

TEXAS DEPARTMENT OF PUBLIC SAFETY

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OPINION COMMITTEE

FILE # ML-45290-07

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July 26, 2007

The Honorable Greg Abbott
Attorney General of Texas
Opinion Committee
209 West 14th Street, 6th Floor
Austin, Texas 78701

RQ-0610-GA

RE: Request for Attorney General Opinion

Dear General Abbott:

Pursuant to Section 402.042 of the Texas Government Code, I am requesting a written opinion regarding the Texas Department of Public Safety's legal authority to issue enhanced driver licenses and personal identification certificates pursuant to Article 21 of Senate Bill 11, which passed during the 80th Legislature, Regular Session.

Article 21 adds new section 521.032 to Chapter 521 of the Texas Transportation Code which allows the Texas Department of Public Safety (Department) to issue an enhanced driver license or personal identification certificate for the purpose of crossing the border between Texas and Mexico. The effective date of this section is September 1, 2007.

On June 6, 2007, the Honorable Rick Perry, Governor of the State of Texas, signed Senate Bill 11 into law; however stated that the provision allowing the Department to create an enhanced driver license to cross the Texas/Mexico border conflicts with current federal law which requires a United States passport to be used to cross international borders.

Under federal law, United States citizens and nonimmigrant aliens are generally required to present passports to enter the United States. Specifically, section 1185(b) of the United States Code provides that it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport." However, current regulations allow waiver of the statutory passport requirement and permit U.S. citizens and citizens of Canada, Mexico and Bermuda to enter the United States from certain Western Hemisphere countries without presenting a passport.

In December of 2004, the United States Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004). Section 7209 of the IRTPA requires the U.S. Department of Homeland Security (DHS) and the U.S. Department of State (DOS) to develop and implement a plan to require all travelers to present "a passport or other document, or combination of documents, deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship" when entering or departing the United States. The plan to implement this Congressional mandate is called the Western Hemisphere Travel Initiative (WHTI). In addition, section 7209 limits the waiver of documentation requirements for U.S. citizens and citizens of Canada, Mexico and Bermuda traveling between the United States and the Western Hemisphere.

The WHTI is being implemented in two phases. As the first phase, regulations were implemented on January 23, 2007, requiring generally all U.S. citizens and citizens of Canada, Mexico and Bermuda traveling by air between the United States and Canada, Mexico, the Caribbean and Bermuda to present a valid passport to enter or reenter the United States.

The second phase of the WHTI is to implement regulations for land and sea border crossings. A Notice of Proposed Rulemaking (NPRM) regarding documents required for travelers departing from, or arriving in, the United States at land and sea ports of entry from within the Western Hemisphere was published in the *Federal Register* on June 26, 2007. This NPRM proposes the specific documents that U.S. citizens and citizens of Canada, Mexico and Bermuda will be required to present when entering the United States at land and sea ports of entry from Western Hemisphere countries. DHS is currently accepting written comments from the public and will accept public comments up to August 27, 2007.

DHS and DOS intend to consider travel documents developed by the various States that would denote identity and citizenship, as well as satisfy section 7209 of the IRTPA. The State of Washington has begun a voluntary pilot program to develop an enhanced driver license and identification card that would denote identity and citizenship. In addition to denoting identity and citizenship, these documents will have compatible technology, security criteria and respond to operational concerns of the U.S. Customs and Border Protection agency. Earlier this year, DHS announced its commitment to Washington State to accept its enhanced driver licenses as proof of identity and citizenship for WHTI purposes. On March 23, 2007, DHS and the State of Washington signed a Memorandum of Agreement to develop, issue, test and evaluate an enhanced driver license and identification card with facilitative technology to be used for land and sea border crossing purposes.

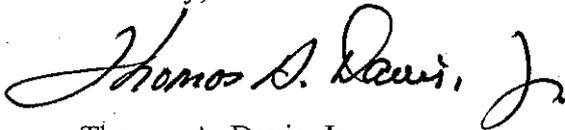
Under the NPRM, the Secretary of Homeland Security is permitted to enter a voluntary pilot program agreement with a State for purposes of conducting a test program, or procedure, designed to evaluate the effectiveness of technology or operational procedures regarding the suitability of travel documents that denote identity and citizenship. Additionally, under the NPRM, DHS proposes to consider documents such as state driver licenses that satisfy the WHTI requirements as sufficient to denote identity and citizenship if developed in accordance with a pilot program agreement between a State and DHS. DHS encourages other states interested in developing driver licenses that will meet both the Real ID Act of 2005 and WHTI requirements to work closely with DHS and to submit proposals similar to Washington State's program to

enhance their driver licenses and identification documents for use at land and sea ports of entry. Prior to the passage of Senate Bill 11, the Department had not submitted a proposal to DHS to develop an enhanced driver license that could be used in lieu of a passport to cross the border between Texas and Mexico.

Based on the preceding background information, the Department respectfully requests an opinion as to whether the provision under Article 21 of Senate Bill 11 allowing the Department to issue enhanced driver licenses for the purpose of entering the United States from Mexico conflicts with current federal law.

Thank you for your consideration of this request. Should you require any additional information, please contact Susana Garcia, Staff Attorney, Driver License Division, at (512) 424-7679.

Sincerely,



Thomas A. Davis, Jr.
Director

Enclosures