

The Arkansas Register



Volume XXVIII, Number 10

April 2005

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Secretary of State
State Capitol, Room 026
Little Rock, AR 72201-1094

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Published by *Secretary of State*
Charlie Daniels

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ATTORNEY GENERAL OPINIONS

Opinion No.: **2004-358**

Higginbotham, Steve
State Senator

RE: Q1) Voting by proxy when federal, state, or local funds and/or grant funds are being used, is it legal to use proxies to conduct voting on issues that will be used to determine the use and/or dispersing of those funds even when the entity's by-laws allow the use of proxies? Q2) Is it legal to use telephone polling of the Quorum Court Justices, then not having a public meeting on the issue to burden the County with debt, even if the new jobs are the main outcome, in reference to the public issue? In this situation there was no public notice, discussion or vote on this issue prior to the County Judge's enjoining [sic] with another county official to promise a definite dollar amount to recruit business to come to the area. Q3) Is the designation of a 501(c)(3) not-for-profit tax exempt status with the federal IRS all that is required to no longer be governed by or accountable to creating an entity of a city or county commission, authority, museums, chamber of commerce, and other committees? **RESPONSE:** Q1) It is unclear what sort of entity is the recipient of the public funds and what conditions, if any, the public grantor of the funds may have placed on their use. I can only opine that (a) if the grantee is organized under a statutory scheme that allows voting by proxy; (b) if the grantee's charter documents do not prohibit voting by proxy on issues relating to the use of grant funds; and (c) if the grantor has not expressly prohibited the practice, voting by proxy under the circumstances you have recited would appear to be legal. However, I must stress that only a finder of fact acquainted with all of the circumstances could advise you whether this practice was permissible in any particular instance. Q2) As a general proposition, any official action by a quorum court undertaken by telephone poll would violate the open-meeting requirement of the FOIA). However, it is unclear what action the quorum court undertook by telephone poll and what relationship the quorum court's actions had to the county judge's reported pledge of funding to some unidentified entity "to recruit business to come to the area." Only a finder of fact familiar with all the underlying circumstances could assess the propriety of the various actors'

conduct under the recited circumstances. Q3) I gather your concern is whether an entity that performs functions identical or similar to those performed by "an entity of a city or county commission, authority, museums, chamber of commerce, and other committees" can organize itself as a nonprofit corporation exempt from taxation under Sec. 501(c)(3) of the Internal Revenue Code and thereby avoid governmental oversight of the sort that might be applicable to local governmental entities. I can only opine that so long as a nonprofit corporation complies with applicable laws and the conditions of its charter documents, the fact that its operations might resemble those of a governmental agency or commission will be immaterial.

Opinion No.: **2005-005**

Mahony, Jodie
State Representative

RE: If a student health professional (a) is enrolled in an institution of higher learning for training in the treatment of medical emergencies; (b) is not compensated for participating in an emergency service, although participation may be a course requirement; (c) is not part of a state agency or other organized volunteer agency and hence is not a "qualified volunteer" under the Arkansas Volunteer Immunity Act, A.C.A. § 16-6-101 through -105; (d) is not an "emergency service worker" under A.C.A. § 12-75-101 through -131; (e) is not a licensed health professional; (f) is supervised by a licensed health professional at an emergency exercise or the site of a declared emergency; and (g) acts in good faith, in the manner of a reasonable and prudent person, and not in a manner that would constitute gross negligence, then will the student be protected from civil liability when acting during an emergency drill or an actual declared emergency? If so, under what particular provision of the Arkansas Code? **RESPONSE:**In my opinion, the only statute that might bear upon your question under the assumptions you have asked me to accept is the state's "Good Samaritan" law, A.C.A. § 17-95-101 (Repl. 2002). Assuming a court held that a student could not be characterized as "trained" in administering emergency assistance, and further assuming that the

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student met the other conditions set forth in this statute, I believe the student would be shielded from tort liability if he were actually administering emergency assistance. I do not believe a student would be eligible for tort immunity pursuant to A.C.A. § 17-95-101 if the alleged tort occurred while the student was participating in an “emergency drill.”

Opinion No.: 2005-016

Brown, James D.
Chair, AR HVAC/R Licensing Board

RE: If the HVAC/R Board does not have the authority to regulate a domestic dryer pursuant to ACA 17-33-102, which exempts household appliances from Board regulation, does the Board have the authority to regulate the dryer vent? **RESPONSE:** In my opinion, while a court would likely uphold the administrative interpretation of the Department of Health that the exemption for household appliances would include the ventilation ducts to domestic clothes-dryers, legislative clarification would best resolve this ambiguity.

Opinion No.: 2005-023

Rosenbaum, Sid
State Representative

RE: In light of the provisions of federal law, specifically U.S. Code Title 26, chpt. 53, sec. 5845(a) which states that the term “firearm” shall not include an antique firearm or antique device, and ACA 5-73-103 which authorizes the Bureau of Alcohol, Tobacco and Firearms to grant exceptions, would a convicted felon, as outlined in ACA 5-73-103(1) be allowed to hunt with a muzzle loader? **RESPONSE:** No.

Opinion No.: 2005-027

Schulte, Susan
State Representative

RE: Is it lawful to require a peddler’s license from

a farmer to sell his produce in any city, town or county in the State of Arkansas pursuant to provisions of ACA 26-76-101, which defines the term “peddler” or “hawker.” **RESPONSE:** In my opinion, the answer to your question is “no,” it would not be lawful to require a “peddler’s license” for a farmer who was selling produce grown by the farmer himself under the circumstances you have described. See opinion for full analysis.

Opinion No.: 2005-035

Miller, Paul
State Senator

RE: May a person who served as a mayor of a city of the first class retire and receive retirement benefits and then subsequently run again for mayor, be elected and still receive his or her retirement benefit? Q2) Could such a retired person elect to run as an alderman, be elected, and receive a retirement benefit? Q3) If not, what could he or she receive? **ANSWER:** This may depend upon the particular retirement system. If this involves a local pension plan made available to “paid nonuniformed employees” by the provisions of A.C.A. 24-12-101 et seq., it appears that the mayor in that instance could retire and begin receiving benefits and then be reelected as mayor or be elected as alderman and continue to receive his or her retirement benefit. See Op. Att’y Gen. Nos. 2002-144 and 98-162. However, the individual could not rejoin the retirement system and would not continue to accrue service credit during the new service. If, however, this involves retirement under the Arkansas Public Employees’ Retirement System (APERS), A.C.A. 24-4-520, as recently amended by Act 652 of 2005, would require a break in service for the mayor in this instance. APERS requires termination of covered employment to be eligible for retirement. See also 24-4-521.

Opinion No.: 2005-038

Maxwell, Allen
State Representative

RE: Does the industrial facility proposed for

ATTORNEY GENERAL OPINIONS

development in Monticello by Warrior meet all the needs of Act 9 in order to be considered a manufacturing facility? ANSWER: This question, involving the applicability of A.C.A. 14-164-201 et seq. ("Act 9") and Ark. Const. Amendment 65 (revenue bonds) to a particular proposed project is intensely factual and must be decided by local counsel acquainted with all of the circumstances.

Opinion No.: 2005-042

Bolin, Johnnie
State Representative

RE: Can the consumer representative on the Arkansas Motor Vehicle Commission own an automobile advertising business and engage in large scale auto sales without violating the provisions of ACA 23-112-201 which state that the "consumer representative and the representative of the elderly shall not be actively engaged in or retired from the businesses regulated by this chapter"? **RESPONSE:** I cannot answer your question because it raises a question of fact which this office is neither authorized nor equipped to answer.

Opinion No.: 2005-044

Jeffress, Jimmy
State Senator

RE: Assuming that two cities are willing to enter into a revenue-sharing arrangement to share the city sales tax revenue generated by a retail outlet located in one of the cities, would existing Arkansas law permit such an arrangement? **ANSWER:** This may depend, as a threshold matter, on whether the tax was levied for a specific purpose or pledged to the payment of bonds. If so, and use of any portion of the tax for the contemplated revenue sharing arrangement would constitute a diversion of the tax from its stated purpose, contrary to Ark. Const. article 16, section 11. This is

a factual question that requires consideration of the levying ordinance and ballot title. If the sales tax at issue is an "operating penny" tax levied under A.C.A. 26-75-217, then such tax revenue may be expended for any purpose for which the city's general funds may be used. This also requires a factual determination, with the issue focusing on whether the sales tax revenue sharing arrangement constitutes a proper municipal purpose for which City A's unobligated general funds may be lawfully disbursed. These questions should be referred to local counsel.

Opinion No.: 2005-049

Horn, Barbara
State Senator

RE: Would it be legal under current Arkansas law for a construction company to enter into an "at risk construction management agreement" with a school district to manage and construct their project with a guaranteed maximum price written into the agreement? **ANSWER:** I cannot opine on this matter because these terms are not defined in Ark. law. See Op. 2004-176. Please refer to A.C.A. 19-11-801, 19-11-802, and 19-11-805 for the general requirements with respect to the procurement of construction management contracts by school districts. Also note that the subject of construction management is addressed by several bills currently pending in the legislative session

Opinion No.: 2005-060

Lamoureux, Michael
State Representative

RE: May a regional distribution district sell real property for fair market value to one [of] its employees, and if so, under what circumstances and which state statute should the sale be conducted? **RESPONSE:** Decline to answer because issue addressed in attached Arkansas Ethics Commission Advisory Opinion No. 2005-EC-005.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2005-061

Roebuck, Tommy G.
State Representative

RE: Are the provisions of HB 1906 of 2005, which propose to appropriate funds from the interest accrued on the Arkansas Healthy Century Trust Fund in order to fund grants to the Arkansas community health centers to provide dental, mental health, preventive services and health education to the uninsured, underinsured and medically needy, consistent with Initiated Act One, Sec. 7(e)(1)(b), (2) and (f)?
RESPONSE: The focus of your inquiry is whether HB 1906 would in any way amend Initiated Act 1, so as to require a 2/3 vote under Amendment 7 to the Arkansas Constitution. It is unnecessary to address this issue, because HB 1906 is an appropriation bill, which will in any event require a 3/4 vote for passage. To the extent your question is whether HB 1906 is otherwise consistent with Initiated Act 1, this is not a question, absent any vote requirement issue, with any fixed legal significance. It is, rather, a policy matter for the General Assembly to determine.

Opinion No.: 2005-069

Altes and Holt
State Senators

RE: Does House Bill 1525, (regarding in-state tuition for undocumented immigrants , i.e., illegal aliens), as amended by Senate Amendment 2, violate any applicable federal law or constitutional provision?
ANSWER? The amended bill would withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. However, it would still run afoul of the federal statute, 8 U.S.C. § 1623, if a court determined that by providing a benefit on the basis of attending high school in Arkansas for three years the bill was merely using school attendance as a proxy for a residence requirement. A court challenge is pending on a similar statute in Kansas.

Opinion No.: 2005-071

Rainey, David
State Representative

RE: Can the City of Dumas lawfully enter into an interlocal agreement to share sales taxes with another city with the sales taxes were passed by the voters of the City of Dumas for certain specific purposes? Q2) Can the City of Dumas lawfully enter into an interlocal agreement to share sales taxes with another city when the sales taxes have been pledged as security for bonds which have been sold to various bondholders?
ANSWER: "No" to both questions. A tax levied for one purpose may not be used for any other purpose without violating Article 16, Section 11 of the Arkansas Constitution. See Attorney General Opinion No. 2005-044 for the legal analysis.

Opinion No.: 2005-074

Rogers, Reginald
Legal Counsel, AR Dept of Health

RE: Is the decision of the custodian of records to release the name of an employee who was relieved from a temporary work assignment that may implicate that employee in wrongdoing, in response to a Freedom of Information Act request, consistent with provisions of the FOIA? **ANSWER:** It is possible that the release of the name coupled with the e-mail would be tantamount to an improper release of job performance records (A.C.A. 25-19-105(c)(1)). This is a fact question to be decided by the custodian. If the employer conducted an investigation and the e-mail essentially restates information that is contained in the record(s) of that investigation, then it is my opinion that the name should not be released. Cf. Op. Att'y Gen. Nos. 2003-016 and 94-391

ADOPTED RULES AND REGULATIONS

BOARD OF ARCHITECTS

Docket No: 021.00.05-001F
Effective Date: 04/09/2005
Contact: John Harris
Telephone: 501-682-3171

Rule Amendments

GAME & FISH COMMISSION

Docket No: 002.00.05-003F
Effective Date: 03/27/2005
Contact: James Goodhart
Telephone: 501-223-6327

Paddlefish and Sturgeon Flesh (meat) Sales

HOSPITAL EQUIPMENT FINANCE AUTHORITY

Docket No: 147.00.05-001F
Effective Date: 03/31/2005
Contact: J. Shepherd Russell, III
Telephone: 501-376-2011

Annual Report for 2004

HUMAN SERVICES

Administrative Services

Docket No: 016.14.05-005F
Effective Date: 04/12/2005
Contact: Joe Franklin
Telephone: 501-682-9631

Financial Guidelines for Purchased Services

Docket No: 016.14.05-006F
Effective Date: 05/12/2005
Contact: Joe Franklin
Telephone: 501-682-9631

DHS 1046 - Emergency Hires

Children and Family Services

Docket No: 016.15.05-001E
Effective Date: 04/11/2005
Contact: Vellor Williams
Telephone: 501-682-8196

Emergency Rule: Family Services Policy & Procedures Manual (VI-A) (VI-A1) (II-E10); Forms CFS-474, CFS-344B

County Operations

Docket No: 016.20.05-002F
Effective Date: 05/01/2005
Contact: Linda Greer
Telephone: 501-682-8257

FSC 05-02 - Food Stamp Program — Exclusion of Combat Pay

ADOPTED RULES AND REGULATIONS

Medical Services

Docket No: 016.06.04-080F
Effective Date: 04/11/2005
Contact: Tom Show
Telephone: 501-682-2483

**State Plan Transmittal #2004-015 -
Hospital Update #70 and Physician
Update #91**

Docket No: 016.06.05-006F
Effective Date: 04/11/2005
Contact: Betty Reed
Telephone: 501-682-8363

Official Notice DMS-2005-A-1, DMS-2005-AR-1, DMS-2005-HH-1, DMS-2005-G-1, DMS-2005-CA-1, DMS-2005-Z-1, DMS-2005-X-1, DMS-2005-II-1, DMS-2005-L-1, DMS-2005-SS-1, DMS-2005-KK-1, DMS-2005-R-1, DMS-2005-Y-1

**TITLE INSURANCE AGENTS
LICENSING BOARD**

Docket No: 193.00.05-001F
Effective Date: 04/16/2005
Contact: Marie Young
Telephone: 501-683-3630

**VII: License Revocation and Disciplinary
Actions, Part B — Handling of the com-
plaint process**



INSURANCE DEPARTMENT

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



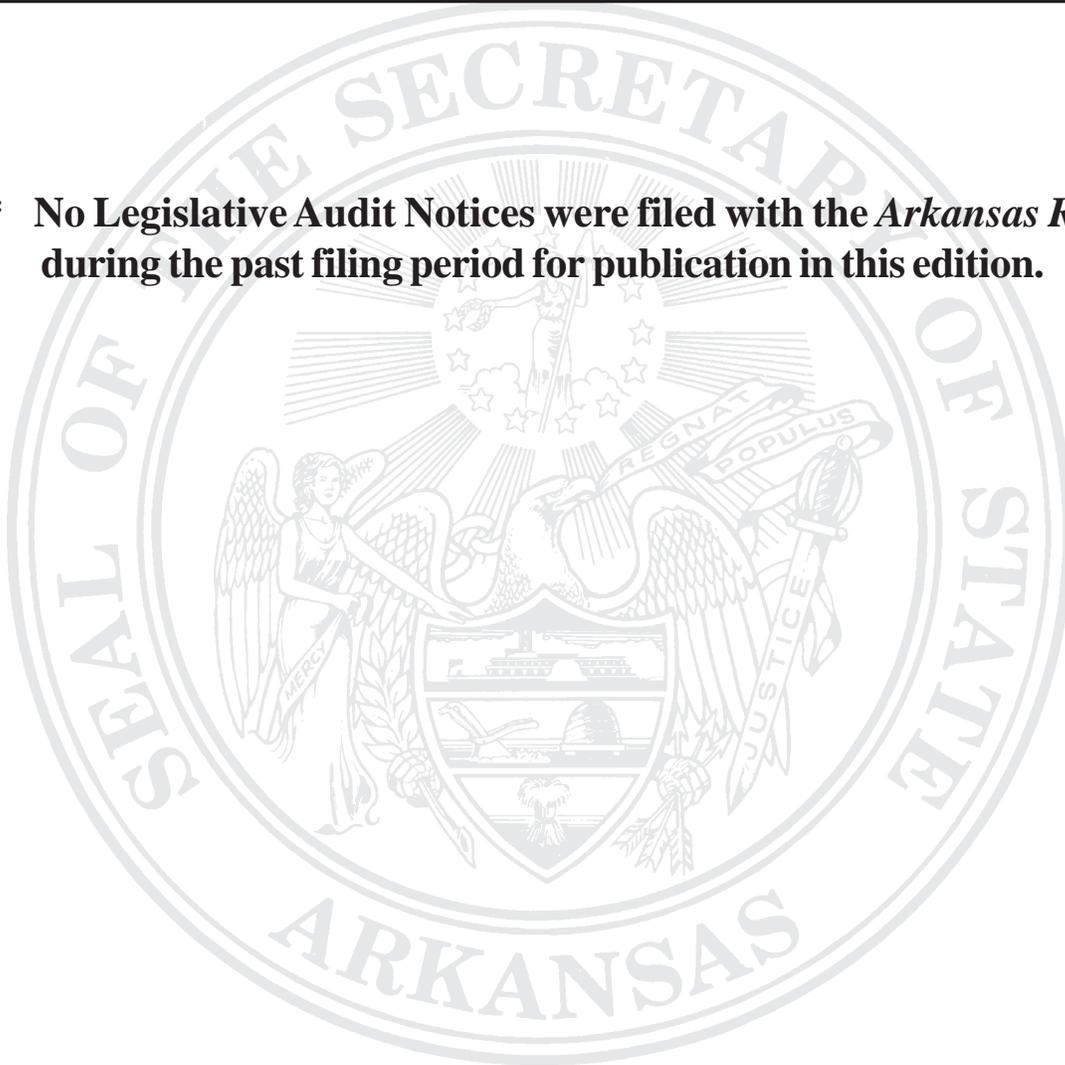
ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

***** No Legislative Audit Notices were filed with the *Arkansas Register* during the past filing period for publication in this edition.**



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