



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1996

The Honorable James Warren Smith, Jr.
Frio County Attorney
500 East San Antonio Street, Box 1
Pearsall, Texas 78061-1421

Letter Opinion No. 96-075

Re: Use of funds collected as compensation by a prosecuting attorney under section 71.041, Family Code, which provides for costs to be assessed against a person who becomes the subject of a protective order as a result of having committed family violence (ID# 37366)

Dear Mr. Smith:

You ask whether the fee collected pursuant to Family Code section 71.041(d) is analogous to, and may be administered and disbursed in the same way as, the "hot check" fund created by article 102.007(f) of the Code of Criminal Procedure. It is not, and may not be.

Section 71.041(d) of the Family Code provides that a court may award attorney's fees to, *inter alia*, a prosecuting attorney "representing an applicant [for a protective order] against the party who is found to have committed family violence." In describing the disposition of such fees, the statute provides that "[t]he amount of fees collected under this subsection as compensation for the fees of a prosecuting attorney shall be paid to the credit of the *county fund* from which the salaries of employees of the prosecuting attorney are paid or supplemented" Fam. Code § 71.041(d) (emphasis added).

By contrast, the language creating the "hot check" fund explicitly places that fund within the sole discretion of the county attorney:

Fees collected under Subsection (c) of this article shall be deposited in the county treasury *in a special fund to be administered by the county attorney* Expenditures from this fund *shall be at the sole discretion of the attorney* and may be used only to defray the salaries and expenses of the prosecutor's office, but in no event may the county attorney . . . supplement his or her own salary from this fund.

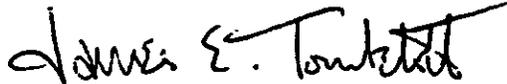
Code Crim. Proc. art. 102.007(f) (emphasis added).

As we have noted in a series of opinions, the administration of the "hot check" fund is "wholly outside of the county budgeting process." Attorney General Opinion DM-357 (1995) at 6. However, what takes the fund out of the budgeting process is the statute's explicit grant of discretionary authority to the county attorney. Absent such language or its equivalent, *see* Attorney General Opinion DM-398 (1996) at 1 (language describing interest on escrow account as "sole property" of tax assessor-collector, instructing collector to "retain" such interest, permitting "no other entity" to use interest, and forbidding use of interest to reduce collector's annual appropriation was sufficient to allow collector to dispose of interest without approval of commissioners' court), expenditure of county funds is under the control of the commissioners' court. Attorney General Opinion DM-357 (1995) at 3. No such explicit authority over the fees in question here is granted the prosecutor by the Family Code. While the language of the Family Code section is sufficient to earmark the funds for the use of the prosecutor's office, it is not sufficient to take the funds out of the general county budgeting process.

S U M M A R Y

Attorney's fees awarded to prosecuting attorneys under section 71.041(d) are not analogous to the "hot check fund" created by article 102.007(f) of the Code of Criminal Procedure, and must be administered and disbursed in accordance with the ordinary county budgeting process.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee