



Arkansas  
Secretary  
Of State

Charlie  
Daniels

# The Arkansas Register



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# TABLE OF CONTENTS

## **ATTORNEY GENERAL**

Opinions . . . . . 4

**RULES AND REGULATIONS** . . . . . 9

## **INSURANCE DEPARTMENT**

Orders . . . . . 11

## **LEGISLATIVE AUDIT**

Orders . . . . . 12

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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.: 2003-002

Gibbons, David L.  
*Pros Att'y, 5th Judicial District*

**RE:** Q1) Does a city attorney have the power to issue subpoenas for medical records in relation to criminal cases, including tests determinative of a criminal defendant's blood alcohol concentration? Q2) Does a city attorney have the power to issue subpoenas for telephone records in relation to criminal cases? Q3) Does a city attorney have the power to issue subpoenas for any type of record which could be used in a criminal trial if such record was a relevant piece of evidence in a criminal case that he was prosecuting? **RESPONSE:** Q1) Yes, pursuant to ACA 16-43-212, unless access to the records is restricted by some other law, such as the Hospital Records Act. Q2) Generally yes, unless a specific restriction applies. Q3) Generally yes, subject to specific restrictions in other laws.

## Opinion No.: 2003-004

Gibbons, David L.  
*Pros. Att'y, 5th Judicial District*

**RE:** Is it required by state law for the salaries of mayor, city attorney, city clerk, and city treasurer for a city of the first class to be set by ordinance, or can these salaries be set by the city's budget which is not passed by ordinance? **ANSWER:** The salaries of the city attorney, city clerk, and elected city treasurer must be set by ordinance. See A.C.A. 14-43-313; 14-43-316. As to the mayor and an appointed city treasurer, state law does not prescribe the procedure to be followed by the city council when it designates/fixes the salaries. See 14-43-409 and Ark. Const. Amend. 56, sec.4. (The opinion distinguishes Ops. 99-129 and 90-166 on this point). Setting the salaries through a budgetary appropriation is therefore permissible. See 14-58-201 through 203 and Op. 2001-230 (procedure for adopting the budget).

## Opinion No.: 2003-005

Gibbons, David L.  
*Pros Att'y, 5th Judicial District*

**RE:** Q1) Does a city have any legal authority or recourse to collect from a convicted defendant for the city's cost of incarcerating the defendant in the county jail prior to sentencing by a criminal court? Q2) If the answer to Q1 is "yes," can the city request the reimbursement of incarceration costs as restitution after a guilty verdict is rendered on a defendant or does a city have to pursue reimbursement for these costs civilly? **RESPONSE:** Q1) The city can collect for any costs incurred by the city for the entire time of incarceration; however, it can collect only after the defendant has been sentenced. Q2) The city may follow the procedures established by law for civil collections. See ACA 16-92-101 et seq. Criminal procedures are also available. See ACA 5-4-203.

## Opinion No.: 2003-006

Gibbons, David L.  
*Pros Att'y, 5th Judicial District*

**RE:** Does ACA 25-19-108 apply to counties, cities, school districts, or other political subdivisions of the state? **RESPONSE:** No. This provision of the FOIA only applies to state agencies, boards and commissions.

## Opinion No.: 2003-007

Gibbons, David L.  
*Pros. Att'y, 5th Judicial District*

**RE:** Is it a violation of state law for a city alderman to vote on an issue that has been brought to the council by a church where the alderman is a member? Q2) Is it a conflict of interest for the alderman to vote on the petition brought to the council by the church where

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# ATTORNEY GENERAL OPINIONS

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the alderman is a member? Q3) If it is a conflict of interest but the alderman votes and the matter is approved, could the vote by the alderman be grounds for the subsequent ordinance to be challenged? RESPONSE: Q1) A.C.A. § 21-8-304(a) bars an alderman from voting on an issue "to secure special privileges or exemption" unavailable to others. Only a finder of fact can determine whether this has occurred in any particular case. However, regardless of whether an alderman is barred from voting on the matter, A.C.A. 14-54-104 provides that even a disinterested city council can close a public street only if public access is no longer "required for corporation purposes." Given the facts as recited, I doubt either the alderman who raised this issue or anyone else on the city council could close the street pursuant to A.C.A. § 14-301-301 et seq., or § 14-301-401 et seq., because (1) the former subchapter of the Code applies only to dedicated public streets and alleys not used for at least five years or abutted by property owned by an educational institution and (2) the latter subchapter applies only to alleys. Q2) A public official is precluded at common law from using his office for personal profit or to exalt his personal interest above his public duty. I cannot answer the factual question of whether a conflict exists under this standard in the specific example you have recited. Q3) A court might rule the ordinance void if it determined that the alderman voted in its favor despite facing a conflict of interests and if the ordinance would not have passed but for his vote.

## Opinion No.: 2003-008

Emigh, Barry

RE: Request for certification of popular name and ballot title of a constitutional amendment authorizing bingo and raffles for nonprofit organizations, authorizing for-profit gambling as specified, empowering the General Assembly to operate lotteries and pass legislation without session or assembly, and for other purposes. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

## Opinion No.: 2003-009

Bracey, John

RE: Was the decision of the custodian of records to release only the unsolicited complaint made by Mary Bracey in response to my request for all witness statements and taped conversations regarding the investigation of retaliatory harassment against Ms. Bracey consistent with provisions of the Freedom of Information Act (FOIA)? RESPONSE: The custodian's determination was partially correct but may not have been entirely responsive. The employee in question and her designated representative are entitled to receive any witness statements and other records pertaining to her because they constitute her personnel or evaluation records. It may be appropriate to redact some information from such records

## Opinion No.: 2003-010

Harris, Eric  
*State Representative*

RE: Did the enactment of Act 1693 of 2001 repeal the municipal courts and requirements for part time judges found in ACA 16-17-101 et seq., specifically 16-17-104 (must be a licensed attorney of the State for four years), and implement Amend. 80's requirements for courts and full time judges, specifically paragraph 16(c), earlier than the January 1, 2005 implementation date stated in paragraph 19(2) of Amend. 80, and in light of the Ark. Sup. Ct. per curiam order of December 19, 2002? ANSWER: Although Act 1693 (16-17-132) did not repeal municipal courts, this act and Amendment 80, section 16 (C) have the effect of superseding 16-17-104 (three year law practice requirement) as to those who assume the office of municipal judge after July 1, 2001. This follows from the redesignation of municipal courts as "district courts."

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.: 2003-011

Baker, Gilbert  
*State Senator*

**RE:** What is the definition of the phrase “school privileges” as it is used in ACA 6-18-1104 (a)(2), which states: “Students who do not participate [in fundraising programs] will not forfeit any school privileges”?  
**ANSWER:** Based on the definition of “school” in 6-18-1102 and the common meaning of “privileges,” this refers generally to the rights that are particular to students and that are granted as benefits or advantages of a school or a school-sponsored organization such as a PTA or booster club.

## Opinion No.: 2003-012

Wood, Jeff  
*State Representative*

**RE:** Q1) Does a county judge have authority to solicit bids and award professional services contracts on behalf of the county for consulting, architectural and general contracting services in connection with the construction of a county jail without the consent of the quorum court? Q2) If the answer to Q1 is “yes,” is the quorum court obligated to appropriate funds to pay for professional services contracts to which it did not consent? Q3) Is the county judge obligated to make the necessary contracts and disburse funds as directed by the quorum court in its appropriation ordinance? **RESPONSE:** Q1) Yes. However, the quorum court must appropriate the funds for such contracts before the judge can enter into them. Q2) No. Q3) No.

## Opinion No.: 2003-013

Hutchinson, Jeremy  
*State Representative*

**RE:** Q1) If enacted, would the attached House

Bill 1083 violate the school funding formula? Q2) If enacted, would the attached House Bill 1083 violate any other current state educational laws?  
**RESPONSE:** Q1) In Lake View School District No. 25 v. Huckabee, Arkansas Supreme Court Case No. 01-836 (Nov. 21, 2002), the supreme court recently declared that the existing school funding formula violates the constitutional guarantee of a “general, suitable and efficient education.” Ark. Const. art. 14. All other things being equal, H.B. 1083 would clearly increase disparities in per-pupil expenditures among the various school districts, thereby exacerbating the formula’s unconstitutional effect. In the wake of Lake View, the legislature is charged with significantly modifying Arkansas’ school-funding system. I obviously cannot opine on what effect your H.B. 1083 might have under any funding formula to be adopted in the future. Q2) I am unaware that H.B. 1083 conflicts with any current state statute. Even if there were a conflict, the proposed statute would repeal by implication any conflicting previous legislation. As for additional constitutional issues, assuming H.B. 1083 were reviewed under the rational basis standard, it might well be upheld as serving a public purpose and not offending the guarantees of due process and equal protection. Alternatively, if the effect of the proposed legislation were to increase disparities in per-pupil expenditures and a court were to review the proposed legislation under the stringent strict-scrutiny standard applicable to state action affecting a fundamental right, I believe the proposed legislation might well be stricken as not narrowly tailored to serve a compelling state interest. Although the supreme court in Lake View declined to reach the issue of whether education is a fundamental right, it did declare that the state has “an absolute constitutional duty to educate our children” — a coinage suggesting that judicial analysis of your proposed legislation might be more stringent than a mere rational-basis review. I am unable to opine precisely what standard of review would apply, much less to apply that standard to a factual situation currently in a state of extreme flux. Finally, I do not believe your proposed legislation constitutes “special” legislation of the sort prohibited by Ark. Const. amend. 14.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.: 2003-014

Mahony, Jodie  
*State Representative*

**RE:** Did the court order issued by the Hon. Collins Kilgore find ACA 26-80-204(18)(D) unconstitutional? Q2) Did the Ark. S. Ct. in its Op. No. 01-836 (Lakeview), find ACA 26-80-204(18)(D) unconstitutional? Q3) Assuming that the Lake View School District offered evidence that the use of supplemental debt service funds to meet the requirements of Amend. 74, as provided by ACA 26-80-204(18)(D), did not satisfy the requirements of Amend. 74 and Judge Kilgore did not specifically rule on that issue, does this render ACA 26-80-204(18)(D) unconstitutional? Q4) Does the fact that the Ark. S. Ct. did not discuss ACA 26-80-204(18)(D) in its decision or in response to the State Defendants' Petition for Partial Rehearing, Certificate of Merit, and Brief in Support result in ACA 26-80-204(18)(D) being unconstitutional? Q5) If neither the Supreme Court nor Judge Kilgore specifically held the above mentioned Code section to be unconstitutional, would that section survive a future constitutional challenge? **RESPONSE:** Neither the trial court nor the supreme court in the Lake View case addressed the constitutionality of A.C.A § 26-80-203(18)(D), which purports to authorize crediting debt service funding supplements against the 25-mill levy mandated for school maintenance and operations pursuant to Ark. Const. amend. 74. Accordingly, the statute remains presumptively constitutional. However, extrapolating from the supreme court's decision in Lake View, I believe a reviewing court would strike the legislation if it were challenged.

## Opinion No.: 2003-016

Billings, Carol  
*City Attorney*

**RE:** Is the decision of the custodian of records to release requested personnel records with exempt information redacted for five (5) City of Pine Bluff employees consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes, with

the possible exception of certain investigatory and recommendation records reflecting the employees' performance on the job for a previous employer who was subject to the FOIA.

## Opinion No.: 2003-018

Bracey, John M.

**RE:** Is the decision of the custodian of records not to release copies of unsolicited complaints filed against City Planning Division employees for a specified period of time consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** With one exception, the custodian is correct in classifying these records as employee evaluation/job performance records. Any unsolicited complaints, however, should be classified as personnel records, and their releasability should be analyzed under the standard that is applicable to such records.

## Opinion No.: 2003-021

Bradford, Jay  
*State Representative*

**RE:** What vote of the General Assembly is required to amend the Tobacco Settlement Proceeds Act? **RESPONSE:** A two-thirds vote of the General Assembly is necessary to amend an act initiated by the people. See Amendment 7 to the Arkansas Constitution.

## Opinion No.: 2003-027

Kelly, Robert D.  
*Attorney at Law*

**RE:** Attorney's client objects to the release of her original application with references, in response to a Freedom of Information Act (FOIA) request, as an unwarranted invasion of her personal privacy. **RESPONSE:** Since a copy of the requested record was not provided, this opinion sets out the general test for release of the record in question.

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# ATTORNEY GENERAL OPINIONS

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**Opinion No.: 2003-029**

O'Fallon, Pola  
*c/o Director, Human Resources*

**RE:** Would release of documents reflecting a Pine Bluff city employee's hire date and salary be consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The opinion outlines the applicable tests for the releasability of records that are typically held in personnel files.



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# ADOPTED RULES AND REGULATIONS

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## GAME & FISH COMMISSION

Docket No.: 002.00.03--001  
Effective Date: 2/7/03  
Contact Person: James Goodhart  
Telephone: (501) 223-6327

**Proposed Fisheries Code Clarifications;  
Steve Wilson/Raft Creek Bottoms WMA  
Waterfowl Hunting Requirements;  
Spring Turkey Season Restrictions on  
Certain WMA's**

## HEALTH DEPARTMENT

### *Health Facility Services*

Docket No.: 007.05.03--001  
Effective Date: 2/10/03  
Contact Person: Renee Mallory  
Telephone: (501) 661-2201

**Rule and Regulations for Utilization  
Review in Arkansas**

## HEALTH SERVICES AGENCY

Docket No.: 049.00.03--001  
Effective Date: 1/23/03  
Contact Person: Mary Brizzi  
Telephone: (501) 661-2501

**Emergency Rule: Moratorium on  
Population Based and Some Utilization  
Based Applications for Nursing Home  
Beds**

## HUMAN SERVICES

### *Child Care & Early Childhood Education*

Docket No.: 016.22.03--001  
Effective Date: 7/1/03  
Contact Person: Thomas Sheppard  
Telephone: (501) 682-8763

### **Child Care System Participant Agreement (FORM DHS-9800)**

### *Children & Family Services*

Docket No.: 016.15.03--002  
Effective Date: 1/31/03  
Contact Person: Vivian Jackson  
Telephone: (501) 682-1577

**Procedure II-E12, Procedure II-E13,  
Policy III-B, Policy VIII-A, Procedure VIII-  
A1, Policy VIII-B, Procedure VIII-B1,  
Procedure VIII-B2, FSPP Glossary, CFS-  
001, CFS-001A, CFS-035, CFS-370, CFS-  
408, CFS-460, and PUB-404**

### *Developmental Disabilities Services*

Docket No.: 016.05.03--001  
Effective Date: 1/31/03  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

**Director's Office Policy 1088 - Burial  
Insurance**

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# ADOPTED RULES AND REGULATIONS

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Docket No.: 016.05.03--002  
Effective Date: 2/20/03  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

**Director's Office Policy 1014 - Autopsy,  
Donation of Body for Medical Research,  
Burial and Cremation**

Docket No.: 016.05.03--003  
Effective Date: 2/20/03  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

**Director's Office Policy 3004-I --  
Maltreatment Prohibition, Prevention,  
Reporting, and Investigation**

Docket No.: 016.05.03--004  
Effective Date: 1/31/03  
Contact Person: Shelley Lee  
Telephone: (501) 682-8671

**Director's Office Policy 3011-D --  
Behavior Management**

*Medical Services*

Docket No.: 016.06.03--004  
Effective Date: 1/31/03  
Contact Person: Tom Show  
Telephone: (501) 682-2483

**State Plan Transmittal #2002-015 --  
Attachment 4.19-A page 11**

*County Operations*

Docket No.: 016.20.03--001  
Effective Date: 2/23/03  
Contact Person: Troy Branscum  
Telephone: (501) 682-8275

**Weatherization Assistance Program's  
2003 State Plan**

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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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