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May 22, 2019

The Honorable Joe Moody
Speaker Pro Tempore
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

The Honorable Nicole Collier
Chair, Committee on Criminal Jurisprudence
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0249

Re: Whether a local law enforcement agency's "no-chase" policy limits a peace officer's duty to prevent and suppress crime and exposes the peace officer to civil liability for later harm caused by the offender the peace officer failed to chase (RQ-0255-KP)

Dear Representative Moody and Representative Collier:

You ask whether a peace officer observing a law enforcement agency's "no-chase policy" may face civil liability for harm later caused by an offender the officer did not chase and whether such policies are unlawful.[1] You do not provide us with a specific policy but tell us generally that no-chase policies require officers to refrain from pursuing suspects in various situations depending on the specific policy at issue. Request Letter at 1; *see, e.g.*, *Williams v. City of Baytown*, 467 S.W.3d 566, 571 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (discussing policy, in part, barring officers from engaging "in pursuit whenever it reasonably appears that apprehension of the escaping offender by other means is likely"); *City of Pharr v. Ruiz*, 944 S.W.2d 709, 713 (Tex. App.—Corpus Christi 1997, no writ) (discussing policy, in part, barring officers from engaging in "high-speed pursuit whenever it reasonably appears that the potential harm to persons or property arising from such pursuit outweigh the potential harm threatened by the escaping offender").

We first address your question regarding the legality of no-chase policies. Request Letter at 1, 3. Texas Code of Criminal Procedure article 2.13 imposes duties on peace officers "to preserve the peace" within their jurisdiction and "prevent or suppress crime" and "arrest offenders" without warrant when authorized. TEX. CODE CRIM. PROC. art. 2.13(a), (b). You tell us that

[1]*See* Letter from Honorable Joe Moody, Chair, Comm. on Crim. Jurisprudence, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–3 (Nov. 26, 2018), https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter"). Although the request was originally submitted by Representative Moody as Chair of the House Committee on Criminal Jurisprudence, he was thereafter named Speaker Pro Tempore. Representative Collier, as the new Chair of the House Committee on Criminal Jurisprudence, thereafter confirmed her desire for this office to proceed with this request.

"[s]ome peace officers have expressed concern that [no-chase] policies conflict with [these] statutory duties." Request Letter at 1.

Generally, while article 2.13 imposes duties to maintain the peace and arrest offenders without warrant, it does not direct how officers are to perform these tasks or mandate what policies governmental entities must implement to effect these duties. *See* TEX. CODE CRIM. PROC. art. 2.13; *see also* TEX. CIV. PRAC. & REM. CODE § 101.055 (providing immunity for injuries caused by governmental entity's policy decisions in determining method of providing police protection). Rather, officers generally have discretion in deciding how and when to seize a suspect for whom probable cause exists to arrest. *See, e.g.*, *City of Columbus v. Barnstone*, 921 S.W.2d 268, 272 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("An officer's decision concerning when and how to arrest a suspect is considered a discretionary act."); *Harris Cty. v. DeWitt*, 880 S.W.2d 99, 102 (Tex. App.—Houston [14th Dist.] 1994), *aff'd*, 904 S.W.2d 650 (Tex. 1995) (A police officer exercises "his judgment in whether to pursue a suspect for whom the officer has probable cause to arrest."); *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 376 (Tex. App.—Dallas 1994, no writ) (discussing officer's exercise of discretion in the method and manner of performing an arrest). The general intent of no-chase policies does not appear to be to abandon the duties imposed by article 2.13 but rather to encourage alternative methods of pursuit that pose less danger to both peace officers and the public than high-speed vehicular chases. *See, e.g.*, *Williams*, 467 S.W.3d at 571. Thus, a no-chase policy adopted for such purposes would not contradict article 2.13. *See, e.g.*, *Brown v. Ener*, 987 S.W.2d 66, 68–69 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (concluding local governmental entity could through its policies remove an officer's discretion to enter vehicular pursuit).[2]

You also ask whether a peace officer following a no-chase policy could incur personal liability for harm later caused by a fleeing suspect. Request Letter at 1–3. We think it unlikely that an officer would incur personal liability under the circumstances you describe for multiple reasons. You specifically ask about official immunity, and we address it first. *Id.* at 2. "Official immunity is an affirmative defense that protects government employees from personal liability." *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). Under the doctrine, police officers performing discretionary—as opposed to ministerial—functions in good faith and acting within the scope of employment are immune from personal liability. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Ministerial acts are those that "require obedience to orders or the performance of a duty to which the actor has no choice." *Id.* at 654. Discretionary acts, however, involve "personal deliberation, decision and judgment." *Id.* Generally, an officer's decision "to pursue a particular suspect will fundamentally involve the officer's discretion." *Id.* at 655. Whether a governmental entity's no-chase policy eliminates any discretion an officer has in deciding whether to pursue a suspect will turn on the terms of the policy. *Compare Ruiz*, 944

[2]As the lawfulness of any governmental entity's no-chase policy will depend on its terms, we can only provide general advice. A policy that requires a police officer—for illegal purposes—to refrain from pursuing an offender would be unlawful. *See, e.g.*, *Sherrell v. City of Longview*, 683 F. Supp. 1108, 1112–13 (E.D. Tex. 1987) (governmental entity cannot provide police protection in a manner which violates the Constitution, such as discriminating against certain persons on an irrational basis).

S.W.2d at 713–15 (concluding that officer maintained discretion to initiate high-speed chase under police department's policy requiring, in part, that officer consider numerous factors before engaging in pursuit), *with Brown*, 987 S.W.2d at 68–69 (concluding that mandatory policy prohibiting emergency pursuit while carrying a civilian passenger eliminated officer's discretion to engage in pursuit). In instances when an officer exercises discretion under a no-chase policy, the officer will likely qualify for official immunity.

Even in circumstances where official immunity does not apply, however, an officer will have other defenses. To have a claim for negligence, a plaintiff must show duty. Courts addressing the circumstances you describe have held that an officer has no duty to arrest a suspect to prevent third-party injury. *See, e.g.*, *Crider v. United States*, 885 F.2d 294, 296, 300 (5th Cir. 1989) (concluding that park rangers who did not take intoxicated driver into custody owed no legal duty to motorcyclist who was later injured in crash with driver); *Munoz ex rel. Martinez v. Cameron Cty.*, 725 S.W.2d 319, 321–22 (Tex. App.—Corpus Christi 1986, no writ) (concluding that sheriff who failed to timely execute an arrest warrant owed no legal duty to third-party victim later killed by subject of warrant).[3] Thus, a victim injured by an offender an officer decided not to chase and arrest would likely have no recourse in tort against the officer for failing to prevent the injury.

Finally, subsection 101.106(f) of the Texas Tort Claims Act ("Act") entitles a governmental employee to dismissal of the lawsuit against them if (1) the suit is based on conduct within the scope of their employment; and (2) the suit could have been brought under the Act against the governmental unit:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE § 101.106(f); *see Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008) (stating that Legislature's purpose in enacting subsection 101.106(f) "was to force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable").[4]

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[3]An exception to this rule is if a special relationship exists between the victim and the officer or agency. *Munoz ex rel. Martinez*, 725 S.W.2d at 321–22.

[4]Section 101.106 is "immaterial to whether suit may be maintained against the proper defendant—the government." *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 352 (Tex. 2013). A plaintiff who elects to sue the governmental employer cannot later decide to sue the employee. TEX. CIV. PRAC. & REM. CODE § 101.106(a)

Under the first prong, the Act defines "scope of employment" as the "performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." TEX. CIV. PRAC. & REM. CODE § 101.001(5); *see Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017) (determining whether an employee was acting within the scope of employment under the Act requires an "objective assessment of whether the employee was doing [his or] her job when [he or] she committed an alleged tort"). Whether an officer was acting within the scope of employment will depend on the circumstances. However, the definition plainly provides that acting within the scope of employment includes performing a task lawfully assigned by a governmental entity, and in the hypothetical you pose, the officer performs his or her job by refraining from pursuing a suspect pursuant to a policy implemented by his or her employer. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(5).[5] With respect to the second prong, whether the suit could have been brought against the officer's governmental employer under the Act, a "tort claim against the government is brought 'under' the Act for purposes of section 101.106, *even if the Act does not waive immunity*" from suit. *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011) (emphasis added). Therefore, for purposes of section 101.106, a plaintiff's suit alleging tort damages for injuries resulting from a no-chase policy is a suit that could have been brought under the Act against the governmental entity that adopted the policy. *See id.* at 376–85. Thus, an officer sued for damages resulting from following his or her governmental employer's no-chase policy would likely be dismissed. *See id.* at 381 ("Properly construed, section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee: he acted within the general scope of his employment and suit could have been brought under the Act.").

(providing that the decision to sue the governmental unit "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter").

[5]Similarly, under a federal suit brought under 42 U.S.C. § 1983, local governments are responsible for the acts of an employee executing the governmental entity's official policy or custom. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

SUMMARY

While Texas Code of Criminal Procedure article 2.13 imposes a duty on peace officers to prevent and suppress crime, policies that encourage officers to seek alternative methods of pursuit in an attempt to ensure the safety of the public and law enforcement officers generally do not conflict with this duty.

An officer observing a governmental employer's no-chase policy is unlikely to incur personal liability for harm caused by a fleeing offender. In instances when an officer exercises discretion under a no-chase policy, the officer will likely qualify for official immunity. In circumstances where official immunity does not apply, an officer will have other defenses, as courts have generally held that an officer has no legal duty to arrest a suspect to prevent third-party injury. Further, subsection 101.106(f) of the Texas Tort Claims Act entitles a governmental employee to dismissal if a suit is based on conduct within the scope of their employment and could have been brought under the Act against the governmental unit.

Very truly yours,

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