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Attorney General's Opinions

A. F. Summer

Richard M. Allen

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ATTORNEY GENERAL'S OPINIONS

The Authority To Issue An Attorney General's Opinion

The Attorney General of Mississippi is empowered by the law of this state to issue written answers to questions posed by authorized persons. Section 7-5-25, Miss. Code Ann. (1972) sets forth a list of those authorized to request such opinions. In general, the list includes the governor, the legislature, the chancery and circuit court clerks, the secretary of state, the various state departments, state officers and commissioners operating under the laws of this state, the heads and trustees of state institutions, district attorneys, the various county and city officials and their attorneys.

The Attorney General's Opinions function as a protective measure, so that there can be no civil or criminal liability against any person or governmental entity who has properly requested the opinion, setting forth all governing facts on the basis of which the Attorney General's Office has prepared and delivered a legal opinion, and which the requesting party has followed in good faith. This general proposition holds true, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

*Issuance Of An Attorney General's Opinion**

Attorneys in the Attorney General's Office are assigned to specific areas of law in which they specialize. After an opinion request is received by the Office of the Attorney General, it is assigned to the attorney whose area of law it might concern. He then researches the problem and prepares a draft of the opinion or answer. This draft is then submitted to the Opinion Committee which is composed of nine attorneys in the office, including the Attorney General. The Opinion Committee meets twice weekly, on Tuesday and Thursday. At the meeting of the Committee, the draft is discussed and reviewed. The Committee either suggests changes, requests more information, or approves the draft if it is agreed that the analysis of the law is correct.

Should changes be suggested or more information requested, the Committee sends the draft back to the attorney for revision. Upon correction or addition, the draft is returned to the Committee where it is again processed. If there are no further changes, additions, or corrections suggested, the draft will be given final approval and issued as an official Attorney General's Opinion.

*Prepared by Attorney General's Office

OPINION NO. CV 79-05

SUBJECT: MUNICIPAL OFFICERS LIABILITY FOR FIRING AN EMPLOYEE. As a general rule, a municipal employee may be discharged from employment by lawful vote of the governing authorities. Applicable case law may require a formal charge or hearing. However, the immunity of public officials from civil suit is subject to several exceptions. *See Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978).

DATE RENDERED: November 21, 1979

REQUESTED BY: Hon. C. P. Land

OPINION BY: A. F. Summer, Attorney General, by S. E. Birdsong, Jr., Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter and has assigned it to me for research and reply.

Your letter states:

> Please advise if the City of Ruleville would have any liability or be legally justified in firing an employee for no reason, other than personal, which has nothing to do with duty, conduct or character.
>
> At least three Aldermen wish to fire one City employee with the excuse (We must reduce payroll). This employee has been on the rolls over two years and the position has been established and filled for several years—(Predecessor moved out of State). There is no way feasibly the duties can be eliminated and, the other personnel in the vicinity cannot assume the additional function and maintain a satisfactory standard of efficiency.
>
> Specific questions we need answered are:
>
> A. Would the City be legally liable if the employee is fired and the job not abolished?
>
> B. If the position is to be refilled would [the] employee have preferential rights to re-instatement?
>
> Request your reply as soon as possible.

This office is informed that Ruleville has a Code charter (Mayor and Board of Aldermen) form of government and under the applicable law does not have a Civil Service System.

Section 21-3-5 of the Mississippi Code of 1972, Annotated, provides in part:

> *Appointive officers*
>
> From and after the expiration of the terms of office of Present mu-

> nicipal officers, the mayor and board of aldermen of all municipalities operating under this chapter shall have the power and authority to appoint a street commissioner, and such other officers and employees as may be necessary, and to prescribe the duties and fix the compensation of all such officers and employees. All officers and employees so appointed shall hold office at the pleasure of the governing authorities and may be discharged by such governing authorities at any time, either with or without cause. . . . The terms of office or employment of all officers and employees so appointed shall expire at the expiration of the term of office of the governing authorities making the appointment, unless such officers or employees shall have been sooner discharged as herein provided.

Therefore, as a general rule, under the provisions of this section, a municipal employee of Ruleville, as distinguished from an appointed officer, may be discharged from employment by lawful vote of the governing authorities. In *Ex parte Castle*, 248 Miss. 159, 159 So. 2d 81 (1963), the Mississippi Supreme Court affirmed the principle that no formal charges or hearing are required where a public officer holds only at the pleasure of superiors. An exception to the rule of no formal charges or hearing is whether there exists on the employee's part a reasonable expectation of continued employment. Such expectation might exist as a result of an agreement, oral or otherwise; the provisions of a personnel manual; or an ordinance regulating employment.

There is another general rule in Mississippi that municipalities, as governmental entities, are immune from civil suit by reason of the doctrine of sovereign immunity. Also, public officials have such immunity but are limited to instances when they act in the performance of official duties requiring deliberation, decision and judgment. See *Davis v. Little*, 362 So. 2d 642 (1978).

There is yet another exception to officials' immunity: In the recent case of *Monell v. Department of Social Services of the City of [New] York, et al.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the Supreme Court ruled, inter alia, that local governmental bodies and local officials can be sued civilly in their official capacities under the Civil Rights Act of 1871 (42 U.S.C. 1983), for depriving persons, including municipal employees, of Federal constitutional rights when acting officially. These rights are numerous and include freedom from unlawful discrimination in employment.

Considering the information in your letter, it would be speculation to say whether the municipality and the governing authorities would be legally liable for the discharge of the employee. In summary, so long as an employee is not discharged in violation of that employee's Federal constitutional rights, there would be no legal liability. The issue of violation of such rights would depend upon the particular facts of the case.

In response to your second question, we are not aware of any statutory right the discharged employee would have to reinstatement. Such might depend upon any municipal ordinance or employment agreement between the municipality and the employee.

It is recommended that you consult your municipal attorney concerning this matter.

With kind regards, I am

Very truly yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: S. E. Birdsong, Jr.

S. E. Birdsong, Jr.
Special Assistant Attorney General

SEB, Jr./mg

OPINION NO. CV 79-06

SUBJECT: LEGALITY OF ALLOWING THE CONTINUATION OF MATERNITY BENEFITS AFTER TERMINATION OF EMPLOYMENT. Title VII of the Civil Rights Act of 1964, as amended April 29, 1979, now requires that maternity be treated "as any other illness." Therefore, maternity benefits may be continued after leave only where similar benefit coverage is allowed for all other disabilities.

DATE RENDERED: July 2, 1979

REQUESTED BY: Mrs. Ruth Howie

OPINION BY: A. F. Summer, Attorney General, by Hubbard T. Saunders, IV, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your June 25, 1979, opinion request letter and assigned it to the undersigned attorney for research and reply.

In your letter you state:

> The following situation requires an opinion as to whether the State Life and Health Insurance plan would be in violation of the new amendments to the Civil Rights Act which became effective on April 29, 1979.
>
> During the period that the state plan has been in effect, due to our policy not having extended benefits, we have permitted those employees

who left state employment due to maternity to continue their maternity benefits coverage by continuing to pay the premium until time of delivery.

The new amendments which became effective April 29, 1979, require us to consider maternity "as any other illness". We do not permit employees who leave us for illness reasons to continue their coverage unless they can retire as disabled. All others must leave our group. Can we continue to allow the maternity benefits as we previously did?

Based upon the facts stated in your letter and the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, it is the opinion of this office that the continued maternity benefits coverage violates Title VII of the Civil Rights Act of 1964, as amended, to the extent that coverage of other disabilities is not likewise continued. There are two options available for correcting this situation: (1) allow continued benefits coverage for all other disabilities or (2) eliminate the continued maternity benefits coverage. However, the continued maternity benefits coverage may only be reduced or eliminated on or after October 31, 1979.

Sincerely yours,

A. F. SUMMER, ATTORNEY GENERAL

Hubbard T. Saunders, IV

BY:

Hubbard T. Saunders, IV
Special Assistant Attorney General

AFS/HTS, IV:bw

OPINION NO. CV 79-07

SUBJECT: MISSISSIPPI LAND OWNERSHIP BY A CORPORATION WHOLLY OWNED BY NONRESIDENT ALIENS. A nonresident alien, as an individual or through a corporation, may not own public land. Neither may a nonresident alien own any private land under his own name. However, a corporation partially or wholly owned by nonresident aliens may own private land.

DATE RENDERED: October 23, 1979

REQUESTED BY: Hon. Gay Dawn Horne

OPINION BY: A. F. Summer, Attorney General, by Mack Cameron, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter of request

dated October 8, 1979 which has been forwarded to the undersigned for research and reply.

Your letter stated:

> As Assistant City Attorney for the City of Jackson, I am hereby requesting your opinion on the following issue:
>
> Does Mississippi law proscribe ownership of land in the State by a domestic or qualified foreign corporation when the stock is wholly owned by non-resident aliens?
>
> Under Miss. Code Ann., Section 89-1-23 (1972), a non-resident alien generally is prohibited from acquiring or holding land in Mississippi. An expressed prohibition against ownership of public lands by a corporation or non-resident alien is found in Miss. Code Ann., Section 29-1-75 (1972). Despite these statutes, no statute proscribing ownership of stock by non-resident aliens was found. Section 199 of the Mississippi Constitution states that the term 'corporation' includes 'all associations and all joint stock companies for pecuniary gain having privileges not possessed by individuals or partnerships.'
>
> Since the legality of ownership of land by non-resident aliens through a corporation is unclear, the City Attorney's office would appreciate your opinion as to the stated issue.

Section 84 of the Mississippi Constitution states:

> The legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this state by nonresident aliens, and may limit or restrict the acquiring or holding of lands by corporations.

The legislature, under the authority of Section 84, has enacted Section 89-1-23 and Section 29-1-75.

Section 29-1-75, as it is presently written, states:

> Neither a corporation (except as herein provided) nor a nonresident alien, nor any association of persons composed in whole or in part of nonresident aliens, shall directly or indirectly purchase or become the owner of any of the public lands; and every patent issued in contravention hereof shall be void. A banking corporation owning such tax-forfeited lands or holding a mortgage or deed of trust thereon at the time of the sale to the state, and whose mortgage or deed of trust is still in force and effect, may purchase such lands, regardless of acreage, owned by it as aforesaid or on which it held a mortgage or deed of trust. In event of a purchase by such corporation as a mortgagee, such lands shall be held for the benefit of the mortgagor subject to all the terms and conditions of the mortgage or deed of trust held by the purchasing banking corporation and, upon payment of the debt secured by such mortgage or deed of trust, together with interest and incidents, such banking corporation shall in that event reconvey such lands to the original mortgagor, his heirs or assigns.

This section deals with public land and would not include under its application any property under private ownership. Thus, a non-resident alien would be prohibited, either as an individual or through a corporation or any type of association, from purchasing any public land such as state land, county or municipal land, and other types of public land.

Since Section 29-1-75 does not apply to the sale of private land, the ownership of private land would be governed by the provisions of Section 89-1-23. That section, as it is presently written, states:

> Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may. Nonresident aliens shall not hereafter acquire or hold land, but a nonesident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt may purchase the same and thereafter hold it, not longer than twenty years, with full power during said time to sell the land, in fee, to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or nonresident, if he be a purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person.
>
> Any person who was or is a citizen of the United States and became or becomes an alien by reason of marriage to a citizen of a foreign country, may hereafter inherit, or if he or she heretofore inherited or acquired or hereafter inherits, may hold, own, transmit by descent or transfer land [free from any escheat to the State of Mississippi, if said land] has not heretofore escheated by final valid order or decree of a court of competent jurisdiction.
>
> Nonresident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi.

Because of the wording of Section 29-1-75, nonresident aliens may not now own land in Mississippi under their own name. However, there is no prohibition against the ownership of private lands by a domestic or qualified foreign corporation, regardless of whether the stock in that corporation is partially or wholly owned by nonresident aliens.

Therefore, it is the opinion of this office that under the laws of Mississippi, as they are now written, a nonresident alien, through partial or complete ownership of a domestic or qualified foreign corporation, may purchase and own any of the lands owned by individuals or

private corporations located within the boundaries of the State of Mississippi.

Sincerely yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: Mack Cameron

Mack Cameron
Special Assistant Attorney General

MC:db

OPINION NO. CV 80-08

SUBJECT: ARREST AND EXTRADITION OF INDIAN FUGITIVES FOUND WITHIN "INDIAN COUNTRY." A sheriff has the authority to issue and serve civil and perhaps criminal process upon Indians in his jurisdiction, regardless of where they are found. This authority does not include criminal matters contemplating the arrest of an Indian fugitive found inside "Indian Country." An Indian tribe is sovereign only to the extent that the United States permits it to be sovereign.

DATE RENDERED: January 30, 1980

REQUESTED BY: Mr. Joe M. Thaggard

OPINION BY: Bill Allain, Attorney General, by Billy L. Gore, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Allain has received your letter of request dated January 15, 1980, and has assigned it to me for research and reply. The inquiries presented are very interesting ones touching upon a highly volatile and delicate area. Your questions are restated here as follows:

> I understand that I have no authority to enforce the criminal laws occurring on the Reservation, but I have been and can foresee additional problems in making arrests on Indian Reservations of Defendants who have committed crimes off the Reservation and to serve civil process upon the Reservation. I have been advised that law and order will not execute our warrants or serve summons in civil matters upon Indians living on the Reservation. I am, further, advised by law and order that a Defendant who commits a crime off the Reservation would have to be extradited by the State of Mississippi.
>
> ° ° ° ° °
>
> I would sincerely appreciate a legal research of the problems and to

be fully advised as to my responsibilities and legal authority concerning the aforementioned problems.

This office has received from the Office of the Governor a copy of a letter dated October 30, 1979, from Phillip Martin, Chief of the Mississippi Band of Choctaw Indians. Appended to that letter is a copy of Resolution CHO 178-79 entitled "A Resolution Governing Extraditions of Indian Fugitives from and to the Choctaw Indian Reservation." I feel confident Tribal Chief Martin forwarded to you a copy of the letter, as well as the resolution itself. That piece of correspondence indicates that carbon copies were mailed to the Sheriffs of Neshoba, Newton, Leake, and Jones Counties. Perhaps it was his letter that precipitated your inquiry to this office. If perchance you did not receive the letter, a copy is attached to this reply.

The Office of the Governor requested that we research the matter of extradition of Indian fugitives found in Choctaw "Indian Country" who have violated state criminal laws within the State of Mississippi, but not within Indian territory. The research of this matter has been assigned to Steve Wright, an attorney in this office who handles our extradition procedures. He is well versed in this area.

Quite frankly I will not at this time be able to give you a definitive opinion one way or the other with regard to the matters of arrest and extradition. The answer to these portions of your inquiry must await the completion of more thorough research in this delicate area. Please be assured, however, we are well aware of the potential problems created by CHO 178-79 and the demands that it places upon the State of Mississippi. We have solicited the assistance of the United States Attorney's Office and hope they can provide some additional insight into this matter.

We do offer the following general jurisdictional guidelines which conform with our interpretation of the present state of the law.

[1] Crimes committed in Choctaw "Indian Country" against non-Indians by non-Indians are subject to the jurisdiction of the State of Mississippi.

[2] Offenses committed in Choctaw "Indian Country" against Indians by non-Indians are subject to federal jurisdiction.

[3] Major felonies committed in Choctaw "Indian Country" against Indians by other Indians are subject to federal jurisdiction.

[4] Crimes committed in Choctaw "Indian Country" against non-Indians by Indians are subject to federal jurisdiction.

[5] Crimes committed by or against Indians and Indian property outside of Choctaw "Indian Country" but within the borders of the State of Mississippi are subject to the jurisdiction of the State

> of Mississippi. If the occurrence is outside the boundaries of so-called "Indian Country" then state law will control regardless of the parties involved.

In the case of *Organized Village of Kake v. Egen*, 7 L. Ed. 2d 573 (1962), the United States Supreme Court declared that its prior "decisions indicate that *even on reservations* state laws may be applied to Indians *unless* such application would interfere with reservation self-government or impair a right granted or reserved by federal law . . ." 7 L. Ed. 2d at p. 583. Further, "State authority over Indians is yet *more* extensive over activities, such as in this case, *not on any reservation*. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of 'Indian Country.' " 7 L. Ed. 2d at p. 583.

In an earlier decision styled *Railway v. Fisher*, 116 U. S. 28 (1885), the United States Supreme Court said: "It has . . . been held that the process of [a territory's] courts may run into an Indian reservation . . . where the subject matter or controversy is otherwise within their cognizance."

Modern decisions of the United States Supreme Court indicate without dispute that as to crimes committed by or against Indians outside the boundaries of "Indian Country" but within the borders of the State, it is within the jurisdiction of the State to try and punish the offender. This would seem to answer your inquiry focusing upon your authority to arrest a fugitive Indian found inside "Indian Country" after he has committed an offense outside of "Indian Country." Regrettably, however, it does not.

In determining whether a State has the authority to arrest an Indian found in Indian territory for an offense committed outside of Indian territory, the courts have focused upon a secondary inquiry: "Would the activities of the state officer interfere in any way with tribal self government?" In other words, would the state action infringe on the right, if any, of the Choctaw Indians to make their own laws and to be ruled by them?

Apparently the Mississippi Band of Choctaw Indians, by formulating and adopting a procedure of extradition to and from an Indian reservation within the boundaries of the State of Mississippi is presently engaged in the undertaking of tribal self-government. The critical inquiry, and one that this office cannot answer at this time, is whether or not the Choctaws have, indeed, been granted the authority to make laws and formulate policies, the enforcement of which would tend to infringe upon the power of the State to try and punish offenders for crimes committed by or against Indians and Indian property outside of "Indian Country" but within the boundaries of the State.

It appears to us at first glance that they do not because to decide otherwise would invite interference with the right of the State to enforce its own laws against its own citizenry and would almost be tantamount to pre-empting State criminal jurisdiction over crimes committed outside of "Indian Country" but within the borders of the State. We do not feel at the present time that the *Smith John* decision went so far as to hold, or even suggest, that only the Tribe or the United States may lawfully apprehend an Indian located within Choctaw "Indian Country" for a violation of State law occurring outside of "Indian Country."

The Treaty at Dancing Rabbit Creek (1830), creates further confusion in this area. While it is silent as to any grant of authority conferring to the Choctaws the right to govern themselves, it does contain this language in Article VIII focusing upon the delivery of offenders:

> ARTICLE VIII. Offenders against the laws of the U.S. or any individual State shall be apprehended and delivered to any duly authorized person where such offender may be found in the Choctaw country, having fled from any part of U.S. but in all such cases application must be made to the Agent or Chiefs and the expense of his apprehension and delivery provided for and paid by the U. States.

In this posture a precise answer to some of your inquiries must be deferred to another day. I would suggest, however, that you solicit the cooperation of tribal authorities if and when it becomes necessary to go into "Indian territory" for the purpose of service [of] process or effecting an arrest for an offense committed outside of "Indian Country." It would not be unwise to initially contact an agent for the Bureau of Indian Affairs and coordinate through him. If you encounter difficulty in a particular case, please advise and give us specific details.

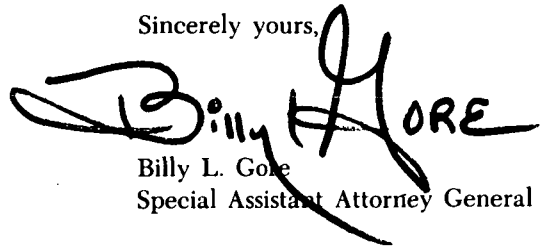
With regard to civil process, and perhaps process involving criminal matters not contemplating the arrest of a fugitive found inside of "Indian Country," I am of the opinion that you have the authority to issue and serve that process upon the Indians in your jurisdiction regardless of where they are found. Again, however, I would first solicit the cooperation of tribal authorities.

In our view Indians are not immune from service of State civil process because immunity is not necessary to protect their right, if any, to make their own laws and be ruled by them. One cannot throw up a shield around himself by claiming that the state process server cannot pierce the exterior boundary of "Indian Country" and serve civil process therein.

Finally, an Indian Tribe or Band is sovereign only to the extent that the United States permits it to be sovereign—neither more nor less. It is the scope of this Choctaw sovereignty that we are presently trying to define. The task is a formidable one. This office will keep you advised.

If our staff can be of further assistance to you with regard to this or any other matter, please do not hesitate to let us know.

Sincerely yours,



Billy L. Gore
Special Assistant Attorney General

BLG/ds

OPINION NO. CV 80-09

SUBJECT: AUTHORITY OF A CITY TO ACQUIRE PROPERTY OUTSIDE ITS CITY LIMITS BY EMINENT DOMAIN. Municipalities may construct industrial enterprises located outside the municipal corporate limits. A city may exercise its eminent domain powers outside the corporate limits. Purposes where the exercise is appropriate include securing land for parks, cemeteries, school houses, and any public building.

DATE RENDERED: January 3, 1980

REQUESTED BY: Hon. Judy Donald

OPINION BY: A. F. Summer, Attorney General, by S. E. Birdsong, Jr., Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter and has assigned it to me for research and reply.

Your letter states:

> The Mayor and Board of Aldermen of the City of Morton have requested that I contact you in regard to the following question.
>
> Does the City of Morton have authority to build a street outside of the municipal boundaries of the City?
>
> Also, does the City have the right of eminent domain to acquire property outside the City limits? If so, are there any limits on what this property acquired by eminent domain outside the City limits may be used for?

Section 21-37-3 of the Mississippi Code of 1972, Annotated, (the "Code"), states the general power of a municipality as to its streets. This section was previously Section 3374-129 of the Code of 1942.

This section was interpreted in *Logan v. City of Clarksdale*, 240

Miss. 716, 128 So. 2d 537 (1961), the court stating at Pages 539 and 540:

> Municipalities can exercise any such powers as are granted to them by the legislature of the state. King v. City of Louisville, 207 Miss. 612, 42 So. 2d 813; City of Natchez v. Engle, 211 Miss. 380, 49 So. 2d 808, 51 So. 2d 564; Love Co. v. Town of Carthage, 218 Miss. 11, 65 So. 2d 568.
>
> Section 3374-129, Code of 1942, Rec., provides as follows: "The governing authorities of municipalities shall have the power to exercise full jurisdiction in the matter of streets, sidewalks, sewers and parks; to open and lay out and construct the same; and to repair, maintain, pave, sprinkle, adorn, and light the same." *Under this section, no authority is granted the city to repair, maintain, or pave a road outside its corporate limits.* A street is a road or highway within a municipality. City of Ellisville v. State Highway Commission, 186 Miss. 473, 191 So. 274.
>
> (Emphasis supplied.)

Aside from this general rule, there is other statutory authority which may be relevant to your inquiry.

Municipalities, either alone or in cooperation with counties, may under the provisions of Chapters 1 and 3 of Title 57 of the Code construct industrial enterprises located outside the municipal corporate limits. The description of powers to be exercised in these chapters (Sections 57-1-23 and 57-3-9) appears to include the power to pave what may be commonly termed a "street" or roadway within the project area.

Municipalities, either alone or in cooperation with counties, may under the provisions of Chapter 5 of Title 57 establish industrial parks or districts outside its limits and pave therein "streets" or roadways.

Similarly, municipalities may under Chapter 7 of Title 57 of the Code, improve surplus airport land or other surplus lands outside its limits for industrial purposes and "[c]onstruct and/or improve and hard-surface roadways, streets . . . and access roads . . . as may be necessary or proper. . . ."

Under Section 21-37-21 of the Code, municipalities may own cemeteries without the municipal limits and within such cemeteries could improve the cemeteries by roadways.

Eminent domain powers of municipalities are set out in Section 21-37-47 of the Code. This section was previously Section 3374-128 (Supp. 1964) of the 1942 Code and the 1942 Code section was interpreted in *Colbert v. City of Tupelo*, 187 So. 2d 319 (1966). These sections are the same except that in the Code, the last paragraph concerning a national defense project is an addition.

Section 21-37-47 states as to the power of eminent domain:

> *Exercise of eminent domain by municipalities*
>
> The governing authorities of municipalities, and any commission created under legislative act and operating as an agency of any municipality, where necessary or incidental to the functions and purposes of the commission as set out in the legislative act providing for such commission, shall have the power to exercise the right of eminent domain for the following purposes:

and there follows in Subparagraphs 1 through 7 a listing of purposes, including securing land for parks, cemeteries, and school houses and for the constructing of any public building. This section continues,

> Such governing authorities or commission may exercise the right *without, as well as within*, the corporate limits of the municipality, and this right may be exercised by any municipality or any such commission aforesaid.
>
> Morever, any municipality in the state may, in the furtherance of any national defense project, within or without its corporate limits but located within ten miles of the corporate limits of such municipality, purchase or acquire lands connected with such project and in so doing exercise the right of eminent domain, if necessary.
>
> (Emphasis supplied.)

In *Colbert*, the Court stated at Pages 319 and 320:

> The sole question raised and argued on appeal is whether the City of Tupelo has authority to acquire land by condemnation for the construction of a public street, when the land lies outside the corporate limits.
>
> [. . . .]
>
> It is not necessary to go beyond the provisions of Mississippi Code Annotated section 3374-128 (Supp. 1964) to discover ample authority for the acquisition of this property by the City of Tupelo, for the above public use, although outside the city limits.
>
> [. . . .]
>
> The language of the above statute is neither unclear nor ambiguous, nor does it require the application of special rules of construction in order to understand it or to determine its meaning. It contains a clear grant of the power sought to be exercised by the City of Tupelo in this case.

Therefore, a municipality may acquire by eminent domain land without the corporate limits for the purposes listed in Section 21-37-47, supra.

Under Chapters 1 and 3 of Title 57 of the Code, mentioned above, municipalities may acquire land by eminent domain without the corporate limits.

Should there be a specific contemplated purpose concerning Morton, you may request an opinion on the subject.

With kind regards, I am

Very truly yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: S. E. Birdsong

S. E. Birdsong, Jr.
Special Assistant Attorney General

SEB., Jr./mg

OPINION NO. CV 80-10

SUBJECT: AUTHORITY OF CHIEF OF POLICE TO SERVE AS CLERK OF THE POLICE COURT AND ISSUE WARRANTS. The chief of police should not be appointed clerk of the municipal police court. Although he is a civil officer he is not defined statutorily as conservator of the peace and therefore is not empowered to issue arrest warrants.

DATE RENDERED: January 7, 1980

REQUESTED BY: Hon. Herman Alford

OPINION BY: A. F. Summer, Attorney General, by S. E. Birdsong, Jr., Special Assistant Attorney General

°Selected portion of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter and has assigned it to me for research and reply.

Your letter states:

> As City Attorney for the City of Philadelphia, Mississippi, it is respectfully requested that the Mayor and Board of Aldermen of the City of Philadelphia, Mississippi, be advised concerning the following question:
>
> The City operates a municipal police Court and under Section 21-33-3, Miss. Code Annotated 1972, have appointed a Police Justice and a Police Justice pro-tempore in lieu of the Mayor serving as police justice.
>
> The present Police Justice has requested the Mayor and Board of Aldermen to authorize the Chief of Police to take the oaths for affidavits and *issue arrest warrants* and to further appoint the Chief of Police as Clerk of the police court.

> It is questioned by the undersigned as city attorney concerning the legality of this procedure in light of the separation of powers in that Section 21-23-11 states "that the clerk of the municipality shall be the clerk of the police court, unless the governing authorities shall otherwise elect."
>
> May the Chief of Police be vested with these additional powers and duties.

Addressing first the matter of the Municipal Court Clerk, the following Sections of the Code are noted:

§ 21-23-7. *Powers and duties of municipal judge.*

[. . . .]

§ 21-23-11. *Clerk of the court.*

[. . . .]

§ 21-23-13. *Executive officer of the court.*

[. . . .]

Reading these sections together, it is the opinion of this office that the Chief of Police is not to be appointed to the position of Clerk of the Municipal Court.

The Legislature has acted to empower conservators of the peace to issue arrest warrants:

§ 99-15-5. *Conservators of the peace—arrest and commitment of offenders.*

[. . . .]

and designated certain civil officers as conservators of the peace:

§ 99-15-1. *Conservators of peace—defined.*

[. . . .]

Elsewhere in Section 19-3-39 members of the board of supervisors are designated conservators of the peace within their respective counties. In Section 21-23-7, Municipal Judges are designated conservators of the peace within their respective municipalities. We do not find a statutory designation of a chief of police as a conservator of the peace.

Section 167 of the Mississippi Constitution of 1890 states that: "All civil officers shall be conservators of the peace, and shall be by law vested with ample power as such." However, the granted power is not unrestricted. Citing this section of the Constitution, the Mississippi Supreme Court held in *Martin v. State*, 190 Miss. 32, 199 So. 98 (1940) that a conservator of the peace has only such authority and power as are defined and limited by a statute enacted by the legislature, except to arrest for crimes committed in his presence which is an authority possessed at common law and now by statute by every person.

We did not find any Mississippi decision concerning chiefs of police as issuers of arrest warrants. Two decisions were found that indicate the court's reasoning on issuance of warrants by other than a judicial officer.

Section 21-23-11, supra, states to the Clerk of the Court: "The clerk shall have the power to take affidavits charging any crime against the municipality or state." In *Porter v. State*, 135 Miss. 789, 100 So. 377 (1924), the court states as to an arrest warrant:

> (2) The affidavit and search warrant were also void, for the reason that the affidavit was made before, and the search warrant issued by, a deputy city clerk. This precise question was decided in the case of City of Jackson v. [Howard, 135 Miss. 102, 99 So. 497 (1924)], in which it was held that, under section 2088, Hemingway's Code (Laws of 1908, c. 115), authorizing the issuance of a search warrant by a justice of the peace, *it is only the judge or magistrate before whom a proper affidavit is filed who, after the exercise of his own judgment as to the credibility of the affiant and the sufficiency of the affidavit, may issue a search warrant*, and that section 3400, Code of 1906 (section 5930, Hemingway's Code), authorizing the clerk of a municipality to issue process from the municipal court, does not authorize such clerk to issue a search warrant.
>
> (Emphasis supplied.)

In further explanation of the limits placed by the court on others than judicial officers, the court in *Sheffield v. Reece, Sheriff*, 201 Miss. 133, 28 So. 2d 745 (1947) in ruling concerning a sheriff's power as a conservator of the peace:

> Section 167, Constitution of 1890, provides that "All civil officers shall be conservators of the peace, and shall be, by law, vested with ample power as such." A sheriff of a county is a civil officer. It is true that the words, "Any conservator of the peace," found in section 2569, Code of 1942, are limited to the officials designated as conservators of the peace in section 2568 thereof, to wit, judges of the Supreme, Circuit and Chancery Courts, and justices of the peace, as held in the case of Martin v. State, 190 Miss. 32, 199 So. 98, 101. The reason for thus limiting the words "Any conservator of the peace," as aforesaid, is due to the fact that under the said section 2569, an examination is to be held by the conservator of the peace in the case referred to therein, to determine whether or not the particular case wherein has issued a warrant, is bailable, that is to say, a judicial hearing. *Manifestly, a sheriff is, therefore, not a conservator of the peace within the purview of this statute, although as a civil officer he is declared* to be one in the general sense by section 167, Constitution of 1890.
>
> (Emphasis supplied.)

We conclude from the foregoing that although a municipal chief of police may be a civil officer as described in Section 167 of the Constitution, such an officer is not empowered to issue arrest warrants.

With kind regards, I am

Very truly yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: S. E. Birdsong

S. E. Birdsong, Jr.
Special Assistant Attorney General

SEB. Jr./mg

OPINION NO. CV 80-11

SUBJECT: A CONTRACT OFFERING "HOME WARRANTY" OR "LIMITED HOME WARRANTY" CONSTITUTES THE SELLING OF INSURANCE. The basic thrust of the protection offered by the company is risk transfer and risk distribution. The company's terminology of the contract as a "warranty" is not conclusive to its nature. A company that offers to a homeowner through an unrelated third party a contract which has as its principle purpose the indemnification of risk of loss is transacting insurance and must be licensed under the laws of Mississippi.

DATE RENDERED: January 15, 1980

REQUESTED BY: Mr. J. Daniel Schroeder

OPINION BY: A. F. Summer, Attorney General, by Stephen J. Kirchmayr, Special Assistant Attorney General

*Full text of Attorney General's opinion is reprinted as follows:

Attorney General Summer has received your letter of request dated December 10, 1979, and has assigned it to me for research and reply. Your request states:

> Recently, a service commonly known as a "home warranty" or "limited home warranty" has appeared in the real estate industry.
>
> Generally, companies which offer this service will agree, for a fee, to repair or replace certain items (appliances, central air conditioning units, plumbing, etc.) should these items need repair during the agreed period of time. The fee is paid by the seller, purchaser or, in some cases, by a real estate broker involved in the sale of the property. The fee is required whether or not any claims are made during the period covered.
>
> Please advise if this activity constitutes the business of insurance and, if so, whether these companies should be licensed by the Insurance Department.

In responding to your inquiry, the following has been assumed:

1. A company enters into an agreement (contract) with a homeowner who is in the process of selling his dwelling. (The agreement being called a home warranty or limited home warranty.)

2. The agreement (contract) provides that the company will repair or replace defective or worn-out specified items in the dwelling such as plumbing, heating and air conditioning system, appliances, etc., during an agreed period of time after the sale of the dwelling.

3. The agreement (contract) is geared to benefit the purchaser of the dwelling, which will, in essence, indemnify the purchaser should one of the specified items become defective.

4. The company providing the agreement (contract) charges a fee, which fee is paid by the seller, purchaser, or, in some cases, by a real estate broker.

5. The company providing this agreement (contract) will provide such to just about any individual who is selling his home and desires to obtain such protection.

Our State defines a contract of insurance, pursuant to Section 83-5-5, Mississippi Code of 1972, as follows:

> [A] contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest, as an indemnity therefor.

A contract of insurance has five elements, such elements are:

(a) The insured possessed an interest of some kind susceptible of pecuniary estimation, known as an insurance interest.

(b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated peril.

(c) The insurer assumes that risk of loss.

(d) Such assumption is part of a general scheme to distribute natural losses among a large group of persons bearing somewhat similar risks.

(e) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund.

A contract possessing only the three elements first named is a risk-shifting device but not a contract of insurance, which is a risk-distributing device; but, if it possesses the other two as well, it is a contract of insurance, whatever by its name or its form.

Vance On Insurance, Third Edition (1951).

In the matter now being discussed, the homeowner has an *insurable interest* (appliances, central heating and air conditioning system, plumbing, etc.); there obviously exists a *risk of loss* when any item becomes defective; the protection plan ("home warranty" or "limited home warranty") *assumes the risk* and replaces or repairs the defective item; this protection plan is offered to a large group of homeowners thereby *distribut[ing] the losses* among [a] larger group of homeowners who also have benefit of this plan; and, finally, this protection is obtained by the payment of money to the company *(fee or premium)*, for the *assumption, by the company, of the risk.*

It is also important to note that this protection plan is not being provided by the seller of a dwelling, *but is being provided by an unrelated third party who assumes the risk.*

The company (the unrelated third party) is in no respect a party to the sale of the dwelling; however, the real estate sale is a most convenient "marketing tool" for the protection plan. Of further interest and importance, it must be noted that it is "the company" who offers the protection *not* the seller. The basic thrust of this protection offered by the company is risk transfer and risk distribution. Accordingly, it is our opinion that a contract of this nature is a contract of insurance.

The mere fact that a company elects, as in this case, to term a contract of insurance as a "warranty" in no way makes such agreement a warranty. "*A warranty is a statement or representation made by the seller of goods*, contemporaneously with, and as a part of the contract of sale, although collateral to the expressed object of it, having reference to the character, quality or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them." 77 *C.J.S., Sales*, § 301 (1952).

Further, a "warranty is an incident to a contract of sale, and assumes or necessarily implies the existence thereof. A warranty is not an essential element of sale, which can exist without it, but there can be no warranty without a sale." 77 *C.J.S., Sales*, § 302(b).

It is interesting to note that one jurisdiction has concluded that "a warranty is made by the *seller* of goods and not by some unrelated third party." *Guaranteed W. Corp., Inc. v. State ex rel. Humphrey*, 533 P.2d 87, 22 Ariz. App. 327 (Ariz. 1975).

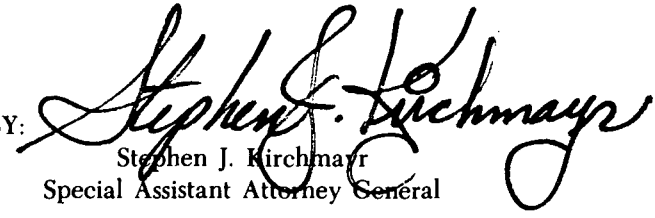
This office has heretofore addressed a similar set of facts, and by way of further explanation, we enclose and incorporate herein our opinion dated May 3, 1979 to Honorable George Dale, such being attached and marked as Exhibit "A". [For the full text of the May 3, 1979 opinion, see 1 MISS. C. L. REV. 346 (1979).]

It, therefore, is our opinion that a contract offered to a homeowner by an unrelated third party, such as a "home warranty" or "limited

home warranty," where such contract's principle purpose is to indemnify the owner against the risk of loss, the individual or company so offering this type of contract, is transacting insurance, and must be licensed to sell insurance under the laws of the State of Mississippi.

Yours very truly,

A. F. SUMMER, ATTORNEY GENERAL

BY: 

Stephen J. Kirchmayr
Special Assistant Attorney General

SJK/mg

OPINION NO. CV 79-12

SUBJECT: EFFECT OF THE GASOLINE SHORTAGE ON CONTRACTS OF THE BOARD OF SUPERVISORS TO PURCHASE GASOLINE. The Board should honor its present contracts provided the successful bidder's price does not exceed a price otherwise available. Future contract prices are governed by the Mississippi Code.

DATE RENDERED: May 21, 1979

REQUESTED BY: Hon. Ben Barrett Smith

OPINION BY: A. F. Summer, Attorney General, by John M. Weston, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Your letter request of May 15, 1979, addressed to Honorable A.F. Summer, Attorney General, has been received and assigned to this writer for research and reply. Your letter states:

> At the beginning of the year the Board of Supervisors took bids on supplies and among the bids accepted was one for the furnishing of gasoline.
>
> With the apparent gasoline shortage looming near I have been requested by the Board to contact you and request an opinion on whether the Board can properly purchase gasoline from other sources or whether they must continue to purchase from the successful bidder whose bid, incidentally, included a provision allowing for increase in his cost of acquisition.

It is the opinion of this office that the Board should make purchases under its present contract with the successful bidder provided bidder can supply requirements at a price not in excess of that otherwise available.

However, in so far as the future is concerned, we direct your attention to amended § 31-7-39, Code of 1972, which provides, inter alia:

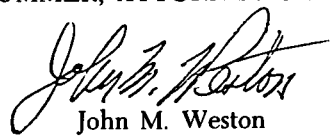
> Whenever the boards and governing authorities shall have advertised for bids for the purchase of gas, diesel fuel, oils and other petroleum products and no acceptable bids can be obtained, such boards and governing authorities are authorized and directed to enter into any negotiations necessary to secure the lowest and best contract available for the purchase of such commodities. Provided, however, no purchase shall be made unless and until at least two (2) separate proposals for the sale of the commodity in question have been received and considered by said purchasing authority, and the price shall be no greater than the lowest price prevailing for such products in the political subdivision.

(Seventh paragraph, page 199, 1978 Cummulative Supplement, Volume 9, Code of 1972).

The Board may, in its discretion, advertise for bids based on tank wagon price prevailing on date of delivery.

Very truly yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: 

John M. Weston
Special Assistant Attorney General

JMW/ped

OPINION NO. CV 79-13

SUBJECT: CHANGE IN A RIVER COURSE AFFECTING THE OWNERSHIP OF LAND. The question is one of fact. If the change in the river course came from "avulsion" the ownership of land would not change. If the change in the river course came from "accretion" the ownership of land would change.

DATE RENDERED: September 21, 1979

REQUESTED BY: Mr. Bill Quisenberry, III

OPINION BY: A. F. Summer, Attorney General, by Richard M. Allen, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your request dated August 20, 1979 and has assigned it to me for research and reply, your letter

of request having attached to it the referenced map and stating as follows:

> The Wildlife Heritage Committee has contracted with the firms of Fairley Engineering and Batson Engineering to survey the 35,000 acre Pascagoula River Wildlife Management Area. Most of the land lines are completed and the surveyors are beginning to traverse the Pascagoula River.
>
> There are two instances in which, in recent years, the Pascagoula River has shifted its course during periods of flooding. The shifts in question were due to the process of avulsion. Also, the Pascagoula River does constitute the boundary of the Pascagoula River Wildlife Management Area where the shifts have occurred. (See attached boundary map).
>
> I am requesting an opinion regarding claim of ownership to the lands lying between the now existing river channel and the old river channel prior to its recent shift due to the process of avulsion. You will note from the map that the two tracts in question comprising a total of approximately 400 acres, now lie west of the new channel. In your opinion does the State of Mississippi, which holds a warranty deed to the properties in question, still own the lands despite the fact that they now lie west of the existing channel of the Pascagoula River?

The Mississippi Supreme Court, in the case of *Sharp, et al. v. Learned*, 195 Miss. 201, 14 So. 2d 218 (1943) states as follows at page 215 thereof:

> And in the matter of substantive law, we have applied the four rules upon which the authorities are in general agreement as follows:
>
> (a) Territory transferred from one side of a boundary river to the other by a gradual process of erosion on one side and accretion becomes a part of the state to which it is added.
>
> (b) Territory transferred from one side of a boundary river to the other by avulsion continues to be a part of the state of which it was originally a part.
>
> (c) Accretion or alluvion is an addition to riparian land made by the water to which the land is contiguous, so gradually and imperceptibly that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.
>
> (d) Avulsion is a change in a boundary stream so rapidly or so suddenly made, or in such a short time that the change is distinctly perceptible or measurably visible at the time of its progress. Or to state it otherwise, so far as concerns practical purposes, when the change is not by accretion, it is by avulsion.

It would be a question of fact as to whether the change came from "avulsion" or "accretion". If "avulsion", the ownership would not

change. If "accretion" the State no longer owns the lands "west of the existing channel of the Pascagoula River."

Thanking you for giving this office this opportunity to be of guidance, I remain

Yours very truly,

A. F. SUMMER, ATTORNEY GENERAL

BY: Richard M. Allen

Richard M. Allen
Special Assistant Attorney General

RMA/ped

OPINION NO. CV 79-14

SUBJECT: PRODUCTION OF ETHYL ALCOHOL AS A FUEL. Ethyl alcohol is a product of a fermented liquid. The same ethyl alcohol used to produce gasohol is also produced for consumption. Therefore, the production of ethyl alcohol is subject to the general prohibitions of Miss. Code Ann. § 67-1-7 (1972) and related statutes.

DATE RENDERED: December 7, 1979

REQUESTED BY: Rep. Charles J. Lippian

OPINION BY: A. F. Summer, Attorney General, by Mack Cameron, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General A. F. Summer has received your letter dated November 14, 1979 and has assigned it to me for research and reply.

Your letter stated:

> At this time I would like to request an Attorney General's Opinion on the question of whether or not the production of ethyl alcohol as a fuel article or blended with gasoline to produce gasohol is authorized, regulated, prohibited, or is a criminal offense under Chapter 1 (Local Option Alcoholic Beverage Control), or Chapter 3 (Sale of Light Wine, Beer or Other Alcoholic Beverages) of Title 67, Mississippi Code of 1972, or Chapter 31 (Intoxicating Beverage Offenses) Title 97, Mississippi Code of 1972. Further, please review any other state laws which may be pertinent in this area.
>
> If your opinion indicates that the production of ethyl alcohol as a

fuel article is prohibited or is a criminal offense, then legislation can be introduced in the 1980 session of the Mississippi Legislature to authorize the production of such a product. Thus, your immediate attention to this matter will be appreciated.

Section 67-1-5, Mississippi Code of 1972, as amended, states the definition of the word "alcohol" [in] subsection (b) as follows:

> (b) The word "alcohol" means the product of distillation of any fermented liquid, whatever the origin thereof, and includes synthetic ethyl alcohol, but does not include denatured alcohol or wood alcohol.

If ethyl alcohol is the product of a fermented liquid, and we understand that it is, then it would fall within this definition. This is important since "alcoholic beverage" is defined in subsection (a):

> (a) [a]ny alcoholic liquid including wines of more than four percent (4%) of alcohol by weight, capable of being consumed as a beverage by a human being, but shall not include wine containing four percent (4%) or less of alcohol by weight and shall not include beer containing not more than four percent (4%) of alcohol by weight, as provided for in section 67-8-5, but shall include native wines.

The general prohibition statute, Section 67-1-7, allows the manufacture, sale, distribution, possession and transportation of alcoholic beverages only in those counties where a local option election is called and held and a majority of the qualified voters in the election vote in favor of the proposal to make, sell, and distribute alcoholic beverages.

Thus, it would appear that since the same ethyl alcohol that is produced for consumption is also used in the production of gasohol, any such ethyl alcohol would be subject to the provisions of Chapters 1 and 3 of Title 67, Mississippi Code of 1972, and of Title 97, Mississippi Code of 1972.

It should also be noted that some provisions of Chapter 65, Title 75, dealing with gasoline and petroleum products, may be applicable to the question you present.

Sincerely yours,

A. F. SUMMER, ATTORNEY GENERAL

BY: Mack Cameron

Mack Cameron
Special Assistant Attorney General

MC: db

OPINION NO. CV 79-15

SUBJECT: RIGHT OF THE PRESS TO SIT IN ON EXAMINATION OF ELECTION BOXES. The examination is a public meeting. However, it is primarily for the benefit of the candidates. To effect an orderly examination, therefore, the role of the press could be limited to that of an observer.

DATE RENDERED: September 18, 1979

REQUESTED BY: Mrs. Mary Sue Stevens

OPINION BY: A. F. Summer, Attorney General, by Richard M. Allen, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Summer has received your office's opinion request dated September 6, 1979 and has assigned it to me for research and reply, your opinion request having attached to it [a] copy of a candidate's "Notice of Examination of Election Boxes" and your letter of request stating:

> Enclosed you will find a copy of a Notice of Examination of Election Boxes.
>
> The attorneys would like to know if the Press is permitted to sit in on this examination.

The deliberations and actions of an Executive Committee are more for the benefit of the candidates and their respective supporters than for the general public and what the Press likes to refer to as "its right to know". However, it is a public meeting in the sense that an Executive Committee could follow procedures outlined by § 25-41-1 through -11, Mississippi Code of 1972 ("Open Meetings").

A deliberative body has the right to establish its own reasonable rules of procedure and if the Press were allowed to be present, it would be up to the body as to whether photographs would be authorized. The primary purpose of such a hearing is to supervise and conduct the requested examination in an orderly manner and the Press could be required to be limited to an observer's role only. The candidate or [his] representatives will be close to what's going on to be able to protect [his] interests. I would particularly caution that the Press representatives would have to [be] forbidden particularly from handling *any* of the contents of the boxes as those contents constitute possible evidence, the integrity of which must be upheld and protected the same way it must be during the course of an actual court trial.

Hoping the above will be of some guidance to you and thanking

you for giving this office this opportunity to be of assistance to you, I remain

Yours very truly,

A. F. SUMMER, ATTORNEY GENERAL

BY: Richard M. Allen

Richard M. Allen
Special Assistant Attorney General

RMA/ped