

ADE 178: Repeal of Rules Governing Debt Service Funding Supplements

General Education Division

Docket No.: 005.15.04--001
Effective Date: 7/17/04
Contact Person: Marcia Harding
Telephone: (501) 682-4222

ADE 189: Rules Governing Special Education Catastrophic Occurrences

Office of Accountability

Docket No.: 005.19.04--004
Effective Date: 7/17/04
Contact Person: Janinne Riggs
Telephone: (501) 682-4219

ADE 188: Rules Governing the Arkansas Comprehensive Testing Assessment and Accountability Program and the Academic Distress Program

Docket No.: 005.19.04--005
Effective Date: 7/17/04
Contact Person: Jim Boardman
Telephone: (501) 371-5005

ADE 185: Rules Governing the State Reporting of Dropout and Graduation Rates

School Improvement & Restructuring

Docket No.: 005.22.04--001
Effective Date: 7/17/04
Contact Person: Ann Biggers
Telephone: (501) 682-4224

ADOPTED RULES AND REGULATIONS

ADE 187: Rules Governing Advanced Placement Courses in the Four Core Areas in High School

Technical Assistance

Docket No.: 005.25.04--001
Effective Date: 7/17/04
Contact Person: Jim Boardman
Telephone: (501) 371-5005

ADE 186: Rules Governing Grants for Distance Learning

FIRE PROTECTION LICENSING BOARD

Docket No.: 179.00.04--001
Effective Date: 7/19/04
Contact Person: Joyce Lemons
Telephone: (501) 661-7903

Rules for Portable & Fixed Systems

Docket No.: 179.00.04--002
Effective Date: 7/19/04
Contact Person: Joyce Lemons
Telephone: (501) 661-7903

Rules for Sprinkler Systems

HEALTH DEPARTMENT

Epidemiology

Docket No.: 007.15.04--001
Effective Date: 6/27/04
Contact Person: Robert Brech
Telephone: (501) 661-2297

Rules Pertaining to Communicable Disease

HEALTH SERVICES AGENCY

Docket No.: 049.00.04--004
Effective Date: 6/26/04
Contact Person: Mary Brizzi
Telephone: (501) 661-2501

HSC Regulation 100M - Nursing Home Bed Methodology

HIGHER EDUCATION

Colleges & University Plans & Operations

Docket No.: 008.02.04--001
Effective Date: 7/4/04
Contact Person: Gary Smith
Telephone: (479) 575-3507

Parking Rules for the University of Arkansas for the Academic Year 2004-2005

ADOPTED RULES AND REGULATIONS

HUMAN SERVICES

Children & Family Services

Docket No.: 016.15.04--002
Effective Date: 7/16/04
Contact Person: Vivian Jackson
Telephone: (501) 682-1577

PUB-402: Operations Manual - including CFS-301, CFS-465 and CFS-1136

County Operations

Docket No.: 016.20.04--006
Effective Date: 7/18/04
Contact Person: Linda Greer
Telephone: (501) 682-8257

FSC 04-08 - Categorically Eligible and Fraud Penalties

Medical Services

Docket No.: 016.06.04--031
Effective Date: 8/1/04
Contact Person: Renita Honorable
Telephone: (501) 683-8577

Transportation Update Transmittal #60

Docket No.: 016.06.04--033
Effective Date: 8/1/04
Contact Person: Betty Reed
Telephone: (501) 683-8363

Official Notice DMS-2004-O-1, DMS-2004-C-4, DMS-2004-L-7, DMS-2004-SS-2, DMS-2004-KK-4, DMS-2004-R-5

Docket No.: 016.06.04--035
Effective Date: 8/1/04
Contact Person: Betty Reed
Telephone: (501) 682-8363

Physician / Independent Lab / CRNA / Radiation Therapy Center Update #87

Docket No.: 016.06.04--038
Effective Date: 8/1/04
Contact Person: Nikki Wade
Telephone: (501) 682-8859

Podiatrist Provider Manual Update #45

Docket No.: 016.06.04--044
Effective Date: 7/1/04
Contact Person: Dorothy Vance
Telephone: (501) 683-2916

Emergency Rule: Official Notice DMS-2004-W-2

Docket No.: 016.06.04--045
Effective Date: 7/1/04
Contact Person: Nikki Wade
Telephone: (501) 682-8859

Emergency Rule: Official Notice DMS-2004-W-1

Docket No.: 016.06.04--055
Effective Date: 7/9/04
Contact Person: Tom Show
Telephone: (501) 682-2483

State Plan Transmittal #2002-017

ADOPTED RULES AND REGULATIONS

INSURANCE DEPARTMENT

Docket No.: 054.00.04--002
Effective Date: 8/1/04
Contact Person: Booth Rand
Telephone: (501) 371-2820

Rule 84 - Prepaid Funeral Benefits Contract Recovery Fund Fees

Docket No.: 054.00.04--003
Effective Date: 7/15/04
Contact Person: Sara Farris
Telephone: (501) 371-2820

Rule 82 - Senior Protection in Annuity Transactions

MOTOR VEHICLE COMMISSION

Docket No.: 063.00.04--001
Effective Date: 7/11/04
Contact Person: John Chappelle
Telephone: (501) 682-1428

Rule 8 - Documentary Fees or Fees Similarly Titled

PHARMACY BOARD

Docket No.: 070.00.04--003
Effective Date: 7/2/04
Contact Person: Charles Campbell
Telephone: (501) 682-0190

Regulation 09 - Pharmaceutical Care / Patient Counseling

Docket No.: 070.00.04--004
Effective Date: 7/2/04
Contact Person: Charles Campbell
Telephone: (501) 682-0190

Regulation 04 - Pharmacy

Docket No.: 070.00.04--005
Effective Date: 7/2/04
Contact Person: Charles Campbell
Telephone: (501) 682-0190

Regulation 08 - Wholesale Distribution

REHABILITATION SERVICES

Docket No.: 165.00.04--001
Effective Date: 7/17/04
Contact Person: Dale Turrentine
Telephone: (501) 296-1620

State Plan for Independent Living 2005 - 2007

STATE LAND INFORMATION BOARD

Docket No.: 192.00.04--001
Effective Date: 7/16/04
Contact Person: Richie Pierce
Telephone: (501) 682-2937

Cadastral Mapping Standard

ADOPTED RULES AND REGULATIONS

STATE PLANT BOARD

Docket No.: 003.11.04--002
Effective Date: 7/9/04
Contact Person: Terry Walker
Telephone: (501) 225-1598

Rules for the Northeast Delta Zone of Arkansas for Boll Weevil Eradication in 2004

Docket No.: 003.11.04--004
Effective Date: 7/11/04
Contact Person: James Scott
Telephone: (501) 570-1159

2003 Amendments to the National Institute of Standards and Technology (NIST) Handbooks 44, 130, and the Annual Book of the American Society for Testing and Materials (ASTM) Standards

Docket No.: 003.11.04--006
Effective Date: 8/1/04
Contact Person: Terry Walker
Telephone: (501) 225-1598

Bakanae (Rice Foolish Seedling Disease) Quarantine Regulations

Docket No.: 003.11.04--007
Effective Date: 7/31/04
Contact Person: Mary Smith
Telephone: (501) 225-1598

Official Standards for Seed Certification

Docket No.: 003.11.04--008
Effective Date: 7/9/04
Contact Person: Mike Thompson
Telephone: (501) 225-1598

Revision to Pesticide Use and Application Act Regulations

Docket No.: 003.11.04--009
Effective Date: 7/9/04
Contact Person: Mike Thompson
Telephone: (501) 225-1598

Revision to Pesticide Classification Regulations

STATE POLICE

Docket No.: 130.00.04--003
Effective Date: 7/11/04
Contact Person: Director
Telephone: (501) 618-8204

Rules for Towing Rotation List

WORKFORCE INVESTMENT BOARD

Docket No.: 181.00.04--001
Effective Date: 7/11/04
Contact Person: Rebecca Trammell
Telephone: (501) 371-1033

Arkansas Unified Five-Year Plan

INSURANCE DEPARTMENT

04-017A

(Amended Emergency License Suspension Order)
In the Matter of
Charlotte Kay Johnson

04-017B

(Amended Emergency License Suspension Order)
In the Matter of
Charlotte Kay Johnson

04-024A

(Amended Order of Suspension)
In the Matter of the Certificate of Authority of
National Health Insurance Company

04-028

(Order to Show Cause)
In the Matter of
**John Sosnowy, Sosnowy Investment Management Company
and American Skandia Life Insurance Corporation**

04-029

(Emergency License Suspension Order)
In the Matter of
Marty D. Simpson

04-030

(Emergency License Suspension Order)
In the Matter of
Derrick Lamont Gunn

04-031

(Order of Cancellation)
In the Matter of the Certificate of Authority of
the Reciprocal Alliance, a Risk Retention Group

04-032

(Consent Order)
In the Matter of
Richard Dean Warner

INSURANCE DEPARTMENT

04-033

(Consent Order)

In the Matter of

Kerry Thompson

04-034

(Cease and Desist Order)

In the Matter of the Illegal Insurance Activities of

Robert Christian Ray

04-035

(License Suspension Order)

In the Matter of

Janet Kay James

04-036

(Emergency License Suspension Order)

In the Matter of

Larry Walker

04-037

(Order)

In the Matter of the Application for Approval of

Acquisition of Control of

Arkansas National Life Insurance Company

by FFS Holdings, Inc.

04-038

(Order of Continued Suspension)

In the Matter of the Certificate of Authority of

Old Southwest Life Insurance Company

04-039

(Order of Cancellation)

In the Matter of the Certificate of Authority of

Legion Insurance Company

04-040

(Order of Cancellation)

In the Matter of the Certificate of Authority of

Villanova Insurance Company

INSURANCE DEPARTMENT

04-041

(Order of Cancellation)

In the Matter of the Certificate of Authority of
**American National Lawyers Insurance
Reciprocal Risk Retention Group, A Tennessee Insurer**

04-042

(Order of Cancellation)

In the Matter of the Certificate of Authority of
Doctors Insurance Reciprocal Risk Retention Group

04-043

(Order of Cancellation)

In the Matter of the Certificate of Authority of
Instant Auto Insurance Company

04-044

(Order of Cancellation)

In the Matter of the Certificate of Authority of
Colonial Casualty Insurance Company

04-045

(Emergency License Suspension Order)

In the Matter of
Jeffrey Ray Johnson

ORDERS AND NOTICES

LEGISLATIVE AUDIT June 28, 2004

Agency	Period Covered
Department of Finance and Administration - Revenue Division - Office of Child Support Enforcement	6/30/03
Arkansas State Land Department	6/30/03
Office of the Governor	6/30/03
State Insurance Department	6/30/03
Capitol Zoning District Commission	6/30/03
Arkansas Catfish Promotion Board - Two-Year Period Ended	6/30/03
Arkansas Minority Health Commission - Two-Year Period Ended	6/30/03
Arkansas Transitional Employment Board - Two-Year Period Ended	6/30/03
Arkansas Rice Research and Promotion Board - Two-Year Period Ended	6/30/03
Arkansas Wheat Promotion Board - Two-Year Period Ended	6/30/03
Forest Echoes Technical Institute	6/30/03
Mid-South Community College	6/30/03
Crowley's Ridge Technical Institute	6/30/03

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