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Secretary
Of State

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

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2000-331

Tom Mars
Director, Arkansas State Police

RE: Pursuant to provisions of ACA 17-40-102(10), are private correctional officers included within the definition of “private security officer, and if so, are companies that employ these correctional officers, if working on public property, included within the definition of “guard company” as stated in ACA 17-40-102(4)? If the officers work on private property, is the employer then considered a “guard company” under the definition provided by ACA 17-40-102(4)? **RESPONSE:** Private correctional officers employed by a private company to work at a state correctional facility on public property are not “private security officers” within the meaning of ACA 17-40-102(21), and the companies that employ them are not “guard companies.” See opinion for analysis.

Opinion No.: 2001-014

Cathryn E. Hinshaw
Exec. Dir., AR Fire & Police Pen Rev Bd

RE: Pursuant to provisions of ACA 24-11-830, should a fireman who is participating in the DROP but is still actively working be considered “retired” for purposes of serving on the local pension board of trustees? **RESPONSE:** Yes. Despite recent amendments to the DROP provisions for police and fire, the status of DROP participants is still more akin to that of retired members than active members, when viewing the total package of contributions or payments on their behalf. See Ops. 99-085, 97-116, 97-007.

Opinion No.: 2001-017

Didi Sallings
Exec Dir, AR Public Defender Commission

RE: Q1) What constitutes a youth services cen-

ter or facility under ACA 9-28-211? Q2) Does the Division of Youth Services (“DYS”) have authority to direct a law enforcement agency to take a child into custody who has been discharged and return them to a DYS facility? **RESPONSE:** Q1) The terms “youth services center” and “youth services facility” are defined by statute at ACA 9-27-303. Q2) With respect to your second question, the law is confusing. On the one hand, the law provides that commitment — and, by implication, recommitment — to a youth services center or facility must be by order of the court. On the other hand, DYS has statutory authority to move a juvenile within its system of youth services centers or facilities and community-based programs, which would suggest that DYS could unilaterally decide to recommit a youth who has not yet been “discharged” from DYS custody by formal release. For constitutional reasons, I believe it is questionable whether DYS may order the pickup of a youth in aftercare for recommitment to indeterminate secure custody without first obtaining court approval. Legislative or judicial clarification on this point is warranted. I further believe a youth picked up for violating conditions of aftercare is entitled to a probable-cause hearing to satisfy due-process concerns. Finally, I believe DYS must obtain a court order before recommitting a “discharged” youth if by “discharge” you mean unconditional, formal release from DYS custody pursuant to A.C.A. § 9-28-210.

Opinion No.: 2001-021

H. G. Foster
Pros. Attorney, 20th Judicial District

RE: Can a private business on private property place restrictions on law enforcement authorities regarding access to its employees while they are at work for the purpose of: 1) serving arrest warrants, misdemeanor or felony; 2) serving subpoenas for criminal cases, misdemeanor or felony; or 3) questioning suspects or witnesses to felonies? **RESPONSE:** As a general proposition, with the possible exception of highly regulated businesses, I believe a private employer might restrict law enforce-

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ment officers from engaging in the described acts in non-public areas of the business without first obtaining either the employer's permission or a search warrant unless exigent circumstances exist. Fourth Amendment.

Opinion No.: 2001-023

Bill H. Stovall, III
State Representative

RE: Q1a) Are the Sky Point Property Owners Association ("SPOA") and the Sky Point Estates Suburban Improvement District ("SID") "conjoined" as stated in the 1978 court order creating the SID, or is the SID autonomous as Melanie Grayson, attorney for the SID states in the attached legal opinion? Q1b) If the two are separate entities, what legal rights do the taxpayers have with the SID as a group or individually? Q1c) Can individual taxpayers or groups of taxpayers attend annual or other meetings of SID commissioners? Q1d) Does public notice need to be given of these meetings? Q2a) Is the SID required to provide financial reports to taxpayers/property owners periodically and/or upon request? Q2b) Is the SPOA "conjoined" with the SID entitled to financial reports periodically or upon request? If not, can the SPOA, as a group of taxpayers, request such reports? Q2c) Are annual or other periodic audits of financial records required? If not, can they be requested by individual taxpayers and/or the SPOA? Q3a) Can the SPOA have input and/or approval of activities or projects that the SID commissioners may be considering? Q3b) If not, can taxpayers individually or as a group have such input and/or approval of activities or projects? Q4a) Can the SPOA have a role in the selection of or replacement of SID commissioners? Q4b) If not, can individual taxpayers or a group of taxpayers have such a role? Q4c) If dissatisfied with one or more SID commissioner, can such commissioner be replaced and, if so, how? Does ACA 14-92-209 apply? If it does apply, does each property owner have one vote or is it one vote per lot owned? Q5) Is it appropriate for SID commissioners to spend taxpayers' monies to obtain legal opin-

ions which in effect make it difficult for the SPOA or individual taxpayers to have access to financial records with details, input into projects, etc.? **RESPONSE:** Q 1a) I cannot explain or interpret the reference to "in conjoint Property Owners Association" in the Final Order approving the improvement district. As a matter of state law, it is correct to say that the SID is autonomous, as the board is the body charged with the power and duty to operate the district. Q 1b) A property owners association such as the SPOA has no role or status under state law with respect to the SID. Individual property owners' rights are as established by statute. See, e.g., A.C.A. 14-92-217, 14-92-218, 14-92-401, 14-92-209. Q 1c) Yes, assuming that the meeting is not subject to an exemption from the FOIA's open meeting requirement. See Att'y Gen. Op. 92-312. Q1d) Yes. Q 2a) I cannot determine whether the one act requiring financial reporting by improvement districts applies in this instance. See Act 515 of 1923 (special legislation). Q 2b) No. State law does not recognize or establish any rights of the SPOA in connection with the SID. Q 2c) No. Q 3a) No. Q 3b) No, other than the exercise of specific statutory rights noted above in response to Q 1b. Q 4a) No. Q 4b) Regarding replacement of commissioners, see Op. 95-348 (discussing the history of the recall provision under 14-92-209). Q4c) See Q 4b and the cited opinion. See 14-92-204 regarding voting rights. Q 5) The board of commissioners has broad discretion in determining the appropriateness of expenditures for legal advice.

Opinion No.: 2001-024

Jim Argue
State Senator

RE: Do provisions of ACA 6-51-601, et seq., which require licensure of professional organizations offering instructions to its membership, apply to a volunteer, nonprofit professional organization offering training workshops to its members and nonmembers for a nominal cost for the purpose of recruiting nonmembers? **RESPONSE:** Under a strict reading

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of the licensure requirements, I must conclude that the requirements do apply to such organizations. However, I do not believe these provisions were intended to apply to such organizations.

Opinion No.: 2001-026

Mike Huckabee
Governor

RE: In light of the type 2 transfer under A.C.A. 25-2-105 (Repl. 1996) that altered the duties, powers and authority of the Director of the Bureau of Standards, is that position still considered a civil office within the prohibition of Art. 5, Sec. 10? **RESPONSE:** This is unclear because the "public office" versus "public employment" distinction has not been addressed in this unique context involving a department's reorganization under separate act, i.e., under this type 2 transfer situation. The Director position remains as a position created by law, with a significant appropriated salary. And he is appointed by and serves at the pleasure of the Governor. Thus, while the Director clearly exercises no power and performs no duties independently of the Plant Board Director following the type 2 transfer, his position may nevertheless have been continued as a subordinate office. In the absence of any decisive case law, this remains an open question and I thus cannot agree that the departmental transfer changes the earlier opinion.

Opinion No.: 2001-027

Richard Hill
Director, DHS Division of Mental Health Services

RE: Request for approval of two interlocal cooperation agreements between the Department of Human Services, Division of Mental Health Services Research and Training Institute (DMHS-RTI) and the University of Arkansas for Medical Sciences Department of Psychiatry and Behavioral Sciences (UAMS-

DPBS) for the study and treatment of psychiatric disorders and training of mental health professionals. **RESPONSE:** Approved as submitted.

Opinion No.: 2001-029

David R. Malone
State Senator

RE: May a participating public employer such as the Four County Solid Waste District withdraw from the Arkansas Public Employees Retirement System (APERS) and establish its own plan after having previously elected to join APERS? **RESPONSE:** No. This would require legislation. Compare previous legislative authorization for municipalities to withdraw from the system. Act 586 of 1975.

Opinion No.: 2001-030

Dwight Fite
State Representative

RE: What is the extent of coverage afforded to residential child care institutions according to A.C.A. 12-12-503 definitions? **RESPONSE:** If you are asking whether the law regarding the mandatory reporting of child abuse applies to abuse inflicted in an orphanage, in my opinion the answer is "yes." If you are asking whether the orphanage is obliged to report such abuse, in my opinion the answer is likewise "yes."

Opinion No.: 2001-033

Mike Huckabee
Governor

RE: In light of the decision in *Chaffin v. Arkansas Game & Fish Comm'n*, 296 Ark. 431, 757 SW2d 950 (1988), does H. B. 1018 violate the separation of

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powers doctrine as it appears in Ark. Const. art. 4?
RESPONSE: The bill amends ACA 10-3-309, which governs the legislative oversight of administrative rules and regulations by the Legislative Council. Although the constitutionality of the bill may depend upon its practical application, it is my opinion that under Chaffin, it is constitutionally suspect.

Opinion No.: **2001-036**

Doyle Webb
State Senator

RE: What is the maximum number of military leave days that are available in any one calendar or fiscal year to an employee of a county sheriff's office who is granted military leave of fifteen (15) days per calendar or fiscal year pursuant to ACA 21-4-212?
RESPONSE: 30 days. See ACA 21-4-102.

Opinion No.: **2001-037**

Jan A. Judy
State Representative

RE: Should the costs of run-off contests for municipal offices be billed directly to the cities, or must the election commission use the formula set out in ACA 7-5-106? RESPONSE: The formula set out in A.C.A. 7-5-104 controls the expenses of runoff elections. See opinion for discussion.

Opinion No.: **2001-039**

John Paul Verkamp
State Representative

RE: Q1) What is the residency requirement for a potential appointee to the city planning and zoning commission? Q2) Can the appointee be a resident

of the jurisdictional planning area but live outside the city limits? RESPONSE: The law is a little unclear, but in my opinion the appointee must reside within the city limits. Arkansas caselaw interpreting Art. 19, sec. 3 of the Arkansas Constitution requires municipal officers to reside in the "political subdivision to be served by the official." This appears under current law to be the city. See opinion for discussion and cites. Q2) No, but see opinion regarding proposed legislation (S.B. 92) that may change this analysis.

Opinion No.: **2001-041**

Barry Emigh

RE: Request for certification of popular name and ballot title of proposed constitutional amendment to allow the operation of bingo and raffles for nonprofit organizations and permit the operation of for profit gambling on water vessels. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: **2001-042**

Jay Bradford
State Representative

RE: Can a county judge serve simultaneously as a director of a regional six-county irrigation district? RESPONSE: Yes (assuming the district was formed under ACA 14-116-101), but individual conflicts of interest may arise, in which case the judge should recuse from participating.

Opinion No.: **2001-043**

Larry Prater
State Representative

RE: Does H.B. 1073, which requires a \$2000 fee

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for sponsors of a special election to levy, increase, decrease or repeal a county library tax, violate Ark. Const. amend. 38, as amended by Amend. 72? Q2) Does the Arkansas Legislature have authority to give quorum courts the discretion to decide which sponsors will be required to pay the filing fee as a condition to submitting the petition to the voters of the county? **RESPONSE:** 1) I cannot conclude that H.B. 1073 is unconstitutional in this regard because there is no unqualified right to a special election. The sponsor may still have his proposal placed before the electors at a general election without fee. 2) Generally “no,” this type of discretion raises obvious red flags in terms of equal protection analysis. In my opinion, however, H.B. 1073 would not be construed as granting this authority.

Opinion No.: 2001-046

Leslie Wyatt
President, Arkansas State University

RE: Are University records regarding student discipline considered scholastic records and thereby exempt from disclosure under the Freedom of Information Act (FOIA)? **RESPONSE:** Although the FOIA does not explicitly answer this question, the Ark. S.Ct’s policy of interpreting the FOIA in favor of openness, and its policy of construing exemptions narrowly lead me to conclude that disciplinary records should not be deemed “scholastic records.” (This opinion contains a footnote concerning FERPA.)

Opinion No.: 2001-047

Bruce T. Edwards

RE: Was the decision of the custodian of records for the Arkansas School for Mathematics and Sciences (ASMS) to deny my request for copies of all documents relating to faculty and staff evaluations of all ASMS administrators consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes. The records are in all likelihood “em-

ployee evaluation or job performance records” and absent a suspension or termination of the affected employees and the presence of other criteria, the records are properly shielded from public inspection.

Opinion No.: 2001-054

Barry Emigh

RE: Request for certification of popular name and ballot title of proposed constitutional amendment to allow for the payment of canvassers and sponsors and public education teachers from the state general fund, exempt teacher earnings from the state income tax and exempt certain food items from the state and local gross receipt sales tax. **RESPONSE:** Popular name and ballot title rejected on authority of the Arkansas Supreme Court decision in *Kurrus v. Priest*, 342 Ark. ___, ___ S.W.2d ___ (10/24/00), which held that popular name and ballot title invalid citing the same infirmities that plague this submission.

Opinion No.: 2001-055

Robert Charles Brown
President, Arkansas Tech University

RE: Was the decision of the custodian of records not to release requested information relating to the search for and hiring of specific current and former faculty members consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The determination was likely correct for some of the records, but may have swept too broadly and withheld records that should have been released. See opinion for analysis.

Opinion No.: 2001-058

Stephen Bright
State Representative

RE: Is House Bill 1382, entitled “An Act to Make

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Long-Term Care Affordable and Available for Facility Residents; and for Other Purposes,” constitutional — especially the equal protection part? The bill imposes a cap on non-economic and punitive damages in cases for medical injury against a long-term care facility. RESPONSE: Subsection (a)(3) of Section 13 of the bill in all likelihood violates article 5, sec. 32 of the Arkansas Constitution and the separation of powers doctrine. There are a number of other possible constitutional challenges which might be brought and courts across the country are split on those arguments.

Opinion No.: 2001-063

Mark E. Parker
Patrolman, Fort Smith Police Department

RE: Was the decision of the records custodian to release a copy of a patrolman’s Internal Affairs file consistent with provisions of the Freedom of Information Act (FOIA)? RESPONSE: The answer will depend on the particular records in the file. The opinion outlines the standards of disclosability for the types of records that are likely contained in the file.



ADOPTED RULES AND REGULATIONS

DEPARTMENT OF CORRECTION

Docket No.: 004.00.01--001
Effective Date: 3/24/01
Contact Person: Larry Norris
Telephone: (870) 267-2000

AR 865 - Visitation

Docket No.: 004.00.01--002
Effective Date: 3/24/01
Contact Person: Larry Norris
Telephone: (870) 267-2000

AR 860 - Inmate Correspondence

FINANCE & ADMINISTRATION

Revenue Division

Docket No.: 006.05.01--002
Effective Date: 3/17/01
Contact Person: Laura Shook
Telephone: (501) 682-7751

Regulation 2000-7 -- Standard Mileage Rates for Income Tax Purposes

Docket No.: 006.05.01--003
Effective Date: 3/17/01
Contact Person: Laura Shook
Telephone: (501) 682-7751

Regulation 2000-8 -- Real Property Tax Credit Claims

HIGHER EDUCATION

Financial Aid

Docket No.: 008.10.01--001
Effective Date: 3/1/01
Contact Person: Julie Cabe
Telephone: (501) 371-2012

Minority Teacher Scholarships Amendments

HEALTH DEPARTMENT

Health Facility Services

Docket No.: 007.05.01--001
Effective Date: 3/8/01
Contact Person: Renee Mallory
Telephone: (501) 661-2201

Rules for Home Health Agencies in Arkansas (2001)

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.01--004
Effective Date: 4/30/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Policy 1017 - Emergency & Disaster Planning

Docket No.: 016.14.01--005
Effective Date: 3/23/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

ADOPTED RULES AND REGULATIONS

Policy 1055 - Quality Management

Docket No.: 016.14.01--006
Effective Date: 4/23/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Policy 1041 - DHS News Releases

Docket No.: 016.14.01--007
Effective Date: 4/30/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Policy 1011 - Solicitation of State Employees

Docket No.: 016.14.01--008
Effective Date: 4/13/01
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Policy 1091 - Appropriate Use of E-Mail and Internet

PHARMACY BOARD

Docket No.: 070.00.01--001
Effective Date: 3/12/01
Contact Person: Charles Campbell
Telephone: (501) 682-0190

07-02-0002 -- Good Compounding Practices

Docket No.: 070.00.01--002
Effective Date: 3/12/01
Contact Person: Charles Campbell
Telephone: (501) 682-0190

01-00-0009 -- Inspector's Warning Notice

POLLUTION CONTROL & ECOLOGY

Water Pollution Control

Docket No.: 014.04.01--001
Effective Date: 3/8/01
Contact Person: Chuck Bennett
Telephone: (501) 682-0654

Regulation No. 2 - Regulation Establishing Water Quality Standards for Surface Waters of Arkansas

PUBLIC SERVICE COMMISSION

Utilities

Docket No.: 126.04.01--001
Effective Date: 3/22/01
Contact Person: Gregory Glisich
Telephone: (501) 682-5782

Arkansas Gas Pipeline Code

INSURANCE DEPARTMENT

***** No Insurance Orders were filed with the *Arkansas Register* during the month of March.**

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

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

INSURANCE DEPARTMENT

01-153
(Consent Order)
In the Matter of
Timothy Allen Graham

01-154
(Consent Order)
In the Matter of
Matthew Heath Wallis

01-155
(Consent Order)
In the Matter of
Jana Lee Cowgill

01-156
(Consent Order)
In the Matter of
Emily Ann Gill

01-157
(Consent Order)
In the Matter of
Sammie Lee Kahler

01-158
(Consent Order)
In the Matter of
Lynn Duane Newton

01-159
(Consent Order)
In the Matter of
Britton Lane Nowell

01-160
(Consent Order)
In the Matter of
James Edward Franks

01-161
(Consent Order)
In the Matter of
Kerri Lynn Klein

Expunged Record per Act 1203 of 2003

01-163
(Consent Order)
In the Matter of
Regina Gaye Adams

01-164
(Consent Order)
In the Matter of
Timothy Alan Martin

01-165
(Consent Order)
In the Matter of
Debra Loise Loveless

01-166
(Consent Order)
In the Matter of
Paula Roig McClain

01-167
(Consent Order)
In the Matter of
James Gibson Compton

01-168
(Consent Order)
In the Matter of
David Wayne Shaw

01-169
(Consent Order)
In the Matter of
Patsy Lou Musgrove

01-170
(Consent Order)
In the Matter of
Eric Edward Miller

01-171
(Consent Order)
In the Matter of
John Albert Ferguson

01-172
(Consent Order)
In the Matter of
Kathy Margaret Benca

ARKANSAS REGISTER

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