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SMITH COUNTY COURTHOUSE
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TYLER, TEXAS 75702

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RQ-0559-GA

December 22, 2006

RECEIVED
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OPINION COMMITTEE
FILE # ML-45091-07
I.D. # 045091

Honorable Greg Abbott,
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for an Opinion concerning a proposed Smith County contract.

Dear Attorney General Abbott:

The Smith County Precinct 4 Commissioner has requested that the Smith County Criminal District Attorney's Office seek an Attorney General Opinion regarding the terms of a contract proposed under the authority of section 351.061 of the Local Government Code.

Question:

Will a contract entered under the ostensible authority of section 351.061 of the Local Government Code pass constitutional muster, if the terms of the proposed contract allow a constable to retain control and supervision of the officers performing services under the agreement to the same extent as other officers, and the agreement will not obligate the constable to assign officers to devote any portion of their working time to the designated area?

Background:

The Smith County Precinct One Constable drafted a proposed contract for law enforcement services under the ostensible authority of section 351.061 of the Local Government Code. The proposed contract was placed on the agenda of the Smith County Commissioners Court (hereinafter the "Commissioners Court" or the "Court") for approval on Monday, September 25, 2006. A copy of the proposed contract is attached as Exhibit A. The terms and language of the proposed contract is identical to contracts used in other Texas counties.

As counsel to the Commissioners Court, the Smith County Criminal District Attorney's Office (hereinafter, the "DA") presented to the members of the Court a memorandum, dated September 22, 2006, regarding Chapter 351 of the Local Government Code and proposed contracts for law enforcement services to nongovernmental associations. Any attorney-client privilege was waived by the Commissioners Court when the memorandum was given to local media subsequent to presentation of the memorandum on September 22nd, and prior to the September 25th Court meeting. As a result, the DA asked that the memorandum be placed in the Court's record and the Court agreed. A copy of the memorandum is attached as Exhibit B and incorporated herein by reference.

During the September 25th meeting of the Commissioners Court, the proposed contract and the DA's memorandum were discussed. The Court was counseled by the DA that any contract that purports to provide law enforcement services on a fee basis to nongovernmental associations is unconstitutional and therefore void and unenforceable. Further, the DA counseled that section 351.061 of the Local Government Code is unconstitutional and therefore any contract entered under the authority of this code section is void and unenforceable. The Smith County Auditor was also present at the September 25th meeting of the Commissioners Court. The Auditor expressed her inability to certify receipts and disbursements under a contract if she believed it to be illegal or unconstitutional or void and unenforceable. Thereafter, no action was taken by the Court regarding the approval of the proposed contract.

On October 9, 2006, the proposed contract was again placed on the Commissioners Court agenda for approval. Again, no action was taken by the Court regarding the approval of the proposed contract.

Subsequently, the Precinct Four Commissioner and the Precinct One Constable sought clarification from the DA regarding the ability of other counties to enter into contracts basically identical to the proposed contract drafted by the Precinct One Constable. In particular, the Commissioner and Constable wanted to know why the language of section 2.3 of the proposed contract would not allow the proposed contract to pass legal and constitutional muster. Section 2.3 of the proposed contract states:

The Constable shall retain control and supervision of the officers performing services under this agreement to the same extent as he does other officers, _____ [name of nongovernmental association] understands and agrees that this Agreement is not intended, nor shall it be construed, to obligate the Constable to assign officers to devote any portion of their working time to the area. If the _____ [name of nongovernmental association] is dissatisfied in any way with the performance of the

County, the Constable or their officers under this Agreement, _____ [name of nongovernmental association] sole remedy is termination under section 4.3.

Exhibit A, p. 2.

While the DA refused to express a legal opinion on the contracts entered into by other counties, the DA agreed to seek an Attorney General Opinion regarding the proposed contract drafted by the Precinct One Constable, upon a formal request to the DA from the Precinct Four Commissioner. Thereafter, the Precinct Four Commissioner formally requested that the DA seek such an opinion.

Law:

For the legal authorities and analysis of the issue at hand, and the conclusion of the DA as counsel to Smith County, the language of the September 22, 2006 Memorandum to the Smith County Judge and Commissioners, attached as Exhibit B, is hereinafter re-created.

Authorities and Analysis:

Section 351.061 of the Local Government Code states:

To protect the public interest, the commissioners court of a county may contract with a nongovernmental association for the provision of law enforcement services by the county on a fee basis in the geographical area represented by the association.

TEX. LOC. GOV'T. CODE §351.061 (LEXIS through 2005 legislation). Section 351.061 of the Local Government Code is the re-codification of article 1581b-2, V.T.C.S., which was enacted by the Sixty-ninth Legislature as Senate Bill 245. Tex. Att'y Gen. Op. No. JM-509 (1986) at 1. According to the bill analysis of the House Study Group in April of 1985, supporters of Senate Bill 245 contended that the bill was simply a codification of a longstanding practice allowing nongovernmental associations to contract with counties for law enforcement services. H. Study Group 69-Reg. Sess., at 2 (Tx. 1985). The analysis goes on to say that a 1983 Attorney General Opinion (JM-57) advised that neither a county, a sheriff, nor a constable was empowered to enter a contract for the provision of law enforcement services to private entities. *Id.* The bill analysis further states that Harris County continued the practice and legislation (Senate Bill 245) was needed to avoid a legal challenge. *Id.*

The 1983 Attorney General Opinion (JM-57) referred to in the bill analysis of SB 245 addressed the question of whether a county sheriff or constable may contract with a private homeowners association to furnish it law enforcement services. Tex. Att'y Gen. Op. No. JM-57 (1983) at 1. At the time the opinion was rendered, there was no statute authorizing such contracts, **or constitutional provisions upon which to base such statutes.** *Id.* [emphasis added]. The opinion went on to state that:

The police power of the state is a fundamental attribute of sovereignty, and the Texas Constitution requires that the powers of government be confided only to bodies of "magistracy". Tex. Const. art. II, §1. See City of Dallas v. Smith, 107 S.W. 2d 872 (Tex. 1937). In our opinion, county officers may not subject their law enforcement

responsibilities and functions to private control or direction. See 72 Am. Jur. 2d States, Territories and Dependencies, §1, at 406 (1974) (duties of the state).

Id. The first sentence of the paragraph quoted immediately above, addresses the powers of government and states that these powers must be confided only to bodies officially entrusted with administration of the law. The second sentence of the paragraph addresses subjecting functions of law enforcement to private entities. In the contract at issue in JM-57, it was agreed that the deputies would be under the supervision and control of the constable. *Id.* at 2. The deputies were required to remain on patrol in the area of the homeowners association except in instances of emergencies. *Id.* The proposed contract is distinguishable in only one point; rather than requiring the deputies to remain on patrol in the designated area except in emergencies, the proposed contract does not oblige a sheriff or constable to assign deputies to devote any portion of their time to the designated area. Other counties utilizing such contracts seem to believe the contracts therefore pass Constitutional muster. However, this distinguishing factor would only seem to address the second sentence of the paragraph as quoted above (subjecting law enforcement responsibilities to private control and direction) and ignores the concerns of the first sentence (requiring sovereign powers of government be confided only to official bodies). The Attorney General however anticipated that parties would try to contract around the requirement that county officers must control and direct law enforcement responsibilities and stated:

While the contract [at issue in JM-57] states that it shall not "obligate the constable" we believe the agreement as a whole interjects an impermissible influence and has a substantial and real effect on the exercise of discretion as to the deployment of deputy peace officers by the constable, or the sheriff, as the case may be.

Id. In other words, regardless of the terms and conditions in the contract, it is the contract as a whole that results in the impermissible influence on a sheriff or constables discretion.

The Attorney General went even further in negating a government entities attempt to contract for law enforcement services to private entities and stated:

Because the agreement in question provides that it shall not "obligate" the county and that the assigned officers remain under the supervision of the elected peace officer, and thereby, arguably, making inapplicable the authorities discussed above prohibiting contracting away such responsibilities, we believe it is necessary to discuss public policy and constitutional questions. The appearance of impropriety, the potential for conflicts of interest, and the potential for less than impartial enforcement of the law, are matters for serious consideration when law enforcement officers know that their positions are supported and funded voluntarily by persons they police. Furthermore, we believe the bare cost items of reimbursement to the county – automobile expenses and salaries – do not adequately cover the full value received by the association in the purchase of the county's name, special authority, and the "good will," as it were, of the county. Such aspects of official imprimatur are of value and are conveyed gratis to a defined group of individuals in violation of article III, section 52, of the Texas

Constitution, which denies political subdivisions the authority "to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever."

Id. at 6. The opinion also goes on to address the proper way to increase the level of law enforcement protection offered by stating that available county revenue could be reallocated or taxes could be increased. *Id.* The Attorney General concluded by stating:

In our opinion, neither a county, a sheriff, nor a constable is empowered to enter into a contract with private entities or homeowners to furnish them special law enforcement protection unavailable to others. Such agreements are void and unenforceable.

Id. Section 351.061 (and its predecessor statute article 1581b-2, V.T.C.S.) ostensibly attempts to provide the statutory authority noted as lacking in JM-57 for law enforcement to contract with nongovernmental entities. However, and most importantly, the issue of constitutional authority on which to base the statute remains lacking. *See Id.* at 1.

In light of the enactment of article 1581b-2 (now §351.061), the Honorable Ray Keller, Chairman of the Committee on Law Enforcement of the Texas House of Representatives, requested an Attorney General's Opinion on whether a sheriff or constable may provide law enforcement services under contract with a private homeowners association. Tex. Att'y Gen. Op. No. JM-509 (1986) at 1. The Attorney General stated that although the question and answer would focus on the office of sheriff, its discussion would also apply to the office of constable. *Id.* The opinion states:

A sheriff and constable both hold elective offices established by the Texas Constitution. Tex. Const. art. V, §§18, 23. They are both peace officers, with duties prescribed by statute. Tex. Code of Crim. Proc. art. 2.12; see Tex. Const. art. V, §23 (Sheriff's duties prescribed by legislature); V.T.C.S. art. 6885 [now § 86.021 of the Local Government Code] (constable to perform duties required by law). Both officers have power to appoint deputies. V.T.C.S. arts. 3902, 6809, 6879a.

Id. In JM-509, the Attorney General declares article 1581b-d (§351.061) unconstitutional under Article II, section 1 and Article III, section 1 of the Texas Constitution (it is important to note here that the code section itself is declared unconstitutional). *Id.* at 2. Article II, section 1 of the Texas Constitution states:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, §1 (2006). Article III, section 1 of the Texas Constitution states:

The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

Tex. Const. art. III, §1 (2006). The Attorney General determined that the provisions of the Texas Constitution, cited above, prohibit the legislature from delegating its power to enact laws. *Id.* at 3 (citing *Brown v. Humble Oil & Refining Co.*, 83 S.W. 2d 935 (Tex. 1935)). The legislature's power under article V, section 18 of the Texas Constitution, and section 86.021 of the Local Government Code, prescribing the election and general powers and duties of the office of constable, must be exercised consistently with article II, section 1 and article III, section 1 of the constitution. *Id.* at 3. Further, the Attorney General determined that the legislature may not delegate its power to the uncontrolled discretion of a private individual or entity. *Id.* (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). Therefore, the Attorney General concluded:

...that article 1581b-2, V.T.C.S. [now §351.061] is not a valid exercise of legislative power. Its enactment does not alter the conclusion of Attorney General Opinion JM-57.

Id. at 4. As a result, the code section itself is unconstitutional and any contract based on the code section is void. Further, the reasoning of JM-57 regarding the public policy and constitutional analysis, determining that any contract for law enforcement services to private entities is void and unenforceable remains unchanged after the enactment of section 351.061 of the Local Government Code (and its predecessor statute).

Most recently the Attorney General addressed the question of whether a sheriff could contract personally to provide security to a private entity. Tex. Att'y Gen. Op. No. GA-0101 (2003) at 1. The Attorney General stated in pertinent part:

...an opinion of this office following the enactment of the statutory predecessor of section 351.061 and 351.062 found that statute unconstitutional as an improper delegation of official authority to a private entity...Having determined that the statute is not a 'valid exercise of legislative power,' Opinion JM-509 concluded that its enactment 'does not alter the conclusion of Attorney General Opinion JM-57.'

Id. at 2 [citations omitted]. The opinion then further states that the Attorney General would not revisit the conclusions of Attorney General Opinions JM-509 and JM-57 in the opinion at hand. *Id.*

Conclusion of DA as Counsel to Smith County:

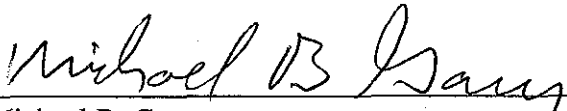
First, section 351.061, as the operative section of Subchapter D of Chapter 351 of the Local Government Code, has been determined by the Attorney General to be unconstitutional. Second, after reviewing not only the Attorney General Opinions, but also the authorities cited therein, the legal opinion of counsel to the Smith County Commissioners Court is that section 351.061 of the Local Government code is unconstitutional. Third, any contract based on the unconstitutional statute, no matter how the contract is structured, is void and unenforceable. Fourth, based on the public policy and constitutional arguments proffered by the Attorney General, the Attorney General has determined any contract the purports to provide law enforcement services to private entities on a fee basis, whether

or not based on a statute, is void and unenforceable. Fifth and finally, after reviewing the Attorney General Opinions and the authorities and reasoning therein, it is the opinion of counsel to the Smith County Commissioners Court that any contract that purports to provide law enforcement services to private entities on a fee basis, whether or not based on a statute is void and unenforceable. Based on the reasons enumerated above, any contract entered by Smith County to supply law enforcement services on a fee basis to nongovernmental associations will be unconstitutional and void.

Request:

The Smith County Criminal District Attorney's Office, on behalf of the Smith County Precinct Four Commissioner, requests an Attorney General Opinion on the constitutionality and legality of a proposed contract for law enforcement services under the authority of section 351.061 of the Local Government Code, including, but not limited to, the effect the language of section 2.3 of the proposed contract may have on the constitutionality and legality of the proposed contract.

Respectfully,

A handwritten signature in cursive script, reading "Michael B. Gary", is written over a horizontal line.

Michael B. Gary
Assistant Criminal District Attorney for Smith County

EXHIBIT A

Agreement for Law Enforcement Services

COPY

THE STATE OF TEXAS §
 §
COUNTY OF SMITH §

This Agreement is entered into pursuant to § 351.061 of the Texas Local Government Code, by and between Smith County, Texas (the "County"), acting by and through its governing body, the Smith County Commissioners Court, and Rose Valley Apartments Homes Mr. Doug Gurkin, Management 1007 N. Northwest Loop 323 Tyler, Texas 75702

RECITALS:

To protect the public interest, the County may contract with a nongovernmental Rose Valley Apartments Homes for the provision of law enforcement services within Rose Valley Apartments Homes geographical area represented by Rose Valley Apartments Homes; and

Rose Valley Apartments Homes desires to obtain the services of the Smith County Constable, Pct. 1 (the "Constable") to provide law enforcement services with in Rose Valley Apartments Homes geographical area as further defined in Exhibit "A".

NOW, THEREFORE, the county and the Rose Valley Apartments Homes, in consideration of the mutual covenants and agreement herein contained, do manually agree as follows:

I.

TERMS:

- 1.1 The services to be performed under this Agreement shall begin on September 1, 2006 and end on August 31, 2007, unless terminated sooner in accordance with the provisions of Section IV.

II.

SERVICES

- 2.1 The County agrees to authorize the Constable to provide 2 officer (s) to devote seventy percent (70%) of their working time to provide law enforcement services within Smith County Precinct 1 with specific the geographical area of Rose Valley Apartments Homes (the "area"), as further defined in Exhibit "A", attached hereto and made a part hereof.

2.2 As used herein, the phrase "working time" means the following: (1) the usual or normal hours that the Constable's officer are required to work in any calendar month and does not include any extra or overtime work; (2) the time the officers are on vacation, on sick leave and receiving worker' compensation benefits for injuries sustained while performing services under this agreement; and (3) the time the officers are on duty in the area providing law enforcement services, which includes time preparing reports, in court in connection with cases arising out of events occurring with in the area, investigating crimes, arresting persons and transporting suspects. The activities listed above are explanatory and are not intended to be exclusive.

2.3 The Constable shall retain control and supervision of the officers performing services under this agreement to the same extent as he does other officers, Rose Valley Apartments Homes understands and agrees that this Agreement is not intended, nor shall it be construed, to obligate the Constable to assign officers to devote any portion of their working time to the area. If the Rose Valley Apartments Homes is dissatisfied in any way with the performance of the County, the Constable or their officers under this Agreement, Rose Valley Apartments Homes sole remedy is termination under section 4.3

III.

CONSIDERATION FOR SERVICES

3.1 Rose Valley Apartments Homes agrees to pay the county the sum of \$ 54,080.00 for 2 officers for a total sum of FIFTY FOUR THOUSAND AND EIGHTY DOLLARS AND NO CENTS (\$54,080.00) to be used by the County for the purpose of paying seventy percent (70%) of the full-time equivalent cost to the County for supplying the law enforcement services, including salaries and additional expenses the County may incur in providing the services under this Agreement.

Rose Valley Apartments Homes agrees to make payments on the total sum in installments, which are due and payable, without demand, on the following dates in the amounts set forth next to the dates:

September 1, 2006	\$4506.67
October 1, 2006	\$4506.67
November 1, 2006	\$4506.67
December 1, 2006	\$4506.67
January 1, 2007	\$4506.67
February 1, 2007	\$4506.67
March 1, 2007	\$4506.67
April 1, 2007	\$4506.67
May 1, 2007	\$4506.67
June 1, 2007	\$4506.67
July 1, 2007	\$4506.67
August 1, 2007	\$4506.63

The monthly installments are due and payable before 10:00 A.M. at the office of the County Treasure, 200 E. Ferguson St., Suite 402, Tyler, Texas 75702

- 3.2 If this agreement is terminated at any time other than at the end of a contract month, the monthly installment or payment for such month will be prorated. Rose Valley Apartments Homes understands and agrees that if the County does not receive the monthly within thirty (30) days of the date due, the County is authorized to terminate this agreement without further notice. The County's failure to make demand for payments due is not a waiver of Rose Valley Apartment Home obligations to make payment.

IV.

DEFAULT AND TERMINATION

- 4.1 If Rose Valley Apartments Homes defaults in the payment of any obligations in this Agreement, the County is authorized to terminate this Agreement without notice.
- 4.2 If Rose Valley Apartments Homes defaults in the payment of any obligations hereunder, Association is liable for all expense incurred by the County as a result of such default, including, but not limited to, attorney's fees, costs, and interest at the rate of one percent (1%) for each month on all past due amounts. The amount of expenses incurred and interest accrued, if any, is deemed to be in addition to any monies due for law enforcement services rendered hereunder. Interest on all past due amounts shall not exceed the maximum amount of non usurious interest that may be contracted for, taken, charged, or received under the law. Any interest in excess of the maximum amount shall be refunded.
- 4.3 Either party may terminate this agreement prior to the expiration of the term set forth above, with or without cause, upon thirty (30) days prior written notice to the other party. The County will submit an invoice to Rose Valley Apartments Homes showing the amounts due for the month in which termination occurs. Rose Valley Apartments Homes agrees to pay the final invoice within ten (10) days of receipt.

V.

NOTICE

- 5.1 Any notice required to be given under the provisions of this Agreement shall be in writing and shall be duly served when it shall have been deposited, enclosed in a wrapper with the proper postage prepaid thereon, and duly registered or certified, return receipt requested, in a United State Post Office, addressed to the parties at the following addresses:

To the County:

Smith County Annex
200 E. Ferguson, Suite 200
Tyler, Texas 75702
Attention: Judge, Commissioners Court

With a copy to:

Constable Henry P. Jackson
Smith County Constable
106 E. Elm
Tyler, Texas 75702

Rose Valley Apartments Homes:

Mr. Doug Gurkin, Management
1007 N. Northwest Loop 323
Tyler, Texas 75702

- 5.1 Either party may designate a different address by giving the other party ten days' written notice,

VI.

MERGER

- 6.1 The parties agree that this Agreement contains all the terms and conditions of the understanding of the parties relating to the subject manner hereof. All prior negotiations, discussions, correspondences and preliminary understandings between the parties and other relating hereto are suspended by this Agreement.

VII.

MICELLANEOUS

- 7.1 This instrument contains the entire Agreement between the parties relating to the rights granted and the obligations assumed. Any oral or written representation or modifications concerning this instrument shall be of no force and effect excepting a subsequent modification in writing signed by both parties.
- 7.2 This agreement may be executed in multiple counterparts, each having equal force and effect of an original.
- 7.3 This agreement is not in effect until it has been signed by Rose Valley Apartments Homes and it has received the approval by the Smith County Commissioners Court and the Constable.

APPROVED AS TO FORM:

MICHAEL GARY
County Attorney

SMITH COUNTY

By _____
MICHAEL GARY
County Attorney

By _____
BECKY DEMPSEY
County Judge

Date Signed: _____

Approved:

By _____
HENRY P. JACKSON
Smith County Constable Pct. 1

Attest:

By _____
DEBORAH CONNERS
Manager

Date Signed: _____

STATE OF TEXAS §
 §
COUNTY OF SMITH §

The Commissioners Court of Smith County, Texas, convened at a meeting of said Court at the Smith County Annex Building in the City of Tyler, Texas on the _____ day of _____, 2006. with the following members present, to wit:

Becky Dempsey	County Judge
JoAnn Fleming	Commissioner, Precinct No. 1
David Stein	Commissioner, Precinct No. 1
Bobby VanNess	Commissioner, Precinct No. 1
JoAnn Hampton	Commissioner, Precinct No. 1

And the following members absent to wit: _____
Constituting a quorum, when among other business, the following was transferred:

**ORDER AUTHORIZING EXECUTION OF LAW ENFORCEMENT AGREEMENT
BETWEEN SMITH COUNTY AND
ROSE VALLEY APARTMENTS HOMES**

Commissioner _____ introduced an order and made a motion that the same be adopted. Commissioner _____ seconded the motion for the adoption of the order. The motion, carrying with it the adoption of the order, prevailed by the following vote:

	YES	NO	ABSTAIN
Judge Dempsey	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Commissioner Fleming	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Commissioner Stein	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Commissioner VanNess	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Commissioner Hampton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The County Judge thereupon announced that the motion had duly and lawfully carried and order had been duly adopted. The order thus adopted follow:

The County Judge is authorized to execute and Agreement for law enforcement services between Smith County and Rose Valley Apartments Homes for 2 officer (s) from Smith County Constable, Precinct 1 in the total amount of FIFTY FOUR THOUSAND AND EIGHTY DOLLARS AND NO CENT for a period beginning September 1, 2006 and ending August 31, 2007.

EXHIBIT B

Date: 09/22/06

To: Judge Dempsey; Commissioner Hampton; Commissioner Van Ness; Commissioner Stein; and Commissioner Fleming.

From: Michael Gary, Asst. Criminal District Attorney.

Subject: Chapter 351 of the Local Government Code and proposed contracts for law enforcement services to non-governmental associations.

MEMORANDUM

Issue:

Can the Commissioners Court and/or a Constable enter into an agreement for law enforcement services under Subchapter D, Chapter 351 of the Local Government Code?

Answer:

The operative section of Subchapter D, Chapter 351 of the Local Government Code, section 351.061, is unconstitutional and any agreement entered into under the authority of this chapter is void.

Facts:

Approximately one month prior to the date of this memorandum, the Precinct One Constable submitted, for legal review, proposed agreements for the provision of law enforcement services to certain local apartment complexes. The agreements were proposed under the authority of section 351.061 of the Local Government Code and based on contracts used in Harris County, Texas.

On September 14, 2006, the Precinct Four Commissioner called and asked for a status of the review. After researching Chapter 351 of the Local Government Code, and completing the legal review of the proposed contracts, I emailed the Precinct One Constable on September 14, 2006. In the email, I expressed my opinion that Smith County cannot enter into contracts with apartment complexes for law enforcement services under the authority of section 351.061 of the Local Government Code because this code section is unconstitutional. Later on September 14, 2006, the Constable came to my office to discuss my legal opinion and requested that I call a designated Assistant Harris County Attorney to discuss the legality of the contracts. At that time, I refused to telephone the Assistant County Attorney as I was concerned about the potential for a legal argument with counsel to another county in which I might have to render a legal opinion affecting their practices.

On September 15, 2006, the Precinct Four Commissioner and the Precinct One Constable called and asked that I meet them in the Commissioner's office. The Commissioner

requested that I call the Harris County Attorney's Office to inquire about their processes and procedures. After expressing my reluctance to do so, I consented to contact Harris County.

On September 18, 2006, James Savage, Assistant Harris County Attorney returned my call regarding the processes and procedures used by Harris County to implement contracts under the authority of section 351.061 of the Local Government Code. Mr. Savage stated that Harris County believes contracts entered by Harris County are valid because the contracts state that the Sheriff and Constables of Harris County maintain control of the supervision of the deputies and that the Sheriff and Constables are not obligated to assign deputies to devote any portion of their time to the area. I did not express any opinion to Mr. Savage during the telephone conversation and thanked him for his time.

Authorities and Analysis:

Section 351.061 of the Local Government Code states:

To protect the public interest, the commissioners court of a county may contract with a nongovernmental association for the provision of law enforcement services by the county on a fee basis in the geographical area represented by the association.

TEX. LOC. GOV'T. CODE §351.061 (LEXIS through 2005 legislation). Section 351.061 of the Local Government Code is the re-codification of article 1581b-2, V.T.C.S., which was enacted by the Sixty-ninth Legislature as Senate Bill 245. Tex. Att'y Gen. Op. No. JM-509 (1986) at 1. According to the bill analysis of the House Study Group in April of 1985, supporters of Senate Bill 245 contended that the bill was simply a codification of a longstanding practice allowing nongovernmental associations to contract with counties for law enforcement services. H. Study Group 69-Reg. Sess., at 2 (Tx. 1985). The analysis goes on to say that a 1983 Attorney General Opinion (JM-57) advised that neither a county, a sheriff, nor a constable was empowered to enter a contract for the provision of law enforcement services to private entities. *Id.* The bill analysis further states that Harris County continued the practice and legislation (Senate Bill 245) was needed to avoid a legal challenge. *Id.*

The 1983 Attorney General Opinion (JM-57) referred to in the bill analysis of SB 245 addressed the question of whether a county sheriff or constable may contract with a private homeowners association to furnish it law enforcement services. Tex. Att'y Gen. Op. No. JM-57 (1983) at 1. At the time the opinion was rendered, there was no statute authorizing such contracts, **or constitutional provisions upon which to base such statutes.** *Id.* [emphasis added]. The opinion went on to state that:

The police power of the state is a fundamental attribute of sovereignty, and the Texas Constitution requires that the powers of government be confided only to bodies of "magistracy". Tex. Const. art. II, §1. See City

of Dallas v. Smith, 107 S.W. 2d 872 (Tex. 1937). In our opinion, county officers may not subject their law enforcement responsibilities and functions to private control or direction. See 72 Am. Jur. 2d States, Territories and Dependencies, §1, at 406 (1974) (duties of the state).

Id. The first sentence of the paragraph quoted immediately above, addresses the powers of government and states that these powers must be confided only to bodies officially entrusted with administration of the law. The second sentence of the paragraph addresses subjecting functions of law enforcement to private entities. In the contract at issue in JM-57, it was agreed that the deputies would be under the supervision and control of the constable. *Id.* at 2. The deputies were required to remain on patrol in the area of the homeowners association except in instances of emergencies. *Id.* The contracts as structured by Harris County are distinguishable in only one point; rather than requiring the deputies to remain on patrol in the designated area except in emergencies, the Harris County contracts do not oblige a sheriff or constable to assign deputies to devote any portion of their time to the designated area. Harris County seems to believe the contracts therefore pass Constitutional muster. However, this distinguishing factor would only seem to address the second sentence of the paragraph as quoted above (subjecting law enforcement responsibilities to private control and direction) and ignores the concerns of the first sentence (requiring sovereign powers of government be confided only to official bodies). The Attorney General however anticipated that parties would try to contract around the requirement that county officers must control and direct law enforcement responsibilities and stated:

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Id. In other words, regardless of the terms and conditions in the contract, it is the contract as a whole that results in the impermissible influence on a sheriff or constables discretion.

The Attorney General went even further in negating a government entities attempt to contract for law enforcement services to private entities and stated:

Because the agreement in question provides that it shall not "obligate" the county and that the assigned officers remain under the supervision of the elected peace officer, and thereby, arguably, making inapplicable the authorities discussed above prohibiting contracting away such responsibilities, we believe it is necessary to discuss public policy and constitutional questions. The appearance of impropriety, the potential for conflicts of interest, and the potential for less than impartial enforcement of the law, are matters for serious consideration when law enforcement officers know that their positions are supported and funded voluntarily by

persons they police. Furthermore, we believe the bare cost items of reimbursement to the county – automobile expenses and salaries – do not adequately cover the full value received by the association in the purchase of the county's name, special authority, and the "good will," as it were, of the county. Such aspects of official imprimatur are of value and are conveyed gratis to a defined group of individuals in violation of article III, section 52, of the Texas Constitution, which denies political subdivisions the authority "to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever."

Id. at 6. The opinion also goes on to address the proper way to increase the level of law enforcement protection offered by stating that available county revenue could be reallocated or taxes could be increased. *Id.* The Attorney General concluded by stating:

In our opinion, neither a county, a sheriff, nor a constable is empowered to enter into a contract with private entities or homeowners to furnish them special law enforcement protection unavailable to other. Such agreements are void and unenforceable.

Id. Section 351.061 (and its predecessor statute article 1581b-2, V.T.C.S.) ostensibly attempts to provide the statutory authority noted as lacking in JM-57 for law enforcement to contract with nongovernmental entities. However, and most importantly, the issue of constitutional authority on which to base the statute remains lacking. *See Id.* at 1.

In light of the enactment of article 1581b-2 (now §351.061), the Honorable Ray Keller, Chairman of the Committee on Law Enforcement of the Texas House of Representatives, requested an Attorney General's Opinion on whether a sheriff or constable may provide law enforcement services under contract with a private homeowners association. Tex. Att'y Gen. Op. No. JM-509 (1986) at 1. The Attorney General stated that although the question and answer would focus on the office of sheriff, its discussion would also apply to the office of constable. *Id.* The opinion states:

A sheriff and constable both hold elective offices established by the Texas Constitution. Tex. Const. art. V, §§18, 23. They are both peace officers, with duties prescribed by statute. Tex. Code of Crim. Proc. art. 2.12; *see* Tex. Const. art. V, §23 (Sheriff's duties prescribed by legislature); V.T.C.S. art. 6885 [now § 86.021 of the Local Government Code] (constable to perform duties required by law). Both officers have power to appoint deputies. V.T.C.S. arts. 3902, 6809, 6879a.

Id. In JM-509, the Attorney General declares article 1581b-d (§351.061) unconstitutional under Articles II, section 1 and Article III, section 1 of the Texas Constitution (it is important to note here that the code section itself is declared unconstitutional). *Id.* at 2. Article II, section 1 of the Texas Constitution states:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, §1 (2006). Article III, section 1 of the Texas Constitution states:

The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

Tex. Const. art. III, §1 (2006). The Attorney General determined that the provisions of the Texas Constitution, cited above, prohibit the legislature from delegating its power to enact laws. *Id.* at 3 (citing *Brown v. Humble Oil & Refining Co.*, 83 S.W. 2d 935 (Tex. 1935)). The legislature's power under article V, section 18 of the Texas Constitution, and section 86.021 of the Local Government Code, prescribing the election and general powers and duties of the office of constable, must be exercised consistently with article II, section 1 and article III, section 1 of the constitution. *Id.* at 3. Further, the Attorney General determined that the legislature may not delegate its power to the uncontrolled discretion of a private individual or entity. *Id.* (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). Therefore, the Attorney General concluded:

...that article 1581b-2, V.T.C.S. [now §351.061] is not a valid exercise of legislative power. Its enactment does not alter the conclusion of Attorney General Opinion JM-57.

Id. at 4. As a result, the code section itself is unconstitutional and any contract based on the code section is void. Further, the reasoning of JM-57 regarding the public policy and constitutional analysis, determining that any contract for law enforcement services to private entities is void and unenforceable remains unchanged after the enactment of section 351.061 of the Local Government Code (and its predecessor statute).

Most recently the Attorney General addressed the question of whether a sheriff could contract personally to provide security to a private entity. Tex. Att'y Gen. Op. No. GA-0101 (2003) at 1. The Attorney General stated in pertinent part:

...an opinion of this office following the enactment of the statutory predecessor of section 351.061 and 351.062 found that statute unconstitutional as an improper delegation of official authority to a private entity...Having determined that the statute is not a 'valid exercise of legislative power,' Opinion JM-509 concluded that its enactment 'does not alter the conclusion of Attorney General Opinion JM-57.'

Id. at 2 [citations omitted]. The opinion then further states that the Attorney General would not revisit the conclusions of Attorney General Opinions JM-509 and JM-57 in the opinion at hand. *Id.*

Conclusion:

First, section 351.061, as the operative section of Subchapter D of Chapter 351 of the Local Government Code, has been determined by the Attorney General to be unconstitutional. Second, after reviewing not only the Attorney General Opinions, but also the authorities cited therein, my legal opinion as counsel to the Smith County Commissioners Court is that section 351.061 of the Local Government code is unconstitutional. Third, any contract based on the unconstitutional statute, no matter how the contract is structured, is void and unenforceable. Fourth, based on the public policy and constitutional arguments proffered by the Attorney General, the Attorney General has determined any contract that purports to provide law enforcement services to private entities on a fee basis, whether or not based on a statute, is void and unenforceable. Fifth and finally, after reviewing the Attorney General Opinions and the authorities and reasoning therein, it is my opinion as counsel to the Smith County Commissioners Court that any contract that purports to provide law enforcement services to private entities on a fee basis, whether or not based on a statute is void and unenforceable. Based on the reasons enumerated above, any contract entered by Smith County to supply law enforcement services on a fee basis to nongovernmental associations will be unconstitutional and void.