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**Secretary of State
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Editor Jon Davidson

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ATTORNEY GENERAL OPINIONS

Opinion No.: 2002-137

Bookout, Paul
State Representative

RE:Pursuant to provisions of ACA 14-137-101, can a private school utilize a public facilities board to sell bonds? **RESPONSE:** With respect to any particular institution, only a court could finally answer this question based upon a review of all the attendant facts. However, assuming the revenue bond proceeds were devoted to effecting capital improvements at a private educational facility, I believe the relevant law might support this means of financing. In explanation of the fact that this conclusion is tentative, I should note that the relevant Arkansas case law deals only with the financing of a private institution of higher education. There is some question whether the same standard applies to institutions of primary and secondary education. Moreover, if the school were a sectarian or parochial institution, I believe the establishment clause would dictate that the public facilities board avoid any conduct or earmarking of bond revenues that would amount to the sponsorship of religious indoctrination. Finally, as most recently acknowledged in *Steele v. Industrial Development Board of Metropolitan Government of Nashville*, 2002 FED App. 0274P (6th Cir., August 14, 2002), the law is unclear as to whether a bond issue of the sort proposed would be permissible if the private school could be characterized as "pervasively sectarian."

Opinion No.:2002-205

Baker, Gilbert
State Senator

RE:Pursuant to provisions of ACA 20-22-901(b)(1), volunteer fire departments are entitled to recover, from nonmember property owners, the reasonable fair market value of services rendered when responding to an uncontrolled fire or 911 call. When volunteer fire departments are responding to such calls and sustain damage or loss of fire department property, can the department also recover the fair market value of replacing such property? **RESPONSE:** Assuming

that the volunteer fire department has responded to the fire in accordance with its statutory authority, the department will be entitled to recover the "fair market value of the services rendered." A.C.A. § 20-22-901. Unfortunately, neither the Code nor case law provides a formula for determining this amount. Accordingly, I cannot opine whether the calculation would include the full cost of damage to or loss of equipment.

Opinion No.:2002-207

Cleveland, Herschel W.
State Representative

RE:How should police officers interpret and enforce provisions of ACA 27-36-215, regarding illumination of vehicle license plates? **RESPONSE:** The statute should be interpreted to mean that colored lights cannot be used to illuminate license plates, and that white lights must be used, but cannot be so bright as to render the license plate illegible at less than 50 feet.

Opinion No.:2002-211

Hoofman, Cliff
State Senator

RE:Is it appropriate for a sheriff's office to charge defendants a fee to pick up a warrant at the sheriff's office and be formally charged with an offense? **RESPONSE:** No. Warrant fees and other costs cannot be collected until after the court has entered a judgment against the defendant. See ACA 16-90-113 (requiring that the judgment include costs).

Opinion No.:2002-216

Greathouse, G. Wayne
Interim Exe Dir, AR Teacher

RE:Does the Teacher Retirement System have authority to legally indemnify members of the Real Estate Committee, created by the Board of Trustees,

ATTORNEY GENERAL OPINIONS

against legal liability for errors and omissions committed in the regular scope of their duties assuming that such indemnification specifically provides that there will be no indemnity for possible liability of Real Estate Committee members to the System itself? RESPONSE: As an initial matter, there is some question whether the trustees were authorized to form the Committee in the first place. However, absent some directly contrary provision in the ATRS trust, given the provisions of ACA 24-7-303 and the powers of delegation set forth in section 8 of Act 151 of 2001, codified at ACA 24-2-601 et seq., I believe forming the Committee was probably permissible. However, Act 151 exposes all agents of the trustees to potential liability for failure to exercise reasonable care in performing their duties. Given the directive that an investment delegee be held to account for lapses in professional performance, I do not believe the trustees may indemnify delegees for liability. I further believe even an advisory committee would be theoretically liable for lapses in rendering advice. Given this conclusion, I need not discuss whether indemnification would be objectional on constitutional grounds.

Opinion No.: 2002-219

Mahony, Jodie
State Senator

RE:Pursuant to provisions of Ark. Const. Amend. 79, does the property relief for the principal residence of a person sixty-five years or older now apply to taxpayers in Union County? If it does not, when will be the first year for the relief to apply? RESPONSE: This tax relief will become applicable in Union County on the Jan. 1st following completion of the adjustments required by Section 2 of Amendment 79.

Opinion No.:2002-224

Priest, Sharon
Secretary of State

RE:What is the result of a circuit judge election held

pursuant to ACA 7-10-101 et seq. in a multi-county district when one of the county election commissions inadvertently omits an unopposed circuit judge candidate from the nonpartisan judicial general election ballot? Q2) What is the result of a circuit judge election held pursuant to ACA 7-10-101 et seq. in a single-county district when the county election commission inadvertently omits an unopposed circuit judge candidate from the nonpartisan judicial general election ballot? Q3) Is it permissible for an unopposed circuit judge candidate to be listed as an unopposed candidate on the November general election ballot or the November judicial runoff ballot if his or her name was inadvertently omitted from the May 21 ballots? Q4) If the answer to Q3 is "no," what is the appropriate action for the election commission to take with regard to such a position? ANSWER: Q1) It is likely that the defect will not materially affect the election results. See A.C.A. 7-10-102; 7-5-208; 7-5-315. Q2) This would likely result in failure to elect the unopposed candidate, because he did not receive a majority vote as required by 7-10-102 and Ark. Const. Amendment 80. The county board of election commissioners probably lacks authority to certify or declare his election. The incumbent will thus hold over as a de jure officer under Ark. Const. Article 19, section 5.; see Op. 2000-139. Q3) No. An election cannot be held on a day other than that fixed by law. The election would probably be void and the results a nullity. Q4) There is no available action for the board.

Opinion No.:2002-227

Emigh, Barry

RE:Request for approval of popular name and ballot title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations, providing for the operation of gambling by Barry Lee Emigh and his transferees, empowering the Legislature to operate lotteries, and for other purposes. RESPONSE: Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

ATTORNEY GENERAL OPINIONS

Opinion No.:2002-228

Jeffress, Gene
State Representative

RE:Are “any” documents in the possession of the Governor’s office FOI-exempt as “working papers”? Q2) Are documents, scored and evaluated in one branch of state government (i.e., ADED), able to be totally shifted to another branch (i.e., the Governor’s office) after initial compilation in the former and thereby gain an FOI exemption? Q3) Are the requested DRA Grant proposals/applications scorings and evaluations FOI-exempt? Q3a) If located at ADED? Q3b) If located in the Governor’s office? **RESPONSE:** 1) “No.” 2) This will depend upon the facts of a particular case, but as a general matter, the FOIA cannot be thwarted by the transfer of open public records to an agency with an FOIA exemption; 3a) No, they are not exempt if located at ADED; 3b) Yes, the documents are exempt if located at the Governor’s office. The question of whether the transfer of records violates the FOIA is a factual one. A separate statute, however, ACA 15-4-203(b)(1), appears to require ADED to keep a copy of the records in question, where they would be open to public inspection.

Opinion No.:2002-229

Baker, Gilbert
State Senator

RE:Q1) Can a city that has enacted a one-cent sales tax, repeal that tax in order to participate and receive a pro rata share of the county’s one-half cent sales tax? Q2) If the city does repeal its one-cent sales tax, can it later re-adopt the tax? Q3) Would the city have to submit the new sales tax to the voters or could it be done by ordinance? **RESPONSE:** The city need not repeal its tax in order to share in the proceeds of county taxes enacted under any authority other than ACA 26-74-401 et seq. If the county tax was enacted under ACA 26-74-401 et seq., the effect of the city’s repeal of its tax would be to allow it to share in the proceeds of the county tax. The city can

repeal any tax the proceeds of which have not been pledged for lease rentals or bonds. It can also reenact the tax, but if it does so, it must follow the same procedures as for a first-time enactment of the tax, including elections (except in the case of the taxes authorized by ACA 26-75-601 et seq., which do not require an election).

Opinion No.:2002-230

Womack, Shawn A.
State Representative

RE:Can a municipal water department charge a higher rate to customers living outside the city limits rather than living inside city limits? **RESPONSE:** Yes, if a reasonable basis exists for charging the higher rate. ACA 14-234-110(b)(3).

Opinion No.:2002-231

House, Don R.
State Representative

RE:Q1) Must a county circuit clerk maintain in bound books, deeds, mortgages, or other instruments in writing, concerning lands and tenements, i.e., grantors and grantees, etc.? Q2) May a county circuit clerk discontinue recording in “bound written books” and use for recording purposes electronic computer recordings exclusively? **RESPONSE:** Q1) The clerk need not maintain “bound books”, (as referenced in ACA 14-15-401), but rather may maintain electronic records. See ACA 13-4-301 et seq. Q2) Yes. See Q.1.

Opinion No.:2002-232

Milligan, Jimmy “Red”
State Representative

RE:Does Article Four (4) of the enclosed Marion

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County Budget Ordinance violate the separation of powers doctrine? ANSWER: No. It is properly within the appropriation power that vests exclusively in the quorum court. See A.C.A. 14-14-907. Although the use of line item appropriations can be problematic, I have been provided no facts in this instance indicating any encroachment on the executive branch (re. administering expenditures).

Opinion No.:2002-235

Green, Robin F.
Benton County Attorney

RE:Q1) Pursuant to provisions of the Freedom of Information Act (FOIA), should the custodian of records release records of complaints or grievances by jail inmates alleging inappropriate behavior by a former Benton County jailer along with any reports or disciplinary actions in response thereto, since the jailer in question resigned after an internal affairs investigation was conducted in response to allegations made by an inmate? Q2) Also, should the former employee be notified in advance of the release of these records as required by the FOIA prior to release of personnel records in other circumstances? **RESPONSE:** The complaints/grievances are personnel records if they were not created at the behest of the employer, and should be released. Any disciplinary records created by the employer in response to the complaints are employee evaluation records and should not be released since the employee was not suspended or terminated. The former employee should be notified.

Opinion No.:2002-236

Judy, Jan A.
State Representative

RE:Should the Fayetteville Police Pension Fund Board of Trustees pay the surviving spouse of a police officer the "amount equal to the pension" (90% of the salary) in accordance with ACA 24-11-425(a), or should the Board follow the limiting language of ACA 24-11-425(f), which states that the sum total of the pension to be

paid the surviving spouse "shall not exceed one-half (1/2) of the salary" of the police officer at the time of his or her death"? **RESPONSE:** The Board should follow the limiting language of (f).

Opinion No.:2002-238

Ward, Janet Troutman
Pulaski County Assessor

RE:Is the decision of the custodian of records to release leave and time sheets for all employees in the Reappraisal Department of the Assessor's office consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** In my opinion, the requested documents comprise personnel records subject to disclosure under the FOIA.

Opinion No.:2002-240

Baker, Gilbert
State Senator

RE:Is a prize give-a-way contest (contest proposal attached), which is being used as a marketing device to attract customers, a violation of the lottery or gaming laws of Arkansas? **RESPONSE:** This contest, as described, does not violate gaming or lottery laws, because it does not involve any risk on the part of the participants.

Opinion No.:2002-242

Emigh, Barry

RE:Request for certification of popular name and ballot title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations, empowering the General Assembly to operate lotteries and authorizing Barry Lee Emigh or his transferees to operate gambling. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

ATTORNEY GENERAL OPINIONS

Opinion No.:2002-243

Milum, Jim
State Representative

RE:Q1) Can the A&P Commission purchase or own property? Q2) Would the City of Harrison have to be on the deed if the A&P Commission purchased a building? Q3) If the City of Harrison does have to be named on a deed, could the City and the A&P own the building jointly or would the A&P Comm'n be a representative of the City in that instance? Q4) Other than paying cash for a building, what options would the City or the A&P Comm'n have regarding financing the sale? **RESPONSE:** Q1) No. A&P Commissions are not statutorily granted the authority to purchase and own property. Q2) Moot. Q3) Moot. Q4) The city has various options, including Am. 78, Am 65, Am. 62, ACA 14-164-301 et seq., ACA 14-164-401 et seq., ACA 26-75-201 et seq., ACA 26-75-301 et seq., ACA 26-75-601 et seq.

Opinion No.:2002-248

Hudnell, Lance
Deputy City Manager

RE:Request for approval of an interlocal cooperation agreement between Garland County, Arkansas and the City of Hot Springs to construct and maintain the Garland County Courts Building located in Hot Springs, Arkansas. **RESPONSE:** Approval denied. Agreement must specify the manner of disposal of jointly-owned property.

Opinion No.:2002-251

Woodruff, Carla
c/o Ken Ferguson, Dir of Human

RE:Is the decision of the custodian of records to

release the employee's original job application after redacting any exempt information consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes.

Opinion No.:2002-255

Shapiro, Belvedresi &
c/o Carol Billings, City Att'y

RE:Was the decision of the custodian of records to release the original employment applications for city law enforcement officers, with exempt information redacted, consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes.

Opinion No.:2002-256

Ward, Janet Troutman
Pulaski County Assessor

RE:Is the decision of the custodian of records to release "a copy of a report detailing sick and vacation leave available, accrued and taken by date for all employees of the Assessor's office from Jan. 1, 2002 to Aug. 23, 2002," consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes.

Opinion No.:2002-257

Witherell, Stacey
Empl Svcs Mgr, LR Human

RE:Is the decision of the custodian of records to release the requested salary and employment information, after redacting all personal information from the records, consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Yes.

ATTORNEY GENERAL OPINIONS

Opinion No.:2002-263

Porter, Twana

Admistrator, Office of Personnel

RE:Is the decision of the custodian of records to withhold disclosure of decisions regarding the employment and termination of a former DHS employee, citing absence of a compelling public interest, consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The result is correct, but the basis for withholding the records from release should be that the termination in question was reversed.



ADOPTED RULES AND REGULATIONS

APPRAISER LICENSING & CERTIFICATION BOARD

Docket No.: 151.00.02--001
Effective Date: 9/15/02
Contact Person: Jim Martin
Telephone: (501) 296-1843

Revised Rules and Regulations

BOARD OF CHIROPRACTIC EXAMINERS

Docket No.: 029.00.02--001
Effective Date: 9/22/02
Contact Person: Carol Ann Gates
Telephone: (501) 682-9015

Part Two Regulations -- 1. Professional Conduct, 2. Unprofessional Acts(q)

DEPARTMENT OF CORRECTION

Docket No.: 004.00.02--002
Effective Date: 9/14/02
Contact Person: G. David Guntharp
Telephone: (501) 682-9586

AR 2.9: Economic Sanctions, AR 4.3: Weapons & Security Equipment, AR 7.18: Resident Property Control, AR 7.22 - Resident Correspondence, AR 7.23 : Resident Publications, AR 8.8 : Community Service Program, AR 8.9 : Testing Offenders for Substance Abuse

DEPARTMENT OF HEALTH

Tobacco Prevention & Education

Docket No.: 007.29.02--001
Effective Date: 9/10/02
Contact Person: Lynda Lehing
Telephone: (501) 661-2231

Great Strides Grant Program

EDUCATION DEPARTMENT

Attorney's Office

Docket No.: 005.23.02--003
Effective Date: 9/19/02
Contact Person: Scott Smith
Telephone: (501) 682-4227

ADE 152 - Rules for Submitting a Petition for a Declaratory Order Issued by the State Board of Board of Education

Docket No.: 005.23.02--004
Effective Date: 9/19/02
Contact Person: Scott Smith
Telephone: (501) 682-4227

ADE 151 - Arkansas Public School Choice Act Enforcement Guidelines

FINANCE AND ADMINISTRATION

Revenue Division

Docket No.: 006.05.02--001
Effective Date: 9/19/02
Contact Person: Linda Holmstrom
Telephone: (501) 682-7751

ADOPTED RULES AND REGULATIONS

Regulation - In-Liew-of-Tax Payments

Docket No.: 006.05.02--002
Effective Date: 9/19/02
Contact Person: Linda Holmstrom
Telephone: (501) 682-7751

Small Business Tax Accounting - Use of Accrual Basis and Cash Basis Accounting Methods

GAME & FISH COMMISSION

Docket No.: 002.00.02--008
Effective Date: 1/1/03
Contact Person: James Goodhart
Telephone: (501) 223-6327

2002-2003 Statewide and WMA Hunting Regulations; Approved Hunting Seasons and Code Proposals; Late Migratory Bird Hunting Regulations; 2003 Fishing Regulations; Increase Non-Resident Trout Permit

HEALTH SERVICES AGENCY

Docket No.: 049.00.02--003
Effective Date: 9/19/02
Contact Person: Mary Brizzi
Telephone: (501) 661-2501

Rulebook: Section VI.A.1 - Continuing Effect of a Permit of Approval

HIGHER EDUCATION

Colleges & University Plans & Operations

Docket No.: 008.02.02--003
Effective Date: 9/22/02
Contact Person: Mike Archer
Telephone: (870) 972-2093

Parking and Traffic Regulations Handbook for Arkansas State University Academic Year 2002-2003

Docket No.: 008.02.02--004
Effective Date: 9/13/02
Contact Person: University Police
Telephone: (479) 968-0222

Parking and Traffic Regulations Handbook for Arkansas Tech University academic year 2002-2003

HUMAN SERVICES

County Operations

Docket No.: 016.20.02--014
Effective Date: 10/1/02
Contact Person: Sandra Miller
Telephone: (501) 682-8250

Policy Directive, MS 02-07 - ARSeniors Medicaid Program

Docket No.: 016.20.02--015
Effective Date: 10/1/02
Contact Person: Sandra Miller
Telephone: (501) 682-8250

ADOPTED RULES AND REGULATIONS

Forms DCO-995 and DCO-975, Implementation of SCHIP Provisions to ARKids B

Medical Services

Docket No.: 016.06.02--032
Effective Date: 10/15/02
Contact Person: Suzette Bridges
Telephone: (501) 682-4122

Official Notice DMS-2002-O-7, DMS-2002-E-5, DMS-2002-KK-11, DMS-2002-Q-8, DMS-2002-R-15 -- Documentation of Medical Necessity for Brand Name Drugs with a Generic Upper Limit

Docket No.: 016.06.02--033
Effective Date: 10/1/02
Contact Person: Carolyn Bradley
Telephone: (501) 682-8577

Transportation Update Transmittal #55

Docket No.: 016.06.02--034
Effective Date: 9/18/02
Contact Person: Tommy Wingard
Telephone: (501) 682-6117

Medical Need Determination Process for Nursing Home Applicants ++

INSURANCE DEPARTMENT

Docket No.: 054.00.02--006
Effective Date: 9/19/02
Contact Person: Sara Farris
Telephone: (501) 371-2820

Rule & Regulation #77 - Standards for Safeguarding Customer Information

Docket No.: 054.00.02--007
Effective Date: 9/19/02
Contact Person: Sara Farris
Telephone: (501) 371-2820

Rule & Regulation #76 - Arkansas External Review Regulation

++ Mistakenly left out of the print edition - the office of the Register regrets the error.

INSURANCE DEPARTMENT

02-065

Consent Order

In the Matter of

Peggy Jenice Vance aka Peggy Jenice Julian

02-066

Order of Suspension

In the Matter of the Certificate of Authority of

International Indemnity Company

02-067

Consent Order

In the Matter of

Robert Mabrey Mullenax

02-068

Cease and Desist Order

In the Matter of the Illegal Activities of the

Alliance Companies, Alliance Savings Company, Inc.,

Lawrence J. Wells, and Financial Insurance Agency

02-069

Order

In the Matter of the Report of Examination of

Arkansas Blue Cross & Blue Shield, a Mutual Company

02-070

Order

In the Matter of the Assumption Reinsurance Agreement by and between
the First Pyramid Life Insurance Company of America and USable Life

02-072

Cease and Desist Order

In the Matter of the Illegal Insurance Activities of

TRG Marketing, LLC; TRG Administration, LLC;

Paul Crouse, Carmelo Zanfei; the Redwood Group

02-073

Emergency Order

In the Matter of

Douglas Alan Price

02-074

Order Vacating Letter of Reprimand

In the Matter of Letter of Reprimand Issued to

Rebsamen Insurance Agency, William Byrd, and Mary Busby

INSURANCE DEPARTMENT

02-075

Order

In the Matter of
Robert David Neal

02-076

Order of Cancellation

In the Matter of the Certificate of Authority of
Phico Insurance Company

02-077

Order of Suspension

In the Matter of the Certificate of Authority of
Reliance Insurance Company

02-078

Order of Cancellation

In the Matter of the Certificate of Authority of
Credit General Insurance Company

02-079

Cease and Desist Order

In the Matter of the
Arkansas Activities of AMS Staff
Leasing, NA, Inc. and Charles D. Wood, Jr.

02-080

Order

In the Matter of
Proposed Rule and Regulation 76

02-082

Order of Suspension

In the Matter of the Certificate of Authority of
Frontier Insurance Company

ORDERS AND NOTICES

LEGISLATIVE AUDIT September 3, 2002

<u>Agency</u>	<u>Period Covered</u>
Arkansas Game and Fish Commission	6/30/01
Department of Finance and Administration - Revenue Division - Office of Child Support Enforcement	6/30/01
Arkansas Department of Correction	6/30/01
Arkansas Department of Emergency Management	6/30/01
Arkansas Department of Correction - Report on Certification of Consumption of Farm Produce	6/30/01
Office of Attorney General	6/30/01
Auditor of State	6/30/01
Auditor of State - Disbursing Officer	6/30/01
Treasurer of State	6/30/01
Counties and Municipal Aid	6/30/01
Arkansas State Board of Architects	6/30/01
Advisory Committee for Registration of Landscape Architects	6/30/01
Arkansas Beef Council	6/30/02
Capitol Zoning District Commission	6/30/01
Arkansas Ethics Commission	6/30/01

ORDERS AND NOTICES

Arkansas Parks and Tourism - History Commission	6/30/01
Department of Information Systems	6/30/01
Arkansas Livestock Show Association	6/30/01
Arkansas State Board of Physical Therapy	6/30/01
Arkansas State Board of Private Career Education	6/30/01
Professional Bail Bondsman Licensing Board	6/30/01
Arkansas Public Defender Commission (Private)	6/30/01
Arkansas Soybean Promotion Board	6/30/02
Central Arkansas Planning and Development District (Private)	6/30/01



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