



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 3, 2016</p>	<p>No. I16-001 (R15-025)</p> <p>Re: State Fire Marshal's Adoption of National Fire Protection Association Code</p>
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To: Representative Steve Montenegro
Arizona House of Representatives

Questions Presented

Whether Arizona Revised Statutes (A.R.S.) § 36-1609 requires the State Fire Marshal to promulgate a rule that adopts the 2013 edition of the National Fire Protection Association (NFPA)¹ 1124 (also known as the “*Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles*”)?

If the Fire Marshal is required to enact such a rule, would a subsequent change in the publication status of NFPA 1124 impact the legal operation of A.R.S. § 36-1609, or any other rules adopted under the statute’s 2013 directive?

¹ According to its website, NFPA is a global nonprofit membership organization with more than 70,000 members from over 100 nations “devoted to eliminating death, injury, property and economic loss due to fire, electrical and related hazards. The association delivers information and knowledge through more than 300 consensus codes and standards, research, training, education, outreach and advocacy; and by partnering with others who share an interest in furthering the NFPA mission.” *About NFPA*, <http://www.nfpa.org/about-nfpa>. (accessed Dec. 15, 2015).

Summary Answer

Arizona Revised Statutes § 36-1609 was amended in 2013 and required the State Fire Marshal to enact a rule adopting NFPA 1124. 2013 Ariz. Sess. Laws ch. 124, § 1. Because the 2013 enacted modification to A.R.S. § 36-1609 did not address any subsequent modifications or withdrawals of NFPA 1124 (2013 edition), any change (including NFPA's subsequent withdrawal of NFPA Code 1124) does not affect A.R.S. § 36-1609(A)'s 2013 directive. In 2015 the State Fire Marshal complied with his legal duty, and submitted a final rulemaking notice for Administrative Code (A.A.C.) § R4-36-401 to the Secretary of State. 21 Ariz. Admin. Reg. 571-73 (Apr. 24, 2015). The amended rule became effective on June 7, 2015. *Id.* at 571. The Rule was properly enacted and has the weight of law, regardless of the status of the NFPA's subsequent withdrawal.

Background

Arizona Revised Statute § 36-1609(A), as amended in 2013, became effective on September 13, 2013 and has not been modified since its amendment.² *Id.*; 2013 Ariz. Sess. Laws ch. 124, §1. It states:

The state fire marshal shall adopt rules pursuant to title 41, chapter 6 to carry out this article, including a rule that adopts the national fire protection association code for the manufacture, transportation, storage and retail sales of fireworks and pyrotechnic articles, 2013 edition as published in August, 2012. A person who sells permissible consumer fireworks to the public shall comply with those rules relating to the storage of consumer fireworks and relating to the retail sales of consumer fireworks before selling permissible consumer fireworks to the public.

2013 Ariz. Sess. Laws ch. 124, § 1.

² The prior version of the statute referenced the 2006 edition of NFPA 1124.

On September 13, 2013, the Fire Marshal opened a rulemaking docket to carry out the mandate in A.R.S. § 36-1609(A). 19 Ariz. Admin. Reg. 2824. The Arizona Secretary of State published a *Notice of Proposed Rulemaking* for A.A.C. § R4-36-401 on November 1, 2013. 19 Ariz. Admin. Reg. 3409. In March, 2014, however, the NFPA Standards Council withdrew the 2013 edition of the NFPA 1124. *Archive of 2014 Standards and Council Meetings Re: D#14-3*, <http://www.nfpa.org/codes-and-standards/standards-development-process/standards-council/agendas-minutes-and-decisions> (last visited February 1, 2016). On June 24, 2014, the State Fire Marshal nonetheless drafted the amendment to A.A.C. § R4-36-401, as required by A.R.S. § 36-1609(A). The amendment incorporated by reference the 2013 version of NFPA 1124 “as published August 29, 2012”. Accordingly, the Secretary of State published a *Notice of Supplemental Proposed Rulemaking* on August 22, 2014, in which the Fire Marshall explained that:

The 2013 edition of *NFPA 1124: Code for The [sic] Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles* is provided for historical reference only. This edition of *NFPA 1124* was temporarily withdrawn by Standards Council Decision #14-1. In Decision #14-1, the Standards Committee directed that *NFPA*® cease all standards development activity regarding the retail sale and storage of consumer fireworks and that the Technical Committee on Pyrotechnics revise *NFPA 1124* in accordance with the newly revised committee and document scopes. The Standards Council will consider the reissuance of *NFPA 1124* once the Technical Committee has completed this work.

Due to NFPA’s above referenced actions, the Department decided to cease promulgating rules addressing fireworks. Upon further research and review the Department is re-opening the record to allow more public comment relating to this rule adoption.

20 Ariz. Admin. Reg. 2333-34 (Aug. 22, 2014) (emphasis added.). The Secretary of State published final rulemaking in the Arizona Administrative Register on April 24, 2015. 21 Ariz. Admin. Reg. 571-73. Amended A.A.C. R4-36-401 became effective on June 7, 2015. *Id.*

Analysis

When it amended A.R.S. § 36-1609(A), the Legislature explicitly directed the Fire Marshal to adopt NFPA 1124. The Legislature has the prerogative to pass laws incorporating other statutes, authorities, and language from other sources—including commercial associations. *Ghera v. State*, 16 Ariz. 344, 353 (1915) (“The legislative department of a state . . . is intrusted with the general authority to make laws at [its] discretion.”) The fact that those other authorities or sources are later modified, revised, or even stricken, does not affect this prerogative. *Dairy and Consumer Coop Assoc.*, 74 Ariz. 35 (1952); *Nelson Machinery Co. v. Yavapai County*, 108 Ariz. 8, 9 (1971) (In Banc) (quoting R.J. Fox, Annotation, *Effect of Modification or Repeal of Constitutional or Statutory Provision Adopted by Reference in Another Provision*, 168 A.L.R. 627, 631 (1947)). The same principle applies here, where NFPA 1124 was incorporated by reference.

The Arizona and United States Supreme Court have recognized the principle of statutes adopting and incorporating other authorities by reference. The Arizona Supreme Court has recognized the following general rule in two cases:

A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal.

Dairy and Consumer Coop Assoc., 74 Ariz. at 38 (quoting *Maricopa County v. Osborn*, 60 Ariz. 290, 296-97 (1943) (quoting 59 C.J. 937, 938, §548).) “The effect of such reference is the same as though the statute or the provisions adopted had been incorporated bodily into the adopting statute.” *Dairy and Consumer Coop Assoc.*, 74 Ariz. at 38 (quoting *Clements v. Hall*, 23 Ariz. 2, 10 (1921) (quoting 2 Sutherland on Stat. Const. § 405)). Such adoption takes the adopted statute as it exists at the time of the passage of the adopting act” *Dairy and Consumer Coop Assoc.*, 74 Ariz. at 38, quoting *Clements v. Hall*, 23 Ariz. at 10, quoting *People ex rel. v. Crossley*, 261 Ill. 78, 85 (1913).

The U.S. Supreme Court also recognized this rule of statutory construction and found it had substantial support:

A wellsettled [sic] cannon tends to support the position of respondents: “Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. * * * Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent.” [Lewis’ Sutherland on Statutory Construction, 2d Ed., Vol. II. pp. 787-8.] The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended. [collecting string cites of multi-jurisdictional case authorities].

Hassett v. Welch, 303 U.S. 303, 314 (1938).

In light of these authorities, this office previously explained that, “[a]s a general rule, when a statute adopts part or all of another statute, the adoption takes the statute as it exists at the time and does not include subsequent additions or modifications absent clear intent of the drafters to the contrary.” Ariz. Atty. Gen. No. I78-171 at *2. (citing *Nelson Machinery Co.*, 108

Ariz. at 98 (quoting 168 A.L.R. at 631). Here, as in this Office’s 1978 Opinion, “[w]e believe this principle of statutory interpretation should control in this case.” *Id.* These authorities make it clear that the subsequent repeal of a statute incorporated by reference has no impact on the effectiveness of A.R.S. § 36-1609. The State Fire Marshal was required to pass a rule incorporating NFPA 1124 as it existed when A.R.S. § 36-1609 was amended in 2013.

Conclusion

A.R.S. § 36-1609, as amended in 2013, required the State Fire Marshal to make a rule adopting the 2013 edition of NFPA’s 1124. Because the statute did not address any subsequent modifications or withdrawals of NFPA 1124, the NFPA’s subsequent withdrawal of NFPA 1124 has no effect. The State Fire Marshal complied with his legal duty, and A.A.C. § R4-36-401 was properly amended effective June 7, 2015. The Rule was properly enacted and has the weight of law, regardless of the status of NFPA 1124.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 16, 2016</p>	<p>No. I16-002 (R16-003)</p> <p>Re: Are third party contractors who operate photo enforcement systems required to be licensed as private investigators under A.R.S. § 32-2401(16)</p>
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To: Sonny Borrelli
Arizona State Representative

Questions Presented

“Are third-party contractors who operate photo enforcement systems required to be licensed as private investigators under Arizona Revised Statute § 32-2401(16), either under subsection (a)(i) because they engage in the business of making an investigation for the purpose of obtaining information with reference to a crime or wrong done against the state, or under subsection (b) because they secure evidence to be used in the trial of civil or criminal cases and the preparation therefor?”

Summary Answer

Third-party contractors who operate photo enforcement systems in Arizona are subject to the private investigator licensing requirements in Arizona Revised Statute (“A.R.S.”) §§ 32-2401 to -2462. In so concluding, this Opinion overrules Arizona Attorney General Opinion No. I10-001, which is to the contrary.

Background

Arizona’s statutes permitting municipalities to use photo enforcement systems are set forth in A.R.S. §§ 28-1201 to -1206. Under these statutes, a “photo enforcement system” is defined as:

[A] device substantially consisting of a radar unit or sensor linked to a camera or other recording device that produces one or more photographs, microphotographs, videotapes or digital or other recorded images of a vehicle's license plate for the purpose of identifying violators of articles 3 and 6 of this chapter.

A.R.S. §§ 28-601(14), -1201. As recounted in the request for this Opinion, a photo enforcement system “is not necessarily operated by law enforcement officers. In at least some instances it is operated by third party contractors who furnish the digitally recorded information to the municipality. In turn, the municipality uses the information as the evidentiary foundation for traffic citations.”

Arizona's statutes governing the licensing of private investigators are set forth in A.R.S. §§ 32-2401 to -2462. Under these statutes, it is a class 1 misdemeanor for a person knowingly to act as a private investigator unless the person is registered as a private investigator and is acting within the scope of the person's employment for an agency that is licensed to conduct the business of private investigations in the State. A.R.S. § 32-2411. A “private investigator” is defined in A.R.S. § 32-2401(16), which provides in part:

“Private investigator” means a person other than an insurance adjuster or an on-duty peace officer as defined in § 1-215 who, for any consideration, engages in business or accepts employment to:

(a) Furnish, agree to make or make any investigation for the purpose of obtaining information with reference to:

(i) Crime or wrongs done or threatened against the United States or any state or territory of the United States.

...

(b) Secure evidence to be used before investigating committees or boards of award or arbitration or in the trial of civil or criminal cases and the preparation therefor.

The private investigator licensing statutes specifically exempt eleven categories of persons from its licensing requirements. *See* A.R.S. § 32-2409(1)–(11). For example, government employees, consumer reporting agencies, practicing attorneys, collection agencies, insurance adjusters, news media, and private process servers, among others, may not be required to register as a private investigator. *Id.* Photo enforcement system contractors, however, are not identified in the list of persons exempted from the private investigator licensing requirements. *See id.*

Analysis

Principles of statutory interpretation guide our analysis into whether third-party contractors who operate photo enforcement systems in Arizona are subject to the private investigator licensing requirements in A.R.S. §§ 32-2401 to -2462. “Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature’s intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). “If the language is clear, [we] must apply it without resorting to other methods of statutory interpretation, unless application of the plain meaning would lead to impossible or absurd results.” *Id.* (internal quotations and citation omitted).

A. The Plain Language of the Statute

A third party which contracts to operate a photo enforcement system in the State clearly falls within the definition of “private investigator” under A.R.S. § 32-2401(16)(b). By definition, persons who contract to operate a photo enforcement system engage in a business to “[s]ecure evidence to be used . . . in the trial of civil or criminal cases and the preparation therefor.” *Id.* Again, a “photo enforcement system” is a device which captures certain information, expressly “for the purpose of identifying violators of articles 3 and 6 of this chapter.” A.R.S. §§ 28-601(14), -1201. Articles 3 and 6 of the relevant chapter concern various traffic violations, including violations for running a red light and exceeding the posted speed limit, which may give rise to civil or criminal penalties. *See* A.R.S. §§ 28-641 to -28-654 (Article 3 concerning various traffic violations); A.R.S. §§ 28-701 to -710 (Article 6 concerning speed restrictions).

Under any fair reading of the statute, collecting information “for the purpose of identifying violators of” traffic laws constitutes securing “evidence to be used . . . in the trial of civil or criminal cases and the preparation therefor.” Because persons who contract to operate a photo enforcement system in the State clearly fall within the plain meaning of A.R.S. § 32-2401(16)(b), this Opinion does not address whether such contractors separately qualify as private investigators under A.R.S. § 32-2401(16)(a)(i).

B. The *Expressio Unius Est Exclusio Alterius* Canon of Statutory Construction

This interpretation—that photo enforcement system contractors must comply with private investigator licensing laws—is also reinforced by the fact that photo enforcement system contractors are not exempted from Arizona’s private investigator licensing requirements. *See* A.R.S. § 32-2409. “A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.” *Pima County v. Heinfeld*, 134 Ariz. 133, 134 (1982). Applying this rule here, the expression of eleven separate categories of exemptions from the private investigator licensing requirements implies an intent not to exempt other persons, including photo

enforcement system contractors. *See id.* (“[T]he expression of specific exceptions to the confidentiality requirement of § 38–431.03(B) for some persons implies an intent not to except other persons, including the Auditor General.”).

C. Arizona Attorney General Opinion No. I10-001

Despite the plain language of the licensing statute, Arizona Attorney General Opinion No. I10-001 concluded that “[a] vendor contracting with the Department of Public Safety (‘DPS’) to provide a state-photo enforcement system is not required to meet the private investigator licensing requirements of Title 32, Chapter 24.” In reaching this conclusion, Opinion No. I10-001 did not engage in any analysis of the language of the statute itself.

Instead, Opinion No. I10-001 simply jumped to the “purpose” of regulating private investigators, as articulated in *Landi v. Arkules*, 172 Ariz. 126, 135 (App. 1992). In *Landi*, the Arizona court of appeals held that the defendants, who contracted to provide heir locating services, were required to be licensed as private investigators. *Id.* at 134. Because they were not properly licensed, the court also refused to enforce the defendants’ contract to perform heir locating services. *Id.* at 135. The court reasoned that doing so would violate the public policy behind Arizona’s private investigator licensing requirements, which policy was to protect “the public from unscrupulous and unqualified investigators.” *Id.* at 135. From this public policy, Opinion No. I10-001 reasoned:

Unlike in *Landi*, which involved a private service which any member of the public may hire, a photo-enforcement system vendor does not provide a private service and is not available to the public to hire. Issuing traffic citations is a state function, and the Legislature enacted A.R.S. § 41-1722 allowing the vendor to issue citations on behalf of the state. Under the statutes governing photo enforcement, the regulation and oversight through the contracting process with DPS protects the public, separate and apart from the private investigator licensing statutes.

This analysis is flawed. The plain language of a statute may not be disregarded “unless application of the plain meaning would lead to impossible or absurd results.” *Bilke*, 206 Ariz. at 464 ¶ 11. Applying the plain language of A.R.S. § 32-2401(16) to require photo enforcement system contractors to comply with private investigator licensing requirements hardly leads to “impossible or absurd results.” Arizona’s basic private investigator licensing laws certainly would not make it “impossible” for photo enforcement system contractors to qualify for a private investigator agency license or for employees of such contractors who are engaged in private investigator activities to register as a private investigator employee. *See, e.g.*, A.R.S. §§ 32-2422 (applicant for an agency license must, among other things, be at least 21 years of age, must be a citizen or legal resident of the United States authorized to seek employment in the United States, must not have been convicted of or indicted for certain criminal conduct, and have at least three years of investigative experience), -2423 (agency license application, fee, surety bond, and

worker's compensation proof), -2441 (applicant for employee registration must, among other things, be at least 18 years of age, must be a citizen or legal resident of the United States authorized to seek employment in the United States, and must not have been convicted of or indicted for certain criminal conduct), -2442 (employee registration application and fee), -2460 (registration not required for employees who do not engage in private investigator services).

There is also nothing inherently “absurd” about requiring licensing compliance from private investigators that perform public functions that are subject to a government contracting process. To be sure, public protection was a purpose of the Arizona legislature in enacting licensing requirements for private investigators. But the statute itself reflects a judgment by the legislature, not only about the desirability of protecting the public, but also about how best to protect the public when persons engage in private investigator activities. *Cf. Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“The [Confrontation] Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”) (Scalia, J.). The method for assessing whether the public is protected set forth in Opinion No. I10-001—namely, whether the government is involved in the contracting process—may not replace the method for protecting the public from unscrupulous and unqualified private investigators prescribed by the legislature.

Conclusion

Third-party contractors who operate photo enforcement systems in Arizona are subject to the private investigator licensing requirements in A.R.S. §§ 32-2401 to -2462. This conclusion is compelled by the plain language of A.R.S. § 32-2401(16)(b). For this reason, this Opinion overrules Arizona Attorney General Opinion No. I10-001, which was not based on and is contrary to the text of Arizona's licensing statutes.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 24, 2016</p>	<p>No. I16-003 (R15-022)</p> <p>Re: Application of A.R.S § 38-511 to gratuitous grant by deed of a conservation easement</p>
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To: Steve B. Montenegro
Arizona House of Representatives

Questions Presented

Does Arizona’s conflict of interest statute in Arizona Revised Statute (“A.R.S.”) § 38-511, apply to a private landowner’s gratuitous grant by deed of a conservation easement to the State, its political subdivisions or any department or agency of either (collectively, the “State”)?

Summary Answer

Arizona Revised Statute § 38-511 does not apply to a private landowner’s gratuitous donation of a conservation easement—which does not impose affirmative obligations on the State or require any consideration in exchange for the donation—because such a donation does not qualify as a “contract” within the meaning of A.R.S. § 38-511.

Background

Arizona's conflict of interest statutes, A.R.S. §§ 38-501 to -511, set forth those matters presenting conflicts of interest for public officers and employees. Ariz. Att'y Gen. Op. I98-025. Under A.R.S. § 38-511(A) (the "Cancellation Provision"), the State is permitted to cancel "any contract" within three years of its execution provided certain conditions are met:

The state, its political subdivisions or any department or agency of either may, within three years after its execution, cancel any contract, without penalty or further obligation, made by the state, its political subdivisions, or any of the departments or agencies of either if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract.

Arizona's statutes permitting and regulating conservation easements are set forth in A.R.S. §§ 33-271 to -276, which are modeled after the Uniform Conservation Easement Act. Under these statutes, a "conservation easement" is defined as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations for conservation purposes or to preserve the historical, architectural, archaeological or cultural aspects of real property." A.R.S. § 33-271(1). This Opinion only concerns conservation easements which are gratuitous. As presented in the request for this Opinion, the conservation easements at issue do not impose any affirmative obligations on the State or require any consideration from the State in exchange for the grant of the conservation easement.

Underlying the question presented is a tax issue. The donation of a conservation easement that meets all statutory and regulatory requirements may be claimed as a federal

charitable contribution deduction. *E.g.*, 26 U.S.C. § 170(h). To qualify for this deduction, a conservation easement must (among other things) include “a restriction (granted in perpetuity) on the use which may be made of the real property.” *Id.* § 170(h)(2)(C); 26 C.F.R. § 1.170A-14(b)(2).

As recounted in the request for this Opinion, the Internal Revenue Service has taken the position that the State’s ability to cancel any contract made by the State within three years of execution applies to all conservation easements. The easement grants are therefore “conditional and not perpetual,” and are disqualified from eligibility for a federal income tax deduction. This Opinion does not address the applicability of the federal charitable contribution deduction to conservation easements to the State. Rather, this Opinion analyzes the narrow issue of whether a *gratuitous* deed of a conservation easement to the State may be subject to the Cancellation Provision.

Analysis

No Arizona court has determined whether the Cancellation Provision in A.R.S. § 38-511(A) applies to a gratuitous deed of a conservation easement to the State. “Our task in interpreting the meaning of a statute is to fulfill the intent of the legislature that wrote it.” *State v. Williams*, 175 Ariz. 98, 100 (1993). “In determining the legislature’s intent, we initially look to the language of the statute itself.” *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11 (2003). If the statute’s language is clear, we apply it “unless application of the plain meaning would lead to impossible or absurd results.” *Id.* The threshold question concerning the applicability of the Cancellation Provision to a gratuitous deed of a conservative easement to the State is whether such a grant qualifies as a “contract” within the meaning of the statute. If such a donation is not a “contract,” then the Cancellation Provision has no applicability.

The Arizona Supreme Court, adopting the approach taken in the Restatement (Second) of Contracts, has defined a contract as “a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.” *Johnson v. Earnhardt’s Gilbert Dodge, Inc.*, 212 Ariz. 381, 384, ¶ 10 (2006) (quoting Restatement (Second) of Contracts § 17(1) (1981)). “The term ‘consideration’ has a settled meaning in contract law. It is a performance or return promise that is bargained for in exchange for the promise of the other party.” *Turken v. Gordon*, 223 Ariz. 342, 349, ¶ 31 (2010) (citing Restatement (Second) of Contracts § 71) (internal quotations and alterations omitted). “In other words, consideration is what one party to a contract obligates itself to do (or to forbear from doing) in return for the promise of the other contracting party.” *Id.*

Here, the gratuitous deed of a conservation easement, which does not impose any affirmative obligations on the State or require any consideration from the State in exchange for the grant of the conservation easement, is not a “contract” within the meaning of the Cancellation Provision. Such a donation is not a contract because, as the issue has been presented, it lacks one of the two requisites for the formation of a contract, namely, consideration. *See Schade v. Diethrich*, 158 Ariz. 1, 8 (1988) (stating that the two requisites for the making of a contract are “a bargain, consisting of promises exchanged, and consideration”).

In concluding that gratuitous conservation easements are not a “contract” subject to the Cancellation Provision, this Opinion notes that a deed may be considered contractual in other contexts, for example, when determining whether an action “arises out of contract” for purposes of awarding attorneys’ fees, *see Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 198 (App. 1983) (an action to enforce mutual restrictive covenant in a deed “arises out of contract” pursuant to A.R.S. § 12–341.01), or considering whether parole evidence is admissible, *Valento v. Valento*,

225 Ariz. 477, 483, ¶ 22 (App. 2010) (“a deed may be treated as a contractual agreement” for purposes of the parole evidence rule). This Opinion also does not affect the long standing rule in Arizona that the lack of consideration does not, by itself, render a deed inoperative. *See In re McDonnell’s Estate*, 65 Ariz. 248, 251 (1947) (“[W]e hold that want of consideration by itself is not enough to make [a deed] inoperative.”). Rather, it addresses the narrow issue presented by the request and concludes that a gratuitous deed of a conservation easement is not a contract subject to cancellation under A.R.S. § 38-511(A).

This interpretation—that the Cancellation Provision does not apply to a gratuitous deed of a conservation easement—is consistent with the purpose of Arizona’s conservation easement statutes. As set forth in its prefatory notes, the Uniform Conservation Easement Act (the “Uniform Act”) “maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes.”¹ Uniform Act, Refs & Annos. In furtherance of this objective, the Uniform Act enables “the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code.” *Id.* Accordingly, Arizona’s conservation easement statutes expressly provide (consistent with the Uniform Act) that “a conservation easement is *unlimited in duration* unless the instrument creating it otherwise provides.” A.R.S. § 33-272(C) (emphasis added). This language was specifically included, not only to provide parties latitude consistent with the preservation purposes of the Uniform Act, but also to enable parties “to fit within federal tax law requirements that the interest be ‘in perpetuity’ if certain tax benefits are to be derived.” Uniform Act § 2, cmt.

¹ When “a statute is based on a uniform act, we assume that the legislature intended to adopt the construction placed on the act by its drafters, and commentary to such a uniform act is highly persuasive.” *May v. Ellis*, 208 Ariz. 229, 232 ¶ 12 (2004) (internal quotations and alterations deleted).

But, if every conservation easement, even if gratuitously granted, is considered a “contract” subject to cancellation under A.R.S. § 38-511(A), then no conservation easement deeded to the State (including its political subdivisions or any department or agency of either) would ever qualify for tax deductions under the requirements of federal tax law as interpreted by the Internal Revenue Service. Such an outcome would thwart an express objective of the Uniform Act to enable parties “to fit within federal tax law requirements,” potentially chilling important donations of conservation easements for the public good.

Conclusion

Arizona Revised Statute § 38-511 does not apply to a private landowner’s gratuitous donation of a conservation easement—which does not impose affirmative obligations on the State or require any consideration in exchange for the donation—because such a donation does not qualify as a “contract” within the meaning of A.R.S. § 38-511.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 28, 2016</p>	<p>No. I16-004 (R16-001)</p> <p>Re: DCS Authority to Interview Children</p>
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To: Gregory McKay, Director
Arizona Department of Child Safety

Questions Presented

Under the current statutory scheme, may DCS lawfully interview a child without prior written parental consent when investigating a report of neglect, if the child is the alleged victim, sibling of the alleged victim, or lives in the home with the alleged victim?

Summary Answer

Yes. DCS may legally interview the children specified in the exception provisions without parental notice as long as doing so is part of a statutorily authorized DCS investigation.

Background

DCS History, Purpose, and Functions

The Arizona Legislature created the Department of Child Safety (DCS) in 2014, separating its functions from the Department of Economic Security (DES). At that time the Legislature promulgated a number of the statutes cited in this opinion, and it amended and

re-numbered other provisions already in statute. Arizona's laws regarding the state's role in protecting children date back to 1970.

In other words, while DCS itself is a new entity, the legal backdrop against which this agency works is extensive and complex.

DCS is tasked with the primary purpose of protecting children. Ariz. Rev. Stat. (A.R.S.) § 8-451(B). DCS achieves this purpose through four functions: (1) investigating "reports of abuse and neglect"; (2) assessing, promoting, and supporting child safety through appropriate placements in response to "allegations of abuse or neglect"; (3) cooperating with law enforcement regarding criminal conduct allegations; and (4) coordinating services to "achieve and maintain permanency" for children and families. *Id.*

Investigations pursuant to the Department's authority are conducted in order to "determine the nature, extent and cause of any condition created by the parents, guardian or custodian, or an adult member of the victim's household that would tend to support or refute the allegation that the child is a victim of abuse or neglect and determine the name, age and condition of other children in the home." A.R.S. § 8-456(C)(1).

Reports of child abuse and neglect primarily come to the Department through its statutorily mandated centralized intake hotline (Child Abuse Hotline). *See* A.R.S. § 8-455. Hotline employees must take a report for investigation when various criteria are met, one of which is that the "suspected conduct would constitute abuse or neglect." *Id.* at § 8-455(D)(1). In fact, if a Department employee receives communications regarding suspected abuse or neglect outside the context of the Hotline, the employee must refer the communicator to the Hotline. *Id.* at § 8-455(A).

In summary, there are three current statutes that set forth the purpose and obligations of DCS relating to investigations: Sections 8-451, 8-455, and 8-456. All three exclusively refer to child “abuse and neglect” and do not use the term “abandonment.”

Current Statutes at Issue

There are two Arizona statutes that contain the language primarily at issue in the underlying request. Section 8-471 creates and sets forth the duties of the Office of Child Welfare Investigations (OCWI), and Section 8-802 describes the duties of DCS Child Safety Workers (CSW). Both contain substantially similar language with regard to the interview provisions for these workers. The OCWI statute is implicated by reports of criminal conduct, while the CSW statute relates to all other reports, demonstrating that DCS’ general obligations and authority regarding all investigations remain the same.

The OCWI statute provides:

A child welfare investigator shall:

1. Protect children.
2. Assess, respond to or investigate all criminal conduct allegations, which shall be a priority, but not otherwise exercise the authority of a peace officer.
3. Not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:
 - (a) The child initiates contact with the investigator.
 - (b) The child who is interviewed is the subject of, is the sibling of or is living with the child who is the subject of an abuse or abandonment investigation pursuant to paragraph 4, subdivision (b) of this subsection.
 - (c) The interview is conducted pursuant to the terms of the protocols established pursuant to § 8-817.

A.R.S. § 8-471(E). The internal reference to “paragraph 4, subdivision (b)” leads to the following language:

4. After the receipt of any report or information pursuant to paragraph 2 of this subsection, immediately do both of the following:
 - (a) Notify the appropriate municipal or county law enforcement agency if they have not already been notified.
 - (b) Make a prompt and thorough investigation of the nature, extent and cause of any condition that would tend to support or refute the report of child abuse or neglect when investigating allegations pursuant to paragraph 2 of this subsection. A criminal conduct allegation shall be investigated with the appropriate municipal or county law enforcement agency according to the protocols established pursuant to § 8-817.

A.R.S. § 8-471(E). The CSW statute provides:

A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless either:

1. The child initiates contact with the worker.
2. The child who is interviewed is the subject of or is the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to § 8-456.
3. The interview is conducted pursuant to the terms of the protocols established pursuant to § 8-817.

A.R.S. § 8-802(B). The cross-reference in subsection (2) here to Section 8-456 relates to the training required for and the conduct of investigations into allegations of child abuse and neglect. Section 8-456 refers to the reports received via the Hotline described in Section 8-455. Neither of these two statutes include any reference to “abandonment investigations.” Indeed, neither statute contains the term “abandonment” yet together these constitute primary statutory authority and direction related to DCS’s investigative function. Rather, consistent with the internal

cross-references in the OCWI and CSW statutes, as well as the Hotline statutes, DCS takes only two types of reports for investigation: abuse reports and neglect reports. *See* A.R.S. § 8-455(D).

Relevant Statutory History

Arizona first codified the authority of “protective service workers” to receive reports that a child is maltreated and investigate such reports in 1970. 1970 Ariz. Sess. Laws, ch. 192, § 1 (enacting A.R.S. §§ 8-531 to -536 providing for protective service for children). At that time, these designated state employees had authority to “receive reports of dependent, abused or abandoned children” and generally to “receive . . . information regarding a child who may be in need of protective services.” (*Id.* at A.R.S. §8-532(C)(1) and (C)(2)). Having received such reports or information, workers were required to “make a prompt and thorough investigation which shall include a determination of the nature, extent, and cause of any condition which is contrary to the child’s best interests[.]” *Id.* at A.R.S. §8-532(C)(3). In the event “reasonable grounds” existed, workers could remove a child temporarily into the State’s custody. *Id.* at A.R.S. § 8-532(C)(4). At the time, these statutes did not discuss interview authority, and the term “neglect” did not appear among the definitions provided.

In 1981, the exemption language at issue in this Opinion first appeared in what was at that time Section 8-546.01. The language adopted in 1981 has remained virtually identical with the language in the current provision (now Section 8-802): “2. A worker shall not interview a child without the prior written consent of the parent, guardian or custodian of the child unless: . . . (b) The child interviewed is the subject of or the sibling of or living with the child who is the subject of an abuse or abandonment investigation pursuant to paragraph 3, subdivision (b), of this subsection.” 1981 Ariz. Sess. Laws, ch. 293, § 4. The cross referenced paragraph

(paragraph 3, subdivision (b)) previously existed and contained the language codified in 1970 regarding the investigation requirement. *Id.*

The 1981 amendments, in addition to adding the exemption, also amended the language of the investigation requirement to read: “Make a prompt and thorough investigation of the nature, extent, and cause of any condition which would tend to support or refute the allegation that the child should be adjudicated dependent.” 1981 Ariz. Sess. Laws ch. 293, § 4, A.R.S. § 8-546.01(C)(3)(b). As of 1981, “dependent child” was a statutorily defined term that effectively included abused, neglected, and abandoned children--though only the terms “abandoned” and “abuse” were defined at that time. 1981 Ariz. Sess. Laws, ch. 293, § 1 (codified at A.R.S. § 8-201) (“‘Dependent child’ means . . . by reason of abuse, neglect, cruelty, or depravity...”). The statutes did not include a definition of “neglect” until 1994. Laws 1994, Ch. 325 §§ 2-3 (codified at A.R.S. §§ 8-531, 8-546). In 1997, the interview exceptions at Section 8-546.01 became today’s Section 8-802. 1997 Ariz. Sess. Laws, ch. 222 §§ 53, subsec. A, 54.

Two years ago, in May 2014, the Legislature created DCS in its current form during a special session; the resulting Session Laws document is almost 200 pages, indicating the complexity and comprehensiveness of this effort. *See* 2014 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 1, § 56. While this legislation created DCS, and set forth the sections of law relating to the investigation authority, the relevant exemption provisions for OCWI and CSW received no substantive amendments. *See* 2014 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 1, §§ 21, 56. In other words, the DCS statutory scheme adopted these exemptions without treatment at the same time it delineated the obligations to take and investigate reports of “abuse and neglect” without recognizing “abandonment” reports.

Interpretation Principles

Certain principles of statutory and constitutional interpretation are relevant here, in particular those principles related to the “Fair Reading Method” of interpretation:

The [endorsed] interpretive approach . . . is that of the “fair reading”: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. . . . [The endeavor] requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. This critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012)

(emphasis in original). Notably,

[a]dhering to the *fair meaning* of the text . . . does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: “a sterile literalism . . . loses sight of the forest for the trees.” The full body of a text contains implications that can alter the literal meaning of individual words.

Reading Law at 356 (quoting *New York Trust Co. v. Commissioner*, 68 F.2d 19, 20 (2d Cir. 1933) (per L. Hand, J.)).

A specific principle or canon of interpretation key to this Opinion is the harmonious reading canon, which tells us that we presume there to be harmony among related provisions because we do not presume that drafters have contradicted themselves. See *Reading Law* at 180; Cf. *State v. Bowsher*, 225 Ariz. 586, 589, ¶ 14 (2010) (en banc) (“When construing two statutes, this Court will read them in such a way as to harmonize and give effect to all of the provisions involved.” (quoting *Pima County ex rel. City of Tucson v. Maya Constr. Co.*, 158 Ariz. 151, 155, 761 P.2d 1055, 1059 (1988)); *Sw. Gas Corp. v. Indus. Comm’n*, 200 Ariz. 292, 297, ¶ 16 (App. 2001) (Arizona courts construe statutory provisions “to harmonize rather than contradict

one another” and construe one statute “together with other related statutes, as though they constituted one law.”) (internal quotation marks and citations omitted).

Analysis

In determining the contours of the authority set forth in the relevant statutes, we look first at their plain text. *State ex rel. Dept. of Economic Sec. v. Hayden*, 210 Ariz. 522, 523, ¶ 7 (2005). Interpreting statutory text requires that effect be given to all parts of the text. *Id.* “Statutes that are in *pari materia*—relating to the same matter—are construed together as though they constituted one law.” *Id.*

As noted above, the two statutes that provide an exception allowing DCS to interview children absent notification to their parents employ substantially similar text. A.R.S. §§ 8-471(E)(3)(b) and 8-802(B)(2). The relevant text sets forth two limitations on the exception: (1) based on the target of the investigation (purported victim; sibling of purported victim; or living with purported victim); and (2) based on the existence of a statutorily authorized DCS investigation.

There appears to be no conflict or disagreement regarding the first limitation, the question is as to the second limitation: whether the plain language of the statute renders the exception applicable in some DCS investigations but not in others. In other words, considering the plain language of the text leads to two possible conclusions: either there is a conflict between the “abuse and abandonment” and “abuse and neglect” language, or the two terms may be read together as harmonious.

Both provisions at issue contain an internal cross-reference to clarify when the DCS investigations are statutorily authorized. With regard to the OCWI statute, the exception to parental notification applies to “an abuse and abandonment investigation pursuant to

paragraph 4, subdivision (b) of this subsection." A.R.S. § 8-471(E)(3)(b). The cross-referenced language serves as the directive to OCWI investigators that they must, "immediately" take two steps after receiving a report or information of criminal conduct: (a) notify law enforcement, and (b) "make a prompt and thorough investigation of the nature, extent and cause of any condition that would tend to support or refute the report of child abuse or neglect. . . ." A.R.S. § 8-471(E)(4). The authorized investigation that the interview exception applies "pursuant to" contains no reference to abandonment, but does reference "the report of child abuse or neglect." A.R.S. § 8-471(E)(4)(b).

Similarly, the CSW statute limits the exemption to "an abuse and abandonment investigation pursuant to § 8-456." A.R.S. § 8-802(B)(2). Section 8-456 is the statutory provision that sets out DCS's investigative authority and is tied to the Hotline provision; it references only "abuse and neglect" investigations thus establishing two categories of investigations DCS is explicitly authorized to conduct. A.R.S. § 8-456. As with the previous cross-reference, the term "abandonment" does not appear in Section 8-456.

Taking into account the context of the statutory scheme, and the statutory history of the particular provisions at issue, the plain language interpretation here must result in a recognition that the law permits investigators to interview children without parental notification only when two parameters are met: (1) the child falls into one of the identified categories, and (2) the law authorizes a DCS investigation.

This conclusion is consistent with the long-standing practice of DCS and its predecessors. *See* Request for AG Opinion (R16-001) at 4 (referencing DCS Policy and Procedure Manual, Chapter 2, Section 3, and noting the relevant policy has remained static for at least 20 years). It is also consistent with this Office's previous statements generally relating to DCS interview

authority. *See* Ariz. Att’y Gen. Op. I88-062 (applying the exception language to allow interviews when investigating “reports that a child is dependent or abused” where the definition of “dependent child” included neglected children); Ariz. Att’y Gen. Op. I98-008 (allowing for child interviews absent parental notification on private school grounds “during an investigation to evaluate allegations of abuse, dependency, neglect, or exploitation.”).¹

This Office recognizes that its conclusion is contrary to that reached by the Arizona Ombudsman-Citizens’ Aide. *See* Report of Investigation (Feb. 16, 2016). That report, however, failed to consider the statutory context or the plain language of the provisions contained in the internal cross-references, which calls into question the hypertechnical textual analysis. Respectfully, this Office explicitly rejects the conclusions reached in the Report of Ombudsman-Citizens’ Aide.

Conclusion

DCS may legally interview the children specified in the exception provisions without parental notice as long as doing so is part of a statutorily authorized DCS investigation. This is consistent with a plain text review of the statute, when taking into account the explicit internal cross-references and the relevant context.

Mark Brnovich
Attorney General

¹ An earlier AG Opinion also recognized interview authority absent parental notification during statutorily authorized investigations. Ariz. Att’y Gen. Op. I75-219. That opinion was issued before the 1981 introduction of the exception language into the statutory scheme. Both of the subsequent opinions in 1988 and 1998 were issued after that introduction, and both cite its text.



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>May 4, 2016</p>	<p>No. I16-005 (R16-002)</p> <p>Re: The authority of the Arizona Corporation Commission or individual Commissioners to obtain information from a public service corporation and its affiliates.</p>
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To: Commissioner Robert L. Burns
Arizona Corporation Commission

Questions Presented

You have requested a formal opinion on the following questions:

1. “Does A.R.S. § 40-241 give an individual Commissioner the power to gather information related to a public service corporation and its affiliates’ political contributions, lobbying and charitable contributions in order to ensure that all funds expended are consistent with the Commission’s authority to set just and reasonable rates? In other words, does the statute give an individual Commissioner the power to look at this information because it is or may be reasonably necessary information for effective ratemaking and to protect the public interest?”

2. “Does A.R.S. § 40-241 permit an individual Commissioner to investigate the degree to which a public service corporation and its affiliates are intertwined in terms of organization, operation and structure in order to ensure the security and financial health of the

affiliates in order to protect consumers from overreaching and abuse by public service corporations and their affiliates such that an affiliate's operations do not hinder the operations of the public service corporation? Specifically, does the statute permit an individual Commissioner to inspect a public service corporation's and/or its affiliates' accounts, books, papers and documents in order to conduct such a review?"

3. "Does Article XV of the Arizona Constitution give the Commission and/or an individual Commissioner the power to require a public service corporation to report information about itself or about its parent, subsidiary, and other affiliated corporations relevant to the Commission's authority under Article XV, particularly in light of *Arizona Corporation Commission v. State of Arizona ex rel. Grant Woods*, 171 Ariz. 286, 830 P.2d 807 (1992); *Arizona Public Service Company v. Arizona Corporation Commission*, 157 Ariz. 532, 760 P.2d 532 (1988), and Article 8 of the Arizona Administrative Code (Affiliated Interest Rules)?"

Summary Answer

The questions presented inquire regarding the authority of the Arizona Corporation Commission (Commission) and individual Commissioners under Article XV of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") § 40-241.

The Commission has broad constitutional authority relating to reporting requirements and inspection of any Public Service Corporation ("PSC") and its affiliates.¹ Under Article XV, Section 13 of the Arizona Constitution, the Commission has the power to require reports from PSCs and companies whose stock is offered for sale to the public ("Public Companies"), which could include PSC affiliates. Furthermore, under Article XV, Section 3, the Commission has the

¹ As used in this opinion, the term "affiliate" means any other entity directly or indirectly controlling or controlled by, or under direct or indirect common control with, a PSC. *See, e.g.*, A.A.C. R14-2-801(1).

authority to adopt rules reasonably necessary for effective ratemaking. Pursuant to this authority, the Commission has adopted the Affiliated Interest Rules, Ariz. Admin. Code (“A.A.C.”) R14-2-801 through -806, which include reporting requirements that apply to both PSCs and certain affiliates.

The Legislature has also granted individual Commissioners limited powers under A.R.S. § 40-241. Under this statute, an individual Commissioner is authorized to inspect the accounts, books, papers, and documents of a PSC. It also authorizes an individual Commissioner to examine under oath officers, agents, and employees of a PSC in relation to the PSC’s business and affairs. Therefore, a Commissioner may use the statutory authority provided by Section 40-241 to gather information from a PSC related to the amount spent by a PSC on political and charitable contributions and lobbying, so long as that authority is exercised within constitutional bounds. This authority also permits an individual Commissioner to gather information from a PSC regarding the degree to which it is intertwined with its affiliates (in terms of organization, operation, and structure). But, applying rules of statutory construction, the term “public service corporation” in this statutory provision does not include affiliates.

Background

Relevant Sources of Commission Authority

The Commission is a regulatory check on corporations “designed to promote both democratic control and competitive economic forces.” *Ariz. Corp. Comm’n v. State ex rel. Woods*, 171 Ariz. 286, 291 (1992). The Framers drafted Article XV of the Arizona Constitution, which establishes the Commission, with a “pronounced, progressive-era concern with regulating corporations, a concern enhanced by the perceived dominance of large railroad and mining companies during the territorial era.” John D. Leshy, *The Arizona State Constitution* 356 (2d ed.

2013). The Framers did, however, “limit [the Commission’s] most sweeping regulatory jurisdiction to [PSCs].” *Id.* at 357.

Article XV, Section 3 of the Arizona Constitution grants the Commission, but not individual Commissioners, the authority to set rates and make reasonable rules, regulations, and orders governing the transaction of business by PSCs in Arizona.² While some earlier cases construed the Commission’s powers under this Section more broadly, Arizona courts have more recently assumed that the Commission’s regulatory power under Section 3 is “restrict[ed] . . . to its ratemaking function,” while acknowledging that the Commission has discretion in “determin[ing] . . . what regulation is reasonably necessary for effective ratemaking.” *Sierra Club—Grand Canyon Chapter v. Ariz. Corp. Comm’n*, 237 Ariz. 568, 572 ¶ 10 (App. 2015), *review denied* (Feb. 9, 2016) (quoting *Woods*, 171 Ariz. at 294); *see also Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 111 ¶ 54 (App. 2004). Although Section 3 does not expressly address inspection, investigation, or reporting, the Arizona Supreme Court, based on the authority that Section 3 confers, upheld the Commission’s Affiliated Interest Rules. *Woods*, 171 Ariz. at 297. These rules require: (1) Commission approval of a utility holding company’s organization or reorganization and transactions between utilities and affiliates; (2) that books and records of affiliates that transact business with a utility be made available for inspection in

² Section 3 provides, in relevant part:

The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations

certain respects; and (3) that reports of diversification plans for utilities and utility holding companies be provided to the Commission. *See* A.A.C. R14-2-801 through -806.

Under Article XV, Section 4 of the Arizona Constitution, the Commission and individual Commissioners may “inspect and investigate the property, books, papers, business, methods, and affairs of any [Public Company] . . . and of any [PSC] doing business within the state.” The Legislature has also provided the Commission and individual Commissioners statutory authority regarding PSC inspections and examinations:

The commission, each commissioner and person employed by the commission may, at any time, inspect the accounts, books, papers and documents of any public service corporation, and any of such persons who are authorized to administer oaths may examine under oath any officer, agent or employee of such corporation in relation to the business and affairs of the corporation.

A.R.S. § 40-241(A).

Finally, Article XV, Section 13 authorizes the Commission, but not individual Commissioners, to require reports to the Commission under oath from PSCs and Public Companies, and to require that such companies provide such information “concerning their acts and operations” as may be required by law or by the Commission. *See also Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm’n*, 157 Ariz. 532, 536 (1988) (interpreting Commission order issued under Section 13); A.R.S. § 40-204 (relating to reports by PSCs to Commission).

Limitations on Commission Authority

The United States Supreme Court has recognized a First Amendment right-of-association privilege against “compelled disclosure of affiliation with groups engaged in advocacy.” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The Supreme Court enforced this privilege when

the government “laid no adequate foundation for its direct demands.” *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 555 (1963). The Supreme Court has further clarified that corporations—including those granted government monopolies—are generally entitled to First Amendment speech protections.³ *See, e.g., First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-76 (1978) (interpreting the First Amendment’s speech protections as applying to corporations); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (analyzing First Amendment speech protections for political speech conducted through corporations); *Consol. Edison Co. of NY v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n. 1 (1980) (“Nor does Consolidated Edison’s status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.”).

When First Amendment concerns arise, courts considering allegations of the government’s intrusion on speech or associational rights must evaluate whether there is a compelling or substantial government interest in doing so. *See, e.g., Alabama*, 357 U.S. at 463. Arizona’s specific authorizations noted above (allowing the Commission and its members to investigate PSCs’ affairs in order to achieve the Commission’s purposes on behalf of the public interest) will satisfy this inquiry where any request is substantially related to those purposes. *See, e.g., John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

³ Notwithstanding this entitlement to speech protections, right-of-association privilege concerns may well be at their nadir for expenditures by those PSCs that are subject to extensive regulation in exchange for a government-imposed monopoly and rate of return. *See, e.g., United States v. Hubbard*, 650 F.2d 293, 306 (D.C. Cir. 1980) (identifying a corporation’s individual attributes, including “the nature and purposes of the corporate entity,” as determining the availability of any privacy right); *Sw. Transmission Co-op., Inc. v. Ariz. Corp. Comm’n*, 213 Ariz. 427, 431-32 ¶ 23 (App. 2006) (“To be a [PSC,] an entity’s ‘business and activities must be such as to make its rates, charges and methods of operation[] a matter of public concern, clothed with a public interest to the extent contemplated by law which subjects it to governmental control’” (quoting *Trico Elec. Coop., Inc. v. Corp. Comm’n*, 86 Ariz. 27, 34-35 (1959))).

Courts also review exercises of agency inspection and investigation authority for reasonableness. *See Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 ¶ 9 (App. 2000) (citing *People ex rel. Babbitt v. Herndon*, 119 Ariz. 454, 456 (1978)). The United States Supreme Court has identified a three-part test for reasonableness: “[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The *Morton Salt* test is consistent with the first three factors Arizona courts commonly use for reasonableness in cases of Commission requests for information. *See Carrington*, 199 Ariz. at 305, ¶ 9, 18 P.3d at 99 (citing *Herndon*, 119 Ariz. at 456). Consistent with further explication by the United States Supreme Court, Arizona courts also have provided a fourth requirement: if an inquiry becomes “a tool of harassment and intimidation rather than a means to gather appropriate information, the appropriate court may intrude and stop the incursion into the constitutional liberties of the parties under investigation.” *Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n*, 133 Ariz. 500, 507 (1982); *see also United States v. Powell*, 379 U.S. 48, 57-58 (1964); *Carrington*, 199 Ariz. at 305 ¶ 9 (stating all four factors).

While the subject matter of the questions presented may implicate these limitations, application of any potential First Amendment or reasonableness factors without specific facts and circumstances to evaluate would be speculative; thus further analysis of these issues is beyond the scope of this opinion.

Analysis

Question 1: The authority of an individual Commissioner under A.R.S. § 40-241 to gather information about a PSC and its affiliates' political contributions, lobbying, and charitable contributions.

Section 40-241 empowers the Commission or an individual Commissioner to gather information in two ways. First, the Commission, each Commissioner, and any person employed by the Commission may “at any time, inspect the accounts, books, papers and documents” of any PSC. Second, any Commissioner or Commission employee who is authorized to administer oaths may also “examine under oath, any officer, agent or employee of such [PSC] in relation to the business and affairs of the [PSC].” A.R.S. § 40-241.

Section 40-241 confers power on individual Commissioners as well as the entire Commission. The plain language of Section 40-241(A) specifically refers to not just “[t]he commission” but also “each commissioner.” By using the language “each commissioner,” the Legislature clearly authorized individual Commissioners to exercise the powers in this statute. *J.D. v. Hegyi*, 236 Ariz. 39, 40-41 ¶ 6 (2014) (“If the language [of a statute] is ‘subject to only one reasonable meaning,’ [courts] apply that meaning.” (citation omitted)); *see also Fields v. Elected Officials’ Ret. Plan*, 234 Ariz. 214, 218 ¶ 16 (2014) (stating that “the legislature generally avoids redundancy”).

The authority conferred by Section 40-241 applies to inspections of PSCs and examinations of PSC personnel; it does not extend to affiliates of PSCs. Section 40-241(A) refers to any “public service corporation,” which is not defined in the Arizona Revised Statutes but in the Arizona Constitution. Ariz. Const. art. XV, § 2. Therefore, the term’s interpretation

should be consistent with its constitutional definition, which does not include affiliates. *See id.*; *Stoecker v. Brush Wellman, Inc.*, 194 Ariz. 448, 453 ¶ 17 (1999) (“The statute’s text is read *in pari materia* with the constitutional provision that authorizes it.”) (citation omitted)); *cf. Rural/Metro Corp. v. Ariz. Corp. Comm’n*, 129 Ariz. 116, 118 (1981) (noting that Article XV, Section 6 of the Arizona Constitution “does not allow the legislature to give ‘public service corporation’ designation to corporations not listed in Article 15, § 2”). This conclusion is bolstered by the fact that another pertinent statute specifically refers to “affiliate” separately from a PSC, even though that language was enacted after Section 40-241. *See* 1998 Ariz. Sess. Laws ch. 209, § 23 (2d Reg. Sess.) (amending A.R.S. § 40-202(C)(2), (C)(6)); *State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990) (“[W]hen determining legislative intent, court[s] may consider both prior and subsequent statutes in *pari materia*.” (citation omitted)).

In sum, pursuant to Section 40-241, an individual Commissioner may gather information regarding a PSC’s political and charitable contributions, and lobbying expenditures, by inspecting the books and records of a PSC, and examining under oath PSC personnel.

Question 2: The authority of an individual Commissioner under A.R.S. § 40-241 to investigate a PSC and its affiliates’ corporate organization, operation, and structure to ensure the security and financial health of the affiliate in order to protect consumers.

Consistent with the answer to Question 1, based on the statute’s plain language, Section 40-241 confers power on individual Commissioners, not just the Commission as a whole. Based on the use of the term “public service corporation,” the statute empowers a Commissioner to investigate by inspecting the accounts, books, papers, and documents of a PSC, but not any affiliates. The statute also authorizes an individual Commissioner to investigate by

examining under oath officers, agents, and employees of a PSC in relation to the PSC's business and affairs. As noted in this question, such an investigation's purpose would be to ascertain any risks the affiliates create regarding the financial wellbeing or effective operation of the PSC.

Question 3: The Commission and individual Commissioners' authority under Article XV of the Arizona Constitution, Affiliated Interest Rules, and related case law to require a PSC to report information about itself or its parent, subsidiary, and other affiliated corporations relevant to the Commission's constitutional authority.

Reporting requirements pursuant to Article XV, Section 3, including the Affiliated Interest Rules.

Under Article XV, Section 3 of the Arizona Constitution, the Commission may require reports pursuant to rules that are reasonably necessary for effective ratemaking. Section 3 grants the Commission authority to “prescribe . . . just and reasonable rates” and “make reasonable rules, regulations, and orders, by which [PSCs] shall be governed in the transaction of business within the state.” Ariz. Const. art. XV, § 3. The authority conferred by Section 3 (ratemaking and rulemaking) must ultimately be exercised by the Commission, not an individual Commissioner. *See, e.g.*, Ariz. Const. art. XV, § 6 (empowering the Legislature to make rules and regulations for Commission proceedings); A.R.S. § 40-102(C) (requiring assent of a majority of Commissioners for an action or order to be “the act of the [C]ommission,” or a “finding, order, or decision of the [C]ommission”). In addition, Section 3 refers to the “corporation commission.” Other provisions of Article XV refer to “the several members” of the Commission, showing that the drafters knew how to confer authority on individual Commissioners and did not do so here. *See* Ariz. Const. art. XV, § 4; *Roubos v. Miller*,

214 Ariz. 416, 420 ¶ 20 (2007) (where the Legislature knows how to do something, as shown elsewhere in the statutory scheme, absence of such language indicates absence of such intent).

Section 3 does not expressly address requiring reports from PSCs. However, in 1990, the Commission adopted the Affiliated Interest Rules. *Woods*, 171 Ariz. at 288. The rules, which apply to the largest utilities, require Commission approval of the organization or reorganization of a utility holding company and transactions between utilities and affiliates. A.A.C. R14-2-801(5), 803, 804(B). They also require that the books and records of affiliates that transact business with utilities be made available for Commission inspection to the extent necessary to audit transactions with utilities. A.A.C. R14-2-804(A). In addition, the rules require reports to the Commission of diversification plans for utilities and utility holding companies. A.A.C. R14-2-805. In *Woods*, the Arizona Supreme Court reviewed whether these rules were constitutional under Article XV, Section 3. *See Phelps Dodge Corp.*, 207 Ariz. at 116 ¶ 83 (discussing *Woods*'s approach to question of rules' constitutionality). The court upheld the rules, concluding that they were "reasonably necessary for effective ratemaking." *Woods*, 171 Ariz. at 294, 297. Under *Woods*, the Commission has authority to adopt additional reporting requirements for PSCs and affiliates under Article XV, Section 3, so long as the additional requirements are reasonably necessary for effective ratemaking. *See id.*

Reporting requirements under Article XV, Section 13.

Under Article XV, Section 13, the Commission, but not individual Commissioners, may require reports and information concerning the "acts and operations" of a PSC or Public Company. Because the language of Section 13 authorizes reports "as may be required by law, or by the corporation commission," the authority to require reports is not conferred on an individual Commissioner. *See also* A.R.S. § 40-204(A), (B) (vesting authority in the Commission). The

power of the Commission to require reports from companies other than PSCs under Article XV, Section 13 was litigated in *Arizona Public Service Co.*, 157 Ariz. 532. The court concluded that a corporation that is not a PSC is subject to the powers set forth in this section if it is a Public Company:

[T]he powers conferred upon the Commission to inspect and investigate under § 4 and to require reports under § 13 extend to all corporations which offer stock for sale to the public. They do not extend to those corporations which do not do so.

Id. at 535. Therefore, this power could relate to an affiliate of a PSC only if the affiliate is a Public Company.

Conclusion

As set forth in this opinion, the Commission, and in some instances individual Commissioners, have the authority to gather information, inspect, and require reports related to the topics specified in the questions presented, subject to fact-specific constitutional considerations.

Mark Brnovich
Attorney General



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE OF ARIZONA

June 7, 2016

Kelly Townsend
Arizona House of Representatives
1700 West Washington, Suite H
Phoenix, AZ 85007-2844

Re: I16-006 / R16-014

Dear Representative Townsend,

You requested an opinion from this Office, asking whether the “period commencing sixty days before a primary election” in Arizona Revised Statutes (“A.R.S.”) § 16-1019(H) means sixty days before a qualified elector may cast a vote under A.R.S. § 16-541, or sixty days before the tenth Tuesday prior to a general election under A.R.S. § 16-201. As you may be aware, our formal opinion process necessarily involves several layers of review and is not, therefore, conducive to a speedy turnaround. We understand time is of the essence regarding your request because the period for placement of political signs began on June 4, 2016, assuming “the period commencing sixty days before a primary election” means sixty days before a qualified elector may cast a vote under A.R.S. § 16-541. For this reason, we offer the following informal opinion regarding the question presented: The “period commencing sixty days before a primary election” in A.R.S. § 16-1019(H) means sixty days before the tenth Tuesday prior to a general election under A.R.S. § 16-201.

Under A.R.S. § 16-1019(C), “a city, town or county of this state shall not remove, alter, deface or cover any political sign” if certain conditions are met. This provision only applies, however, “during the period commencing sixty days before a primary election and ending fifteen days after the general election, except that for a sign for a candidate in a primary election who does not advance to the general election, the period ends fifteen days after the primary election.” A.R.S. § 16-1019(H). In other words, this statute does not prohibit cities, towns, and counties from taking down political signs if the sign is put up too far in advance of, or left up too long after, an election.

Arizona law allows qualified electors to vote by early ballot. A.R.S. § 16-541(A) (“Any election called pursuant to the laws of this state shall provide for early voting. Any qualified

elector may vote by early ballot.”). The county recorder mails early ballots “within five days after receipt of the official early ballots from the officer charged by law with the duty of preparing ballots pursuant to § 16-545, except that early ballot distribution shall not begin more than twenty-seven days before the election.” A.R.S. § 16-542(C). The officer charged with the duty of preparing ballots, in turn, is required to deliver early ballots to the county recorder “not later than the thirty-third day before the election.” A.R.S. § 16-545(B). Thus, the date for mailing early ballots is calculated from the date of “the election.” This year, the Maricopa County Recorder has posted that early ballots will “begin mailing at 27 days prior to each of the noted election dates.”¹

Arizona law specifies when the “primary election” occurs. Arizona Revised Statute § 16-201 provides: “On the tenth Tuesday prior to a general or special election at which candidates for public office are to be elected, a primary election shall be held.”

Distilled to its essence then, your question asks what “primary election” means in A.R.S. § 16-1019(H)—does it mean the date early ballots are mailed, or does it mean the date of the primary election set forth by statute? If “primary election” means the date that primary election early ballots are mailed, candidates and ballot supporters/opponents would have approximately 27 additional days to post political signs.

The answer to your question is straightforward. The date of the primary election is the date specifically provided by statute—not the date that ballots are mailed out for the primary election. Again, A.R.S. § 16-201 provides that the date of the “primary election” is “the tenth Tuesday prior to a general or special election at which candidates for public office are to be elected.” *See also* A.R.S. § 1-213 (“Words and phrases shall be construed according to the common and approved use of the language.”). Nothing in the early balloting statute in A.R.S. § 16-541 purports to alter the date of the “primary election.” It simply allows qualified electors to vote by early ballot. To read “primary election” to mean the date a qualified elector can vote by mail would be to manufacture ambiguity.

Arizona courts also “construe statutory provisions in light of the entire statutory scheme so they may be harmonious and consistent.” *Cypress on Sunland Homeowners Ass’n v. Orlandini*, 227 Ariz. 288, 297, ¶ 30 (App. 2011) (internal quotes omitted). But, absurd results would be produced if the term “election” was consistently interpreted throughout Arizona’s statutes to mean the date that qualified electors can vote by mail. For example, if this interpretation were adopted, early ballots would never be mailed. Again, early ballots are mailed approximately 27 days “*before* the election.” *See* A.R.S. § 16-542(C) (emphasis added). But, if “election” means the date ballots are mailed, the trigger for mailing ballots would always be 27 days out.

Further, A.R.S. § 16-1019(H) does not only prevent cities, towns, and counties from taking down political signs “sixty days before a primary election.” It also prevents cities, towns,

¹ Maricopa County Recorder, *Early Voting Ballot Request* (Jun. 6, 2016, 2:00 PM), <https://recorder.maricopa.gov/earlyvotingballot/earlyvotingballotrequest.aspx>.

Representative Townsend

June 7, 2016

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and counties from taking down political signs “ending fifteen days after the general election.” But, if the “general election” date is interpreted consistently to mean the date that ballots for the general election are mailed (instead of the date of the actual general election), cities, towns and counties would be able to take down political signs for the general election 15 days after the mailing—potentially resulting in political signs being taken down before the actual general election date.

These absurdities can be avoided by adhering to the plain meaning of “primary election” as defined by the legislature in A.R.S. § 16-201. Thus, the “period commencing sixty days before a primary election” in A.R.S. § 16-1019(H) means sixty days before the tenth Tuesday prior to a general election under A.R.S. § 16-201.

Sincerely,

John R. Lopez IV
Solicitor General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>June 8, 2016</p>	<p>No. I16-007 (R16-012)</p> <p>Re: Potential Liability of State Board of Investment for Complying with Proposition 123</p>
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To: The Honorable Jeff DeWit
Arizona State Treasurer

Questions Presented

Does the State Board of Investment or individual Board members (the “Board”) face potential liability for complying with the distribution requirements of Proposition 123 in light of pending and potential future legal challenges to the propriety of those requirements based on provisions of Arizona’s Enabling Act? In addition, does the Board face any liability for making distributions to charter schools pursuant to Proposition 123?

Summary Answer

No, the Board does not face liability, personal or otherwise, for acting in compliance with the law—including Proposition 123—because Arizona’s public officials have a duty to obey laws unless a court enjoins a law or declares it unconstitutional. The Board cannot ignore the constitutional amendment created by Proposition 123, including the provisions related to continued distribution of monies to charter schools.

Background

Proposition 123 amended Arizona’s constitutional provisions relating to school funding based on our state trust lands; the provisions of Proposition 123 were effective upon electorate approval, and made retroactive “to from and after June 30, 2015.” 2015 Ariz. Sess. Laws, 1st Spec. Sess., ch. 1, §§ 8, 10. With the recent Proposition 123 amendments incorporated, Article X, section 7 of the Arizona Constitution clearly prescribes the forthcoming distribution requirements:

G. The board of investment shall determine the amount of the annual distributions required by this section and allocate distributions pursuant to law. The annual distribution from the permanent funds:

[. . .]

2. For fiscal years 2015-2016 through 2024-2025, shall be six and nine-tenths percent of the average monthly market values of the fund for the immediately preceding five calendar years, except that in fiscal year 2015-2016, the distribution made from the permanent state school fund shall be \$259,266,200.

Ariz. Const. art. X, § 7(G)(2).

Specific constitutional provisions can create affirmative duties for public officials. *Jennings v. Woods*, 194 Ariz. 314, 320 (1999) (constitutional holdover provision provides an affirmative duty for corporation commissioner to remain in office until qualified successor is appointed). Arizona’s public officials have the duty to obey laws unless a court enjoins them or declares them unconstitutional. *See Button v. Nevin*, 44 Ariz. 247, 257 (1934) (“Public officials . . . have but one duty, and that is to enforce the law as it is written, and, if the effect of their action is disastrous, the responsibility is upon the Legislature and not upon them.”).

Qualified immunity protects government officials from personal liability insofar as their conduct does not invade clearly established statutory or constitutional rights known to reasonable

persons. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012). It represents a broad shield that ensures ample protection to all but the plainly incompetent or those who knowingly violate the law. *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

With regard to charter schools, such schools in Arizona have received monies from the state land trust fund for 21 years. *See generally* 1994 Ariz. Legis. Serv., 9th Sp. Sess., Ch. 2, § 2 (H.B. 2002) (authorizing the establishment of charter schools in Arizona, to be funded indirectly from state land trust proceeds routed through the general fund); *see also* 2000 Ariz. Legis. Serv., 5th Sp. Sess., Ch. 1, § 16 (S.B. 1007) (using money from the state land trust fund to create the Classroom Site Fund, which funds district and charter schools on equal terms). Proposition 123 does not change the class of permissible recipients or beneficiaries of state land trust fund monies; rather, Proposition 123 amends the formula and amounts of distributions from the state land trust.

Analysis

Even if the Board believes that a current or potential legal challenge to Proposition 123 is or would be well-founded and likely to prevail,¹ it still is required to comply with the law. Proposition 123 amends the portion of the Arizona Constitution that the Board is entrusted to enforce. If there were a clear contradiction between Proposition 123 and another applicable law such that compliance with both was a “physical impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963), then the Board might have to choose which law to follow. That is not the case here. This situation is akin to *Austin v. Campbell*, 91 Ariz. 195 (1962), where the Arizona Supreme Court held that the state auditor was not liable for authorizing per diem payments for legislators under a statute later determined unconstitutional.

¹ *Arguendo*. Beyond the observation of presumptive validity, this Opinion does not address the merits of any legal challenge to Proposition 123.

The Court based its conclusion upon the fundamental point that citizens, including state officials, are entitled to rely on a statute as an “operative fact which cannot be ignored.” *Id.* at 203. Noting that courts presume such acts constitutional, the Court stated that “No penalties should be visited upon the citizenry for doing likewise.” *Id.*

In addition, qualified immunity protects the Board’s members from liability because it protects government officials’ conduct performed in compliance with the law, or absent a demonstration that such conduct violates “clearly established” law. *al-Kidd*, 131 S. Ct. at 2083 (citation omitted).

Finally, with regard to charter schools as specific beneficiaries, the Proposition 123 amendments do not alter the trust’s beneficiaries. Charter schools have received monies from these trust funds for 21 years. Proposition 123 does not compel the Board to overturn more than two decades of pattern and practice in this area due to the nature of the beneficiary.

Conclusion

The Board does not face liability, personal or otherwise, for acting in compliance with the law as it stands currently. Arizona’s public officials have a duty to obey laws unless a court enjoins them or declares them unconstitutional.

John R. Lopez IV
Solicitor General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 22, 2016</p>	<p>No. I16-008 (R16-006)</p> <p>Re: Limitations on Constables Rights to Carry Firearms</p>
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To: M. Lando Voyles
Pinal County Attorney

Questions Presented

1. Is Ariz. Att’y Gen. Op. I95-009 still applicable in light of subsequent changes to the statutes A.R.S. §§ 1-215(27) and 13-105(29), both of which now include constable in the definition of “peace officer”?
2. Do the subsequent statutory changes affect the prior conclusion that constables are not primary law enforcement officers and do not benefit from A.R.S. § 38-1113 exceptions, which allow peace officers to carry firearms, when not exercising their official duties?

Summary Answer

1. No. The opinion is no longer applicable for its primary conclusion that constables must be certified by the Arizona Peace Officer Standards and Training Board (AZ POST) in order to exercise the authority or perform the duties of a peace officer, given the statutory

changes explicitly granting constables the authority of a peace officer, without the need for board certification, during the performance of official duties.

2. No. The “prior conclusion” this question references is that expressed in Ariz. Att’y Gen. Op. I87-167, which articulated that constables are not primary law enforcement officers and “have no duty to engage in regular law enforcement activities,” except insofar as their “status as peace officers compels them to act in immediate situations or while in the furtherance of primary duties.” The statutory basis for this prior opinion has not changed.

The crux of these two questions is an inquiry into whether current law permits constables to carry firearms outside the context of their official duties. There are no exceptions allowing constables to carry firearms as peace officers outside the context of their official duties. Because constables are not considered primary law enforcement, these official duties are largely limited to their on-duty employment. However, in certain off-duty situations where there is an obvious and immediate threat, a constable can respond to the threat under official duty. This would allow peace-officer privileges, including the broader firearm carry rights under A.R.S. § 38-1113, to extend to constables in these very limited situations. Importantly, nothing in this opinion impacts constables’ general Second Amendment rights as citizens to carry firearms consistent with state law when they are not carrying out official duties.

Background

Since at least the 1960s, constables have been included in the definition of “peace officer” found in A.R.S. § 1-215 (“In the statutes and laws of the state, unless the context otherwise requires: . . . (27) ‘Peace Officers’ means . . . constables . . .”).

In Ariz. Att’y Gen. Op I84-167, the Attorney General considered, “What is the duty of a constable to engage in law enforcement activity within his precinct?” *Id.* In addressing that

question, the opinion cited portions of the Arizona Constitution (Article XXII, § 17) and various Arizona statutes (A.R.S. §§ 1-201, 1-215, 9-901, 11-403, 11-441, 11-442, 11-444, 11-445, 22-102, 22-131, 38-843, and 38-1001), the relevant portions of which are essentially the same today as they were in 1984. The opinion concluded,

Clearly, a constable may be required to preserve the peace, make arrests and perform other duties of a peace officer. *See* Ariz. Att’y Gen. Op. I63-8. In our opinion, however, these are not the primary duties of a constable. In view of the legislation that has been discussed, the primary responsibility of law enforcement within the precinct falls upon the Sheriff, the town marshal or the police. Therefore, a constable has no duty to engage in regular law enforcement activities such as patrolling within his precinct, except insofar as his status as a “peace officer” compels him to act in immediate situations or while in the furtherance of his primary duties of attending the courts of justices of the peace and executing process within the county.

Id. A decade later, the Attorney General reviewed that opinion in light of the 1990 amendments to A.R.S. § 41-1823, which required most individuals to become AZ POST certified before they could exercise the powers of a peace officer. A.R.S. § 41-1823 (2008). The subsequent opinion concluded, “[W]e modify Ariz. Att’y Gen. Op I84-167 to provide that constables cannot exercise the authority or perform any duties of a peace officer without first being properly certified” by AZ POST. Ariz. Att’y Gen. Op. I95-009.

In 2007, the Arizona Legislature enacted A.R.S. § 38-1102 concerning the rights of peace officers to carry weapons. The statute was modified a few times and renumbered to § 38-1113. § 38-1113, currently reads in relevant part,

(A) Notwithstanding any other law and except as provided pursuant to subsection C of this section, a peace officer shall not be prohibited from carrying a firearm if the peace officer is in compliance with the firearm requirements prescribed by the Arizona peace officer standards and training board.

(G) For the purposes of this section: (2) “Peace officer” has the same meaning prescribed in section 1-215

A.R.S. § 38-1113(A)–(G) (2015).

In 2008, the Arizona Legislature amended three relevant statutes. First, it amended § 13-105 to explicitly include constables in the definition of peace officer for Title 13. The statute now reads in relevant part, “In this title, unless the context otherwise requires: (25) ‘Peace officer’ means any person vested by law with a duty to maintain public order and make arrests *and includes a constable.*” A.R.S. § 13-105 (2015) (emphasis added).

Second, it amended § 22-131 to explicitly limit the authority of a constable. The statute now reads, in relevant part, “A constable who is duly elected or who is appointed by the board of supervisors has the authority of a peace officer only in the performance of the constable’s official duties.” A.R.S. § 22-131(E) (2014).

Third, it amended § 41-1823 to eliminate the AZ POST certification requirement for constables. The statute now reads in relevant part: “Except. . . . persons given the authority of a peace officer pursuant to §§ 8-205, 11-572, 12-253, 13-916 *or 22-131*, no person may exercise the authority or perform the duties of a peace officer unless he is certified by the board” A.R.S. § 41-1823(B) (2008) (emphasis added).

Analysis

1. The conclusion expressed in Ariz. Att’y Gen. Op I95-009, that constables require AZ POST certification in order to exercise the authority or perform the duties of a peace officer, is no longer valid because of the 2008 statutory amendments described above. A.R.S. § 41-1823(B) created an exception to the AZ POST certification requirement for persons with the authority of a peace officer pursuant to § 22-131. *Id.* A.R.S. § 22-131(E) granted constables the authority of peace officers. A.R.S. § 22-131(E) (2014). Therefore, constables no longer require AZ POST certification to act as peace officers.

However, constables (and all other peace officers) still do require AZ POST certification in order to carry a weapon pursuant to § 38-1113 in places and at times where otherwise prohibited by law. A.R.S. § 38-1113(A) (2015).

2. The statutory basis for the Ariz. Att’y Gen. Op I84-167 has not changed since its issuance. As such, that prior opinion’s general conclusion likewise has not changed. As noted above, however, the crux of the entire opinion request is whether constables may now carry firearms as peace officers outside the context of their official duties.

The Arizona Legislature in 2007 enacted legislation (now A.R.S. § 38-1113) to grant AZ POST certified peace officers the right to carry firearms where others are prohibited from doing so. The 2008 amendment to § 22-131(E), restricting constables’ peace-officer authority to their official duties, appears to complicate the 2007 legislation’s apparent purpose.

§ 38-1113(A) reads,

A. Notwithstanding any other law and except as provided pursuant to subsection C of this section, a peace officer shall not be prohibited from carrying a firearm if the peace officer is in compliance with the firearm requirements prescribed by the Arizona peace officer standards and training board.

Id. A.R.S. § 38-1113(G) incorporates the definition of peace officer from § 1-215(23), which reads simply, “Peace officers means constables. . . .” *Id.* at § 38-1113(G).

This would seem to grant a constable who has passed AZ POST training the right to carry a firearm as a peace officer where citizens are generally prohibited from doing so. The statute grants this right to peace officers only, and pursuant to § 22-131, constables only have the authority of peace officers in the performance of official duties. The language of § 22-131 appears to limit constable rights as peace officers, and case law suggests that the rights and authority of any peace officer extend only when that individual is acting under an official duty.

Specifically, § 22-131(E) states “A constable . . . has the authority of a peace officer only in the performance of the constable’s official duties.”

The general limitation of peace officer rights and authority to the performance of official duties is demonstrated in *State v. Fontes*, 195 Ariz. 229, 232 (Ariz. Ct. App. 1998). In that case, a defendant assaulted a sheriff’s deputy who was moonlighting as a plainclothes security guard. *Id.* at 230-31. The defendant was convicted under §13-2508 of “aggravated assault on a peace officer or resisting arrest” even though the deputy was off-duty. *Id.* Defendant appealed, arguing that he could not be convicted under this statute because the officer was not “engaged in the execution of any official duties” or “acting under color of . . . official authority” and therefore was not acting as a peace officer at the time. *Id.* The Court of Appeals upheld the conviction, reasoning that “a sheriff’s deputy has a duty to preserve the peace and ‘arrest all persons who attempt to commit or who have committed a public offense . . . even when the officer is ‘off-duty.’” *Id.*; see also *State v. Kurtz*, 78 Ariz. 215, 219 (Ariz. 1954) (whether an off-duty deputy is acting as a peace officer depends on whether the deputy was “acting in vindication of public right and justice” or “merely performing acts of private service to [his] employer”).

The court explored the extensive nature of rights and privileges extended to law enforcement officers in *Lane v. Indus. Comm’n*, 218 Ariz. 44, 51 (Ariz. Ct. App. 2008). In that case, a police officer was injured by gunfire while mountain biking with his friends. *Id.* at 46. The officer was found ineligible for workers’ compensation because the gunfire was random, not directed at his group, and therefore not arising out of his employment as a police officer. *Id.* at 47. The officer appealed, arguing that “the relevant code of conduct for his employment required him to ‘act in an official capacity if [he] observe[d] an incident requiring police action,” and that his status as a peace officer exposed him to an increased risk of gunfire. The Court of

Appeals reversed based on these arguments, finding that the officer's injuries did arise out of his employment. *Id.* at 51; *cf. Eubank v. Sayad*, 669 S.W.2d 556, 568 (Mo. Ct. App. 1984) (upholding disciplinary measures against a police officer for drunken off-duty altercation because “[i]n a very real sense a police officer is never truly off-duty”).

The way in which courts consistently view the status of “peace officer” indicates that the rights, privileges and authority of a peace officer attach only if an officer is acting under his official duties. While case law also seems to suggest that the rights and privileges of peace officers attach at all times, that is only because the official duties of law enforcement officers like sheriffs extend beyond their primary, paid employment. Even when they are off-duty, sheriffs have proactive official duties to preserve the peace and arrest those violating the law that can extend to almost any situation, even a casual walk through a neighborhood or a trip to the grocery store. The duties of constables, however, do not extend so far. As Ariz. Att’y Gen. Op I84-167 makes clear, constables do not have duties co-extensive with sheriffs and are not “primary law enforcement officers.”

The statutes defining peace officer and constable also require a limited view of a constable's rights as a peace officer. A.R.S. § 38-1113 incorporates the definition of peace officer in § 1-215(23) and grants constables the authority of peace officers without reference to the issue of on- and off-duty status. A.R.S. § 1-215(23)'s silence on the issue is reconcilable with the on-duty limitation of § 22-131(E). However, the language of § 22-131(E) is irreconcilable with an interpretation of § 1-215(23) that constables are always peace officers, and that they have the authority of peace officers in typical off duty situations. The Arizona Legislature chose to enact the final clause of that statute limiting peace officer status (“only in the performance of the constable's official duties”) and it cannot be ignored. While relevant case

law suggests § 22-131(E) does not add any restrictions particular to constables, it still serves to stress the limited peace-officer authority of constables. Because constables do not have “law enforcement” duties that extend beyond the particulars of their on-duty work, their peace-officer rights generally do not extend to off-duty situations.

Still, the “peace officer” designation may assign some additional duties, rights, and privileges to constables acting off duty. As Ariz. Att’y Gen. Op I84-167 concludes “a constable has no duty to engage in regular law enforcement activities such as patrolling within his precinct, except insofar as his status as a ‘peace officer’ compels him to act in immediate situations or while in the furtherance of his primary duties of attending the courts of justices of the peace and executing process within the county.” Ariz. Att’y Gen. Op. I84-167. This suggests that the “peace officer” status could allow constables to act in immediate situations with full peace officer authority, even when off duty. If there is an apparent, immediate threat, an AZ POST certified constable could carry a firearm under A.R.S. § 38-1113, even if he otherwise would be unable to as a citizen. Without further legislation to guide on the matter, however, this off-duty right is extremely limited. While it may include a constable taking a firearm into a gun-free business when seeing an armed robbery underway, it would not include a constable taking a firearm into a gun-free restaurant out of a general fear that someone might attack him or his family.

Conclusion

The 2008 statutory changes to §§ 22-131 and 41-1823(B) explicitly granted constables the authority of a peace officer, during the performance of official duties, without the need for AZ POST certification. These statutory changes rendered Ariz. Att’y Gen. Op. I95-009 not applicable with respect to its primary conclusion. But the statutory basis for Ariz. Att’y Gen.

Op. I84-167 (concluding that constables are not primarily law-enforcement officers) has not changed, and that opinion need not be discarded to answer the questions posed here. Because the official duties of a constable are limited to on-duty work, off-duty constables, even if certified by AZ POST, only have the right to carry a firearm where doing so is otherwise prohibited by law in situations when an obvious and immediate threat presents itself. An AZ POST certified, on-duty constable, however, has the right to carry a firearm in times and at places otherwise prohibited by law, pursuant to A.R.S. § 38-1113.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>September 2, 2016</p>	<p>No. I16-009 (R15-024)</p> <p>Re: Private schools and POST certified employees gun carry law</p>
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To: Steven B. Yarbrough
Arizona State Senate

Questions Presented

1. Is there any state law or other prohibition that prevents private schools from permitting trained firearm handling persons who are not POST certified school employees from carrying concealed weapons on campus?
2. Are private schools in Arizona permitted to have firearms secured on campus which are available only to trained firearm handling non POST certified employees?

Summary Answer¹

1. State and federal law do not prohibit an individual that holds an Arizona Concealed Carry Weapons Permit from carrying a concealed handgun on private school grounds

¹ This opinion is limited to the question whether private schools may permit firearms on campus. It does not consider the extent to which such schools may choose to bar firearms as an exercise of their private property rights. *See e.g. GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) (“Quite simply, there is no constitutional infirmity when a private property owner exercises his, her, or its—in the case of a place of worship—right to control who may enter, and whether that invited guest can be armed.”).

in Arizona. Additionally, State and federal law permit individuals to possess firearms in school zones for use in a program approved by the private school.

2. Yes. Private schools in Arizona may have firearms secured on campus.

Background

From its adoption, Arizona's Constitution has explicitly recognized the individual right to armed self-defense. Ariz. Const. art. 2, § 26 ("The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired . . ."). Indeed, the Arizona Constitutional Convention rejected a provision stating that "[t]he Legislature shall have the power to regulate the wearing of arms to prevent crime," indicating that the drafters intended a robust individual right to carry free from the Legislature's infringement. John S. Goff, ed., *The Records of the Arizona Constitutional Convention of 1910* 678–79 (1991). Still, prior to 1994, the general public was prohibited from carrying a concealed weapon in Arizona. *See State v. Moerman*, 182 Ariz. 255, 259 (App. 1994) (discussing the history of Arizona's restriction of concealed carry). Peace officers, regulated by the Arizona Peace Officer Standards and Training Board (POST), who are POST certified have been exempt from this regulation. *See Arizona Revised Statutes (A.R.S.) § 41-1822; Arizona Administrative Code (A.A.C.) R13-4-101, et seq.* (2016). Permitted concealed carry for the general public was enacted as A.R.S. § 13-3112, in response to appellate decisions upholding convictions against process servers who were carrying concealed weapons for protection on the job. *See Moerman*, 182 Ariz. At 259; *Dano v. Collins*, 166 Ariz. 322, 324 (App. 1990). Between 1994 and 2010, Arizona citizens who wanted to carry a concealed weapon were required to obtain a Concealed Carry Weapons Permit ("CCW"). In 2010, the Arizona Legislature passed legislation known as "constitutional carry," allowing all individuals who have open carry firearm rights the freedom to carry concealed even without an

Arizona CCW. *See* 2010 Ariz. Sess. Laws ch. 59. Although State law allows individuals to carry concealed without a permit, Arizona continues to offer CCWs.² Licensure provides certain benefits to the individual, including reciprocity for concealed carry with other states. Per the Arizona Department of Public Safety, as of June 26, 2016, there were 273,186 active CCWs. Ariz. Dep’t of Public Safety, *Statistics: Concealed Weapons Permits*, available at azdps.gov/services/concealed_weapons/statistics/ (last visited July 1, 2016).

The Federal Gun Free School Zones Act (“GFSZA”) makes it unlawful for “any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe is a school zone.” 18 U.S.C. § 922(q)(2)(A). The GFSZA does not distinguish between private and public schools and defines a school zone as either “in or on the grounds of a public, parochial or private school” or “within a distance of 1,000 from the grounds of a public, parochial or private school.” *Id.* at (a)(25). The GFSZA’s prohibition against knowingly possessing a firearm in a school zone does not apply to the possession of a firearm “if the individual possessing the firearm is licensed to do so by the State in which the school zone is located . . . and the law of the State . . . requires that, before an individual obtains such a license, the law enforcement authorities of the State . . . verify that the individual is qualified under law to receive the license.” *Id.* at (q)(2)(B)(ii). Finally, the GFSZA’s prohibition against knowingly possessing a firearm in

² Among other criteria, eligible applicants for an Arizona CCW must be twenty-one years of age or older (with some exceptions for nineteen and twenty year olds with military service), must not be under indictment for a felony offense, must not be a felon (with some exceptions for the conviction being set aside), must not suffer from mental illness, must not be a prohibited possessor pursuant to A.R.S. § 13-3101(A)(7), and must complete a firearms safety training program pursuant to A.R.S. § 13-3112(N). Ariz. Dep’t of Public Safety, *Obtain A New Concealed Weapons Permit*, available at azdps.gov/services/concealed_weapons/permits/obtain/ (last visited July 1, 2016).

a school zone also does not apply to possession of a firearm “by an individual for use in a program approved by a school in the school zone.” *Id.* at (q)(2)(B)(iv).

Under Arizona law, a person commits “misconduct involving weapons” by knowingly “possessing a deadly weapon on school grounds.” A.R.S. § 13-3102(A)(12). As with the GFSZA, “school grounds” under this statute includes private schools. *See* A.R.S. § 13-3102(N)(4) (defining school as “a public or nonpublic kindergarten program, common school or high school” and school grounds as “in, or on the grounds of, a school”). Arizona law also includes exemptions for “[a] person specifically licensed, authorized or permitted pursuant to a statute of this state or of the United States,” *Id.* at 3102(C)(4), and possession of a “firearm for use on the school grounds in a program approved by a school,”³ *Id.* at 3102(I)(2).

Analysis

1. Arizona CCW permittees are not legally prohibited from carrying a concealed handgun on private school grounds in Arizona. Individuals may also carry a firearm under a program approved by a private school.

With regard to federal law, the GFSZA exempts individuals “licensed . . . by the State” from the blanket prohibition of knowing possession of a firearm in school zones. *Id.* at (q)(2)(B)(ii). The meaning of “licensed” possession in the GFSZA is not explicitly defined in the statute, but that term includes both POST certification and state-issued CCWs if “the law of the State . . . [requires verification] that the individual is qualified under law to receive the license.” *United States v. Tait*, 202 F.3d 1320, 1324 (11th Cir. 2000). In *Tait*, the Eleventh Circuit held that a defendant’s possession of a firearm in a school zone was not subject to prosecution under the GFSZA because he held an Alabama CCW permit. *Id.* at 1323–25.

³ Separate considerations may apply to public schools. *See* A.R.S. § 15-341(A)(23) (the governing board of a public school district shall “prescribe and enforce policies and procedures that prohibit a person from carrying or possessing a weapon on school grounds unless the person is a peace officer or has obtained specific authorization from the school administrator.”).

Arizona's CCWs are only issued to applicants who are not "prohibited possessor[s] under state or federal law." A.A.C. R13-9-201(A). Accordingly, the GFSZA does not prohibit Arizona CCW permittees from carrying weapons on private school grounds.

Additionally, the GFSZA exempts firearms possessed by an individual for use in a program approved by a school. 18 U.S.C. § 922(q)(2)(B)(iv). Thus, if an Arizona private school were to initiate a program enrolling trained firearm handling persons in a program through which these persons would be allowed to carry concealed in the school zone, the GFSZA's prohibitions would not apply to those enrolled individuals.

The analysis is much the same under Arizona law. While there is a general prohibition for possessing a deadly weapon on school grounds, including private school grounds, A.R.S. § 13-3102(A)(12), those who are "licensed, authorized or permitted" to carry firearms under State or federal law are exempt, *id.* at 3102(C)(4). POST certification and an Arizona CCW are two such State permits. Accordingly, Arizona law does not prohibit CCW permittees from carrying concealed weapons on private school campuses.

Additionally, Arizona law exempts firearms possessed by an individual for use in a program approved by a school. *Id.* at 3102(I)(2). Thus, if an Arizona private school were to initiate a program enrolling trained firearm handling persons in a program through which these persons would be allowed to carry concealed on school grounds, Arizona's prohibitions would not apply to those enrolled individuals.

2. State and federal law do not prohibit the storage of firearms on private school campuses.

Nothing in federal or State law prohibits the secured storage of firearms on private school campuses in Arizona. As discussed above, federal and State prohibitions do not apply to firearms possessed for use in a program approved by a school, 18 U.S.C. at (q)(2)(B)(iv); A.R.S.

§ 13-3102(I)(2). An Arizona private school could initiate a program in which they securely store firearms on campus and provide access to trained firearm handling employees. While POST certification and CCW permitting are two forms of firearm handling training, the school's program could choose to enroll additional employees who lack those certifications.

Conclusion

Arizona CCW permittees may carry concealed firearms onto private school grounds and otherwise properly store them on school property. Individuals may also possess a firearm on private school campuses pursuant to a program approved by the school. Private schools may also securely store firearms on campus that trained firearm handling employees may access.

Mark Brnovich
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>Informal Attorney General Opinion</p> <p>September 20, 2016</p>	<p>No. I16-010</p> <p>Re: Advisory Model Policy for Law Enforcement Applying SB 1070</p>
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This informal Attorney General opinion sets forth an advisory model policy to guide law enforcement agencies and officers as to their duties under state law.¹ This advisory model policy reflects the Attorney General’s view as to the constitutional interpretation of § 2(B) and 2(D) of S.B. 1070, A.R.S. § 11-1051(B) and (D), and acknowledges the Legislature’s admonition that § 2 must “be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.” A.R.S. § 11–1051(L). In particular, this policy is intended to articulate the constitutional limits demarcated in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Arizona v. United States*, 132 S. Ct. 2492 (2012); and *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), among other applicable authority.

I. The Statute

The relevant sections of A.R.S. § 11-1051 provide:

B. For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal

¹ Although this opinion is designated “informal”, the analysis contained herein has the same persuasive weight as the analysis in a formal Attorney General opinion.

government pursuant to 8 United States Code § 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

D. Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present in the United States and who is in the agency's custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this state.

II. Policy

Law enforcement officers shall conduct contacts with individuals suspected of being unlawfully present in the United States in a manner consistent with federal and state laws. See A.R.S. § 11-1051(L). Officers shall protect the civil rights, privileges, and immunities of all persons. Officers shall not prolong a stop, detention, or arrest solely for the purpose of verifying immigration status. *Arizona*, 132 S. Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”) If an officer deviates from this policy, the officer must notify a supervisor at the first reasonable opportunity. Officers shall not contact, stop, detain, or arrest an individual based on race, color, or national origin, except when it is part of a suspect description linking that individual to a particular unlawful incident and said description is timely, reliable, and geographically relevant or when otherwise authorized by law. See A.R.S. § 11-1051(B).

III. Definitions

The following definitions will apply to the terms below as discussed in this informal opinion:

Alien: Any individual not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

Civil immigration violation: A violation of a federal civil immigration law. Offenses include, but are not limited to, unlawful presence of an alien in the United States; an alien whose visa has expired and has not been renewed; or an alien who seeks or engages in unauthorized employment. *See, generally*, 8 U.S.C. §1227(a)(1)(B)-(C).²

Criminal immigration violation: A violation of a federal criminal immigration law. Offenses include, but are not limited to, violations of Title 8, U.S.C., §1324; Title 8, U.S.C. §1325(a); and Title 8, U.S.C. §1326.

Determine: To ascertain or conclude, especially after observation or consideration. *See* Dictionary.com, <http://www.dictionary.com> (15 Apr. 2016). Only the federal government may determine immigration status. *Arizona*, 132 S. Ct. at 2498 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”); *see also Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“The States enjoy no power with respect to the classification of aliens.”).

ICE/CBP: Immigration and Customs Enforcement/Customs and Border Protection.

Immigration status: The legal standing of an alien’s presence in the United States.

Probable cause: Reliable information based on facts and circumstances sufficient to lead to the conclusion that it is more likely than not that a crime has been committed and that the individual to be arrested has committed it. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, (2003) (“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”) (internal quotation marks and citation omitted)

Reasonable suspicion: Specific facts which taken together with rational inferences from those facts support an objective belief that an individual has committed or is about to commit an offense; based upon the facts that exist, there is reason to investigate further. An officer may stop or briefly detain an individual for further investigation based on reasonable suspicion (a *Terry* stop), but may not arrest on that basis alone. *See Terry v. Ohio*, 88 S.Ct. 1868 (1968).

Unlawfully present: For the purpose of applying § 2(B) and 2(D) of S.B. 1070, officers may consider an alien “unlawfully present” only if the alien is NOT: (1) a lawful or conditional permanent resident; (2) a nonimmigrant in an authorized period of stay; (3) a refugee or asylee; or (4) otherwise authorized or allowed to remain in the United States by federal law or the federal Department of Homeland Security.³

Verify: To prove to be true; confirm; substantiate. Dictionary.com, <http://www.dictionary.com> (15 Apr. 2016).

² State law enforcement officers generally lack authority to detain individuals for civil violations of immigration law. *Arizona*, 132 S. Ct. at 2506 (“Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.”).

³ This definition is for purposes of this policy alone.

IV. Consensual Contacts

State laws related to immigration enforcement neither expand nor limit an officer's ability to approach an individual and engage in a consensual contact. During a consensual contact, the officer may inquire about any subject matter. However, the individual contacted does not have to answer questions or produce any identification, but may choose to do so voluntarily. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497 (1983). During a consensual contact, officers may ask, but shall not demand, that an individual produce immigration documents.

V. Individuals Lawfully Stopped or Detained

Officers shall not prolong a stop or detention for an immigration inquiry to request or obtain verification of immigration status, or prolong a criminal investigation or inquiry in order to accommodate or complete immigration-related tasks. *Arizona*, 132 S.Ct.at 2509; *see also Rodriguez*, 135 S.Ct. at 1614-16.

An officer shall presume that a person is lawfully present in the United States if the person provides any of the following: a valid Arizona driver license or nonoperating identification license; a valid tribal enrollment card or other form of tribal identification; or any valid United States federal, state or local government issued identification, provided the issuing entity requires proof of legal presence in the United States. A.R.S. § 11-1051(B)(1)-(4).

If in the course of duty an officer has reasonable suspicion that an individual is unlawfully present in the United States, based on all available facts, except race or ethnicity, the officer shall attempt to verify the individual's immigration status by contacting ICE/CBP unless doing so would prolong the stop or detention, or the circumstances below apply. The officer shall, consistent with department policies, document the verification attempt, including the basis for the officer's reasonable suspicion as to unlawful presence and any response from ICE/CBP, in the stop data collection system.⁴

If it is not practicable for an officer to investigate or verify an individual's immigration status due to factors such as call load, staffing, emergencies, other present duties, availability of personnel on scene, location, available back-up, ability to contact ICE/CBP, or the availability of ICE/CBP, the officer may, consistent with department policies, use discretion not to pursue an investigation into the individual's immigration status, but shall document the justification for such a decision in the stop data collection system.

If an officer has reasonable suspicion that an individual is unlawfully present, but believes that investigating or verifying immigration status may hinder or obstruct an investigation, the officer may, consistent with department policies, use discretion not to inquire into the individual's

⁴ "In January 2003, the Arizona Department of Public Safety began voluntarily collecting data regarding traffic and pedestrian stops, including information pertaining to the characteristics of the traffic stop, driver, vehicle and officer(s)."

See http://www.azdps.gov/about/reports/docs/Traffic_Stop_Response_2008.pdf (last visited 09/13/16)

immigration status. A.R.S. § 11-1051(B). The officer shall, consistent with department policies, document the justification for such a decision in the stop data collection system. Factors to consider that may indicate an immigration inquiry could hinder or obstruct an investigation may include the need for suspect, victim, and witness cooperation in any investigation.

VI. Immigration Violations

If an officer has probable cause to believe that an individual has committed a civil immigration violation, the officer has no authority to arrest the individual and shall not detain the individual longer than necessary to complete the state law basis for the contact.⁵ *See Melendres*, 695 F.3d at 1001 (any extension of a lawful stop “must be supported by additional suspicion of criminality. Unlawful presence is not criminal.”).

If an officer has probable cause to believe that an individual has committed a federal criminal immigration violation, the officer may arrest the individual and contact ICE/CBP to clarify its interest in detaining the individual.⁶ *See Melendres*, 695 F.3d at 1001 (citing *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), for the proposition that “federal law does not preclude local law enforcement of the criminal provisions’ of federal immigration law.”). Officers may wait a reasonable time period for ICE/CBP response and should document any response or direction from ICE/CBP. If ICE/CBP fails to respond or take disposition within a reasonable amount of time and there is no other criminal violation, the officer shall release the individual.

If ICE/CBP agrees to take disposition of the individual, officers may assist by transporting the individual to an ICE/CBP facility if ICE/CBP so directs. A.R.S. § 11-1051(D). When making the determination to transport, officers shall, consistent with department policies, consider department and division priorities.

Officers shall not arrest an individual simply because the individual lacks proper documentation. *See Melendres*, 695 F.3d at 1000-01.

VII. Arrests

An officer or jail official shall not prolong an arrest or detention for an immigration inquiry, including to request or obtain verification of immigration status. *Arizona*, 132 S.Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”).

⁵ This restriction on non-federal law enforcement does not apply where such officials have been specifically trained and delegated to exercise the authority of an immigration officer under § 287(g) of the INA, 8 U.S.C. § 1357(g), and are acting pursuant to that authority. *Melendres*, 695 F.3d at 1001.

⁶ It remains an open issue whether reasonable suspicion of illegal entry or another immigration crime would be a basis for prolonging a detention. *Arizona*, 132 S. Ct. at 2509.

If, after reviewing all available facts (except race or ethnicity) and/or evidence, an officer has reasonable suspicion that an arrestee is unlawfully present in the United States, a reasonable attempt shall be made to contact ICE/CBP to verify the arrestee's immigration status prior to releasing the arrestee, but release may not be delayed in order to request or obtain verification. *Id.* The presumptions and the exceptions in section V above apply to this paragraph. Officers shall, consistent with department policies, document any response or direction from ICE/CBP in the stop data collection system.

The officer shall proceed to handle the arrestee according to department policy, which may result in the issuance of a citation, referral, and the release of the arrestee.

VIII. Contact with ICE/CBP

Officers attempting to verify an individual's immigration status shall do so by contacting Operational Communications. Operational Communications shall submit an inquiry through the National Law Enforcement Telecommunications System (NLETS) for verification of an individual's immigration status. After a response is received from ICE/CBP, Operational Communications shall forward the information to the officer. If information verifying an individual's immigration status is received from another source (such as an ICE/CBP officer on scene), the verification shall, consistent with department policies, be documented in the stop data collection system.

If an officer wishes to request verification prior to the release of an individual or arrestee, Operational Communications may follow the NLETS submission with a phone call to the Law Enforcement Support Center (LESC).⁷ As explained above, however, officers may not extend a stop or detention in order to make a verification request or to wait for a verification response.

IX. Consular Notification

Officers should follow consular notification procedures set forth in the Vienna Convention on Consular Relations (the Convention), *see* Article 30 of the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820, namely, "when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 339 (2006) ("[Article 36 of the Convention] provides that 'if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.'"). Law enforcement officials may refer to the following for guidance on such notification procedures: Law Bulletin 2009-05, *Foreign Nationals—Advice of Rights in Addition to Miranda Warnings*; the

⁷ "ICE's LESC operates '24 hours a day, seven days a week, 365 days a year' and provides, among other things, 'immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies.'" *Arizona*, 132 S. Ct. at 2508 (internal citations omitted).

U.S. Department of State’s *Consular Notification and Access Manual*, (Fourth ed. 2016), https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf (last visited 9/13/16).⁸

John R. Lopez IV
Solicitor General

⁸ This informal opinion does not confer upon aliens any legal rights beyond those recognized by binding court precedent. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. at 2681 (“Indeed, Article 36 [of Vienna Convention on Consular Relations] does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention.”).



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>October 14, 2016</p>	<p>No. I16-011 (R16-013)</p> <p>Re: Charter Schools Credit Transfers to District Schools</p>
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To: Paul Boyer
Arizona House of Representatives

Question Presented

When a school district denies transfer credit to a student from a charter school, do Ariz. Rev. Stat. § 15-701.01(I) and Ariz. Admin. Code R7-2-302(5)(a)¹ require the school district to allow the student to take a placement examination and offer core credit if the student receives a passing score on the examination, or may the school district simultaneously deny transfer credit and refuse to offer a placement examination to students from a charter school?

Summary Answer

Once a student is enrolled and upon that student's request, the high school district must provide the opportunity for the student to demonstrate competency in a particular academic course or subject to obtain academic credit to fulfill high school graduation requirements for the course or subject without enrolling in the course or subject and in lieu of classroom time. Additionally, a high school district may award credit toward the completion of high school graduation requirements to a student from a K-8 school for courses successfully completed prior to the ninth grade that meet the high school mathematics credit requirements.

¹ While the opinion request referenced A.A.C. R7-2-302(5)(a), the more applicable rule is R7-2-302(5)(c), upon which this opinion is based.

Factual Background²

A charter school authorized to serve students in grades kindergarten through eight (“K-8”) offers a number of high school level courses to its junior high students. These courses are aligned with and meet the competency requirements adopted by the Arizona State Board of Education (“State Board”) and most, if not all, school district governing boards around the state. Some high school districts have refused to accept transfer credit for the completion of these courses at the charter school. Consequently, the charter school students must either (1) take the same course again, or (2) be placed in a more advanced course without credit for their prior coursework. Moreover, many of these high school districts do not allow these students to take a placement examination to demonstrate proficiency in the courses they have taken at the K-8 charter school, asserting that they are not statutorily required to do so because the charter school is authorized for K-8 education, not high school education.

Analysis

The Legislature has assigned the State Board the responsibility for prescribing the “minimum course of study³ and competency⁴ requirements for the graduation of pupils from high school.” A.R.S. §§ 15-203(A)(13), 15-701.01(A). As mandated, the State Board adopted A.A.C. R7-2-302, setting forth the requirements for high school graduation. Students are required to obtain a minimum of twenty-two credits in order to graduate. The State Board identifies fifteen credits in particular subject areas or courses that the student must take to receive a high school diploma. A.A.C. R7-2-302(1)(a-e). The State Board also allows a local school district governing board or charter school to prescribe seven credits of additional courses that the student may take to meet the twenty-two credit minimum, as well as to prescribe courses or competency requirements that are in addition to or higher than the twenty-two required by the State Board. *Id.* at (1)(f); A.R.S. § 15-701.01(C).

Arizona Revised Statutes § 15-701.01(H) and (I) address a high school’s acceptance of transfer credits from a pupil previously enrolled in a charter school or school district.

If a pupil who was previously enrolled in a charter school or school district enrolls in a school district in this state, the school district shall accept credits earned by the pupil in courses or instructional programs at the charter school or school district. The governing

² These facts are drawn from the request and assumed to be true for the purposes of rendering this legal opinion. No independent factual investigation occurred as part of the drafting process.

³ A “course of study” is defined in A.R.S. § 15-101(10) as “a list of required and optional subjects to be taught in the schools.”

⁴ “Competency” is defined in A.R.S. § 15-101(8) as “a demonstrated ability in a skill at a specified performance level.”

board of a school district may adopt a policy concerning the application of transfer credits for the purpose of determining whether a credit earned by a pupil who was previously enrolled in a school district or charter school will be assigned as an elective or core credit.

A.R.S. § 15-701.01(H)

A pupil who transfers credit from a charter school, school district or Arizona online instruction shall be provided with a list that indicates which credits have been accepted as an elective credit and which credits have been accepted as a core credit by the school district or charter school. Within ten school days after receiving the list, a pupil may request to take an examination in each particular course in which core credit has been denied. The school district or charter school shall accept the credit as a core credit for each particular course in which the pupil takes an examination and receives a passing score on a test, aligned to the competency requirements adopted pursuant to this section, designed and evaluated by a teacher in the school district or charter school who teaches the subject matter on which the examination is based. . . .

Id. at (I).

To implement these provisions, the Legislature has delegated power to the State Board to “adopt rules to allow high school pupils who can demonstrate competency in a particular academic course or subject to obtain academic credit . . . without enrolling in the course or subject.” A.R.S. § 15-701.01(J). The State Board has exercised that authority to provide that, upon a student’s request, the school district “shall provide the opportunity for the student to demonstrate competency” in specified subject areas “in lieu of classroom time.” A.A.C. R7-2-302(5)(c). Where “appropriate,” this demonstration will include taking the competency test adopted by the State Board and earning a minimum score set by the State Board. *Id.* Consequently, upon the request of an enrolled student, the local school district governing board must provide the opportunity for the student to demonstrate competency in particular academic courses or subjects and obtain academic credit without enrolling in the courses or subjects.

The State Board has also prescribed a more specific rule for students entering high school and seeking credit in mathematics. A.A.C. R7-2-302(1)(c)(iv). That rule provides that “[c]ourses successfully completed prior to the ninth grade that meet the high school mathematics credit requirements⁵ may be applied toward satisfying those requirements.” *Id.* Accordingly,

⁵ The State Board requires four credits of mathematics containing content prescribed in A.A.C. R7-2-302(1)(c)(i-iii) for high school graduation.

high school districts may award academic credit toward high school graduation requirements for a student's completion of a high school level mathematics course at a K-8 school, even without administering a competency exam as required in the general provision for credit transfers.

Conclusion

Upon request of an enrolled student, the high school district must provide the student an opportunity to demonstrate competency in an academic course or subject to obtain academic credit without enrolling in the course or subject and in lieu of classroom time. Additionally, a high school district may award credit toward the completion of high school graduation requirements to a student for courses successfully completed in a K-8 school that meet the high school mathematics credit requirements.

Mark Brnovich
Attorney General

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STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 6, 2016</p>	<p>No. I16-012 (R16-016)</p> <p>Re: Board of Technical Registration Jurisdiction over Trained Geologists</p>
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To: E. LeRoy Brady, Chairman
Board of Technical Registration

Questions Presented

1. What jurisdiction, if any, does the Arizona State Board of Technical Registration (“Board”) have over “trained geologists”?
2. Do Arizona Revised Statutes (“A.R.S.”) § 32-122.01 and Arizona Administrative Code (“A.A.C.”) R4-30-208, which define the Board’s requirement for degree recognition and qualifying experience, apply to a “trained geologist”?
3. Does the Board have the authority to require a person claiming to be a “trained geologist” to provide documented proof of education and experience?
4. Can the Board regulate the practice of “trained geologists” in Arizona if they fail to practice with minimum competence and harm the public?
5. A.R.S. § 32-106.02 gives the Board the authority to investigate allegations of unlicensed practice and impose civil penalties upon unlicensed individuals if the work they performed should have been performed by a licensed professional. Will the Board be able to investigate and impose civil penalties upon “trained geologists” pursuant to this statute if it receives complaints from the public and substantiates them?

Summary Answer

1. The Board has jurisdiction over those trained geologists who have voluntarily registered with the Board, and those who failed to comply with the requirements in § 32-144(F).

2. A.R.S. § 32-122.01 and A.A.C. R4-30-208 apply only to trained geologists who have voluntarily registered.
3. While the Board has the authority to condition professional registration upon proof of education and experience, it does not have the authority to generally require such documentation from individuals exempt from registration. In the context of a complaint alleging an individual does not meet the education and experience requirements for a trained geologist, the Board may require proof in order to resolve that complaint.
4. No, the Board's disciplinary authority is limited to registrants or those who are required to be registrants with the Board.
5. Yes, if the Board receives a complaint that a trained geologist improperly engaged in geology work for which registration is required, the Board has the authority to investigate and impose civil penalties for substantiated allegations.

Background

The Arizona State Board of Technical Registration is a regulatory body tasked with reviewing applications to practice certain trades, determining whether applicants are qualified for licensure or certification, and investigating complaints lodged against practitioners of those trades. Historically, the Board has been tasked with regulating the practice of engineering, architecture, geology, assaying, land surveying, landscape architecture, home inspection, the alarm industry, and environmental remediation. A.R.S. § 32-106 defines the Board's powers and duties, which include, in pertinent part, to:

3. Consider and act on or delegate the authority to act on applications for registration or certification.
4. Conduct examinations for in-training and professional registration except for an alarm business or an alarm agent.
5. Hear and act on complaints or charges or direct an administrative law judge to hear and act on complaints and charges.

A.R.S. § 32-106(A)(3)-(A)(5). With regard to complaints, the Board may investigate allegations made against "a person who is not exempt" from the Board's authority, and who "is not registered or certified . . . [but] is practicing, offering to practice or by implication purporting to

be qualified to practice any board regulated profession or occupation.” A.R.S. § 32-106.02(A). Further, the Board’s disciplinary authority allows it to “take disciplinary action against the holder of a certificate or registration” A.R.S. § 32-128(C). The Board’s investigatory and prosecutorial jurisdiction does not apply to individuals who are exempt from registration with the Board.

In 2016, the Arizona Legislature passed, and the Governor signed, House Bill 2613, modifying the statutes dealing with the regulation of the trades within the Board’s jurisdiction. In particular, whereas the previous statutory scheme dealt only with “professional geologists” who must register with the Board, these recent statutory amendments added the category of “trained geologists” to those individuals who are exempt from the Board’s registration requirements. A.R.S. § 32-144(F) (“A trained geologist may engage in a geological practice without being registered under this chapter.”). The statute sets forth conditions, under which a trained geologist may not practice geology, including:

A trained geologist may not engage in a geological practice if any of the following applies:

1. The trained geologist has been convicted of a felony in this state or any other state.
2. The trained geologist has been registered or licensed in this state or any other state and has had the registration or license suspended or revoked by this state or the other state.
3. The trained geologist has been prohibited from engaging in a geological practice in this state or any other state due to any private, civil or professional complaint related to an ethical or technical violation while engaged in the practice of geology.
4. The trained geologist fails to disclose to a person employing or hiring the trained geologist:
 - (a) Any disciplinary action taken against the trained geologist in this state or any other state due to any private, civil or professional complaint that is

related to an ethical or technical violation while engaged in the practice of geology.

- (b) That the trained geologist is not a registered geologist pursuant to this title.
5. The trained geologist is required to be registered by another law in this state or by federal law.
 6. State or federal law conditions the issuance of a license or permit, including permits issued under title 27, 37, 45 or 49, on the issuance of a report that is sealed by a registered geologist.

A.R.S. § 32-144(F) (footnote omitted)

Trained geologists must have “[e]arned a geology degree from an accredited educational institution” and “[p]articipated in geological work experience outside of an educational institution for at least four years.” A.R.S. § 32-144(G). The Board’s general administrative regulations set forth the manner in which it calculates credit for education and work experience requirements. A.A.C. R4-30-208. With regard to work experience credit, the regulations require applicants to obtain substantiation from relevant employers. *Id.* at R4-30-208(B).

Analysis

I. What jurisdiction, if any, does the Board have over “trained geologists”?

The practice of geology is well-understood throughout Title 32, Chapter 1, as falling within the ambit of the Board’s regulatory charge. *See, e.g.*, A.R.S. §§ 32-101 (B)(14). As noted above, the Board is authorized to accept and act on applications submitted for registration as a licensed geologist; to conduct related examinations; and to hear, investigate, and act on complaints.

The Board has jurisdiction over trained geologists who choose to register with the Board, and thus may pursue investigations and disciplinary actions against such individuals as registrants. The Board also has jurisdiction over individuals engaging in geological practice who fail to meet the education or work experience requirements for trained geologists in § 32-144(F),

and thus are not entitled to the registration exemption. *See* A.R.S. § 32-106.02(A) (granting authority to investigate complaints and impose civil penalties against a person who is not exempt from registration and is “practicing, offering to practice or by implication purporting to be qualified to practice” geology).

II. Do A.R.S. § 32-122.01 and A.A.C. R4-30-208, which define the Board’s requirement for degree recognition and qualifying experience, apply to a “trained geologist”?

Section 32-122.01 and R4-30-208 both apply to a trained geologist who applies for professional registration with the Board. § 32-122.01(A) provides that an applicant for professional registration as a geologist (1) be of good moral character and repute, (2) have eight years of education, experience, or both in the field of geology, and (3) pass in-training requirements and professional examinations. A.R.S. § 32-122.01(A). By its very terms, this statutory provision applies only in the context of an application for registration, a process from which trained geologists are exempted.

R4-30-208 elaborates on the manner of calculating education and experience requirements by defining how many months of credit the Board should assign for various forms of education and experience. *See, e.g.*, R4-30-208(A)(2)(d) (“In determining pro rata credit, 30 semester hours or 45 quarter hours shall equal 12 months credit.”); R4-30-208(B)(1) (“One hundred and thirty hours or more of work per month is equal to one month of work experience.”). The requirements for professional registration as a geologist are a combined total of eight years education and experience; there is no degree requirement. A.R.S. § 32-122.01(A)(2). In determining whether an applicant meets the professional registration requirements for a geologist, the Board will still look to § 32-122.01 and R4-30-208.

A trained geologist must specifically have a degree issued by an accredited institution plus “at least four years” of experience in the practice of geology. A.R.S. § 32-144(G). Because the education requirements for a trained geologist do not require calculation (the individual either has a degree or does not), the administrative regulation directing the calculation of time spent in education has no relevance.

The statutory work experience requirement for a trained geologist is that he or she “[p]articipated in geological work experience outside of an educational institution for at least four years.” The plain terms of this requirement are different from the professional registration work experience description that an applicant must “[b]e actively engaged in education or experience, or both . . . for at least eight years.” A.R.S. § 32-122.01(A)(2). The new exemption does not employ the standard statutory language of “actively engaged in” but rather uses “participated in.” The Board promulgated R4-30-208 as an implementing regulation for its general statutory scheme and incorporated stringent calculation requirements. The statutory language departure in the context of the trained geologist exemption divorces that provision from this implementing regulation. As a result, R4-30-208 does not apply to a trained geologist.

III. Does the Board have the authority to require a person claiming to be a “trained geologist” to provide documented proof of education and experience?

The Board has the authority to condition registration upon documented proof of education and experience (see the discussion above regarding the Board’s jurisdiction over registration of trained geologists). The Board does not have the authority to affirmatively require such documentation from individuals not seeking registration as trained geologists; to infer such a general requirement would be to administratively adopt a *de facto* registration requirement for a category of individuals the Legislature explicitly exempted from registration.

The Board can require proof of education and experience in the context of a complaint alleging that an individual engaged in the practice of geology but failed to meet the education or experience requirements for a trained geologist (which would render that respondent ineligible for the registration exemption). A.R.S. § 32-106.02.

IV. Can the Board regulate the practice of “trained geologists” in Arizona if they fail to practice with minimum competence and harm the public?

The Board has the authority to investigate complaints lodged against trained geologists for engaging in the practice of geology without a license while failing to meet the education and experience requirements of § 32-144(G). If the allegations in such a complaint are substantiated, the respondent would not qualify as a trained geologist and thus would not be entitled to the exemption. Outside of this context, however, the Board’s regulatory authority as to geologists is limited to those who are registered with the Board: “The Board may take disciplinary action against *the holder of a certificate or registration*[.]” A.R.S. § 32-128(C) (emphasis added); *see also* R4-30-301 (“All *registrants* shall comply with the following rules of professional conduct[.]”) (emphasis added).

V. Will the Board be able to investigate and impose civil penalties upon “trained geologists” pursuant to A.R.S. § 32-106.02 if it receives complaints from the public and substantiates them?

As explained more fully above, the Board’s authority to investigate and impose penalties on trained geologists is limited to substantiated complaints alleging that an individual is not entitled to the trained geologist exemption by virtue of a failure to comply with or meet the requirements of the exemption as set forth in A.R.S. § 32-144(F)-(G). The Board does not have the authority to investigate or impose civil penalties on trained geologists pursuant to any other complaints. *See* A.R.S. § 32-106.02(A) (specifically limiting the board’s authority under this section to complaints against “a person who is not exempt.”).

Conclusion

In summary, the statutory amendments adopted in 2016 explicitly exempt trained geologists from registration with the Board, and thereby largely exempt such individuals from the Board's jurisdiction. Absent allegations that an individual is improperly claiming this exemption, the Board lacks jurisdiction over trained geologists.

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