

The Arkansas Register



Volume XXIX, Number 1

July 2005

TABLE OF CONTENTS

ATTORNEY GENERAL

Opinions 4

RULES AND REGULATIONS 10

INSURANCE DEPARTMENT

Orders 14

LEGISLATIVE AUDIT

Orders 15

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

Editor **Jon Davidson**

Published by *Secretary of State*
Charlie Daniels

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.

THE ARKANSAS REGISTER

DISCLAIMER

The Secretary of State website, www.sos.arkansas.gov, contains copies of rules filed by Arkansas state agencies, boards and commissions with the *Arkansas Register* in an “acceptable electronic format” as per Act 1648 of 2001. The rules contained therein are not to be considered “official” copies of agency rules. The official copies remain the paper copies housed in the *Arkansas Register* division of the Secretary of State’s office. While the rule texts are not the “official” copies, every attempt has been made to ensure their accuracy and reliability. However, the Secretary of State’s office makes no warranties or guarantees regarding the content of the copies presented on its website.

ACCESS TO RULES

Electronic versions of agency rule filings are available from the Secretary of State website. The rules may be accessed by clicking on the title of the rule listed in **BLUE**. Most of the rules are available in an Adobe PDF format; however, some rules may link you to a specific website for the particular agency. Rule titles followed by asterisks (***) are not available in an electronic form. To receive a hard copy of these types of rules or any other rule, you may either contact the agency contact person or the office of the *Arkansas Register*. Copies of rules obtained from the office of the Register are subject to a 25 cent per page copy charge. Inquiries may be directed to the *Arkansas Register* office at the contact points listed below.

Secretary of State’s office
Arkansas Register
026 State Capitol
Little Rock, AR 72201
(501) 682-3527
jon.davidson@sos.arkansas.gov

ATTORNEY GENERAL OPINIONS

Opinion No.: 2005-075

Jones, Terry D.

Pros Attorney, 4th Judicial District

RE: What is the penalty, if any, for violation of the Arkansas State Fire Code when a city or county has not adopted such? **RESPONSE:** In my opinion, the Arkansas Fire Prevention Code (“AFPC”) has the force of state law and is enforceable regardless of whether a local government has adopted it by ordinance. Additionally, the State Fire Marshal, the Arkansas State Police, and enumerated local officials have state-mandated authority to enforce the AFPC. As a matter of state law, any failure to obey an order or instruction of an authorized fire official enforcing the AFPC is a Class A misdemeanor punishable by up to one year imprisonment as well as a fine not to exceed \$1,000.00. The AFPC is enforceable by the State Fire Marshal through the Arkansas State Police or by a local official who is an ex officio deputy to the fire marshal under the Fire Prevention Act, A.C.A. 12-13-101 through -116 (Repl. 2003).

Opinion No.:2005-083

Higginbothom, Steve

State Senator

RE:In light of the recent consolidation of the cities of Helena and West Helena, will the newly consolidated city be able to keep two district judges now in place in each city or will it be reduced to one? Q2) If it is reduced to one, which one will remain in place? **ANSWER:** The two district judgeships remain in place, rendering the second question moot. See A.C.A. 16-17-917 (establishing the Phillips County District Court with two departments) and 16-17-901 (defining “department” as the physical location where sessions of court are held).

Opinion No.:2005-087

Broadway, Shane

State Senator

RE:May an Arkansas city of the first class lawfully adopt an ordinance and enter a contract with a private corporation for the collection of user fees from insurance companies for the delivery of fire and police department services? **RESPONSE:** In all likelihood “no.” See opinion for full analysis.

Opinion No.:2005-093

Davis, Brent

Pros Attorney, 2nd Judicial Circuit

RE:Does the emergency clause set forth in section 2 of Act 1151(the Local Option Horse Racing and Greyhound Racing Electronic Games of Skill Act) set forth facts which establish a current emergency so as to make such clause valid? Q2) Is it a violation of the Arkansas Constitution and/or an impermissible delegation of legislative authority, to grant the power to choose within which political subdivision, i.e., city, town or county, the election is to be held, to the sole discretion of the “franchise holder,” as is set forth in ACA **ANSWER:** Q1) The emergency clause failed to pass. Q2) No. When 23-113-201 is placed in context and the act is considered as a whole, the presumption of constitutionality prevails. See Opinion for discussion.

Opinion No.: 2005-099

Laverty, Randy

State Senator

RE: Are there any state laws or state agency regulations that govern the management or mismanagement of non-real estate escrow accounts?

ATTORNEY GENERAL OPINIONS

RESPONSE: I am unable to determine the nature of the escrow account from the information that has been provided to me. While I have not found any applicable regulations or laws governing the administration of an escrow account of the type you describe, I do note that the contract creating the escrow account is subject to the general law of contract, and a private attorney may be able to advise your constituent on the proper course of action.

Opinion No.:2005-102

George, Nathan V.
State Representative

RE:Q1) Is it permissible to erect a [publicly funded] Civil War monument on private land? Q2) How far off the highway is the right of way? RESPONSE: With respect to your first question, I am unable to opine on whether public funds may be permissibly expended to erect a Civil War monument because such a determination will require a factual analysis of the attendant circumstances for which this office is neither authorized nor equipped. With respect to your second question, right of way distances are determined on a case by case basis and I recommend contacting the Arkansas Highway and Transportation Department Right of Way Division regarding the specific portion of the highway at issue.

Opinion No.:2005-105

Broadway, Shane
State Senator

RE:Pursuant to provisions of Act 2133 of 2005, does the union or professional association have to be recognized by the municipality as representing the employee for benefit or wage negotiations, or does a municipality have to deduct membership fees of any and all professional associations that an employee might want to belong to and subsequently have their membership fees withheld from their salary? RESPONSE: In my opinion, a municipality must

deduct the membership dues for any union or professional association of which a full-time municipal employee is a member if the employee has in writing requested the municipality to withhold the membership dues from his or her paycheck.

Opinion No.:2005-106

Nisbet, A. Wyckcliff
Friday Eldredge & Clark

RE:Request for approval of an amendment to the interlocal cooperation agreement between the cities of Little Rock and North Little Rock, Pulaski County, Central Arkansas Water, Little Rock Wastewater and NLR Wastewater to establish the Pulaski Area Regional Geographic Information System ("Pagis"). RESPONSE: My review indicates that the agreement is in proper form and compatible with the laws of this state, and is approved.

Opinion No.: 2005-108

Sample, Bill
State Representative

RE: Is the Hot Springs Village Voice newspaper a legal newspaper? Q2) Can the Hot Springs Village Property Owners Association use this newspaper to advertise their legal notices? RESPONSE: Your first question requires a factual determination that is outside the scope of an opinion from this office. This office is not equipped or empowered as a factfinder to make a determination of this nature, which requires the application of specific statutory requirements to the particular facts surrounding the publication. Your second question also requires a factual determination under A.C.A. 16-3-105, supra, based on the test detailed in the enclosed opinions, if indeed state law requires the Hot Springs Village Property Owners Association ("Association") to publish its legal notices in a "legal newspaper." You have provided no information in this regard, and I must note that to my knowledge, state law does not impose such a

ATTORNEY GENERAL OPINIONS

requirement on a property owners' association. Compare, e.g., A.C.A. 14-93-117 and -123 (regarding property owners' improvement districts). But see A.C.A. 4-33-141(b) (Repl. 2001) (regarding "notice" under the Arkansas Nonprofit Corporation Act).

Opinion No.: 2005-109

Berry, Stan
State Representative

RE: Is a vehicle that is licensed with an NR [Natural Resources] license plate authorized to haul native stone? **RESPONSE:** In my opinion native stone may not be hauled on a vehicle licensed under A.C.A. 27-14-601(a)(3)(H) unless the native stone is "to undergo further processing into a finished or semifinished product other than crushed rock or crushed stone[.]"

Opinion No.:2005-115

Laverty, Randy
State Senator

RE:In light of the provisions of Act 1452 of 2005, as codified at A.C.A. § 6-20-604, can the Department of Education legally continue to send isolated school funds to school districts based on prior-year average daily membership figures even if the school in question has been completely or partly closed? **RESPONSE:** The answer to this question is "no" if the isolated school has been closed, see A.C.A. 6-20-604(h); "no" for the year in which an isolated school has been partially closed, see *id.*; and "yes" for any year subsequent to the year in which an isolated school has been partially closed, see A.C.A. 6-20-603(b).

Opinion No.:2005-119

Trusty, Sharon
State Senator

RE:Does the display, sale, or purchase of a "Thin Blue Line" sticker by anyone other than a law enforcement officer or a family member of an officer violate A.C.A. 5-37-208 (criminal impersonation), A.C.A. 5-77-202 (law enforcement insignia sales), or any other laws? **RESPONSE:** To the extent the question inquires as to a violation of criminal laws, it is more properly addressed to the local prosecuting attorney. In addition, the question may depend upon factual considerations arising under the statutes you mention.

Opinion No.: 2005-127

Altes, Denny
State Senator

RE:If the provisions of HJR 1003 were to become effective, would bingo and raffles conducted pursuant to the proposed amendment be legal? Q2) Would the conduct of such bingo and raffle endeavors still be illegal due to the criminal laws set forth at ACA 5-66-101 through -119? Q3) Would the Legislature have to amend the existing criminal statutes regarding gambling in order to legalize charitable bingo and raffles? **RESPONSE:** Declined to issue an opinion due to the pending election on the question and the absence of any forum for challenging an advisory opinion on the matter. Reference suggested to Section 1 of the HJR.

Opinion No.:2005-131

Jessup, Datus
LR City Employee

RE:Is the decision of the custodian of records to release Mr. Jessup's application with exempt and personal information removed in response to a Freedom

ATTORNEY GENERAL OPINIONS

of Information Act request consistent with provisions of the FOIA? RESPONSE: Yes.

Opinion No.: 2005-137

Dangeau and Wooldridge
Co-Chairs, Joint Budget Committee

RE: Given that at least part of the revenues for the state Medicaid program originates as general revenues of the state, do those funds retain their character as general revenue funds when they are paid out as matching funds for federal Medicaid moneys? Q2) May the Department of Veterans Affairs include funds received through Medicaid to meet the balanced operating budget requirement of Section 9 of Act 2272 of 2005? Q3) Under Act 2272 of 2005, may funds be expended on construction or renovation of the Fayetteville Nursing Home, if the operating budget presented to the Joint Budget Committee or the Arkansas Legislative Council included Medicaid reimbursements as an additional source of income necessary to balance the budget? RESPONSE: The question is largely one of legislative intent and is one that will be decided in the first instance by the appropriate legislative committee. In my opinion, however, a court might well conclude that an operating budget relying on Medicaid reimbursement does not run afoul of Section 9 of Act 2272.

Opinion No.: 2005-140

Borhauer, Shirley
State Representative

RE: Are the attached petition cover sheet and sample petition signature page in proper form according to the provisions of Act 1237 of 2005? RESPONSE: The Attorney General is not invested with the power to approve or certify the sufficiency of such petitions. This duty is entrusted to the county judge. As a state

statutory matter, however, it appears that the attached cover sheet and signature page contain the required statutory elements listed in the new act. The formal, completed petition, however, will be subject to the review and independent determination of the county judge.

Opinion No.: 2005-141

Petrus, Benny
State Representative

RE: Is the Department of Finance and Administration (DF&A) determination that dealers should be held responsible for sales tax on a prepaid transaction which is provided under the terms of an extended service contract correct? RESPONSE: I am unable to offer an opinion on this matter. Your question solely raises issues of application of the state sales tax law. Questions of this nature are properly addressed to the Revenue Division of the Department of Finance and Administration under the regulatory authority pursuant to A.C.A. 26-52-105 (Repl. 1997). See Op. Att'y Gen. 2004-218; see also Gross Receipts Tax Regulations GR-75 and -76 ("No opinion, whether formal or informal, issued by any other agency can be binding on the Department of Finance and Administration, Revenue Division.").

Opinion No.: 2005-146

Fowler, Bessie
Organizer

RE: Is the decision of the City of Pine Bluff to withhold the home telephone (phone) numbers of all city employees in response to a request under the Freedom of Information Act (FOIA) consistent with provisions of the FOIA? ANSWER: No, because no determination was made regarding the existence of specialized facts supporting the decision not to disclose a listed home phone number.

ATTORNEY GENERAL OPINIONS

Opinion No.: 2005-148

Barbara Horn
State Senator

RE: For the purpose of Act 60, what would constitute an isolated school or campus (meeting four (4) of the five (5) criteria for isolated) being considered "open"? More specifically: 1. Would keeping utilities turned on and the buildings maintained constitute "open" if no students were being served in those buildings? 2. Would serving some students parts of the school week on a part day schedule every school day constitute "open"? 3. Would maintaining a pre-school program for an entire school year constitute "open"? 4. Would locating only a class of school age children receiving self-contained special education services constitute "open"? 5. Would locating one or more grades of elementary aged children constitute "open"? 6. Would locating only a district wide alternative learning environment or in-school suspension program in such a school constitute "open"? 7. Would maintaining only an adult education program in such a school constitute "open"? 8. Would locating administrative offices on such a campus constitute "open"? 9. Would scheduling interscholastic events for school aged children such as athletic tournaments, competitions, quiz bowl, etc. constitute as "open"? 10. Would leasing out facilities to an outside entity constitute as "open"? **RESPONSE:** I must respectfully decline to answer your specific questions, which raise issues of fact that this office is neither equipped nor authorized to address. However, I can and will set forth the general principles that I believe the Arkansas Department of Education would apply in determining whether a particular isolated facility qualifies as "open" and hence eligible for special needs and isolated school funding. As discussed further below, the primary operative principle that I believe would provide guidance in addressing each of your specific questions is that a school facility will qualify as "open" if it

accommodates in accredited classroom activities students classified as K-12. The amount of available state funding will depend upon the average daily membership of such students, possibly supplemented by special needs funding for qualifying K-12 students.

Opinion No.: 2005-154

Mathis, Bob
State Representative

RE: Does Sec. 3 of Act 166 of 2003 prohibit the Fayetteville Veterans' Home from contracting as a Medicaid provider with the Department of Human Services when it states: "(A) No contract may be awarded nor obligations otherwise incurred in relation to the project or projects described herein in excess of the State Treasury funds actually available therefore as provided by law"? Q2) Do the provisions of ACA 20-81-105(b) through (f) which require that the Little Rock Veterans' Home not exceed seventy beds and contain no Medicaid beds apply to the operations of the Fayetteville Veterans' Home? **RESPONSE:** "No" and "no."

Opinion No.: 2005-160

Wilson, J.R.
Chief, Hope Police Department

RE: Is the decision of the custodian of records to release the attached documents in response to a Freedom of Information Act (FOIA) request for Officer Collins' personnel file consistent with provisions of the act? **RESPONSE:** In most respects the custodian's decision is consistent with the FOIA. There may, depending upon the facts, however, be some additional

ATTORNEY GENERAL OPINIONS

job performance records that should be withheld if there was no final administrative resolution of any suspension or termination. In this regard, if there is a reversal of any applicable suspension or termination, it is treated as if it did not occur. See Opinion 2002-263.

Opinion No.: 2005-162

Witherell, Stacey

Employee Services Manager, LR Human Resources

RE: As custodian of the records and in response to a Freedom of Information Act (FOIA) request, I have

determined that records of disciplinary actions of former and current Little Rock Police Department officers are exempt from release under the FOIA unless a final administrative resolution has been reached. Is my interpretation of the FOIA correct in this instance?

RESPONSE: Determining whether the requested documents are exempt will require a case-by-case and document-by-document analysis. The opinion sets forth the standard applicable to employee evaluation/job performance records.



ADOPTED RULES AND REGULATIONS

ASSESSMENT COORDINATION DEPARTMENT

Docket No: 177.00.05-001E
Effective Date: 07/01/2005
Contact: Bob Leslie
Telephone: 501-324-9108

Emergency Rules 4.21 - 4.28

AUCTIONEERS LICENSING BOARD

Docket No: 150.00.05-001F
Effective Date: 07/18/2005
Contact: Kristy Arnold
Telephone: 501-682-1156

Board Rules

CRIME VICTIMS REPARATIONS BOARD

Docket No: 143.00.05-001F
Effective Date: 07/09/2005
Contact: Mica Strother
Telephone: 501-682-3644

Rule No. 21 - Cost Ceiling on Medical Bills

DEPARTMENT OF LABOR *Safety Division*

Docket No: 010.15.04-001F
Effective Date: 08/15/2005
Contact: Susan Miller
Telephone: 501-682-4504

Regulations of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act

ECONOMIC DEVELOPMENT COMMISSION

Docket No: 168.00.05-001F
Effective Date: 08/22/2005
Contact: Morris Jenkins
Telephone: 501-682-7377

Consolidated Incentive Act

Docket No: 168.00.05-002F
Effective Date: 08/22/2005
Contact: Morris Jenkins
Telephone: 501-682-7377

Non-Profit Incentive Act

FINANCE & ADMINISTRATION *Office of Accounting*

Docket No: 006.09.05-001E
Effective Date: 06/17/2005
Contact: Floyd Hays, Jr.
Telephone: 501-371-1469

ADOPTED RULES AND REGULATIONS

**Emergency Rule 2005-3:
Implementation of Accountability
Provisions for Disbursements from the
General Improvement Fund by the
Department of Finance and
Administration Disbursing Officer**

Revenue Division

Docket No: 006.05.05-001F
Effective Date: 07/21/2005
Contact: Linda Holmstrom
Telephone: 501-682-7751

**Regulation 2005-2: Standard Mileage
Rates for Income Tax Purposes**

Docket No: 006.05.05-002F
Effective Date: 07/21/2005
Contact: John Theis
Telephone: 501-682-7000

**Regulation 2005-1: Exemptions from Tax
- Repair and Maintenance of Railroad
Parts, Railroad Cars and Equipment**

GAME AND FISH COMMISSION

Docket No: 002.00.05-007F
Effective Date: 07/10/2005
Contact: James Goodhart
Telephone: 501-223-6327

**Flood Prone Regions Code; Captive-
Reared Mallard Code Revisions**

HUMAN SERVICES

Child Care & Early Childhood Education

Docket No: 016.22.05-001E
Effective Date: 07/01/2005
Contact: David Griffin
Telephone: 501-682-8590

**Emergency Rule: Minimum Licensing
Requirements for Child Care Family
Homes**

Medical Services

Docket No: 016.06.05-030F
Effective Date: 08/01/2005
Contact: Tommy Wingard
Telephone: 501-682-6117

**Rule for Licensure of Residential Long
Term Care Facilities: Section 310 -
Incident Reporting**

Docket No: 016.06.05-038F
Effective Date: 08/01/2005
Contact: Renita Honorable
Telephone: 501-682-8577

**Arkansas Medicaid Provider Manuals
Section V - DMS-653**

Docket No: 016.06.05-039F
Effective Date: 08/15/2005
Contact: Tommy Wingard
Telephone: 501-682-6117

ADOPTED RULES AND REGULATIONS

Revisions to licensure regulations for long term care facilities in how to file administrative appeals

Docket No: 016.06.05-040F
Effective Date: 08/01/2005
Contact: Carolyn Patrick
Telephone: 501-682-8359

Rehabilitative Services for Persons with Mental Illness (RSPMI) Update #59

Docket No: 016.06.05-041F
Effective Date: 08/01/2005
Contact: Nikki Wade
Telephone: 501-682-8292

Prosthetics Update #67

Docket No: 016.06.05-051F
Effective Date: 07/25/2005
Contact: Betty Reed
Telephone: 501-682-8363

Child Health Management Services (CHMS) Provider Manual Update Transmittal #57

Docket No: 016.06.05-052F
Effective Date: 07/25/2005
Contact: Carolyn Patrick
Telephone: 501-682-8359

School-Based Mental Health Provider Manual Update Transmittal # 17

Docket No: 016.06.05-053F
Effective Date: 07/24/2005
Contact: Nikki Wade
Telephone: 501-682-8292

Official Notice DMS-2005-W-2 — 2005 HCPCS Procedure Code Conversion

Docket No: 016.06.05-054F
Effective Date: 07/24/2005
Contact: Binnie Alberius
Telephone: 501-682-8361

State Plan Transmittal #2003-001

SOCIAL WORK LICENSING BOARD

Docket No: 120.00.05-001F
Effective Date: 08/12/2005
Contact: Troylene Jones
Telephone: 501-372-5071

Section III: Provisional License

STATE MEDICAL BOARD

Docket No: 060.00.05-003F
Effective Date: 06/30/2005
Contact: Peggy Cryer
Telephone: 501-296-1802

Amended Regulation No. 24 — Rules Governing Physician Assistants

ADOPTED RULES AND REGULATIONS

STATE PLANT BOARD

Docket No: 003.11.05-003F
Effective Date: 07/08/2005
Contact: Darryl Little
Telephone: 501-225-1598

Amendment of Section 6 of the National Institute of Standards (NIST) Handbook 130 - Voluntary Registration Regulation

Docket No: 003.11.05-004F
Effective Date: 07/08/2005
Contact: Terry Walker
Telephone: 501-225-1598

Arkansas Boll Weevil Eradication Program

Docket No: 003.11.05-005F
Effective Date: 07/08/2005
Contact: Terry Walker
Telephone: 501-225-1598

Rules for the Northeast Delta Zone of Arkansas for Boll Weevil Eradication in 2005

TOBACCO CONTROL BOARD

Docket No: 175.00.05-001F
Effective Date: 08/01/2005
Contact: 501-682-9757
Telephone: Janis Campbell

Amendments to Rules and Regulations

INSURANCE DEPARTMENT

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

ORDERS AND NOTICES

LEGISLATIVE AUDIT

June 27, 2005

Agency	Period Covered
Department of Education - Arkansas School for the Blind	6/30/04
Department of Health	6/30/04
Department of Finance and Administration - Revenue Division - Office of Child Support Enforcement	6/30/04
State Insurance Department	6/30/04
Arkansas Deaf and Hearing Impaired Telecom Services Corp (Private)	12/31/04
Assessment Coordination Department	6/30/04
State Bank Department	6/30/04
Arkansas Catfish Promotion Board	6/30/04
Arkansas Corn and Grain Sorghum Promotion Board	6/30/04
Arkansas Rice Research and Promotion Board	6/30/04
Arkansas Wheat Promotion Board	6/30/04

Secretary of State
Charlie Daniels
Arkansas Register Division
State Capitol Building, Room 026
Little Rock, AR 72201-1094

***** **2005** subscriptions to the *ARKANSAS REGISTER* will be sold on a “CALENDAR YEAR” basis (January through December) only. To subscribe to the *ARKANSAS REGISTER* complete the following form and mail to the address given above.

_____ I would like to subscribe to the *ARKANSAS REGISTER* for the **2005** year (January through December) at the price of **\$40** per subscription.

_____ I would like to order the following copies of the *ARKANSAS REGISTER* at \$3.50 per copy.

Volume: _____ **Issue:** _____

Name: _____

Address: _____

City: _____ **State:** _____ **Zip:** _____

Contact Person: _____ **Phone No.:** () _____

The *ARKANSAS REGISTER*, an official publication of the State of Arkansas, is published monthly with a cumulative index published annually. Subscribe to the *ARKANSAS REGISTER* by completing the form above and mailing it to the address given on the form. Make all checks payable to the *ARKANSAS REGISTER*.

ARKANSAS REGISTER



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