



**THE ATTORNEY GENERAL
OF TEXAS**

WAGGONER CARR
ATTORNEY GENERAL

AUSTIN 11, TEXAS

June 29, 1964

Hon. Tom Blackwell
District Attorney
Travis County
Austin, Texas

Opinion No. C-277

Re: Whether a County Auditor in a county having a population of 190,000 or more is authorized and required to audit funds collected by a county official, not for the county, but held as an agent or trustee for private individuals.

Dear Mr. Blackwell:

Your letter of May 29, 1964, reads in part as follows:

"QUESTION: Is the County Auditor authorized and required to audit funds collected by a county official not for the county but held as an agent or trustee for private individuals.

"FACTS: It has been the custom for many years in the county for Justices of the Peace, County Attorneys and District Attorneys to accept reimbursement on 'hot checks' and to pay it directly to the merchants involved without having this fund go through any official county channels and without being audited by the County Auditor."

You further ask for an interpretation of Article 1656a, Vernon's Civil Statutes, which reads in part as follows:

"The County Auditor in counties having a population of one hundred ninety thousand (190,000) or more according to the last preceding or any future Federal Census shall prescribe the system of accounting for the county and the forms to be used by the District Clerk, the District Attorney and all county and precinct officers and by all persons in the collection and disbursement of county revenues, funds, fees, and all other moneys collected in an official capacity whether belonging to the county, its subdivisions or precincts, or to, or for the use or benefit of, any person, firm, or corporation; he shall prescribe the mode and manner in which the District Clerk, the District Attorney and all county

and precinct officers shall keep their accounts, and he shall have the power to require all officers to furnish monthly, annual, or other reports under oath of all moneys, taxes, or fees of every nature received, disbursed, or remaining on hand; and in connection with such reports he shall have the right to count the cash on hand with such officer, or to verify the amount on deposit in the bank in which such officer may have placed the same for safekeeping. He shall have the power to adopt and enforce such regulations not inconsistent with the Constitution and laws as he may deem essential to the speedy and proper collection and checking of, and accounting for, the revenues and other funds and fees belonging to the county or to any person, firm, or corporation for whom any of said officers may have made collections, or for whose use or benefit they may have received or may hold such funds. . . ." (Emphasis added).

The first sentence of the above quoted statute refers to county funds and to "all other moneys collected in an official capacity. . . ." The case of Nueces County v. Currington, 139 Tex. 297, 162 S.W.2d 687 (1942), to which we may refer for help in defining "official capacity," held that "a fee paid a public officer for the performance of a duty enjoined by statute is a fee collected in an official capacity." There is no statutory requirement or authority in Texas for the collection by a county official of money to cover "hot checks," with subsequent payment directly to the payee of the check. Such a collection, therefore, would not be done in an "official capacity," the words "official capacity" referring to the status of an official when performing an act under statutory duty, but such collection would be received under color of authority by virtue of his office.

In light of the foregoing, it is the opinion of this office that the mandatory provisions contained in the first sentence of the above Article 1656a do not apply to funds collected by a county official as an agent or trustee for private individuals, and that the County Auditor is not required to audit such funds.

The last sentence of that part of Article 1656a above quoted specifically covers revenues and other funds and fees belonging to "any person, firm, or corporation for whom any of said officers may have made collections, or for whose use or benefit they may have received or may hold such funds." The act states that the County Auditor shall have the "power" to adopt and enforce regulations pertinent to the collection and checking of and accounting

for, such funds. Should a county official, in an official capacity with statutory authority or under color of authority by virtue of his office, receive or collect funds not belonging to the county, the county auditor by virtue of such power given to that office in the provision stated, does have the authority to audit funds so collected, not for the county, but held by the official as an agent or trustee for private individuals, firms or corporations.

The provision in Article 1656a concerning the deposit and custody of such funds is covered by a previous opinion of this department, No. WW-86 (1957).

SUMMARY

A County Auditor, in a county having a population of 190,000 or more, is authorized, but not required, to audit funds collected by a county official, not for the county, but collected or received under color of authority by virtue of his office, and held as an agent or trustee for private individuals, firms or corporations.

Yours very truly,

WAGGONER CARR
Attorney General

By 
Edward P. Bolding
Assistant

EPB:wb

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman
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APPROVED FOR THE ATTORNEY GENERAL

BY: Stanton Stone