



DALLAS COUNTY  
 SUSAN HAWK  
 DISTRICT ATTORNEY  
 CIVIL DIVISION

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July 10, 2015

Via CMRRR and email: [Opinion\\_committee@texasattorneygeneral.gov](mailto:Opinion_committee@texasattorneygeneral.gov)

Honorable Ken Paxton  
 Office of the Attorney General  
 Attention: Opinion Committee  
 P.O. Box 12548  
 Austin, Texas 78711-2548

FILE # ML-47761-15  
 I.D. # 47761

**RQ-0035-KP**

Re: *Request for opinion regarding a District Attorney's authority to use the hot check fund to pay for expenses related to the improper towing, impoundment, and sale of a federally seized vehicle.*

Dear Attorney General Paxton:

I respectfully request your opinion on behalf of the Dallas County District Attorney's Office.

**QUESTION PRESENTED:**

The previous administration of the Dallas County District Attorney's ("District Attorney") office incurred approximately \$1,800.00 in expenses to reclaim a federally-seized vehicle that had been improperly towed, impounded, and sold. The District Attorney's office paid the \$1,800.00 out of its federal forfeiture account. The company that had the vehicle towed reimbursed \$900.00 of the \$1,800.00 paid by the District Attorney's office to reclaim the vehicle. The remaining \$900.00, paid out of the federal forfeiture account, must be reimbursed to the federal forfeiture account, which is under a "do-not-spend" order. Can the District Attorney's Office use its hot check fund to reimburse the federal forfeiture account \$900.00 in expenses it incurred to reclaim a federally-seized vehicle after it had been improperly towed, impounded, and sold?

**DISCUSSION:**

The Texas Code of Criminal Procedure, Section 102.007, allows for the collection of a fee for collecting and processing certain checks or sight orders, to be held in a special fund (hereinafter the "hot check fund".) Subsection 102.007(f) gives the elected prosecutor sole discretion over expenditures from the hot check fund. TEX. CODE CRIM. PROC. § 102.007. The only limitation on expenditures from the hot check fund is that "...in no event may the district attorney...supplement his or her own salary from this fund." *Id.* at § 102.007(f). An expenditure from the hot check fund is generally allowable if: 1) the expenditure is related to the official business of the office; and 2) there are no constitutional or statutory provisions prohibiting the expenditure. Tex. Att'y Gen. Op. No. JM-0313 (1985); Tex. Att'y Gen. Op. No. GA-0475 (2006).

1. Is the expenditure related to the official business of the office?

The main duty of the District Attorney is to represent the state in criminal cases. Article 2.01 of the Texas Code of Criminal Procedure, “duties of district attorneys,” provides:

Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely.

The District Attorney also has authority to seek civil penalties and injunctions. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 12.003 (enjoin filing of fraudulent liens); TEX. TRANS. CODE § 393.001 (outdoor signs on public rights-of-way); TEX. OCC. CODE § 2002.058 (enjoin unlawful raffles). Additionally, the District Attorney’s Office does legal research and gives legal advice. *See, e.g.*, TEX. GOV. CODE § 41.007 (gives legal opinions in writing to county or precinct officers regarding their official duties, upon request).

In 2011, the District Attorney’s Office acquired a 2001 Porsche Boxster (the “Vehicle”) through the Federal Equitable Sharing Program. Federal law authorizes the sharing of federally-forfeited property with participating state and local law enforcement agencies, including prosecutors’ offices. 21 U.S.C. § 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a-(c)(1)(B)(ii). Equitably shared property is to be used for law enforcement purposes. *See* Exhibit A; *see also* United States Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, Criminal Division, Asset Forfeiture and Money Laundering Section, Washington, DC, (April 2009), p. 24, [accessed 06/28/15] from: <http://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf>. The Vehicle was used by the District Attorney’s office for undercover operations and surveillance purposes.<sup>1</sup> In 2013, the Vehicle was improperly towed, impounded, and sold. Equitably shared tangible property cannot be sold without the approval of the U.S. Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section. *Id.* at p. 24. The District Attorney’s Office paid \$1,800.00 out of its federal forfeiture account, to United Tows, to reclaim the Vehicle.<sup>2</sup> Specifically, United Tows incurred the following expenses for the Vehicle: auction fee (\$605.00), tow fee (\$121.00), impoundment fee (\$20.00), storage fee (\$ 1040.00), notification letters (\$50.00), tax (\$87.45), and attorney fees (\$750.00). *See* Exhibit B. United Tows expenses totaled \$2,673.45.00; however, the District Attorney’s office only agreed to pay the storage fee, impoundment fee, and attorney fee, which totaled approximately \$1,800.00. Ace Parking, which wrongfully had the Vehicle towed, reimbursed the District Attorney’s Office \$900.00 of the expenses.

The \$900.00 paid out of the federal forfeiture account to reclaim the Vehicle must be reimbursed to the federal forfeiture account which is under a “do-not-spend” order. Since the \$900.00 was paid to United Tows for expenses to reclaim the Vehicle, which was used for undercover operations and was not authorized to be sold by the U.S. Department of Justice, the use of \$900.00 out of the hot check fund to reimburse the forfeiture account for such expenses is related to the official business of the office.

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<sup>2</sup> The District Attorney’s Office also had to pay an additional \$1,789.45, to Park Place Porsche, for vehicle maintenance/service expenses.

2. Are there any other constitutional or statutory provisions prohibiting the expenditure?

The Vehicle is subject to, *inter alia*, the Equitable Sharing Agreement (“Agreement”), the *Guide to Equitable Sharing*, the obligations set forth in Title 2 Code of Federal Regulations (CFR) § 200, *et seq.*, and related laws.

The *Guide to Equitable Sharing*, Section VIII(D), governs the transfer of tangible property to a local government entity. Section VIII(D), however, does not address what funds are to be used for the maintenance or upkeep of the property. The following Section, Section VIII(E), “Reimbursement of federal costs,” provides:

State and local law enforcement agencies that receive real property or tangible personal property must pay the Department of Justice Assets Forfeiture Fund for any liens, costs related to storage or maintenance, costs of shares to other agencies, and the federal share. If the agency is unable to pay these expenses with appropriated or equitably shared funds, these costs can be charged against the agency’s equitable share of other assets in the case. If the requesting agency is unable to pay the federal share, costs, and the shares of other agencies, the property will be sold and the proceeds equitably distributed to participating agencies.

The Internal Revenue Manual, Section 9.7.9 “Equitable Sharing and Reverse Asset Sharing,” provides some guidance as to the meaning of this section. *See* I.R.M. § 9.7.9. Specifically, Section 9.7.9.6.2, “Reimbursement of Federal Costs,” provides:

Where real or tangible personal property is transferred to a state or local law enforcement agency, the value of that property shall be charged against that agency’s equitable share or other assets in the investigation....

*See* I.R.M. § 9.7.9.6.2 (emphasis added). Thus, it appears that this provision is concerned with the reimbursement of the federal costs at the time of transfer, not subsequent costs or expenses after transfer.

Additionally, 2 CFR § 200.1, *et seq.*, which establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities, appears to apply to the Vehicle. Section 200.101(b) provides:

The following table describes what portions of this Part apply to which types of Federal awards. The terms and conditions of Federal awards (including this Part) flow down to sub-awards to sub recipients unless a particular section of this Part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this Part regardless of whether the non-Federal entity is a recipient or sub recipient of a Federal award....

The term “recipient” means “...a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program.” The term “federal award” includes federal financial assistance, such as grants and cooperative agreements, in the form of non-cash contributions or donations of property. *See* 2 CFR §§ 200.38, 200.40. Subpart

D contains the standards governing property. *See* 2 CFR § 200.310, *et. seq.* Subpart D, Section 200.313, “equipment and other capital expenditures,” provides:

(a) Title. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a Federal award will vest upon acquisition in the non-Federal entity. Unless a statute specifically authorizes the Federal agency to vest title in the non-Federal entity without further obligation to the Federal government, and the Federal agency elects to do so, the title must be a conditional title. Title must vest in the non-Federal entity subject to the following conditions:

(1) Use the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the Federal awarding agency or pass-through entity.

...

(c) Use. (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority....

“Equipment” is defined as:

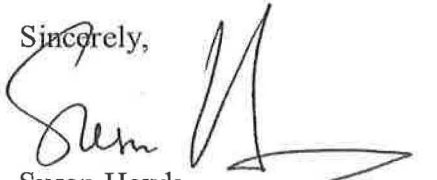
...tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or \$5,000....

*See* 2 CFR § 200.313. The Vehicle has a useful life of more than a year and an acquisition cost of over \$5,000.00; therefore, Section 200.313 applies. Section 200.313(a)(2) prohibits the encumbrance of the Vehicle. The statute, however, does not define encumbrance. Black’s Law Dictionary defines encumbrance as, “[a]ny right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee by conveyance,” which is not applicable in this matter. *See* Black’s Law Dictionary 527 (6th ed. 1990). The American Heritage College Dictionary defines encumbrance as “a lien or claim on property.” *See* American Heritage College Dictionary 453 (3rd ed. 1993). Paying for the towing and impoundment expenses, to procure the release of the Vehicle back to the District Attorney, does not result in a lien or claim to the Vehicle. As such, there does not appear to be any constitutional or statutory provision prohibiting the expenditure from the hot check fund.

CONCLUSION:

The District Attorney is allowed to use the hot check fund once the expenditure is: 1) not to supplement the elected District Attorney's salary; 2) related to the official business of the office; and 3) not prohibited by any constitutional or statutory provisions. The Dallas County District Attorney seeks to use \$900 from the hot check fund to reimburse the federal forfeiture account for expenses arising from the improper towing, impoundment, and sale of a federally seized vehicle, which was used for surveillance and undercover operations. The District Attorney respectfully requests that you review this matter and issue an opinion, at your earliest convenience, deciding whether or not the District Attorney may use the hot check fund, established under the Texas Code of Criminal Procedure, Section 102.007, to reimburse the forfeiture account for such expenses.

Sincerely,



Susan Hawk  
Dallas County District Attorney