

RQ-487

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Opinion 01/28/93

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January 26, 1993

MBJ

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548, Capitol Station
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~~FILE # 74218696~~

I.D.# 18696

Attention of Opinions Committee

Re: Expenditure and control of forfeiture funds acquired under Chapter 59 of the Texas Code of Criminal Procedure where a local agreement exists

Sir:

Several questions have come up over the last several years regarding the use of funds acquired through the forfeiture process prescribed in Chapter 59 of the Texas Code of Criminal Procedure. While I believe that some of these questions have been answered by your office, the opinions have not been sufficiently on point to avoid difficulties. I therefore request an opinion on four of these questions and have provided a brief of the law prepared by Assistant Kerr County Attorney, Stan Reid.

It is our understanding that there are two pending opinions (RQ-378 and RQ-469) concerning Chapter 59 which may involve the questions presented today. A comprehensive opinion on this subject is sorely needed.

Specifically, my questions are:

1. Can the expenditure of funds acquired through forfeiture under Chapter 59 of the Code of Criminal Procedure, be made at the sheriff's sole discretion, that is, outside of the budget and/or without prior approval by the commissioners' court?
2. Do the provisions of the County Purchasing Act (Local Government Code, Sections 262.021, et seq.) apply to purchases made with funds generated by forfeitures under Chapter 59 of the Code of Criminal Procedure?

3. Are funds which are acquired through Chapter 59 of the Code of Criminal Procedure required to be deposited in the county treasury?
4. Are funds which are acquired through Chapter 59 of the Code of Criminal Procedure and deposited in the county treasury required to be deposited in the county depository?

Article 59 Forfeiture Funds

Chapter 59 of the Code of Criminal Procedure contains the provisions for the forfeiture of contraband as well as the rules regarding the expenditure of funds acquired through forfeiture. TEX. CODE CRIM. PROC. ANN. art. 59.01, et seq. (Vernon Supp. 1993). The forfeiture provisions of Chapter 59, although dealing with the same subject matter, are substantially different from the forfeiture provisions of the "Controlled Substances Act," Chapter 481, Texas Health and Safety Code, (formerly contained in Article 4476-15, Texas Revised Civil Statutes). Op. Tex. Att'y Gen. No. JM-1253, note 1 (1990).

Under Chapter 59, property that is contraband is subject to seizure and forfeiture by the State. TEX. CODE CRIM. PROC. ANN. art. 59.02 (Vernon Supp. 1993). "Contraband," as used in Chapter 59, generally refers to property used in the commission of an offense and includes offenses under the Controlled Substances Act. TEX. CODE CRIM. PROC. ANN. art. 59.01(2) (Vernon Supp. 1993).

Administration of Forfeiture Funds

General Law

As a general rule, fees, commissions, funds, and other money belonging to the county shall be deposited with the county treasurer by the officer who collects the money. TEX. LOC. GOV. CODE § 113.021(a) (Vernon 1988). The officer must deposit the money in accordance with any applicable procedures prescribed by or under Section 112.001 or 112.002. *Id.* at (b) (authority for the county auditor to adopt and enforce regulations). Each district or criminal district attorney is also required to deposit in the county treasury of the county in which the attorney has jurisdiction, any funds received. TEX. LOC. GOV. CODE § 140.003(f) (Vernon 1988).

The county treasurer shall deposit the money in the county depository in a special fund to the credit of the officer who collected the money. *Id.* at (b). The interest accruing on the money in the special fund is for the benefit of the county in accordance with other law. *Id.* at (c).

The county treasurer, as chief custodian of county funds, is required to keep in a designated depository, and to account for, all money belonging to the county. TEX. LOC. GOV. CODE § 113.001 (Vernon 1988). The county treasurer is also required to receive all money belonging to the county from whatever source it may be derived. TEX. LOC. GOV. CODE § 113.003 (Vernon 1988). The county treasurer shall then divide the funds received into three classes:

(2) . . . all fines and forfeitures; and

(3) other money received by the treasurer's office that is not otherwise appropriated by this section or by the commissioners court.

TEX. LOC. GOV. CODE § 113.004(b) (Vernon 1988).

Chapter 59

Chapter 59 provides that all forfeited property shall be administered by the attorney representing the State, acting as the agent of the State, in accordance with accepted accounting practices and with the provisions of any local agreement entered into between the attorney representing the State and law enforcement agencies. TEX. CODE CRIM. PROC. ANN. art. 59.06(a) (Vernon Supp. 1993). Consistent with general law, each district or criminal district attorney is required to deposit in the county treasury of the county in which the attorney has jurisdiction, any funds received. TEX. LOC. GOV. CODE § 140.003(f) (Vernon 1988). Funds acquired through forfeiture pursuant to Chapter 59 of the Code of Criminal Procedure are likewise required to be deposited in the county treasury if a local agreement exists. Op. Tex. Att'y Gen. No. DM-162 (1992).

If no local agreement exists, the property must be sold by the sheriff and the proceeds deposited in the State General Fund. *Id.* If a local agreement exists, all money, securities, negotiable instruments, stocks or bonds, or things of value, or proceeds from the sale of those items, shall be deposited according to the terms of the agreement into one or more of the following funds:

(1) a special fund in the county treasury for the benefit of the office of the attorney representing the state, to be used by the attorney solely for the official purposes of his office;

. . . .

(3) a special fund in the county treasury if distributed to a county law-enforcement agency, to be used solely for law enforcement purposes

TEX. CODE CRIM. PROC. art. 59.06(c) (Vernon Supp. 1993).

This statutory scheme is consistent with general law and with the special provisions regarding monies received by the district or criminal district attorney. TEX. LOC. GOV. CODE, Chapters 112 and 113 (Vernon 1988); TEX. LOC. GOV. CODE § 140.003(f) (Vernon 1988). Therefore, where a local agreement exists, funds acquired through a Chapter 59 forfeiture must be deposited in the county treasury. See generally, *State v. \$10,000*, 800 S.W.2d 872, 877-881 (Tex. App.--San Antonio, no writ) (forfeiture funds through the Controlled Substances Act are county funds).

Expenditure of Forfeiture Money

General Law -- Budget Required

The Texas Constitution requires that "[n]o money shall be drawn from the Treasury but in pursuance of specific appropriations made by law." TEX. CONST. art. VIII, § 6 (Vernon 1955). The prohibition against spending government money except under an appropriation is a traditional constitutional limitation. 2 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS (1977). Almost every state has a provision that directly or by necessary implication prohibits expenditure of money except by appropriation. *Id.* Under the Texas Constitution, the several counties of this State are legal subdivisions of the State and are therefore bound by the same general limitations. TEX. CONST. art. XI, § 1 (Vernon 1955).

In accordance with the prohibitions of Article VIII, Section 6 of the Texas Constitution, the legislature has provided that no expenditures of county funds may be made except in "strict compliance with the budget," unless the commissioners' court determines that an emergency exists. TEX. LOC. GOV. CODE §§ 111.010, 111.041, and 111.070 (Vernon 1988). 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.8 (Texas Practice 1989). All proposed expenditures of the county, therefore, regardless of the source of the funds, must be budgeted. 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.4 (Texas Practice 1989). District and criminal district attorneys are also required to prepare a budget for the current fiscal year and file it with each commissioners' court within 30 days after the date the fiscal year of the attorney's office begins. TEX. LOC. GOV. CODE § 140.003 (Vernon 1988).

The requirement for an appropriation prior to expenditure of public funds by counties is also set forth by various statutes. The Local Government Code provides that once money is deposited in the county treasury, a person may not spend or withdraw money from the county treasury except by a check or warrant drawn on the county treasury, whether or not the money is in a county depository as required by law. TEX. LOC. GOV. CODE § 113.041(b) (Vernon 1988). The county treasurer shall disburse the money belonging to the county and shall pay and apply the money as required by law and as the

commissioners' court may require or direct, not inconsistent with law. *Id.* at (a). The county treasurer may not pay money out of the county treasury without a certificate or warrant from an officer who is authorized by law to issue the certificate or warrant. *Id.* at (c).

Additionally, the county auditor is required to oversee the warrant process to ensure that the expenses of any department do not exceed the budget appropriations for that department. TEX. LOC. GOV. CODE § 111.092. He should not approve any claim for which there is no budget appropriation. 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.10 (Texas Practice 1989).

It is settled law that a county can act only through its commissioners' court. *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 455 (1948). The Texas Constitution and Legislature have placed budget authority and responsibility for expenditures of funds with the commissioners' court of each county. TEX. CONST. art. V, § 18(b) (Vernon Supp. 1993); TEX. LOC. GOV. CODE, Chapter 111 (Vernon 1988). As the governing and administrative body of a county, it has the power to determine the county budget and make appropriation of funds. *Rheuark v. Shaw*, 628 F.2d 297, 301, note 5 (5th Cir. 1980), cert. den., 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981); 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.01 (Texas Practice 1989). Likewise, only the commissioners' court may amend the budget and shift funds; the other officials have no authority to amend the budget or transfer funds. 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.11 (Texas Practice 1989).

Finally, the commissioners' court alone may contract for the county. *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084 (1941) (sheriff without authority to contract for county); 35 DAVID BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 15.13 (Texas Practice 1989). No other county officers have authority to execute county contracts. *Id.*

Chapter 59

Consistent with general law, Chapter 59 of the Code of Criminal Procedure specifically requires that "proceeds, whether distributed to the district attorney or the sheriff, or both, may be spent by them after a budget for the expenditure of the proceeds has been submitted to the commissioners' court." TEX. CODE CRIM. PROC. ANN. art. 59.06(d) (Vernon Supp. 1993). The budget must be detailed and clearly list and define the categories of expenditures, but may not list details that would endanger the security of an investigation or prosecution. *Id.*

It is clear, therefore, that funds derived from forfeiture under the provisions of Chapter 59 of the Code of Criminal Procedure and deposited in the county treasury under a local agreement can only be expended in accordance with the budget of the county as passed

or amended by the commissioners' court. The discretionary power of the commissioners' court with regard to the expenditure of those funds, however, is limited. Op. Tex. Att'y Gen. No. DM-72 (1992); Op. Tex. Att'y Gen. No. JM-678 (1987).

While the commissioners' court has the duty to ensure that the funds are budgeted "solely for law-enforcement purposes," it does not have the authority to use the existence of an award to offset or decrease total salaries, expenses, and allowances that the agency or the attorney receives from the commissioners' court at or after the time the proceeds are awarded. TEX. CODE CRIM. PROC. ANN. art. 59.06(d) (Vernon Supp. 1993). Likewise, the agency receiving the money does not have unlimited discretionary authority. While the agency's budgeted forfeiture expenditures may not be denied by the commissioners' court (so long as they are bona fide, law-enforcement related expenditures), forfeiture funds may not be used to increase a salary, expense, or allowance for employees who are budgeted by the commissioners' court unless the commissioners' court first approves the expenditure. TEX. CODE CRIM. PROC. ANN. art. 59.06(d) (Vernon Supp. 1993).

Article 59.06(d), therefore, requires that proceeds awarded under that chapter may only be spent after a budget for the expenditure has been submitted to and approved by the commissioners' court. Op. Tex. Att'y Gen. No. JM-1253 (1990); see generally, *State v. \$10,000*, 800 S.W.2d 872, 877-881 (Tex. App.--San Antonio, no writ) (forfeiture funds through the Controlled Substances Act are county funds). Expenditure of such funds outside the budget would violate the budget law and would form an unauthorized contract.

Concerns regarding budget items which, if public, might endanger on-going or planned criminal investigations or covert law enforcement operations have been addressed by Chapter 59 and the Open Records Act. Chapter 59 states that the required budget submission must be detailed and clearly list and define the categories of expenditures. TEX. CODE CRIM. PROC. ANN. art. 59.06(d) (Vernon Supp. 1993). However, it specifically allows the exclusion of details that would endanger the security of an investigation or prosecution. *Id.* The Open Records Act exempts from public disclosure information relating to litigation of a criminal nature and records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime. TEX. REV. CIV. STAT. art. 6252-17a, §3(a)(3) and (8) (Vernon Supp. 1993)

Competitive Bidding Required

General Law

The general bid statute that pertains to counties is located in Chapter 262, Subchapter C, of the Texas Local Government Code. TEX. LOC. GOV. CODE § 262.021, *et seq.* (Vernon 1988). Under that chapter,

before a county may purchase one or more items under a contract that will require an expenditure exceeding \$10,000, the commissioners' court of the county must comply with the competitive bidding or competitive proposal procedures prescribed by Subchapter C. TEX. LOC. GOV. CODE § 262.023(a) (Vernon 1988).

The competitive bidding and competitive proposal requirements apply only to contracts for which payment will be made from current funds or bond funds or through time warrants. TEX. LOC. GOV. CODE § 262.023(b) (Vernon 1988). "Current funds" means funds in the county treasury that are available in the current tax year, revenue that may be anticipated with reasonable certainty to come into the county treasury during the current tax year, and emergency funds. TEX. LOC. GOV. CODE § 262.022(3) (Vernon 1988) (emphasis added). Even district and criminal district attorneys are required to purchase items in accordance with the same procedures and subject to the same requirements applicable to a county under Subchapter C, Chapter 262, (The County Purchasing Act). TEX. LOC. GOV. CODE § 140.003 (Vernon 1988). For the purposes of Section 140, a district or criminal district attorney is treated as if he were a county. *Id.*

By order of the commissioners' court, an exemption from the competitive bidding and proposal requirements may be granted where the item is necessary to preserve or protect the public health or safety of the residents of the county. TEX. LOC. GOV. CODE § 262.024(2) (Vernon Supp. 1993).

Chapter 59

Chapter 59 of the Code of Criminal Procedure does not address competitive bidding. There being no legislative provision to the contrary, forfeiture funds deposited in the county treasury for the benefit of county law-enforcement agencies are unquestionably "current funds" of the county. *See generally, State v. \$10,000, 800 S.W.2d 872, 877-881 (Tex. App.--San Antonio, no writ) (forfeiture funds through the Controlled Substances Act are county funds).* Expenditure of those funds are therefore subject to the requirements of the County Purchasing Act (Chapter 262 of the Texas Local Government Code).

In 1988, then Attorney General Jim Mattox addressed the question of whether the provisions of the County Purchasing Act applied to purchases made with funds generated by forfeitures under Section 5.08 of Article 4476-15, Texas Revised Civil Statutes (the Controlled Substances Act). Letter Op. Tex. Att'y Gen. No. LO-88-112 (1988). General Mattox concluded that where expenditures are allowed at the sole discretion of the official, the provisions of the County Purchasing Act need not be followed and that the funds derived from Sections 5.03 through 5.081 were "sole discretion" funds. *Id.* (emphasis added). The provision in question, however,

was Section 5.08 of Article 4476-15 (the Controlled Substances Act) which stated that the "special fund" established by Section 5.08(f) was to be administered by the seizing agencies or office to which they were forfeited. *Id.* It did not address Chapter 59, which had not yet been enacted.

In 1989, the Controlled Substances Act was codified as part of the Texas Health and Safety Code (effective September 1, 1989). *Op. Tex. Att'y Gen. No. JM-1253, note 1 (1990)*. Articles 59.02, 59.05, 59.06 and 59.08 were enacted after codification and in the same bill that repealed those codified provisions of Article 4476-15. *Id.* (emphasis added). These sections were "new statutes" which were "substantially different" from the repealed Controlled Substances Act. *Id.* (emphasis added). Since Chapter 59 contains requirements different from and in addition to those contained in the old Article 4476-15, Letter Opinion No. LO-88-112 cannot be used to create discretionary spending authority with regard to Chapter 59. This is especially true where Chapter 59 contains a budget submission requirement not found in Article 4476-15. *TEX. CODE CRIM. PROC. ANN. art. 59.06(d) (Vernon Supp. 1993)*.

In either event, in 1990, the San Antonio Court of Appeals held that property forfeited under the Controlled Substances Act must be forfeited to the county and that expenditures made therefrom must adhere to the budget process, thus overruling LO-88-112. *State v. \$50,600.00, 800 S.W.2d 872, 877-881 (Tex. App.--San Antonio 1990, no writ)* (emphasis added). The same logic expressed above by the San Antonio court can be applied to Chapter 59. Additionally, Chapter 59, by its own terms, contains clear provisions that expenditures must be made through the budget process.

The forfeiture funds acquired under Chapter 59, not being "sole discretion" funds and subject to the budget process, however limited, are "current funds" and expenditures of those funds are subject to the provisions of the County Purchasing Act.

County Depository

Chapter 116 of the Local Government Code applies to money collected or held by a district, county, or precinct officer in a county and by the officers of a defined district or subdivision in the county, and requires that such money be deposited under that chapter. *TEX. Loc. Gov. CODE § 116.002 (Vernon 1988)*; Letter Op. *Tex. Att'y Gen. No. LO-89-30 (1989)*; Letter Op. *Tex. Att'y Gen. No. LO-89-30 (1989)*. Section 140.003 of the Local Government Code provides, in part, that the county shall hold, deposit, disburse, invest, and otherwise care for funds [acquired by the district or criminal district attorney] on behalf of the [district or criminal district attorney] as [that attorney] directs. *Id.*; see also, *TEX. Loc. Gov. CODE § 113.004(b) (Vernon 1988)*.

Chapter 59

Consistent with this general law, the phrase "special fund," as used in Chapter 59, contemplates that the funds will be deposited in the county depository in accordance with the statutory provisions generally governing the handling of county funds. TEX. Loc. Gov. CODE Chapter 116 (Vernon 1988); Op. Tex. Att'y Gen. No. DM-162 (1992); see generally, Op. Tex. Att'y Gen. No. H-1185 (1978) (Article 4476-15 forfeitures); see also, TEX. Loc. Gov. CODE §§ 113.021(a), 112.001, and 112.002 (authority of county auditor). There is no statutory or constitutional exception to this requirement.

Conclusion

Since the Legislature is constitutionally prohibited from spending public funds without an appropriation, it cannot create that power in another. Chapter 59 cannot, constitutionally, allow an expenditure of public funds without appropriation. The whole structure of Texas government is based on accountability and open government, especially with regard to expenditure of public funds. The framers of our present constitution were well aware of numerous abuses of governmental spending powers. Recent examples of this abuse are present today at both the state and national level. The County Purchasing Act has a similar purpose.

It is therefore our conclusion that, if a local agreement exists, the funds acquired through forfeiture under Chapter 59 of the Code of Criminal Procedure must be deposited in the county depository and may only be expended through budgetary appropriations. These funds, if not purely "county funds," are in the nature of county funds and clearly meet the definition of "current funds" under Chapter 262 of the Local Government Code (the County Purchasing Act). As such, they are subject to the requirements of that chapter, and purchases with Chapter 59 funds must comply with the competitive bidding or proposal requirements of Chapter 262 if the purchase is over \$10,000.00.

Thank you for your time and effort in this regard.

Very truly yours,



David Motley
County Attorney

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cc: Tom Bullington, Texas Sheriffs' Association
✓ William Walker, Assistant Attorney General (RQ-469)
Steve Aragon, Assistant Attorney General (RQ-378)