

The Arkansas Register



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

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Charlie Daniels***

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THE ARKANSAS REGISTER

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

ATTORNEY GENERAL OPINIONS

Opinion No.: 2007-062

Cummings, Sam
Chair, AR HVAC/R Licensing Board

RE: Do provisions of A.C.A. 17-33-102 give the HVAC/R Licensing Board authority to adopt rules and regulations to start a mechanical plan review process and charge fees for rendering such service?

RESPONSE: In my opinion, the specific language of Chapter 33 of Title 17 of the Arkansas Code Annotated authorizes the HVAC/R Licensing Board to promulgate and charge a fee for a mechanical plan review process. In my opinion, this conclusion is also supported by the provisions of the Arkansas Mechanical Code.

Opinion No.: 2007-152

Norton, James
State Representative

RE: Are provisions of the National Animal Identification System (NAIS) program, contracted between the United States Department of Agriculture (USDA) and Arkansas Livestock and Poultry Commission (ALPC), transitioning from voluntary to mandatory in January 2009? **RESPONSE:** The two documents provided do not appear to amount to a contractual obligation on the part of the state to commit to mandatory NAIS registration by agricultural producers by some point in 2009. I lack the resources or the authority to opine whether the state has in some other manner, contractual or otherwise, committed itself to mandatory participation in the NAIS program.

Opinion No.: 2007-168

Pierce, Trent P., M.D.
Chairman, Arkansas State Medical

RE: Does Arkansas State law or existing case law preclude the Arkansas State Medical Board from promulgating rules and regulations to govern

physicians who engage in collaborative practice agreements with Advanced Practice Nurses?

RESPONSE: In my opinion the State Medical Board has authority to regulate in the general area of physician conduct relating to collaborative practice agreements to the extent that the regulations are necessary to carry out the purposes of the Arkansas Medical Practices Act. The question of whether any particular regulation would be held invalid can only be answered with regard to its specific content. See opinion for full analysis.

Opinion No.: 2007-170

Hutchinson, Donna
State Representative

RE: What, if anything, can be done under the incorporation scheme set out under A.C.A. 14-38-115 to remove the Spanker Creek Estates Subdivision from the newly incorporated area of Bella Vista in light of the fact that the Subdivision was erroneously included in the official map depicting the boundaries of the City of Bella Vista? **RESPONSE:** I am prohibited from the private practice of law and as such cannot offer private legal advice in this matter. I have set out the applicable law surrounding the issue, however, to aid your understanding of the issues. The applicable statute does not itself provide a remedy in this circumstance. It is not clear whether the ordinary avenues to challenge a municipal incorporation apply to a 14-38-115 incorporation. In any event the time periods for pursuing these remedies has passed. Several additional obstacles may prohibit any judicial relief. It appears that the only avenue of relief is the statutory procedure for “detachment” provided at 14-40-1801—1803, which requires an election of qualified electors.

Opinion No.: 2007-171

Salmon, Mary Anne
State Senator

RE: Is Sherwood’s fire protection district, formed under Act 183 of 1939, legal? What Arkansas law would

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have been applicable in organizing fire protection for an incorporated town in August 1950? Q2) Is the Order signed by County Judge Villines, to consolidate Pulaski Fire Protection District #5 and Sylvan Hills Fire District #6 valid since it was signed prior to the effective date of Act 438 of 2005 (amending 14-284-124)? Q3) Is Act 438 of 2005 special or local legislation since Sherwood is the only locality in Arkansas where two independently operated fire protection districts formed under Act 183 of 1939 existed in the same city? Q4) Do fire departments created by Act 183 of 1939 have to be dissolved as mandated by provisions of the Section 14 of Act 183 (14-284-118)? RESPONSE: Q1) I cannot resolve the question of whether a particular fire protection district was lawfully formed, but in my opinion the 1939 act, as amended, A.C.A. 14-284-101 to 14-284-121, is generally not authority for landowners in an incorporated town to petition for the provision of fire protection services through an improvement district embracing only lands lying within the town boundaries. The applicable law in 1950 included Act 41 of 1941 (A.C.A. 14-92-205) and probably Sec. 6 of Act 1 of 1875 (A.C.A. 14-53-101). Q2) It is possible that separate authority existed under 14-284-124 for this particular consolidation. Q3) No. Q4) No.

Opinion No.: 2007-174

Burris, Mike
State Representative

RE: Would the provision of a stipend to offset expenses and time of First Responders for the Lake Hamilton Fire Protection Association jeopardize the volunteer standing of these RNs, paramedics and EMTs under Arkansas' Good Samaritan law (ACA sec. 17-95-101)? RESPONSE: As of July 31, 2007, when Act 683 of 2007 takes effect, the "first responders" referenced in your request would not enjoy qualified immunity under the "Good Samaritan" law regardless of whether they accepted compensation or reimbursement for rendering emergency services. Under the version of the Good Samaritan law in effect until July 31, 2007, I believe the first providers referenced in your request would fall within the

protection of the Good Samaritan law only if they accepted no compensation or reimbursement for providing emergency services.

Opinion No.: 2007-175

Burris, Mike
State Representative

RE: Do excess funds of the Hot Spring County Solid Waste Authority ("SWA") belong only to Hot Spring County or are the other members of the SWA entitled to a portion of the excess funds based upon some formula such as a comparison of their per-capita distribution and Hot Spring County's distribution in years when an excess occurred? Q2) Do other entities that contributed during the time the excess was created also have any right of return of payment? If so, under what formula would the return of their excess contribution be determined? Q3) If a municipal member of the SWA decided to withdraw their membership, what rights would that member have to the funds and assets of the SWA upon withdrawal? Q4) If a withdrawing members is entitled to a portion of the assets and an agreement cannot be reached, what process would be used to allocate assets? Q5) If a withdrawing member has the right to obtain part of the assets, what input, if any, would the SWA board have on the assets to be distributed to the withdrawing member? Q6) If both municipal members withdrew, could the SWA continue to operate as a separate "public body and body corporate and politic" or would it be subject to the provisions of A.C.A. 14-14-705, as a county board or commission? RESPONSE: 1) and 2) The judicial orders entered in litigation surrounding this issue will control the first two questions and there is no indication in these rulings that any portion of the excess funds was to be apportioned to the municipalities; 3) the applicable statute provides for withdrawal, but states that all contractual rights acquired and obligations incurred will remain. I cannot conclude, in light of this language, that the withdrawing members are entitled to any distribution of the assets; 4) unnecessary to answer; 5) unnecessary to answer; 6) Although not entirely clear,

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in my opinion “yes” it could continue to operate as a SWA.

Opinion No.: 2007-177

Broadway, Shane
State Senator

RE: Regarding restructuring a school district board of directors into electoral zones, if the school board of directors has authority to restructure the election of board members into a combination of zones and at-large positions under A.C.A. 6-13-630, do electors have equal authority when they utilize the petition process proscribed in A.C.A. 6-13-615? Is there an authority which can be cited for equal authority? If not, why not? **RESPONSE:** No. ACA 6-13-615 does not allow electors to petition for a combination of at-large and single-member zones. It only provides for single-member zones. I can find no separate authority for this action.

Opinion No.: 2007-181

Johnson, David
State Representative

RE: Pursuant to provisions of A.C.A. 23-52-102(3)(d), is a retail store considered a “check casher” when the store cashes checks for persons entering the store that do not purchase a consumer or other product from the retail store during the same visit? Q2) Does the exclusion from the definition of “check casher” require that the retail store’s act of cashing the check for any person entering the store be incidental to that person’s main purpose for entering the store on the same visit? Q3) Must a retail store require that the person entering the store purchase a consumer or other product during the person’s visit in order to cash the person’s check while being entitled to the exemption in A.C.A. 23-52-102(3)(d)? **RESPONSE:** With respect to all three of your questions, although the statute is in some respects ambiguous, I believe a retailer of consumer or other goods need obtain a permit as a “check casher” only if it realizes more

than 3% of its gross revenues from check cashing fees. In my opinion, whether or not the customer makes a purchase while cashing a check is of no consequence to the issue.

Opinion No.: 2007-182

Broadway, Shane
State Senator

RE: Is it legal for the City of Benton to use money from the regular city “Street Fund” to pay the interest on \$3,000,000 in Amendment 78 notes issued to finance several street projects? **RESPONSE:** No, if by “Street Fund” you mean a fund that is comprised primarily of state aid in the form of highway turnback revenues (see A.C.A. 27-70-207). In my opinion, the term “road fund revenues” under Amendment 78 is properly interpreted to refer only to revenues derived from the county road tax levied pursuant to Ark. Const. amendment 61, which is apportioned to cities pursuant to A.C.A. 26-79-104.

Opinion No.: 2007-185

Flowers, Stephanie
State Representative

RE: Under what circumstances and time limitations would the results of a school board millage increase election be subject to nullification if it was determined that there had been false and misleading advertising surrounding the millage projections? **RESPONSE:** Decline to answer because of pending litigation.

Opinion No.: 2007-187

Laverty, Randy
State Senator

RE: If a landowner erects a fence on property that he mistakenly believes to be his and subsequently sells

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that land to an out-of-state buyer, does the out-of-state buyer have to wait the require seven years before he can claim ownership of the acreage in question by filing an adverse possession claim? Q2) Were the first landowners that sold the land to the out-of-state buyer required by laws governing adverse possession to notify the other claimant of the land in writing or directly in person of their intent to build a fence and claim possession of the land? RESPONSE: Decline to answer because of the bar against engaging in the private practice of law.

Opinion No.: 2007-192

Evans, Lenville
State Representative

RE: Pursuant to the Arkansas Freedom of Information Act (FOIA), is a water system that provides drinking water to the public required to release the names, addresses, account numbers, water usage, and payment histories of it customers? Q2) Would the answer be different depending upon how the water system was organized, e.g., Public Facilities Board, nonprofit corporation, Regional Water Distribution Districts? Q3) Would the response to question one be different if the water system receives state or federal loan or grant proceeds used for water system construction and/or improvements? RESPONSE: Q1) Yes, if the water system is publicly-owned. See Attorney General Opinions 2000-129 and 97-244. See also Ops. 2002-285 (rural water district), 2004-205 (waterworks facilities board), and 2001-314 (community water association). If the water system is not public, the answer may depend upon whether the private entity is "wholly or partially supported by public funds or expending public funds" within the meaning of the FOIA. Q2) The particular manner in which it is organized might call for a different analysis, with the answer likely dependent upon whether the entity receives direct public funding so that the public funds element of the FOIA test is satisfied. See *Waterworks v. Kristen* 72 Ark. App. 37, 42, 32 S.W.3d 60 (2000). Q3) A loan would likely constitute indirect public funding, whereas a grant would constitute direct

funding. See *Weatherford and Ops.* 2001-314, 99-090, 94-001, 92-205, and 95-273. Regarding any water bills containing system information, see A.C.A.25-19-105(b)(17).

Opinion No.: 2007-193

Thompson, Robert
State Senator

RE: Can Lawrence County lease property it acquired as a gift to a private individual for the purpose of operating a for-profit business? Q2) If so, are bids required before the property is leased? RESPONSE: Q1) Based upon your factual recitation, I assume this donated property is surplus in the sense of not being required for direct public use to maintain the efficient administration of services to the public. I further assume that what you characterize as a transaction similar to a "charitable gift" was not conditioned in a way that would result in a reverter of the property in the event it was used for any purpose other than direct governmental use. Given these assumptions, I believe the answer to your first question is, in all likelihood, "yes." Having offered this opinion, I must note that the law in this regard is not entirely clear and would benefit from legislative or judicial clarification. Q2) Pursuant to the provisions of A.C.A. 14-16-105 (Supp. 2005), I believe the answer to your second question is "no."

Opinion No.: 2007-196

Pace, Daryl A.
State Representative

RE: Under Arkansas law, Division of Health rules and regulations, or any other applicable laws, is a city park required to provide "hard plumbed" restroom facilities? Q2) If the answer to question 1 is "yes," would a city park open to the general public be classified as an A-5 facility which applies to "stadiums, amusement parks, bleachers, and grandstands for outdoor sporting events and activities?" RESPONSE:

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In my opinion, with respect to your first question, the Arkansas Plumbing Code (“APC”) requires “hard plumbed” restroom facilities in any construction project that includes “buildings.” Whether the park referenced in your request would include “buildings” is a question of fact best determined by the Department of Health. With respect to your second question, in my opinion, again this is a factually specific determination, regarding whether “buildings” are included in the park and what classification the “buildings” would be. That is an issue properly determined by the Department of Health subject to the requirements of the Administrative Procedures Act, A.C.A. 25-15-201 through -218 (Repl. 2002 & Supp. 2005). A court, however, would likely defer to the Department of Health’s determination unless it can be shown that the department is “clearly wrong.”

Opinion No.: 2007-199

Daniels, Charlie
Secretary of State

RE: Request to fix and declare the popular name for Senate Joint Resolution 4 (Proposed Constitutional Amendment 1), amending various provisions of the Arkansas Constitution concerning voting and elections. **RESPONSE:** Popular name fixed and declared pursuant to A.C.A. 7-9-110(a)(1) (Repl. 2000). See opinion for text of approved popular name.

Opinion No.: 2007-200

Daniels, Charlie
Secretary of State

RE: Request to fix and declare the popular name for House Joint Resolution 1004 (Proposed Constitutional

Amendment 2), proposing a constitutional amendment to provide that appropriation bills are valid for one fiscal year, to require the General Assembly to meet in fiscal session during even-numbered years, and to set the length of sessions, and other purposes. **RESPONSE:** Popular name fixed and declared pursuant to A.C.A. 7-9-110(a)(1) (Repl. 2000). See opinion for text of approved popular name

Opinion No.: 2007-225

Anderson, Mary C.
c/o Judy Besancon, AR DHHS

RE: Is the decision of the custodian of records to release this employee’s personnel file in response to a Freedom of Information Act request consistent with provisions of the FOIA? **RESPONSE:** In the absence of any indication of what documents the custodian intends to produce, the opinion sets forth the standards the custodian should apply in making his or her determinations regarding disclosure.

Opinion No.: 2007-226

Morgan, Randy
Chief of Detention, Pulaski County

RE: Is the decision of the custodian of records to release the personnel files of two nurses employed at the Pulaski County Regional Detention Facility in response to a Freedom of Information Act request consistent with provisions of the FOIA? **RESPONSE:** I have not reviewed the records in question, but have detailed the applicable tests. A number of documents contained in personnel files are typically releaseable with appropriate redactions.

ADOPTED RULES AND REGULATIONS

ARKANSAS SENTENCING COMMISSION

Docket No: 154.00.07-001F
Effective Date: 08/24/2007
Contact: Wanda Hayes
Telephone: 501-682-5031

Arkansas Sentencing Standards Seriousness Reference Table

BOARD OF NURSING

Docket No: 067.00.07-001F
Effective Date: 08/04/2007
Contact: LouAnn Walker
Telephone: (501) 686-2704

Chapter 1 - General Provisions; Chapter 2 - Licensure; Chapter 7 - Rules of Procedure; and Chapter 8 - Medication Assistant-Certified

COMMISSION FOR PUBLIC SCHOOL ACADEMIC FACILITIES & TRANSPORTATION

Docket No: 203.00.07-001F
Effective Date: 08/25/2007
Contact: Doug Eaton
Telephone: 501-682-4261

Rules Governing Property Insurance Requirements for Public School Facilities

Docket No: 203.00.07-002E
Effective Date: 08/15/2007
Contact: Doug Eaton
Telephone: 501-682-4261

Emergency Rule AFT 022 - Amendment to Rules Governing Property Insurance Requirements

CONTRACTORS LICENSING BOARD

Docket No: 033.00.07-001F
Effective Date: 08/10/2007
Contact: Howard Williams
Telephone: 501-372-4661

Year End Report ***

DEPARTMENT OF WORKFORCE EDUCATION

Docket No: 172.00.07-004F
Effective Date: 07/27/2007
Contact: Dale Turrentine
Telephone: 501-296-1620

Telecommunications Access Program (TAP)

Docket No: 172.00.07-007F
Effective Date: 08/19/2007
Contact: Angela Heard
Telephone: 501-683-1152

Guidelines for Arkansas Sex and Child Offender Registration Act also know as "Megan's Law"

ADOPTED RULES AND REGULATIONS

ECONOMIC DEVELOPMENT COMMISSION

Docket No: 168.00.07-001F
Effective Date: 09/03/2007
Contact: Gay Johnson
Telephone: 501-682-7323

Amendments to the Arkansas Existing Workforce Training Act

EDUCATION DEPARTMENT *Division of Human Resources*

Docket No: 005.16.07-001F
Effective Date: 08/25/2007
Contact: Barbara Culpepper
Telephone: 501-682-5763

Rules Governing Non-Traditional Teacher Licensure

Docket No: 005.16.07-009F
Effective Date: 08/25/2007
Contact: Michael Rowland
Telephone: 501-682-1146

ADE 255 - Rules Governing Eligibility and Financial Incentives for National Board for Professional Teaching Standards

Legal Services

Docket No: 005.23.07-001F
Effective Date: 08/25/2007
Contact: Paul Lazenby
Telephone: 501-682-8587

ADE 257 - Rules Governing the Arkansas Better Chance Program

FINANCE & ADMINISTRATION *Office of State Procurement*

Docket No: 006.27.07-001E
Effective Date: 07/23/2007
Contact: Jan Moore
Telephone: 501-682-7750

Emergency Rule 2007-6: Changes in the Arkansas State Procurement Law

GAME & FISH COMMISSION

Docket No: 002.00.07-006F
Effective Date: 08/02/2007
Contact: James Goodhart
Telephone: 501-223-6327

Captive Mallard Importation Regulations; 2007 - 2008 Early Migratory Bird Codes; 2007 - 2008 Legal Muzzleloader Equipment Approval

HUMAN SERVICES

Developmental Disabilities Services

Docket No: 016.05.07-002F
Effective Date: 10/01/2007
Contact: Pam Fowler
Telephone: 501-682-4747

Policy 1091 - Certification Policy for Non- Center-Based Services

ADOPTED RULES AND REGULATIONS

Docket No: 016.05.07-003F
Effective Date: 10/01/2007
Contact: Pam Fowler
Telephone: 501-682-4747

Certification Standards for Early Intervention Services

Docket No: 016.05.07-004F
Effective Date: 10/01/2007
Contact: Pam Fowler
Telephone: 501-682-4747

Certification Standards for ACS Waiver Services

Docket No: 016.05.07-005F
Effective Date: 10/01/2007
Contact: Pam Fowler
Telephone: 501-682-4747

Licensing Standards for Center-Based Community Programs

Docket No: 016.05.07-006F
Effective Date: 10/01/2007
Contact: Pam Fowler
Telephone: 501-682-4747

Policy 1090 - Licensing Policy for Center-Based Community Services

Docket No: 016.05.07-007F
Effective Date: 09/01/2007
Contact: Traci Harris
Telephone: 501-682-8677

Policy 1089 - Criteria for Expansion of DDS Services Policy

PROFESSIONAL BAIL BOND COMPANY & BAIL BONDSMAN LICENSING BOARD

Docket No: 164.00.07-001F
Effective Date: 08/23/2007
Contact: Diana Wilson
Telephone: 501-682-5782

Rule 1 - Regulation of Bail Bond Business (Section 19 & 20)

PUBLIC SERVICE COMMISSION

Utilities Section

Docket No: 126.03.07-008F
Effective Date: 08/04/2007
Contact: Diana Wilson
Telephone: 501-682-5782

High Cost Fund Rules

ADOPTED RULES AND REGULATIONS

REAL ESTATE COMMISSION

Docket No: 076.00.07-001F
Effective Date: 08/31/2007
Contact: Bill Williamson
Telephone: 501-683-8014

Rules of the Real Estate Commission

STATE BANK DEPARTMENT

Docket No: 210.00.07-003F
Effective Date: 08/01/2007
Contact: Candace Franks
Telephone: 501-324-9019

46-101.3 - Confidential or Non-Confidential Status of Bank Department Records; 47-101.2 - Incidental Powers



INSURANCE DEPARTMENT

*** No Insurance Department Orders will be listed in this edition of the *Arkansas Register*. For copies of Orders that were released during this month please call (501) 682-3527.



ORDERS AND NOTICES

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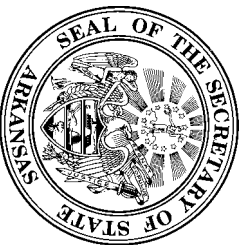
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