



Arkansas
Secretary
Of State

The Arkansas Register

Volume XXIV, Number 11

May 2001

Corporate Records - Elections - Capitol Building and Grounds

State Capitol - Little Rock, Arkansas 72201-1094 - 800.482.1127

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

Editor **Jon Davidson**
Published by
Secretary of State

The *Arkansas Register* is an official publication of the State of Arkansas. It contains administrative rules and regulations adopted by state agencies, boards and commissions pursuant to Act 434 of 1967, as amended. The *Arkansas Register* also includes Attorney General opinions, notice of legislative audit reports and insurance orders. The subscription rate is \$40 per year or \$3.50 a copy, distributed monthly, postpaid within the United States.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2001-056

Bill Bridgforth
Chair, State Board of Law Examiners

RE: Can a judgment of guilty for two felony convictions that was subsequently discharged without an adjudication of guilt pursuant to ACA 5-64-407 and expunged under ACA 16-90-901, be considered a felony conviction for purposes of application of Section 7.L.(2)(b) of the Procedures of the Ark.S.Ct. Regulating Professional Conduct of Attorneys at Law? Q2) Also, in your opinion is there a conflict in the provisions of ACA 5-4-301(d)(1) and those cited in the attached "Order for Discharge, Dismissal and To Seal"? **RESPONSE:** In my opinion, the document you have submitted captioned "Judgment" is a "felony conviction" to the extent that it imposes a fine. A.C.A. § 5-4-301(d)(1) (Supp. 1999). Although the court's subsequent "Order for Discharge, Dismissal and to Seal" purports to expunge this conviction, I believe the court lost jurisdiction to review the conviction once the time for filing post-trial motions regarding the fine had passed. Accordingly, I believe the conviction stands, triggering application of Section 7.L.(2)(b), which would preclude the applicant from applying for readmission to the bar. ACA 5-64-407

Opinion No.: 2001-062

Gilbert Baker
State Senator

RE: Once a state agency has promulgated regulations which include eligibility criteria, does the agency have the authority, without going back through the process required under the Arkansas Administrative Procedures Act, to employ more restrictive criteria to disallow services to persons who meet the promulgated standards? Q2) If the answer to question 1 is "yes," must the state agency provide notice to the persons formerly eligible under the promulgated standards or to the agencies providing services under the promulgated regulations or both, and if so, what notice must be given? Q3) If the

answer to question 1 is "yes," does the state agency have the authority to retroactively disallow services so that payments for services provided under the promulgated regulations are disallowed or ordered repaid or both? **RESPONSE:** The application and formulation of DHS rules to establish eligibility for early intervention and early childhood services under Medicaid is currently at issue in the pending case of Whitaker v. Pryor et al., Case No. 4-01 CV00116GH (E.D. Ark. 2001), in which I am a defendant. As a matter of policy, this office has consistently declined to issue opinions on matters that are the subject of pending litigation. Consequently, I must respectfully decline to address your questions.

Opinion No.: 2001-068

Gary Biggs
State Representative

RE: Are local law enforcement officers who approve an Arkansas Department of Correction (ADC) request for furlough from an inmate to be released in their jurisdiction held responsible for the prisoner's actions while away from the ADC? **RESPONSE:** Although there is no authority directly on point, I do not believe local law enforcement officers would subject themselves to potential liability by "approving" an inmate's request for a furlough. In my opinion, whether to grant or deny a furlough is a non-delegable decision for the ADC to make. I believe A.C.A. § 12-50-108 reflects a legislative determination that the director of the agency charged with custody of an inmate should bear ultimate responsibility for the consequences of granting a conditional release.

Opinion No.: 2001-069

Jim Argue
State Senator

RE: Is the Arkansas Aids foundation, a private, nonprofit organization that receives Ryan White Title

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II federal grant funds through the Arkansas Department of Health, subject to provisions of the Freedom of Information Act (FOIA)? RESPONSE: This cannot be conclusively answered because it requires a factual review of the Foundation's operations, as well as its specific activities or functions in relation to the grant. The question is whether the private entity carries on "public business" or is otherwise sufficiently intertwined with the activities of government.

Opinion No.: 2001-075

Henry "Hank" Wilkins, IV
State Senator

RE: Does the civil service commission have authority to place a successful candidate on a list for promotion until such time as that person has two years supervisory experience, as stated in the Job Description Manual, even though this has not been the practice of the civil service commission? Q2) If the answer to Q1 is "yes," what are the consequences of the civil service commission's past practices of promoting individuals who do not have the required two-year supervisory experience required in their Job Description Manual? RESPONSE: Must decline to answer because these questions are the subject of an adversary administrative proceeding.

Opinion No.: 2001-077

David M. Haak
State Representative

RE: Can school districts hold their money in financial institutions such as investment brokerage firms, credit unions or savings and loans? RESPONSE: No, under current law. See A.C.A. 19-8-104 (requiring that public funds, as defined in 19-8-101 to include school funds, must be deposited in "banks located in Arkansas.") Note: House Bill 1772 would amend the definition of "bank" or "banking institution" to include savings and loans.

Opinion No.: 2001-081

ALERT
c/o Gerhard Langguth

RE: Request for certification of popular name and ballot title for proposed constitutional amendment to eliminate taxes on food and medicine. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2001-083

William "Bill" Walker, Jr.,
State Senator

RE: May the City of Wrightsville put two donated 16-passenger vans to uses other than specific city functions without violating State law? Q2) May the City lease these vehicles to civic groups, churches, non-profit groups and other entities? Q3) Are there any circumstances in which the vehicles may be loaned to such groups for their use? RESPONSE: In my opinion, the city may not use the vans for any purpose that does not further municipal affairs. The city may lease out the vans only if doing so would serve some legitimate public purpose. I believe loaning out the vans to churches or private nonprofit organizations would be flatly unconstitutional. The propriety of loaning the vans out to other entities must be determined on a case-by-case basis, subject to the general principle that municipalities are generally barred from donating public resources to other entities. Ark. Const. art. 12, sec. 5. ACA 14-42-108(b)(1).

Opinion No.: 2001-084

Arnell Willis
State Representative

RE: In light of the fact that other Phillips County Constitutional officers entered office making the same salaries as their predecessors, should it be considered

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a reduction in salary in violation of A.C.A. 14-14-1203 for the current county treasurer to enter office making less than his predecessor? RESPONSE: No. The raising of other officers' salaries does not constitute a decrease in the treasurer's salary.

Opinion No.: 2001-085

Stephen D. Bright
State Representative

RE: Nine questions regarding the proper organization, procedures and authority of property owners associations. RESPONSE: I would be unable to answer these questions without reviewing the charter documents of the POA, which I presume is a private, nonprofit corporation. Questions regarding the scope of authority of the POA's board of directors can only be answered by recourse to these documents, as well as to certain generally applicable corporate law. I am further barred by statute from answering many of these questions, which relate a non-public dispute that should be addressed by private counsel.

Opinion No.: 2001-086

Steve Oliver
Prosecuting Attorney, 18th Judicial Dist East

RE: Are records located in the administrative section of the sheriff's department, which is open from 8 a.m. to 5 p.m. Monday through Friday, subject to inspection and copying under the FOIA twenty-four hours a day 7 days a week because the jail division is part of the sheriff's department and maintains the longer hours? RESPONSE: In my opinion, a finder of fact might well conclude that the "regular business hours" of the custodian of the records at issue are 8 a.m. to 5 p.m. Monday through Friday, thus supporting the conclusion that no FOIA inspection need be permitted at other times. However, the law on this

question is unclear. Moreover, determining who should be deemed the custodian of the records will involve undertaking a factual inquiry I am unauthorized and unable to conduct.

Opinion No.: 2001-087

Preston Scroggin
State Representative

RE: Does a non-profit child care facility have to have a privilege license to [or] tax in the town in which it operates? RESPONSE: In my opinion, a town has the authority to impose a privilege or occupational tax on a nonprofit child-care facility. ACA 26-77-102. To determine whether the tax applies, one must refer to the town's ordinances.

Opinion No.: 2001-089

Kevin Smith
State Senator

RE: Pursuant to provisions in A.C.A. 13-2-502, -508, and 14-14-705, is the City of Stuttgart legally entitled to appoint 7, 10 or 12 members to their joint city-county library board? RESPONSE: A joint city-county library should be "established and operated" like a public city library. ACA 13-2-508(e). The library should consequently have no fewer than five and no more than seven trustees. ACA 13-2-502(a)(1).

Opinion No.: 2001-091

David Thomas
c/o Stephen Lisle, Lisle Law Firm

RE: Is the decision of the custodian of records to release Mr. Thomas' resume after redacting all protected information consistent with provisions of the

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Freedom of Information Act (FOIA)? RESPONSE: The decision is generally correct, but may sweep too broadly with regard to "purely personal information". Such information may not rise to the level of protectability. The opinion also includes a discussion of the issue of addresses and telephone numbers.

Opinion No.: 2001-092

Stephen D. Bright
State Representative

RE: Does a nursing home facility have the right under state law to prohibit a resident in a nursing home from installing an electronic monitoring device (EMD), whether it is video or audio? Q2) Does the nursing home have the right to deny admission or expel a resident who wants or attempts to install one of these EMDs where notice is given to all who enter the room informing them about the use of the EMD and the roommate, if any, agrees to the EMD in the room? This could also be requested by the legal guardian of the resident. Q3) Does it make any difference if the resident is private pay or Medicare pay? Do the residents still have the same rights regarding these devices in their rooms? Q4) Would rights of the nursing home employees affect the use of these devices in these facilities? Q5) What rights do renters have (i.e., apartment complexes) to install these types of devices in their domicile? Do their rights differ from those of nursing home residents? Q6) Do nursing homes have the right to install EMDs in the rooms if the facility wants to? Would they have to get the permission of the resident? Q7) Is the room considered home to the resident and, if so, what rights would that bring to them? RESPONSE: 1) The issue is not governed by law. As such, it is a matter of contract between the parties. 2) Same. 3) No. 4) As long as there is a legitimate reason for the monitoring and the employee is informed of it beforehand, "no." No rights of the employee would be violated in that instance. 5) Their rights are also governed by contract (a lease agreement). The difference is practical, not legal. 6) No, not without the residents permission, and perhaps not even with their permission. See opinion.

7) Residents have such rights as are guaranteed them by ACA 20-10-1204 and by contract.

Opinion No.: 2001-093

Mark Riable
Board Chairman, AR Schools for Deaf & Blind

RE: Should an employee for the Arkansas Schools for the Blind and Deaf immediately contact the [Child Abuse] hotline when he or she learns of an allegation, or report the incident to their supervisor and allow the supervisor to make the decision to contact the hotline? Q2) Do other entities, i.e., Department of Education, have existing procedures that can provide assistance in this regard? RESPONSE: I decline to answer because these questions are the subject of pending litigation.

Opinion No.: 2001-095

Barry Emigh

RE: Request for certification of popular name and ballot title of proposed constitutional amendment to allow nonprofit bingo and raffles, for-profit gambling, and exempt certain food items from state and local sales taxes. RESPONSE: Rejected due to ambiguities in the text of the measure.

Opinion No.: 2001-096

Sarah Agee
State Representative

RE: A person is charged with DWI 3 in city #1 on one date and is then charged with DWI 3 in city #2 a short time later. He pleaded guilty to the DWI 3 in city #2, while the charge in city #1 is pending trial. Can the DWI 3 in city #1 be amended to a DWI 4 and

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referred to the prosecutor's office for prosecution as a felony? Q2) Does a candidate have authority to use the title of "judge" on a ballot after having been appointed or elected, even if it is at a higher level? RESPONSE: Q1) I decline to answer this question because it appears to be the subject of pending litigation. Q2) Yes, regardless of whether the incumbent was elected or appointed. ACA 7-7-305(c)(1)(A) permits any holder of "elective office" to use his title. A judgeship is an elective office even if the incumbent has been appointed to fill a vacancy pursuant to Ark. Const. amend. 29.

Opinion No.: 2001-101

Lonetree, Snell, Thomas, et al
c/o Jeff Barrows, PAO, Ft Smith PD

RE: Is the decision of the custodian of records to release "the personnel files of all staff, including civilians, employed by the Fort Smith Police Department," along with a list of all salary and noncash compensation paid to each employee for calendar year 2000 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.

Opinion No.: 2001-103

ALERT
c/o Gerhard Langguth

RE: Request for certification of popular name and ballot title of proposed constitutional amendment to eliminate taxes and food and medicine. RESPONSE: Popular name certified as submitted, ballot title certified as revised. See opinion.

Opinion No.: 2001-106

Stephen D. Bright
State Representative

RE: Is the decision to withhold records of the Superintendent's annual evaluation performed by the North Little Rock School District Board consistent with provisions of the Freedom of Information Act (FOIA)? RESPONSE: If the superintendent in question has not been suspended or terminated, the threshold requirement has not been met and the evaluation record is not subject to inspection under the FOIA. See opinion for analysis.

Opinion No.: 2001-112

Cameron/Thornton/Coker, et
DF&A Office of Field Audit, NE District

RE: What records contained in several state employees' personnel files must be released in order to comply with a Freedom of Information Act (FOIA) request? Q2) Is the decision to release records in these employees' personnel files consistent with provisions of the FOIA? RESPONSE: Q1) I cannot answer this question without reviewing the particular files at issue. As a general proposition, employee performance evaluations or job reports will be subject to disclosure if an administrative appeal of a job suspension or termination has been completed, if the requested documents served as a basis for the suspension or termination, and if a compelling public interest in disclosure exists. Personnel records are generally subject to disclosure unless their publication would constitute a clearly unwarranted invasion of privacy.

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Opinion No.: 2001-114

Mark Burnette

Mitchell, Blackstock, Barnes, Attorneys

RE: Is the decision of the LRSD custodian of records to release certain records contained in the personnel files of two district coaches consistent with provisions of the Freedom of Information Act (FOIA)?
RESPONSE: Some records should be released and others withheld after applying the tests for releasability applicable to the various records. See opinion.



ADOPTED RULES AND REGULATIONS

ASSESSMENT COORDINATION DEPARTMENT

Docket No.: 177.00.01--002
Effective Date: 5/3/01
Contact Person: Rita Rollins
Telephone: (501) 324-9240

Emergency Rule: Amended Rule 5.0 (Addendum A-10)

Docket No.: 177.00.01--003
Effective Date: 5/3/01
Contact Person: Rita Rollins
Telephone: (501) 324-9240

Emergency Rule: New Rule 3.29 - Location Factors

Docket No.: 177.00.01--004
Effective Date: 5/3/01
Contact Person: Rita Rollins
Telephone: (501) 324-9240

Emergency Rule: Amended Rule 4.19 - Uniform Notice of Real Estate Value Change

Docket No.: 177.00.01--005
Effective Date: 5/3/01
Contact Person: Rita Rollins
Telephone: (501) 324-9240

Emergency Rule: Amended Rule 3.31 - Failure to Comply with Standards of Performance Audit

HIGHER EDUCATION

Financial Aid

Docket No.: 008.10.01--002
Effective Date: 4/30/01
Contact Person: Julie Cabe
Telephone: (501) 371-2012

Emergency Rule: Academic Challenge Scholarship Program Rules and Regulations

Docket No.: 008.10.01--003
Effective Date: 4/30/01
Contact Person: Julie Cabe
Telephone: (501) 371-2012

Emergency Rule: Arkansas Governor's Scholars Program Rules and Regulations

HUMAN SERVICES

Medical Services

Docket No.: 016.06.01--011
Effective Date: 4/19/01
Contact Person: Tom Show
Telephone: (501) 682-2483

Emergency Rule: State Plan #2001-006 - Non-State Public Hospital Inpatient Adjustment

Docket No.: 016.06.01--012
Effective Date: 4/19/01
Contact Person: Tom Show
Telephone: (501) 682-2483

ADOPTED RULES AND REGULATIONS

**Emergency Rule: State Plan #2001-010 -
Private Hospital Inpatient Adjustment**

Docket No.: 016.06.01--013
Effective Date: 4/19/01
Contact Person: Tom Show
Telephone: (501) 682-2483

**Emergency Rule: State Plan #2001-011 -
Pediatric Hospital Inpatient Adjustment**

Docket No.: 016.06.01--014
Effective Date: 4/30/01
Contact Person: Sharon Jordan
Telephone: (501) 682-8489

**State Plan Transmittal #01-005 - Nursing
Facility Rate Methodology**

Administrative Services

Docket No.: 016.14.01--010
Effective Date: 7/1/01
Contact Person: Brenda Jackson
Telephone: (501) 682-6250

**Social Services Block Grant
Comprehensive Services Program Plan
(CSPP 01-2)**

Docket No.: 016.14.01--011
Effective Date: 6/29/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

**DHS Policy 1027 - Volunteer Employment
and Personnel Policy**

INSURANCE DEPARTMENT

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ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

***** No Audit Reports were filed with the *Arkansas Register* during the month of May.**

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ARKANSAS REGISTER

Published by:

Secretary of State

FROM: Secretary of State
Arkansas Register Division
State Capitol, Room 026
Little Rock, AR 72201-1094

Presorted Standard
U.S. Postage
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Little Rock, AR 72201
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