



Arkansas  
Secretary  
Of State

# The Arkansas Register



**Volume XXVI, Number 4**

**October 2002**

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**Secretary of State  
State Capitol, Room 026  
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*Secretary of State***

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# THE ARKANSAS REGISTER

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.: 2002-241

Minton, Randy  
*State Representative*

**RE:** Can a garnishee refuse to pay a garnishment to a creditor claiming that the employee does not make more than \$500.00 in wages per week and is therefore not subject to garnishment under ACA 16-66-208? **RESPONSE:** The garnishee is entitled to have a court determine whether an employee and particular property are subject to garnishment before being required to garnish an employee's wages. Whether the garnishee has standing to raise a particular exemption depends upon whether the exemption inures to the garnishee's benefit. Whether a particular exemption applies depends upon the facts of each case.

## Opinion No.:2002-247

Robinson, Charles L., CPA,  
*Legislative Auditor*

**RE:** Pursuant to provisions of ACA 5-64-505(f), must all seized items be listed on the confiscation report to the Arkansas Drug Director, or may prosecuting attorneys or other officials establish a threshold for determining the seized items that should be listed on the report? Q2) Are the items to be included on the confiscation report referred to in ACA 5-64-505(f) only those subject to civil forfeiture? Q3) If firearms are seized in connection with a controlled substances criminal offense and separate firearm criminal charges are filed, should the firearms be included on the confiscation report? **RESPONSE:** Q1) The statute is clear in directing that all seized items be listed on the confiscation report. Any policy providing that seized property be reported only if it exceeds a certain value is directly contrary to the law. Q2) Yes, inasmuch as A.C.A. §5-64-505(f) is a civil statute and as such necessarily applies to property "subject to civil forfeiture." However, if property is subject to forfeiture under both the civil and the criminal codes, the civil forfeiture procedure will control. See ACA 5-5-102. Q3) Yes. See also Opinion 99-282.

## Opinion No.:2002-249

Beebe, Mike  
*State Senator*

**RE:** Can a city council reduce the salary of the mayor, whether elected or appointed, without the mayor's prior approval? **RESPONSE:** No. ACA 14-42-113(a).

## Opinion No.:2002-250

Durham, Hugh C.  
*Director, AR Game & Fish Commission*

**RE:** Must the Game & Fish Comm'n disclose for public inspection and copying, pursuant to the Arkansas Freedom of Information Act (FOIA), correspondence, unpublished memoranda, and working papers pertaining to a pending lawsuit (a quiet title action) where, in the opinion of the Commission, such disclosure would unduly interfere with the ability of the Commission to perform its duties? **ANSWER:** Yes, because there is no exemption for the Commission under the FOIA for attorney work product or for records that would be covered by the attorney-client privilege. See A.C.A. 25-19-105 (b) (7); Edmark and Hope Brick Works cases. In my opinion, requiring the disclosure of the Commission's legal files does not violate separation of powers, nor is it contrary to Ark. Const. amend. 35.

## Opinion No.:2002-253

Devine, Marcus C.  
*Director, AR Dept of Environmental*

**RE:** In the event the Department of Environmental Quality (ADEQ) implements a clean up of contamination which includes institutional or engineering controls on private property to prevent migration of contaminants offsite, may ADEQ also place institutional or engineering controls in the form of a deed restric-

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# ATTORNEY GENERAL OPINIONS

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tion on private property without the property owner's consent? RESPONSE: Reasonable "institutional or engineering controls" fall within the range of "remedial action" ADEQ is authorized to undertake pursuant to A.C.A. §8-7-503(10). However, I question whether ADEQ may impose such controls through deed restrictions on any project other than one (a) undertaken in conjunction with a cleanup undertaken pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq., or (b) involving abandoned hazardous waste sites pursuant to the Remedial Action Trust Fund Act ("RATFA"), A.C.A. 8-7-501 et seq. See A.C.A. § 8-7-1104.

## Opinion No.:2002-258

Wood, Jim  
*State Representative*

RE:In light of the fact that the State Highway Department did not receive notice of the City of Patterson's annexation petition of U.S. Hwy 64, as required by ACA 14-40-502, and did not consent to said annexation, would your opinion be consistent with the conclusion reached in Op. 98-003? Q2) Since the Highway Department did not sign the petition, is U.S. Hwy 64 in the city limits of Patterson pursuant to the attempted annexation? RESPONSE: Q1) Yes. A.C.A. § 14-40-502 applies only to the annexation of property completely surrounded by a city — a condition apparently not met in this case. The notice provisions of that statute are consequently inapplicable. Moreover, no statutory provision applicable to an annexation initiated by property owners — the form of annexation that appears to have occurred in Patterson — requires that the Highway Department be directly informed of or accede to the proposed annexation. Q2) I cannot opine whether any portion of U.S. Highway 64 lies within the Patterson city limits, since only a finder of fact can determine whether all the conditions for annexation have been met. However, I can and will opine that the Code contains no requirement that the Highway Department sign off on a petition for annexation filed by a majority of the property owners in an area that includes a state-owned highway.

## Opinion No.:2002-259

Creekmore, Mike  
*State Representative*

RE:What are the rights of a parent regarding signing an application for a driver instruction permit for his or her minor child? ANSWER: This question was asked with regard to a non-custodial parent who wished to sign an application while her minor daughter was with her during summer visitation. The Department of Finance and Administration was correct in advising her that she could not sign because A.C.A. 27-16-702 requires the signature of a custodial parent, i.e, a parent having legal custody (see Op. 89-378).

## Opinion No.:2002-261

Gullett, Brenda  
*State Senator*

RE:Q1) Are two city police and fire department dispatchers who were transferred into the Metropolitan Emergency Communications Association ("MECA") pursuant to an interlocal agreement between the City of Pine Bluff and Jefferson County to establish the 911 system, considered employees of the City or MECA? Q2) Dependent on the answer to Q1, can the employees avail themselves of the city vacation policy or can MECA pay them now for the excess days and impose a 10-day minimum? RESPONSE: I cannot answer these questions definitively, because I do not have all the facts. The question is not addressed by the interlocal agreement, and thus must be governed either by any express contract that was entered into with these employees, or by any implied contract that arises out of the parties'

## Opinion No.:2002-262

Emigh, Barry

RE:Request for approval of popular name and ballot

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# ATTORNEY GENERAL OPINIONS

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title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations, permitting gambling as specified, empowering the General Assembly to establish lotteries, and for other purposes. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the

## Opinion No.:2002-264

Argue, Jim  
*State Senator*

**RE:**Does any provision of statutory or constitutional law prohibit the city of Little Rock from requiring any out-of-state owner of rental property located within the city to designate a resident of Pulaski County as his agent for service of notice and process relating to the property? RESPONSE: As a city of the first class, Little Rock is "authorized to perform any function and exercise full legislative power in all matters of whatsoever nature pertaining to its municipal affairs," A.C.A. § 14-43-602, so long as its exercise of that power by ordinance is not "contrary to the general laws of the state," Ark. Const. art 12, § 4. In my opinion, an ordinance requiring an out-of-state property owner to designate a county resident as his agent for service of process is clearly permissible under this standard. I do not believe exempting nonresident real estate agents from this residency requirement offends the equal protection

## Opinion No.:2002-265

Roebuck, Tommy G.  
*State Representative*

**RE:**In the event the South Central Drug Task Force ("DTF") is disbanded or a member(s) suddenly quits the force and there wasn't enough money in the DTF budget to make full payment of the accrued comp hours of the DTF members, could each county, municipality or board members individually be held liable for payment? RESPONSE: This question is based

on a possibly unwarranted assumption that compensation time not used at the time of an employee's termination gives rise under the Fair Labor Standards Act to a claim for monetary compensation. However, even if the facts support this assumption, so long as the employee was hired pursuant to the grant authorization referenced at A.C.A. §16-21-147(c), as appears to be the case, and further so long as the entities served have not expressly committed to make payment for unused comp hours, specified grant revenues should constitute the sole source of employee compensation. Absent some misappropriation of grant funds that might amount to a tort or a breach of fiduciary duty, I do not believe the referenced entities and individuals would face potential liability to the employee.

## Opinion No.:2002-266

Hall, Darryl J., Sr.  
*Sergeant, ASP, Troop A, Highway Patrol*

**RE:**Trooper objects to the release of "any document contained within [his] personnel file which may confirm disciplinary job action stemming from allegations filed in 1995 by three females," which were requested under the Freedom of Information Act (FOIA). ANSWER: The records will probably be either employee evaluation or job performance records. The test for each is set forth. A conclusive opinion would require review of the actual records.

## Opinion No.:2002-267

Miller, Paul  
*State Senator*

**RE:**Does a county quorum court have the authority to pass an ordinance making the county assessor a floodplain administrator, whose primary duty is to administer the National Floodplain Insurance Program in a county or municipality and includes such responsibilities as issuing building permits for construction of structures in a flood plain? RESPONSE: Yes.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2002-268

Judy, Janice A.  
*State Representative*

**RE:**Q1) Can municipalities that ordinarily adopt annual budgets that end on Dec. 31 of each year, change their budgets to end on Jan. 31 of each year by adopting a new budget pursuant to ACA 14-58-202 "on or before Feb 1" of each year? Q2) Can municipalities adopt a fiscal year that begins Feb. 1 and ends Jan. 31 of each year? Q3) Is there a conflict between ACA 14-58-201, which requires a budget period from Jan 1 to Dec 31, and ACA 14-58-202, which allows until Feb 1 for the annual budget to be adopted? Q4) If a municipality has traditionally adopted the coming year's budget prior to Dec 31 of the current year, and if the municipality fails to adopt a budget for the next year, then under what mechanism does the city continue to operate past Jan 1 until Jan 31 of the next year? Q5) In the situation under Q4, does the city or town continue to operate under a continuing budget resolution or under a temporary budget based on the most recently adopted budget? **RESPONSE:** Q1) No. State law implies an intent that the fiscal year for cities run from Jan. 1 through Dec. 31. Q2) No. See Response to Q1. Q3) No. This disparity simply permits a one-month gap during which the city council must act affirmatively, either by temporarily adopting the previous year's budget, or by acting on each individual expenditure in order to make expenditures. Q4) See response to Q3. Q5) See response to Q.3.

## Opinion No.:2002-269

Childers, Marvin  
*State Representative*

**RE:**Q1) Is it contrary to Act 833 of 1991 for a quorum court resolution to state that Act 833 of 1991 "requires" the Intergovernmental Cooperation Council of each county to recommend the appropriation of funds to each municipal and fire department? Q2) Is it contrary to Act 833 of 1991 for a quorum court resolution to provide that any fire department that has not com-

pleted all necessary paperwork by October 31 of each calendar year will not be eligible to participate in the Act 833 program for that year, and that all funds, or any portion thereof, that would have gone to such ineligible fire departments shall be distributed evenly among the remaining eligible fire departments in the county? **RESPONSE:** Q1) No. Although Act 833 does not explicitly require the county intergovernmental cooperation council to notify the quorum court of the fire protection needs of the districts, it could be construed to mean that the council is required to do so in the event that such needs would warrant a different distribution than a population-based distribution. Q2) No. Counties are authorized to imposed stricter standards than are imposed by state law. See ACA 14-14-808 and -809.

## Opinion No.:2002-270

Malone, Percy  
*State Senator*

**RE:**Should an individual's petition for "city clerk" in Caddo Valley (a second class city), be considered definite and certain enough to allow the petitioner to be placed on the ballot since the office sought is actually "recorder-treasurer"? **RESPONSE:** Yes. See Op. 94-313. Any challenge to the petition must be filed with the judicial branch.

## Opinion No.:2002-272

Emigh, Barry L.

**RE:**Request for certification of popular name and ballot title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations, empowering the General Assembly to operate lotteries, authorizing gambling as specified, empowering the General Assembly to pass laws out of session, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2002-273

Williamson, Tim  
*Pros Attorney, 18th West Judicial District*

**RE:**Can an executive office-holder of a city be employed by a contractor of a separate legal entity that serves or provides utility service to the city of which he is the executive officer? **RESPONSE:** The answer will depend upon certain facts, but could be impacted by ACA 14-42-107(b), by the statutes under which the utility association was formed, or by common law conflict of interest principles. See also ACA 21-8-304.

## Opinion No.:2002-274

Mahony, Jodie  
*State Senator*

**RE:**Are records of the Tomato Cooperative in Hermitage, Arkansas — an entity funded almost exclusively by federal grants, loans guaranteed by the U.S. Dept. of Agriculture, and other public funds — considered 'public records' as defined in ACA 25-19-103(5)(A) (Freedom of Information Act (FOIA))? **RESPONSE:** The answer will depend upon the source of the Cooperative's funding, as well as the nature of its activities.

## Opinion No.:2002-277

Judy, Janice A.  
*State Representative*

**RE:**Can the county recorder reimburse the county general fund from the current balances in the Recorder's Cost Fund for past years in which certain salary and expenses were paid by the county general fund that could also have been paid from the Recorder's Cost Fund (ACA 21-6-306) at the recorder's discretion? **ANSWER:** No, unless there is a sufficient carryover of appropriated, unexpended

Recorder's Cost Fund revenues from the past years involved. See Ark. Const. article 14, section 2, as amended by Amendment 10. See also generally Op. 2001-250; 96-235 (regarding the appropriation requirement). There can be no appropriation of 2002 revenues to pay claims incurred in prior years.

## Opinion No.:2002-278

Duggar, Jim Bob  
*State Representative*

**RE:**For the purpose of calculating benefits in the event the City of Springdale elects to adopt the Benefit Program 2 of the Local Police and Fire Retirement System, (see ACA 24-10-602(a)(2)(A)), would members be entitled to three percent (3%) of their final average pay from the date of their employment with the City, or would they be entitled only to benefits under Benefit Program 2 only from the date that particular program was adopted? **RESPONSE:** They will be entitled to receive the benefits authorized under Benefit Program 2 only from the effective date of Benefits Program 2. See ACA 24-10-602(b).

## Opinion No.:2002-282

Green Robin  
*Benton Co. Attorney, Benton Co. Courthouse*

**RE:**Is the decision of the custodian of records to withhold release of documents relating to disciplinary action against several sheriff's office employees that did not result in suspension or termination of any employee consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes. The requested documents clearly constitute employee evaluation or job performance records and, as such, are not disclosable unless and until there has been a final administrative resolution of any suspension or termination proceeding.

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# ADOPTED RULES AND REGULATIONS

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## BOARD OF CHIROPRACTIC EXAMINERS

Docket No.: 029.00.02--002  
Effective Date: 10/12/02  
Contact Person: Carol Ann Gates  
Telephone: (501) 682-9015

**Part Two Regulations -- A.) Application for State Examination & Licensure; E.) Professional Practices**

## DEPARTMENT OF COMMERCE

*State Plant Board*

Docket No.: 003.11.02--004  
Effective Date: 10/13/02  
Contact Person: Darryl Little  
Telephone: (501) 225-1598

**Arkansas Vegetable Plant Regulations**

## EDUCATION DEPARTMENT

*Administrative Services*

Docket No.: 005.01.02--002  
Effective Date: Proposed  
Contact Person: Kristi Pugh  
Telephone: (501) 682-9850

**PROPOSED RULE: Governing Initial and Standard Administrator Licensure**

\*\*\*

*Office of Accountability*

Docket No.: 005.19.02--007  
Effective Date: Proposed  
Contact Person: Ron Tolson  
Telephone: (501) 682-4342

**PROPOSED RULE: Governing Initial and the First Standard Teaching License**  
\*\*\*

## FINANCE & ADMINISTRATION

*Revenue Division*

Docket No.: 006.05.02--003  
Effective Date: 10/18/02  
Contact Person: Linda Holmstrom  
Telephone: (501) 682-7751

**Regulation 2002-2 -- Standard Mileage Rates for Income Tax Purposes**

## GAME & FISH COMMISSION

Docket No.: 002.00.02--009  
Effective Date: 10/13/02 & 10/3/02  
Contact Person: James Goodhart  
Telephone: (501) 682-6327

**2002-2003 Statewide and WMA Hunting Regulations; EMERGENCY RULE: Prohibition of Importation of Deer, Elk and Other Cervids; Prohibition of Snakeheads**

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# ADOPTED RULES AND REGULATIONS

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## HEALTH SERVICES AGENCY

Docket No.: 049.00.02--004  
Effective Date: 10/13/02  
Contact Person: Mary Brizzi  
Telephone: (501) 661-2501

### Methodology for Hospice Facilities \*\*\*

Docket No.: 049.00.02--005  
Effective Date: 10/13/02  
Contact Person: Mary Brizzi  
Telephone: (501) 661-2501

### Changes in the Nursing Home Permit of Approval Methodology \*\*\*

## HUMAN SERVICES

### County Operations

Docket No.: 016.20.02--016  
Effective Date: 9/26/02  
Contact Person: Sandra Miller  
Telephone: (501) 682-8251

### FSC 02-15 - Food Stamp Program Changes

Docket No.: 016.20.02--017  
Effective Date: 10/10/02  
Contact Person: Sandra Miller  
Telephone: (501) 682-8251

### FSC 02-14 - Food Stamp Program Changes in Work Registration Policy

## Development Disabilities Services

Docket No.: 016.05.02--003  
Effective Date: 10/19/02  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

### Policy No.: 1014 -- Review and Acceptance of Gifts of Real Estate

Docket No.: 016.05.02--004  
Effective Date: 10/19/02  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

### Policy No.: 1086 -- Application and Service Policy for Admission to Human Development Centers

## POLLUTION CONTROL & ECOLOGY

### Air Pollution Control

Docket No.: 014.01.02--001  
Effective Date: 9/26/02  
Contact Person: Mike Porta  
Telephone: (501) 682-0752

### Regulations #26 - Regulations of the Arkansas Operating Air Permit Program

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# ADOPTED RULES AND REGULATIONS

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## POLLUTION CONTROL & ECOLOGY

### *Air Pollution Control*

Docket No.: 014.06.02--002  
Effective Date: 9/26/02  
Contact Person: James Stephens  
Telephone: (501) 682-0809

### **Regulation 20 - Arkansas Surface Coal Mining and Reclamation Code**

#### *Regulated Storage Tanks*

Docket No.: 014.07.02--001  
Effective Date: 9/26/02  
Contact Person: Jennifer Tucker  
Telephone: (501) 682-0883

### **Regulation 12 - Surface Tank Regulation**

## PROFESSIONAL ENGINEERS & LAND SURVEYORS

Docket No.: 044.00.02--002  
Effective Date: 10/11/02  
Contact Person: J. T. Clements, Jr.  
Telephone: (501) 682-2824

### **Revised Rules of the Board**

## PUBLIC SERVICE COMMISSION

### *Utilities*

Docket No.: 126.03.02--005  
Effective Date: 9/26/02  
Contact Person: Diana Wilson  
Telephone: (501) 682-5782

### **Net Metering Rules**

## ARKANSAS REHABILITATION SERVICES

Docket No.: 165.00.02--002  
Effective Date: 10/7/02  
Contact Person: Dale Turrentine  
Telephone: (501) 296-1620

### **New Arkansas Rehabilitation Services Policy and Procedure Manual**

## STATE LAND INFORMATION BOARD

Docket No.: 192.00.02--001  
Effective Date: 9/28/02  
Contact Person: Learnon Darby  
Telephone: (501) 682-2929

### **Arkansas Centerline File Standard**

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# ADOPTED RULES AND REGULATIONS

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## HUMAN SERVICES

### *Medical Services*

Docket No.: 016.06.02--034  
Effective Date: 9/18/02  
Contact Person: Tommy Wingard  
Telephone: (501) 682-6117

**Medical Need Determination Process  
for Nursing Home Applicants ++**

## HIGHER EDUCATION

### *Colleges and Universities Plans and Operations*

Docket No.: 008.02.02--005  
Effective Date: 9/5/02  
Contact Person: Greg Smith  
Telephone: (479) 575-3507

**Parking and Traffic Regulations  
Handbook for the University of  
Arkansas (Fayetteville) for the  
academic year 2002-2003 ++**

**++ Mistakenly left out of the September  
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regrets the error.**

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# INSURANCE DEPARTMENT

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**\*\*\* No Insurance Orders were filed with the *Arkansas Register* during the past filing period for placement in this edition.**

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# ORDERS AND NOTICES

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## LEGISLATIVE AUDIT September 30, 2002

<b>Agency</b>	<b>Period Covered</b>
Department of Parks and Tourism	6/30/01
Arkansas State Board of Examiners in Counseling	6/30/01
Department of Finance and Administration - Revenue Division - Office of Motor Vehicle	6/30/01
State Insurance Department	6/30/01
Arkansas Oil and Gas Commission	6/30/01
Arkansas Teacher Retirement System	6/30/01
Arkansas Supreme Court	6/30/01
Arkansas Court of Appeals	6/30/01
Administrative Office of the Courts	6/30/01
Arkansas Department of Environmental Quality	6/30/01
Department of Finance and Administration - Revenue Division - Expenditures	6/30/01
Department of Finance and Administration - Revenue Division - Racing Division	6/30/01
Arkansas Geological Commission	6/30/01
State Board of Registration for Professional Geologists	6/30/01
Martin Luther King, Jr. Commission	6/30/01

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# ORDERS AND NOTICES

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Arkansas Motor Vehicle Commission	6/30/01
Department of Rural Services	6/30/01
Arkansas State Board of Sanitarians	6/30/01
Arkansas Waterways Commission	6/30/01
Arkansas Student Loan Authority (Private)	6/30/02
Central Interstate Low-Level Radioactive Waste Commission (Private)	6/30/01
Riverside Vocational Technical School	6/30/01
Department of Workforce Education - Arkansas Rehabilitation Services	6/30/01



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