

TEXAS DEPARTMENT OF PUBLIC SAFETY

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September 8, 2008

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FILE # 11-45822-08

I.D. # 045822

The Honorable Greg Abbott
Attorney General
Opinion Committee
209 W. 14th Street
Austin, Texas 78701

RQ 0740-GA

Re: Request for Attorney General Opinion regarding the authority of the Public Safety Commission to authorize statewide driver license checkpoints and related questions

Dear General Abbott:

The Public Safety Commission ["Commission"] requests your formal opinion on the following questions:

- I. Whether the Commission is a "politically accountable governing body at the State level" as the term is used in *Holt v. State*, 887 S.W.2d 16 (Tex. Crim. App. 1994)?
- II. Whether the Commission can authorize a driver license checkpoint program to be implemented by commissioned officers of the Department of Public Safety?
- III. Whether the Commission can authorize other state and local law enforcement agencies to implement a driver license checkpoint program established by the Commission?

Questions I and II

- I. Whether the Commission is a "politically accountable governing body at the State level" as the term is used in *Holt v. State*, 887 S.W.2d 16 (Tex. Crim. App. 1994)?
- II. Whether the Commission can authorize a driver license checkpoint program to be implemented by commissioned officers of the Department of Public Safety?

The Department of Public Safety has not conducted driver license checkpoints¹ since the issuance of the Texas Court of Criminal Appeal's opinion in *Holt v. State*. In *Holt v. State*, the Texas Court of Criminal Appeals interpreted the United States Supreme Court's opinion in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) regarding the constitutionality of sobriety checkpoints. In *Sitz*, the United States Supreme Court held that the state's sobriety checkpoint policy, established by executive order of the state's governor following a study mandated by the Michigan legislature, was constitutional under the Fourth Amendment. The Court stated that the choice of law enforcement alternatives remained with politically accountable government officials who have the responsibility for utilizing limited government resources. *Id.* at 453-454.² Previously, however, the United States Supreme Court referred to driver license checkpoints in *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse* the Court held that random traffic stops made without reasonable suspicion to check driver licenses were unconstitutional. But the Court went on to state: "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.*" *Id.* at 674-675 [emphasis added]. In *City of Indianapolis v. Edmunds* the United States Supreme Court again suggested that checkpoints held to check driver license and registration status would be constitutionally permissible because, like sobriety checkpoints, the purpose of such checkpoints is traffic safety rather than general criminal interdiction. 531 U.S. 32, 37-38 (2000). Presumably, the United States Supreme Court would apply the same procedural safeguards to driver license and registration checkpoints as it did to sobriety checkpoints in *Sitz*.

When the Texas Court of Criminal Appeals addressed the legality of sobriety checkpoints in *Holt v. State*, the court concluded that to "pass constitutional muster," a sobriety checkpoint "must at a basic minimum be authorized by a statewide policy emanating from a *politically accountable governing body.*" *Holt v. State*, 887 S.W.2d at 19 [emphasis added]. The court did not specifically define the phrase "politically accountable governing body at the state level." However in a footnote, Justice Miller, noted that in a prior opinion he had written that *Sitz* requires the legislature to create a statewide administrative scheme for sobriety checkpoints in order for such checkpoints to be constitutional. *Id.* at n.2 (citing *State v. Wagner*, 810 S.W.2d 207 (Tex. Crim. App. 1991)). While the court did not discuss driver license checkpoints in *Holt*, it is reasonable to presume that in light of *Sitz* and *Edmunds*, the Texas Court of Criminal Appeals would apply the same requirement for their implementation.

As of today, the Texas Court of Criminal Appeals still has not clarified what constitutes a politically accountable governing body, as contemplated by the *Holt* opinion, that could lawfully implement a constitutional checkpoint program. The closest the court came to a definition was in a footnote in *State v. Skiles* where the court noted that it had previously stated in *Holt* that:

...in order to pass federal constitutional muster, these [checkpoint] guidelines and procedures must be authorized by a statewide policy emanating from a politically

¹ For purposes of this Request, the term "driver license checkpoint" includes checking the vehicle operator's driver license, vehicle registration, and proof of financial responsibility.

² The Michigan Supreme Court later held that sobriety checkpoints are illegal under the Michigan Constitution.

accountable governing body. This presumably, though unclearly, suggests that at least some legislative action is necessary.³

Although the Texas Court of Criminal Appeals has not defined “politically accountable governing body,” the term “governmental body” is defined by TEX. GOV’T CODE ANN. § 551.001(3) (Vernon 2004 & Supp. 2007) (Texas Open Meetings Act). Section 551.001(3)(A) provides that “governmental body” means: a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointment members.” The Attorney General has interpreted this subsection by applying certain criteria. First, the body must be an entity within the executive or legislative department of the state. Second, the entity must be controlled by one or more elected or appointment members. And third, the entity must have supervision or control over public business or policy. TEX. ATT’Y GEN. LO-146 (1996).

The Commission is the controlling body for the Department of Public Safety. TEX. GOV’T CODE ANN. § 411.003 (Vernon 2004 & Supp. 2007). As such, the Commission is a governing body within the meaning of TEX. GOV’T CODE ANN. § 551.001(3)(A). As the governing body of the Department, the Commission is statutorily charged with the duty to formulate and adopt policies and plans to enforce the state’s criminal, traffic, and safety laws; to prevent crime; and to detect and apprehend persons who violate laws. *See* TEX. GOV’T CODE ANN. § 411.004 (Vernon 2004). To carry out this mandate, the Commission may adopt administrative rules. *Id.*

Considering the Commission is a governing body under terms of the Texas Open Meetings Act that is charged with specific statewide law enforcement responsibilities under its enabling legislation, and considering the existing case law from the Texas Court of Criminal Appeals, the Commission seeks your interpretation as to whether the Commission has the authority to authorize the Department to implement a driver license checkpoint program.

Question III

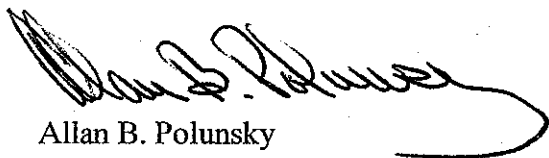
- III. Whether the Commission can authorize other state and local law enforcement agencies to implement a driver license checkpoint program established by the Commission?

As discussed in Questions I and II, the Commission has specific authority to adopt administrative rules for implementation of Texas statutes regulating driver license issuance and enforcement. However, all commissioned officers in Texas are legally authorized to enforce statutes requiring that individuals operating motor vehicles on public roads possess a valid driver license. Therefore, the Commission seeks your interpretation as to whether the Commission has the authority to authorize all state and local law enforcement agencies charged by law with enforcement of driver license statutes to implement driver license checkpoint programs.

³ 938 S.W.2d 447, 454 n. 9 (Tex. Crim. App. 1997) [emphasis added].

I would greatly appreciate your attention and consideration of these questions. Driver license checkpoints could potentially serve significant public interests in traffic safety and your opinion in this matter will help the Commission in the formulation of appropriate law enforcement policy.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Allan B. Polunsky", with a long, sweeping underline that extends to the right.

Allan B. Polunsky

Chair

Public Safety Commission