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OPEN RECORDS DIVISION

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October 17, 2002

OCT 21 2002

Texas Attorney General
Attn: Susan Gusky
P.O. Box 12548
Austin, Texas 78711-2548

OPINION COMMITTEE

Re: Request for Attorney General Opinion

FILE # ML-42853-02
I.D. # 42853

Dear Opinions Chairperson:

As the elected Criminal District Attorney for San Jacinto County, Texas, I request an opinion from the Attorney General as follows:

My question: Does the County Auditor or a Special Auditor have the authority to audit accounts that are not County funds, such as (1) State Supplement Funds pursuant to Sec. 46.004, Tex. Gov. C., (2) Grant Funds pursuant to Article 104.004, Tex.C.Crim.Proc., and (3) Hot Check Funds collected pursuant to Article 102.007 Tex.C.Crim.Proc.?

The County Auditor for San Jacinto County has requested information on the State Supplement Funds given to the office of Criminal District Attorney. Additionally, pursuant to §115.032(a) of the Local Government Code a special audit was ordered of all county records for 2001. This is the provision where if at least 30% of the voters who voted in the last gubernatorial election file a petition for an audit with a district judge who has jurisdiction in the county, there shall be a special audit of all county records. The county's outside auditing firm of Sandersen, Knox and Belt have requested the following from the Criminal District Attorney's Office:

REQUESTED BY: [Faint text]
DATE: [Faint text]

1. Special Bank Account (State Funds)

- Copy of the check register for the period of January 1, 2001 to December 31, 2001.
- Original bank statements for the same period.

The County Auditor contends that this request received from Sandersen, Knox and Belt for the audit they are now conducting relates to a special audit.

State Supplement Funds and Grant Funds

Chapter 46 of the Texas Government Code, which is generally referred to as the Professional Prosecutors Act, specifically states in §46.004, Expenses, the following:

- a) Each state prosecutor is entitled to receive not less than \$22,500 a year from the state to be used by the prosecutor to help defray the salaries and expenses of the office. That money may not be used to supplement the prosecutor's salary.
- b) Each state prosecutor shall submit annually to the comptroller of public accounts a sworn account showing how this money was spent during the year.

Article 104.004, Extraordinary Costs of Prosecution, of the Texas Code of Criminal Procedure states:

- a) The criminal justice division of the governor's office may distribute money appropriated by the legislature for the purposes of this article to a county for the reimbursement of expenses incurred by the county during the fiscal year during which application is made or the fiscal year preceding the year during which application is made for the investigation or prosecution of an offense under Section 19.03, Penal Code, or an offense under the Penal Code alleged by the attorney representing the state to have been committed for a purpose or reason described by Article 42.014.
- b) For each fiscal year, the division shall distribute at least 50 percent of the money distributed under this article during that year to counties with a population of less than 50,000, except that if the total distributions applied for by those counties

is less than 50 percent of the money distributed during that year, the division is only required to distribute to those counties the amount of money for which applications have been made.

- c) The division may adopt a budget and rules for the distribution of money under this article.
- d) All money distributed to a county under this article and its expenditure by the county is subject to audit by the state auditor.

The San Jacinto County Auditor claims authority under §115.031 of the Local Government Code, which states, in part:

- a) If considered by the commissioners court of a county to be justified by an imperative public necessity, the court may employ a disinterested, competent, and expert public accountant to audit all or part of the books, records, or accounts of:
 - 1) The county;
 - 2) A district, county, or precinct officer, agent, or employee, including the county auditor;
 - 3) A governmental unit of the county; or
 - 4) A hospital, farm, or other county institution maintained at public expense.

Additionally, the San Jacinto County Auditor claims authority under §115.032 of the Local Government Code, which states in part:

- a) If a number of qualified voters residing in a county equal to at least 30 percent of the voters who voted in the county in the most recent general gubernatorial election file a petition for an audit with a district judge who has jurisdiction in the county, there shall be a special audit of all county records.

It is the position of the Criminal District Attorney's Office, which was pointed out to the Commissioners Court and the County Auditor in a memorandum, that they do not have the authority to audit these funds. Support for this position can be found in §115.0035, Examination of Funds Collected by

County Entity or the District Attorney, of the Local Government Code, which reads in part:

- b) At least once each county fiscal year, or more often if the county auditor desires, the auditor shall, without advance notice, fully examine the accounts of all precinct, county and district officials.
- c) This section does not apply (emphasis added) to funds received by the attorney for the state from the comptroller of public accounts pursuant to the General Appropriations Act, or to federal or state grant-in-aid funds received by precinct, county or district officials.

Attorney General Opinion No. JM-428 addressed this issue in 1986 when the Gray County Commissioners took the amount allocated to the District Attorney under Chapter 46 of the Government Code by the State of Texas by deducting that amount (\$27,650) from his office budget. The Attorney General stated: "When a district attorney receives state funds for his office expenses under section 46.004 of the Government Code, the counties composing the district must continue to provide funds for his office in an amount at least equal to the amount of funds provided for the office by the county on the effective date of the act. Funds received under this statute are not (emphasis added) subject to appropriation or control by the commissioners court.

Attorney General Opinion No. JM-70 addressed the attempts of the Cameron County Commissioners Court in the adoption of the county budget to reflect a suggested use for the state funds received by a prosecutor. The Attorney General held that the budgetary statutes permit the commissioners court to determine the use of county funds only. It may show the availability of state funds appropriated to local officials to be used in their discretion, but may not purport to determine their use, or include those amounts in the total budget.

Referring back to §46.004(b) of the Government Code the statute states: "each state prosecutor shall submit annually to the comptroller of public accounts a sworn account showing how this money was spent during the year".

It is the position of the Criminal District Attorney's Office that any prosecutor who receives funds under §46.004 of the Texas Government Code or Art. 104.004 of the Texas Code of Criminal Procedure is accountable only to the comptroller of public accounts as to how this money was spent during the preceding year due to the fact that these funds are not county funds.

Hot Check Fund

Article 102.007, Fee for Collecting and Processing Sight Order, of the Texas Code of Criminal Procedure is the statute that governs the "Hot Check Fund" of the District Attorney's Office and reads in part:

- f) 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, district attorney or criminal district 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, district attorney, or criminal district attorney supplement his or her own salary from this fund.

Attorney General Opinion No. DM-357 (1995) held that: "the county attorney's fee fund, accumulated pursuant to article 102.007 of the Code of Criminal Procedure, is wholly outside of the county budgeting process. The county judge, or the county auditor on behalf of the county judge, may not require the county attorney to submit a budget for use of the county attorney's fee fund for the upcoming fiscal year."

The extent of the County Auditor's scope is defined in §112.006 of the Texas Local Government Code and states as follows:

- a) The county auditor has general oversight of the books and records of a county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county.

b) The county auditor shall see to the strict enforcement of the law governing county finances.

It is the position of the Criminal District Attorney's Office that the State Supplements and State Grants as referred to above are neither intended for use by the County, nor are they belonging to the County. That is why state auditing procedures are involved with them. Even Hot Check Fund money is not intended for use by or belongs to the County. All of these funds are prosecutor discretion funds.

The county has no control or discretion with respect to the use of said funds and as such the County Auditor's authority should not extend to these funds, especially in light of the fact that the prosecutor's office must account to the State Comptroller for at least two of these funds on an annual basis.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott W. Rosekrans", with a horizontal line extending to the right from the end of the signature.

Scott W. Rosekrans
Criminal District Attorney
1 State Highway 150, Room 21
Coldspring, Texas 77331



**San Jacinto County
Auditor's Office**

Ray Stelly, CPA
County Auditor
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Assistant Auditor

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October 18, 2002

Susan Gusky
Chair, Opinions Committee
Attorney Generals Office
209 W. 14th St.
Austin, TX 78701

RECEIVED
OCT 22 2002
OPINION COMMITTEE

FILE # ML-42853-02
I.D. # 42855

Ms. Gusky:

I am hereby requesting an opinion from the Attorney General's office regarding several matters of state law. These requests deal with a dispute between myself and the San Jacinto County District Attorney, Scott Rosekrans. I have attempted to resolve these disputes with Mr. Rosekrans to no avail.

The specific questions I have are as follows:

1. Our outside audit firm, Sanderson, Knox and Belt, in the course of a special audit as defined in § 115.032 of the Local Government Code, requested information from Mr. Rosekrans regarding bank records of state funds allocated to the Criminal District Attorney's Office pursuant to § 46.004 of the Texas Government Code. Mr. Rosekrans, initially under the impression the request came from my office, refused this request. Upon being notified that the request came from our outside audit firm Mr. Rosekrans still refused to provide this information.

Is Mr. Rosekrans obliged to provide this information to me and/or our outside audit firm?

2. In their Management Letter associated with their audit of the financial records of San Jacinto County for fiscal year ending December 31, 2001, our outside auditor, Sanderson, Knox and Belt, issued two findings regarding the District Attorney's office. In one of these findings Sanderson, Knox and Belt wrote, regarding the purchase of a vehicle through the use of the Hot Check Fund, "It appears that the Criminal District Attorney entered into a note agreement to finance the purchase of a car for his office, which does not appear to be allowed under state law."

Mr. Rosekrans maintains that Article 102.007 of the Texas Code of Criminal Procedure allows him to expend these funds at his sole discretion. I maintain that Article XI, section 7 of the Texas Constitution prohibits him from incurring such a debt.

Could you please issue an opinion as to the legality of Mr. Rosekrans incurring debt, the repayment of such debt being from the Hot Check Fund?

3. In the aforementioned Management Letter, Sanderson Knox and Belt stated that the State Supplemental Funds received by Mr. Rosekrans under Chapter 46 of the Texas Government Code should be accounted for by the County as a fiduciary fund type, and maintained on the County's general ledger.

Mr. Rosekrans states that "the Firm's recommendation on page 6 is totally without basis or support in law. Any prosecutor who receives funds under the Professional Prosecutor's Act is accountable only to the comptroller of public accounts as to how this money was spent during the preceding year."

It is my contention that Section 140.003 of the Local Government Code supports the finding of Sanderson, Knox and Belt. Subsection (f) of that section states "Each specialized local entity (the definition of which includes the District Attorney's office) shall deposit in the county treasury of the county in which the entity has jurisdiction the funds the entity receives. The county shall hold, deposit, disburse, invest, and otherwise care for the funds on behalf of the specialized local entity as the entity directs."

Could you please issue an opinion as to whether the language in Section 140.003 of the Local Government Code regarding "funds the entity receives" should include funds received under Chapter 46 of the Texas Government Code? Does the County Auditor have a right to demand that such funds be accounted for by the County as a fiduciary fund type, and maintained on the County's general ledger?

Related correspondence is included. Please let me know if you require further information. Thank you in advance for your assistance.



Ray Stelly
San Jacinto County Auditor

CC: District Judge Robert Trapp
District Judge Elizabeth Coker
Judge Joe Adams
Scott W. Rosekrans, Criminal District Attorney

Commissioner James Hill
Commissioner Bruce Thomas
Commissioner Thomas Bonds
Commissioner Will Copeland