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**Secretary of State
State Capitol, Room 026
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Editor Jon Davidson

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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.: 2002-124

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

RE: Does Act 988 of 1991, as amended by Act 1408 of 2001 (codified as ACA 27-14-314), restrict the use of fines collected under the act as the result of arrest by municipal law enforcement officers to law enforcement agencies or may the fine monies be used for equipment for fire departments or other municipal departments? **RESPONSE:** The language of the statute is broad enough to permit some uses pertaining to fire departments and rescue operations. The governing body is invested with authority over the fund into which the fines are deposited.

Opinion No.: 2002-125

Gullett, Brenda
State Senator

RE: Is a municipal rezoning ordinance (passed by the Pine Bluff City Council) subject to referendum? Q2) Does a referendum petition hold a local ordinance in abeyance until the referendum is decided? **ANSWER:** Q1: I cannot provide a response because this issue is currently in litigation in Pulaski County (see *Lemond v. City of Little Rock*). Q2: This question is also pending before a court.

Opinion No.: 2002-127

Frazier, Deborah
Director, AR Health Servs Permit Agency

RE: Q1) Does Act 1319 of 1999, now codified as ACA 9-28-407(a)(3), exempt all psychiatric residential treatment facilities licensed or permitted by the Child Welfare Agency Review Board ("Board") as of 1999 from the Health Services Permit Agency and

Commission permit of approval process? Q2) May a psychiatric residential treatment facility licensed or permitted by the Board as of 1999 expand its facility and seek to license additional beds without first obtaining a permit of approval for the additional beds? Q3) Does the phrase "licensed or permitted by the [Board] as of 1999" mean those facilities licensed or permitted as of the effective date of Act 1319, as of December 31, 1999, as of January 1, 1999, or some other date? **RESPONSE:** The exemption that is stated in ACA 9-28-407(a)(3) has the effect of allowing psychiatric residential treatment facilities that were licensed by the Child Welfare Agency Review Board as of the effective date of Act 1319 of 1999 (which was July 30, 1999), to continue to operate in the status for which they were licensed at that time, without the necessity of obtaining further permits or licenses for that status from the Health Services Permit Agency and Commission. However, if these facilities intend to change their status (for example, if they intend to expand), they must obtain the required permits.

Opinion No.: 2002-128

Boozman, Fay W., MD, MPH
Director, AR Dept of Health

RE: Is Battery in the Third Degree a disqualifying offense under ACA 20-13-1106(c), which does not list specific offenses, or should Battery in the First Degree, the only battery specifically listed offense, be considered as exclusive when it comes to the disqualification of EMTs? Q2) Would a conviction for Battery in the Second Degree in violation of ACA 5-13-202 be a disqualifying offense? Q3) Can the Division of Emergency Medical Services act on information received from sources other than official criminal background checks when concerns about an EMT's criminal activity arises? **RESPONSE:** 1) A battery in the third degree adjudication does not disqualify a person from being an EMT under ACA 20-13-1106(c) or (b). 2) No. 3) It depends. See opinion.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2002-131

Jacobs, Phillip T.
State Representative

RE: Does the annexation limitation placed on municipalities with a population of fewer than 1,000 persons by provisions of ACA 14-40-302, also apply where real estate owners are petitioning to be annexed into a municipality of under 1,000 persons under the authority of ACA 14-40-601? Also please clarify the application of Act 1751 of 2001, which amended ACA 14-40-302 as it pertains to annexation by municipalities under the election method.
RESPONSE: No. Act 1751 amends only the statute relating to "involuntary" annexations initiated by the municipality's governing body, not to "voluntary" annexations initiated by the residents of the territory to be annexed.

Opinion No.: 2002-132

Jacobs, Phillip T.
State Representative

RE: Pursuant to provisions of ACA 14-55-203, should a declaration of "present" or "abstain" be counted with the majority in order to provide a majority of the whole number of members of the city council and thereby declare the motion passed? Q2) Would the adoption of procedural rules such as Robert's Rules of Order cause a different ruling to be applied in the above question? Q3) If the answer to Q1 is "yes," could legislation be passed on declaring an abstention vote to be without effect or to be considered a negative vote? **RESPONSE:** 1) No. 2) No. 3) Unnecessary to answer.

Opinion No.: 2002-133

Taylor, Jerry
State Representative

RE: Can one individual serve simultaneously as

the elected county coroner and also as a member of the quorum court? **ANSWER:** No. This would constitute an unlawful conflict of interest under the constitution (article 4, section 2), statutes (A.C.A. 14-14-502) and the common law incompatibility of offices doctrine.

Opinion No.: 2002-134

Hendren, Kim
State Representative

RE: Must a commercial development submit and receive approval of its plans from the City of Centerton before beginning construction in the city's exclusive territorial jurisdiction area? Q2) If the City of Centerton has a city planning commission and has developed plans for the area within five miles of its corporate limits, does the Benton County Planning Board have any authority to approve commercial developments within this area of jurisdiction? **ANSWER:** Q.1: Yes, in terms of plat approval. See A.C.A. 14-56-417 (c). If there is no subdivision and no platted lots or parcels, reference must be made to any city ordinances or regulations that protect or carry out the intent of the city's plans. See 14-56-412 (d) and (e), 14-56-415, 14-56-417 (b) (5), and 14-56-421. Q.2: No, if the County purports to act pursuant to its planning authority, The city's planning authority in its growth area is exclusive. 14-56-413 and 14-17-208 (l) and (I). The county's zoning authority must be noted, however. 14-17-209.

Opinion No.: 2002-138

Hathorn, Mike
State Representative

RE: May a superintendent add a duty, and additional pay there on, to supplement the salary schedule (as required by ACA 6-17-201) and a certified employee's contract, without the added duty having been submitted to the school district's personnel policies committee for consideration and/or to the

ATTORNEY GENERAL OPINIONS

school board for approval? Q2) If the answer to Q1 is "no," may a school board retroactively approve the added duty without it first being submitted to the school districts personnel policy committee for consideration? Q3) If a duty, and additional pay thereon, is added to a school district's supplement to the salary schedule and an employee's contract without proper approval, would the employee, a certified staff member who received the additional pay on this unapproved duty, be required to reimburse those funds to the school district? Q4) If the answer to Q3 is "no," and a school district wishes to discontinue a supplemental duty, may a school district reduce that employee's salary by the amount he was receiving for those duties since he will no longer be performing them? Q5) Would the answer to Q4 be different if the supplemental duty had been properly approved? Q6) How would one determine if an additional duty had been added to the supplement to the salary schedule? If the only duties listed for class sponsors are to sponsor the 11th and 12th grades, would the addition of 10th grade class sponsor be considered an additional duty added to the supplement to the salary schedule? Q7) If the answer to Q1 is "no," since contracts are signed by members of the school board, would their signature signify approval by the board? RESPONSE: Q1) No. The power to add a duty to the supplemental salary schedule resides exclusively in the school board in consultation with the personnel policies committee. A.C.A. §§ 6-17-204 and -205. Q2) No. Adding a duty implicates personnel policy, which the school board may fashion only in consultation with the personnel policies committee. Q3) No. Case law establishes that teachers are entitled to additional payment for performing supplemental duties regardless of whether those duties have been properly approved. Q4) If the supplemental duty is not a provision of a valid contract with a specified term, the school district may immediately stop the supplemental payment and direct the teacher to stop performing the duty. Q5) If the performance and payment provisions are properly approved and hence part of a contract, the district is contractually bound for the term of the contract. Q6) By statute, an "additional duty" is one defined by the school board in consultation with the personnel policies committee. I believe adding a "class sponsor

10th grade" should clearly qualify as an "additional duty" for which a teacher is entitled to compensation regardless of whether the position is listed on the supplementary salary schedule. Q7) I do not believe a school board may contract with a teacher to perform an additional duty if the board has not first designated that duty on the supplemental salary schedule after consulting with the personnel policies committee. Notwithstanding this conclusion, I believe a teacher is entitled to payment for any supplemental duties performed.

Opinion No.: 2002-139

King, Barbara
State Representative

RE: In light of the provisions of ACA 14-40-1201, can the city council of the larger city refuse to pass an ordinance calling for a special election on the consolidation or annexation when sufficient petitions have been filed to consolidate? Q2) Does the city council of the larger city have a mandatory duty to call for an election? ANSWER: Q1: Yes. The statute makes it "lawful" for the council to pass an ordinance favoring the annexation and approving the petition. Thus, the council is authorized, but not required, by 14-40-1201(b) (1) to pass the ordinance. Q.2: No.

Opinion No.: 2002-140

Emigh, Barry

RE: Request for certification of popular name and ballot title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations incorporated in the state; permitting the operation of for-profit gambling the Diamond States Casinos, Limited, a corporation to be organized; and empowering the General Assembly to operate a lottery or lotteries and to call special sessions. ANSWER: Approved as revised.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2002-141

Simon, Raymond
Director, AR Dept of Education

RE: Q1) Is an applicant for employment in a non-certified position with a local public school district eligible for employment with the school district pursuant to ACA6-17-414 when that person pled guilty, nolo contendere or was found guilty of a criminal offense listed in subsection (b)(1), and when the sentence was pursuant to Act 346 of 1975 or any other expungement provisions in law and the applicant has fulfilled the terms and conditions of Act 346 or other expungement provisions? Q2) Is the Department required to determine an applicant is ineligible for employment in a non-certified position with a public school district pursuant to ACA 6-17-414 when the sentence was pursuant to Act 346 or other expungement provisions, but the applicant's criminal conviction has not yet been expunged from the criminal background results reported to the Department? Q3) Pursuant to ACA 6-17-414, is the Department to rely only on the criminal background information reported to the Department by the Arkansas State Police when determining whether an applicant is eligible for employment or must the Department review the entire court record when a party challenges the criminal background information reported to the Department? Q4) If the Department is required to review the full court record to determine the eligibility status of an applicant when the ACA 6-17-414 criminal record is challenged, who has proper standing to challenge the criminal record reported to the Department? **RESPONSE:** Q1) No. (See opinion for reasoning.) However, the language of ACA 6-17-414 should be legislatively clarified to specify that it includes expunged defendants. Q2) Yes. The result would be the same even if the record had already been expunged. See response to Q.1. Q3) State law does not require the Department to go beyond the report. However, it does not prohibit the Department from doing so. Q4) The Dept. is not required to review the full court record. This question thus may be moot.

Opinion No.: 2002-142

Hickinbotham, Boyd
State Representative

RE: Can the suburban improvement district [the "SID"] terminate their [sic] responsibility for road maintenance under their present charter, and if not what procedure can be undertaken to accomplish this? Q2) What procedure would be required for the suburban improvement district to provide funds to the city for road maintenance? **RESPONSE:** Q1) I am unable to answer your first question without reviewing the terms of the SID's charter. However, assuming the SID has discharged all its debts and no provision of the charter provides otherwise, I believe the SID could terminate its responsibility for road maintenance by simply dissolving. Moreover, assuming the city has accepted the developer's dedication of the streets for public use, I believe the city is already primarily responsible for street maintenance pursuant to A.C.A. § 14-301-101. Q2) If the city has accepted the dedication of the streets and accordingly undertakes road maintenance, it should directly finance such maintenance through the assessments authorized at A.C.A. § 14-301-101 et seq. I do not believe the legislature anticipated that a suburban improvement district would remain in existence solely to finance the maintenance of improvements that have been conveyed to and accepted by a municipality.

Opinion No.: 2002-143

Holt, Jim
State Representative

RE: If a county sheriff is paid by government funds to operate and dispatch a radio system for the county's small town municipal law enforcement can the sheriff deny radio access to a constable if the constable is a state certified law enforcement officer? **RESPONSE:** If the arrangement is one under which the law enforcement services are provided pursuant to an interlocal agreement, the provisions of that agreement

ATTORNEY GENERAL OPINIONS

may address the question and must therefore be consulted. In the absence of such an agreement, state law does not require the sheriff to permit constables to use the sheriff's radio system that is paid for with county funds. However, state law does not prohibit the sheriff from doing so, and under certain factual circumstances, the quorum court may have the authority to require the sheriff to do so. Access to the Arkansas Crime Information Center can only be granted in accordance with the requirements of state law and the Rules and Regulations of the Supervisory Board. In order for a constable to obtain such access, he must be certified by the Arkansas Commission on Law Enforcement Standards and Training, or have a certified law enforcement officer in his department.

Opinion No.: 2002-146

Cash, Claud V.
State Senator

RE: Which fair housing law should be obeyed in Arkansas — Title VIII of the Civil Rights Act of 1968 as amended in 1988; Arkansas Act 1327 of 1995; or Arkansas Act 1785 of 2001? Q2) If a violation is claimed by any person, to whom would they complain? Q3) Do any of these change the intent of the original Civil Rights Act of 1866? **RESPONSE:** Q1 A) All three enactments should be and can be obeyed, since no disharmony exists among them. Q2) 42 U.S.C. § 3601 et seq. set forth the procedures for asserting a federal claim either in state or federal court or administratively before the Secretary of the Department of Housing and Urban Development. With respect to state-law causes of action, A.C.A. §§ 16-123-210, -317 and -336 set forth the procedures for pursuing relief either in circuit court or before the Arkansas Fair Housing Commission. Q3) No. See opinion.

Opinion No.: 2002-147

Morrissey, Travis J.
Att'y at Law, Hurst Law Firm, PLLC

RE: Request for certification of the popular name

and ballot title of a proposed constitutional amendment to rename the Environmental Enhancement Fund, change the purpose for which such funds are to be used, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2002-148

Morrissey, Travis J.
Att'y at Law, Hurst Law Firm, PLLC

RE: Request for certification of popular name and ballot title of proposed constitutional amendment to provide for the election of members of the Arkansas Game and Fish Commission by popular vote, provide that the Governor appoint the Director of the Commission, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

Opinion No.: 2002-150

Jones, Janice
Chief of Police, Lonoke Police Dept

RE: Is the decision of the custodian of records not to release the requested personnel files for all full and part time officers employed by the Lonoke Police Department for the past twelve months, time sheets/ records for all full and part time officers and dispatch officers from April 1, 2001 to present, and copies of any and all F-4 forms filed with the Commission on Law Enforcement Standards in the past six months on the basis that the request is vague in whole or in part as it pertains to officers who are not named in the request consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** No. The request is sufficiently clear to warrant a response. The tests for the release of personnel and employee evaluation records are set forth.

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Opinion No.: 2002-154

Carter, Shannon
c/o Lonoke Police Department

RE: Requestor objects to the release of documents in her personnel file pursuant to a Freedom of Information Act (FOIA) request. **RESPONSE:** Forwarded copy of response to custodian. See Op. 2002-150.

Opinion No.: 2002-155

Cole, Malcolm
c/o Lonoke Police Department

RE: Requestor objects to release of documents in his personnel file that are responsive to a Freedom of Information Act (FOIA) request. **RESPONSE:** Forwarded copy of response to custodian. See Op. 2002-150.

Opinion No.: 2002-156

Mauk, Randy
c/o Lonoke Police Department

RE: Requestor objects to documents in his personnel file being released in response to a Freedom of Information Act (FOIA) request. **RESPONSE:** Forwarded copy of response to custodian. See Op. 2002-150.

Opinion No.: 2002-158

Morgan, Roger L.
Att'y for Mtn Home School District

RE: Is the decision of the custodian of records not to disclose the personnel file of an employee who was suspended but then resigned consistent with

provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Not entirely. Some records in the personnel file may be subject to disclosure under the ACA 25-19-105(b)(12) test for personnel records. As for any "job performance or evaluation records" in the personnel file, they will be subject to the test set out at ACA 25-19-105 c (1)—and the subsequent resignation has no impact on the question of whether there has been a final administrative resolution of the suspension under that test. The Teacher Fair Dismissal Act does not require a contrary result. ACA 6-17-1505 et seq. The release of these records will depend upon the facts and the content of the records in question.

Opinion No.: 2002-159

Witherell, Stacy
Employee Serv Mgr, LR Human

RE: Is the decision of the custodian of records to release status change forms on certain city employees for the period beginning Jan. 1, 1998 through Dec. 31, 1999, pursuant to a Freedom of Information Act (FOIA) request consistent with provisions of the FOIA? **RESPONSE:** If, as seems likely, the Personnel Status Change Forms merely record an employee's history of changes in position and salary, the decision to disclose the requested personnel records is consistent with the mandates of the FOIA.

Opinion No.: 2002-160

Lasiter, Laura
Personnel Director, City of No.L.R.

RE: Was the decision of the custodian of records to withhold disclosure of a ranked list of individual test scores of candidates for Captain consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes. The scores should not be released. See opinion for analysis.

ADOPTED RULES AND REGULATIONS

EDUCATION DEPARTMENT

Attorney's Office

Docket No.: 005.23.02--001
Effective Date: Proposed
Contact Person: Scott Smith
Telephone: (501) 682-4227

PROPOSED RULE: Process for Submitting a Petition for a Declaratory Order Issued by the Arkansas State Board of Education ***

Docket No.: 005.23.02--002
Effective Date: Proposed
Contact Person: Scott Smith
Telephone: (501) 682-4227

PROPOSED RULE: Rules Governing the Guidelines, Procedures and Enforcement of the Arkansas Public School Choice Act

Early Childhood

Docket No.: 005.24.02--002
Effective Date: 6/23/02
Contact Person: Janie Huddleston
Telephone: (501) 682-4891

ADE 148 - Arkansas Better Chance Program Regulations

Office of Accountability

Docket No.: 005.19.02--006
Effective Date: 5/26/02
Contact Person: Marcia Harding
Telephone: (501) 682-4221

ADE 147 - Amendments to Rules on Special Education Early Childhood

GAME & FISH COMMISSION

Docket No.: 002.00.02--004
Effective Date: 5/20/02 & 5/30/02
Contact Person: James Goodhart
Telephone: (501) 223-6327

Emergency Rule: 15.18 - Importation of Cervids Prohibited; Adopted Rule: 2002-2003 Statewide and WMA Hunting Regulations

Docket No.: 002.00.02--005
Effective Date: 6/2/02
Contact Person: James Goodhart
Telephone: (501) 223-6327

15.15 - Scientific Collection Permit Requirements; 43.10 - Possession or Use of Glass Containers Within the Banks of Navigable Waterways Prohibited

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.02--007
Effective Date: 6/17/02
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Policy 1052 - Rules and Regulations Promulgation

ADOPTED RULES AND REGULATIONS

County Operations

Docket No.: 016.20.02--006
Effective Date: 6/7/02
Contact Person: Sandra Miller
Telephone: (501) 682-8251

FSC 02-08 - Complaint Form (DCO-110)

Docket No.: 016.20.02--007
Effective Date: 6/7/02
Contact Person: Sandra Miller
Telephone: (501) 682-8251

FSC 02-10 - Electronic Benefits Transfer (EBT) Adjustment Policy

Docket No.: 016.20.02--008
Effective Date: 6/16/02
Contact Person: Sandra Miller
Telephone: (501) 682-8251

TEA Policy 5110 - Extended Support Services (ESS) Child Care and related forms

Docket No.: 016.20.02--009
Effective Date: 6/24/02
Contact Person: Sandra Miller
Telephone: (501) 682-8251

TEA Policy 5130-5145 - Extended Support Service Employment Bonus and Transportation Assistance; Title IV-A - State Plan Sections 6.5.1 and 6.5.2 and form DCO-177 - Notice of Time Limit Determination

Docket No.: 016.20.02--010
Effective Date: 6/24/02
Contact Person: Sandra Miller
Telephone: (501) 682-8251

TEA Program: TEA Policy Directive 02-03 - Hardship Extensions to the Federal 60-month Time Limit and related forms

Docket No.: 016.20.02--011
Effective Date: 7/1/02
Contact Person: Betty Reed
Telephone: (501) 682-8363

Section I of all Providers Manuals & Physician/Independent Lab/ CRNA/ Radiation Therapy Center Update Transmittal #80

Docket No.: 016.20.02--012
Effective Date: 7/1/02
Contact Person: Carolyn Patrick
Telephone: (501) 682-8359

State Plan Transmittal #2001-011 and Rehabilitative Services for Persons with Mental Illness Update #42

Docket No.: 016.20.02--013
Effective Date: 7/1/02
Contact Person: Randy Helms
Telephone: (501) 682-1857

Revised Payment Method for Arkansas Health Center Nursing Facility

ADOPTED RULES AND REGULATIONS

STATE BUILDING SERVICES

Docket No.: 017.00.02--001
Effective Date: 5/31/02
Contact Person: Robert Laman
Telephone: (501) 682-5558

Revised Sections: Table of Contents, Sections 4) - Construction Section, 6) - Architectural Section, State Building Services Rule #1 - Small Order / Quote Bids

STATE MEDICAL BOARD

Docket No.: 060.00.02--004
Effective Date: 5/30/02
Contact Person: Peggy Cryer
Telephone: (501) 296-1802

Regulation 6 - Governing Occupational Therapists

TOWING AND RECOVERY BOARD

Docket No.: 157.00.02--002
Effective Date: 5/30/02
Contact Person: Peggy Cryer
Telephone: (501) 296-1802

Rule 8.2 and 8.4 - Fees

WORKFORCE EDUCATION

Docket No.: 172.00.02--002
Effective Date: 6/20/02
Contact Person: Peggy Wakefield
Telephone: (501) 682-1500

Program Policies and Procedures: Secondary Programs Adult Skill Training Classes and Secondary Vocational Centers

INSURANCE DEPARTMENT

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

ORDERS AND NOTICES

LEGISLATIVE AUDIT

April 29, 2002

<u>Agency</u>	<u>Period Covered</u>
State Plant Board	12/30/01
Arkansas War Memorial Stadium Commission (Private)	6/30/00
Arkansas War Memorial Stadium Commission (Private)	6/30/01
Department of Finance and Administration - Revenue Division- Office of Management Services-Cashier Section	6/30/01
Department of Finance and Administration - Revenue Division - Office of Driver Services	6/30/01
Department of Finance and Administration - Revenue Division - Individual Income Tax Section - For the two-year period ended	6/30/01
Department of Finance and Administration - Revenue Division - Office of Field Audit - Collection Section	6/30/01
Arkansas Revenue Department Building Commission	6/30/01
Arkansas Abstractors Board of Examiners - For the two-year period ended	6/30/01
Arkansas State Board of Cosmetology - For the two-year period ended	6/30/01
Department of Higher Education	6/30/01
Arkansas Public Service Commission	6/30/01

ORDERS AND NOTICES

Arkansas Real Estate Commission	6/30/01
Arkansas Development Finance Authority	6/30/01
Arkansas Employment Security Department (Private)	6/30/01
East Arkansas Planning and Development District, Inc. (Private)	6/30/01
Forest Echoes Technical Institute	6/30/01



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