

DPS LEGAL BULLETIN

Issue 186

For DPS Use Only – Do Not Circulate

August/September/October 2015

Correction to the Texas Criminal and Traffic Law Manual, 2015 – 2016

In the *Texas Criminal and Traffic Law Manual, 2015 – 2016* edition, published by LexisNexis, an error has been identified. On page 937, Transportation Code section 521.246(b) was incorrectly left in the publication and not stricken pursuant to enrolled HB 2246, 84th Legislature. Delete section 521.246(b).

To ensure users of the law book are notified of the error and correction, Lexis has developed a website for the correction to be disseminated, www.lexisnexis.com/txerrata. The link will allow the user to read, download, or order copies of the errata sheet which is designed to be peeled and affixed to the inside of the book. If ordering for a group, plug in the quantity needed and order a group at one time.

If you have any questions, please contact Barbara Hinesley, Legal Assistant, Office of General Counsel.

Office of General Counsel

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890

Fax: 512/424-5716

General Counsel

Phillip Adkins

Deputy General Counsel

Duncan Fox

Deputy General Counsel

Valerie Brown

Deputy Chief, Legal Operations

Louis Beaty

Sr. Asst. General Counsel

Kathleen Murphy

Asst. General Counsel

Janette Ansolabehere

Asst. General Counsel

Jeff Lopez

Asst. General Counsel

Donna Starling

Asst. General Counsel

Elizabeth Goins

Asst. General Counsel

Brian Riemenschneider

Asst. General Counsel

Cari Bernstein

Managing Atty, Contracting

Pam Smith

Asst. General Counsel

Molly Cost

Asst. General Counsel

ML Calcote

Asst. General Counsel

Kaylyn Betts

Asst. General Counsel

Nick Lealos

Asst. General Counsel

Jennifer Wright

Publications Updated with Changes from the 84th Legislature, Regular Session

- The *Texas Criminal and Traffic Law Manual, 2015 – 2016*, edition, published by LexisNexis, is available for purchase through the DPS General Stores.

- An online version in html of the *Texas Criminal and Traffic Law Manual, 2015 – 2016* edition, published by LexisNexis, is available at <http://dpsnet/general/dpsmanuals/index.htm>. The online version contains legislative history and LexisNexis editorial case notes.

- The following 84th Legislative update publications are also available at <http://dpsnet/Divisions/DirectorStaff/Legal/> :

- *2015 – 2016 Laws Affecting DPS*
- Government Code Chapter 411 with portions of Article V, General Appropriation Bill.

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November/December 2015

New Law Requirements for Officer Involved Shooting Reports

House Bill 1036 which passed in the last legislative session imposes new requirements for reporting on injuries and deaths caused by peace officers and for injuries or deaths to peace officers. The law is codified in Article 2.139 and 2.1395 of the Code of Criminal Procedure. The reporting requirement applies to incidents during which a peace officer discharges a firearm causing death or injury to another and incidents where a person who is not a peace officer discharges a firearm and causes injury or death to a peace officer. It is important to point out that the new House Bill 1036 reporting requirement is in addition to, and not a substitute for the existing Department policies for comprehensive firearms discharge investigations, custodial death reports and Department injury reports. The new Department policy is located at Section 5.06.12. It requires reports to be submitted to the Office of General Counsel (OGC) within ten days of the incident. Please ensure that the appropriate form is submitted to OGC at Joanne.Scarbrough@dps.texas.gov.

Where can reporting forms be obtained? Blank PDF forms are available at the Attorney General website: www.texasattorneygeneral.gov/cj/peace-officer-involved-shooting-report

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890

Fax: 512/424-5716

General Counsel

Phillip Adkins

Deputy General Counsel

Duncan Fox

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Where can final reports be viewed?

Final reports are posted to both the DPS website and the Attorney General website.

DPS website:

<http://dps.texas.gov/GeneralCounsel/OfficerInvolvedShootingRprt.htm> .

Attorney General website:

www.texasattorneygeneral.gov/cj/peace-officer-involved-shooting-report.

Office of General Counsel

DPS Policy: General Manual, Chapter 5, Section 06.12, Officer Involved Shooting Reports.

Articles 2.139 and 2.1395 of the Code of Criminal Procedure require law enforcement agencies to report an incident in which a peace officer discharges a firearm causing death or injury to another or an incident when a non-peace officer discharges a firearm and causes injury or death to a peace officer. The report is to be submitted to the Attorney General not later than the 30th day after the date of the officer-involved injury or death.

1. Responsibility for Reporting

a. The immediate supervisor of the officer involved will be responsible for preparing and submitting the report through the appropriate chain of command to the Office of General Counsel.

b. A report shall be submitted even though other agencies involved in the occurrence may be required to submit a report.

c. In addition to the officer involved shooting report, the immediate supervisor is also responsible for completing the administrative requirements for firearm discharges resulting in death or injury that are explained in section 96.09 of this Chapter of the General Manual.

2. Procedure for Reporting Officer Involved Shootings

a. Forms are available on the Attorney General website at www.texasattorneygeneral.gov/cj/peace-officer-involved-shooting-report.

b. The completed report shall be submitted to the Office of General Counsel within ten days of the incident.

c. The Office of General Counsel will review the report, obtain appropriate signatures, and submit the report to the Attorney General.

d. The DPS internet site shall be updated to comply with statutory posting requirements.

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JANUARY/FEBRUARY 2016

REST IN PEACE § 724.012(b) - COURTS LIMIT THE IMPLIED CONSENT LAW

The Texas Court of Criminal Appeals has finally ended an argument about Transportation Code Section 724.012(b)'s authority to take a blood specimen from a DWI suspect without a warrant or consent. In 2013 the United States Supreme Court issued *Missouri v. McNeely*, holding that officers could no longer take blood from a person arrested for DWI unless the officer had the suspect's consent, obtained a search warrant, or could show exigent circumstances justifying the blood draw without consent or warrant. In the ensuing months, multiple Texas Courts of Appeal followed *McNeely*, and reversed numerous DWI convictions based on defendants' challenges to admission of the result of a blood test taken under Section 724.012(b), Transportation Code.

State v. Villarreal

In November 2014, the Texas Court of Criminal Appeals (CCA) finally addressed the issue in *State v. Villarreal*, on appeal from the Fourth

Court of Appeals in San Antonio. In a 5-4 decision, the CCA ruled that while an officer who arrests a person for DWI has a duty to obtain a breath or blood specimen from a person who meets the specific criteria in Section 724.012(b), Transportation Code, the officer may no longer rely on the statute for the authority to take the blood without the person's consent absent a search warrant or proof of exigent circumstances. All appeals for reconsideration of this decision were denied in January 2016 and it is now settled law. However, the impact on DPS Troopers should be minimal because Highway Patrol's policy since *McNeely* has been for Trooper to obtain an evidentiary search warrant in the event the DWI suspect refuses to voluntarily give a breath or blood specimen.

Can't Get Consent or Warrant—Proving Exigent Circumstances

Frankly, it is not easy to prove that exigent circumstances justified the taking of blood without consent or a warrant. Since *McNeely* only one reported case has upheld a warrantless blood draw based on exigent circumstances. The case is *Garcia v. State* issued in May 2015 by the Fourteenth Court of Appeals. Garcia and his passenger were following friends to a party after leaving a bar. Speeding, Garcia lost control of his SUV and crashed. His SUV landed nearly 700 feet from the road after flipping twice. The crash occurred at 10:20 p.m.

A Brazoria County officer was the first to arrive at the scene. Garcia told him that he had lost control of his SUV because he was speeding. A witness identified Garcia as the driver. The officer requested Life Flight for Garcia's passenger who was critically injured. The officer also requested for an ambulance for Garcia who complained of back pain. EMS immobilized Garcia and placed him in the ambulance for initial treatment.

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890

Fax: 512/424-5716

General Counsel

Phillip Adkins

Deputy General Counsel

Duncan Fox

Deputy General Counsel

Valerie Brown

Deputy Chief, Legal Operations

Louis Beaty

Sr. Asst. General Counsel

Kathleen Murphy

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Asst. General Counsel

Jennifer Wright

At 11:10 p.m., Trooper David Wyman arrived as the passenger was being loaded into the helicopter. All traffic was stopped while the helicopter departed. Meanwhile, Wyman spoke to Garcia in the ambulance and smelled a strong odor of alcohol. Garcia also admitted to drinking “a little bit.” At this point, the ambulance left for the hospital. Wyman called for another Trooper to relieve him and began the investigation into the crash. When the second Trooper arrived, Trooper Wyman left for the hospital, arriving at 12:00 a.m.

When Trooper Wyman arrived, Garcia was in x-ray. While he waited for Garcia to return to his room, Wyman was told that the passenger had died. Garcia returned to his room at 1:00 a.m. Trooper Wyman interviewed Garcia, noticing several indicators that Garcia was highly intoxicated. Garcia refused to perform any SFSTs although Wyman observed nystagmus in Garcia’s eyes. Trooper Wyman gave Garcia the required DWI warnings and asked him for a blood specimen which Garcia refused. Trooper Wyman then ordered a nurse to draw Garcia’s blood which she did at 1:15 a.m. (he had a BAC of .239).

At trial, Garcia moved to suppress the blood test results on the ground that he had refused consent and the blood was taken without a search warrant. The trial court denied the motion and Garcia was convicted. He raised the same argument on appeal. The State argued that exigent circumstances justified the Trooper’s decision to have the blood drawn without a warrant.

The State stressed the following facts as establishing exigent circumstances:

- Garcia could not do the SFSTs at the scene of the crash because he was being treated for his injuries,
- Garcia’s transport to the hospital was delayed because of Life Flight,
- Trooper Wyman had to begin the crash investigation which involved a possible fatality and could not leave until another Trooper arrived,
- After arriving at the hospital, Trooper Wyman was unable to do a full DWI investigation until Garcia returned from x-ray, and did not develop probable cause until then (around 1:00 a.m.),

- Garcia’s blood alcohol was dissipating,
- Garcia was possibly receiving pain medications, and
- At the time, Brazoria County had no on-call judge to sign evidentiary search warrants.

The appellate court considered these factors as well as Trooper Wyman’s testimony that once he had developed probable cause, due to the lack of an on-call magistrate, the process of getting the warrant would be lengthy and complicated. By the time Wyman was able to do his investigation into Garcia’s condition and developed probable cause, nearly three hours had passed. Adding on the time needed to prepare the affidavit and warrant, locate a judge to review and sign it, and return to the hospital would have taken another hour or more. The court concluded that the state established that exigent circumstances justified the warrantless blood draw.

The *Garcia* case shows that it is not enough to tell the court that it would take two or three hours to get the warrant. Instead, the state will have to show the court every factor that prevented the officer from obtaining a search warrant in a reasonably timely manner, and that there was no reasonable alternative. *Janette LoRie Ansolabehere, Assistant General Counsel, Office of General Counsel*
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March/April 2016

WEAVE ON DOWN THE ROAD

We all know that there must typically be at least reasonable suspicion to justify a traffic stop, but what traffic violation or other criminal offense is there to investigate when a car weaves within a lane and possibly enters, or at least touches the lines of the adjacent lane? The Texas Court of Criminal Appeals recently answered this question with a surprising twist in *Leming v. State*. No. PD-0072-15, 2016 Tex. Crim. App. LEXIS 73 (Tex. Crim. App. Apr. 13, 2016).

The case involved three possible reasons to justify the stop: community caretaker doctrine, failure to maintain a single lane, and driving while intoxicated.

Community Caretaker

The Longview police officer who stopped the car said that he was concerned that the driver needed his help. This issue was

not presented to the Court of Criminal Appeals, but the lower appellate court held that the officer's belief was unreasonable because weaving within a lane is not a strong indicator of distress and there was no observable need of assistance from law enforcement in this case.

Failure to Maintain a Single Lane

The State also argued that the officer had reasonable suspicion that the driver violated Section 545.060 of the Transportation Code by failing to maintain a single lane. This seemed like a losing argument too because many other courts have held that Section 545.060 is not violated unless the lane change was done unsafely, and there was no evidence of that in this case. But here's the twist—the Court of Criminal Appeals challenged this established understanding based on its interpretation of prior legislative history and stated that Section 545.060 may be violated when a driver fails to stay entirely within a single lane when it is practical to do so, regardless of whether going outside the lane is unsafe.

This interpretation was only adopted by a plurality of the court—meaning that only four out of the nine judges agreed, but a majority of the judges did not disagree—so it is uncertain how courts will apply it in the future.

Driving While Intoxicated

The majority of the court, however, did agree that there was reasonable suspicion that the driver was intoxicated. Although isolated

OFFICE OF GENERAL COUNSEL	
Phone: 512/424-2890	Fax: 512/424-5716
General Counsel	Phillip Adkins
Deputy General Counsel	Duncan Fox
Deputy General Counsel	Valerie Brown
Deputy Chief, Legal Operations	Louis Beaty
Sr. Asst. General Counsel	Kathleen Murphy
Asst. General Counsel	Janette Ansolabehere
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weaving within a lane alone is not enough to justify a stop, there was more here. The officer and another concerned driver observed sustained and significant weaving for several minutes. The car was also going 13 mph under the speed limit and slowed further as the patrol car approached. Under the totality of the circumstances, a reasonable officer would suspect that the driver was intoxicated.

What did we learn from this case?

When a car is weaving within a lane, it is unlikely that a stop will be justified under the community caretaking doctrine, unless more distress is exhibited from the driver and there is really no one other than the officer to help. If the car appears to cross over into an adjacent lane, that may be enough to investigate a violation of Section 545.060, even if there is no evidence that the lane change was unsafe. However, it is also very important to document any observations of intoxication. Isolated weaving within a lane or driving under the speed limit alone is not enough to raise reasonable suspicion of DWI. But when a car has been weaving significantly for a few minutes, is driving unusually slow, and there is other suspicious behavior, including the time of day or night and the location of the car, an investigative stop to determine the driver's intoxication level will likely be justified. *Kaylyn Betts, Assistant General Counsel Office of General Counsel ❖*



“Section 545.060 may be violated when a driver fails to stay entirely within a single lane when it is practical to do so, regardless of whether going outside the lane is unsafe.”

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May/June 2016

What to do When You Receive a Public Information Request (PIR)

If you receive a written request for information, do not ignore it!

Any request for information submitted to the Department in writing is a public information request (PIR). The request does not need to be typed, nor does it need to use the terms “public information” or “open record” or be directed to a specific person. However, if the request is a subpoena or a court order signed by a judge, it is treated differently than a PIR.

A PIR submitted by mail, fax, or in person does not need to be sent to the Office of General Counsel (OGC) for it to be a valid request, and you should not ask a requestor to resubmit the request to OGC. However, if you receive a PIR via email, please respond to the requestor as soon as possible with the following statement:

OFFICE OF GENERAL COUNSEL	
Phone: 512/424-2890	Fax: 512/424-5716
General Counsel	Phillip Adkins
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Pursuant to §552.301(c) of the Public Information Act (PIA), the Director has designated the following email address for public information requests: OGC.Webmaster@dps.texas.gov.

An email request must be sent directly to that address or through the Department's Public Information Request Page on our public website. A request emailed to any other Department email address does not trigger the requirements of the PIA.

Upon receipt of a PIR, date stamp the first page. This serves as proof of the date a request was received by the Department. The date of receipt is very important if we need to ask the Attorney General's office to allow us to withhold records. If the PIR is received after 5PM, on the weekend, or on a skeleton crew day, it is considered to have been received on the next business day.

Identify the records responsive to the request. For example, in some instances, the requestor may be asking for a specific report, whereas in other instances the requestor might want all information the Department has relating to an incident. This is an important distinction because we only need to provide the information requested; however, we need to ensure that we provide all of the information requested. The Department is not required to create documents, do research, or answer questions in response to a PIR. And only the records in existence on the date the request is received are responsive.

If you have the information requested and there is no legal reason not to release it, you may respond to the requestor yourself. Ensure that you maintain a copy of the request and your response. Public information requests must be retained in accordance with the DPS Retention Schedule.

If you believe there is some legal reason that the information should not be released (see *Common Exceptions to Disclosure* below), forward the PIR and all of the responsive records to OGC. Please note that many exceptions to disclosure are waived if we do not ask the Attorney General to rule on the request within 10 business days after the Department (not OGC) receives the request. If the exceptions are waived, the Department will most likely be required to release it.



In some cases, you can simply redact confidential information and release the remainder of the records. An opinion from the Attorney General is not required to withhold the following information:

- Driver license number and state or country of issuance
- Identification card number and state or country of issuance
- photocopy of a license or ID card issued by any state or country, or a local agency

authorized to issue an identification documents

- License plate number and state of issuance
- vehicle identification number
- FBI number
- criminal history records (TLETS/TCIC/NCIC)
- Social security number of a living person
- Fingerprints
- DNA records
- Autopsy photos
- Insurance policy, bank account, bank routing, credit card, debit card, and charge card numbers
- e-mail address of a member of the public
- date of birth of a member of the public
- individual handgun license records
- Employee's Personal Information (if employee has elected to restrict the information)
 - Home Address
 - Home/Cellular Telephone

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- Social Security Number
- Family Information

In some cases, you may be able to charge the requestor for copies of information. Charges for complying with PIRs are set by the Attorney General's office, and the charges for some common items are:

- 10¢ per page for letter and legal size documents
- \$1.00 per CD
- \$3.00 per DVD
- \$2.50 per video cassette
- \$1.00 per audio cassette
- the actual cost of reproducing non-digital photos
- postage, if the copies are not picked up
- \$15 per hour for labor + \$3 per hour for overhead (only if you are providing more than 50 pages of copies)
- \$6.00 per crash report (set by statute)

The Public Information Act does not require that you certify records or provide an affidavit in order to authenticate requested records. If you receive a PIR asking for certification or a business records affidavit, you should inform the requestor that a subpoena is required to provide authenticated records. You may also inform the requestor that only TxDOT may provide a certified Peace Officer's Crash Report (CR-3). Unless the requestor withdraws the PIR, you still need to process the request and provide uncertified copies of the records requested.

Additional information about handling public information requests is available on the [OGC intranet site](#) and the [DPS website](#). If you have any questions, you can call OGC at (512) 424-2890 and ask to speak to the open records staff.

Common Exceptions to Disclosure

The Department cannot withhold any of this information without asking for a timely ruling from the Attorney General's office.

- Confidential Information
 - Medical/EMS Record
 - Emergency Response Personnel
 - Risk/Vulnerability Assessment
 - Criminal Intelligence System records
 - Polygraph results
 - Identity of sexual assault victim
 - Personal financial information
 - Confidential informant
 - Law enforcement records concerning a child
 - Investigation of report of child abuse or neglect
 - Homeland security
- Ongoing Investigation
- Pending Charges
- Law enforcement sensitive
- Litigation
- Bidding in Progress
- Attorney-Client Privilege
- Attorney Work Product
- Audit Working Papers
- Test Items

- *Molly Cost*, Assistant General Counsel, Office of General Counsel ❖

DPS LEGAL BULLETIN

Issue 191

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July/August 2016

Weakened Exclusionary Rule is Not a Fishing-Expedition License

If you have paid attention to the media recently, you likely heard about *Utah v. Strieff*. In that case, the United States Supreme Court essentially watered down the federal exclusionary rule. Some have asked whether that case changed the rules for investigative stops. The short answer to that question is no. The exclusionary rule is not really a rule—it is more of a remedy for when officers break constitutional rules. But it is not the only available remedy, and the mere fact that it is now weakened should not impact how officers conduct pedestrian and roadside stops. Officers are still expected to comply with the federal and state constitutions and laws and DPS policies, regardless of the remedy that may be imposed if those rules are not followed.

Background: In December of 2006, a South Salt Lake police officer received an anonymous tip that a home was being used for narcotics activity.

While conducting surveillance, the officer saw a person, later identified as Edward Strieff, leave the house and walk down the street. The officer did not have any other information about Strieff, but he wanted to ask him some questions about what was going on inside the house. So he *ordered* Strieff to stop and asked to see his identification. The officer then discovered that Strieff had an outstanding arrest warrant for a minor traffic offense. Based on the warrant, the officer arrested Strieff, and during a search incident to the arrest, the officer found methamphetamine in Strieff's pocket.

The State conceded that the stop was unconstitutional because it was not justified by reasonable suspicion. Normally, the exclusionary rule would prohibit the State from using any evidence obtained as a result of the unlawful stop to prosecute Strieff because courts want to deter officers from violating the Fourth Amendment. But the State argued that the evidence should not be excluded because the outstanding arrest warrant broke the connection between the unconstitutional conduct and the discovery of the drugs. The Supreme Court agreed.

Holding: The Supreme Court held that when an officer discovers a valid, pre-existing, and untainted arrest warrant, evidence seized pursuant to the arrest is admissible even when the initial stop violated the Fourth Amendment. But the court noted that officers may still be subject to civil liability even if the officer did not know that the stop was unlawful. And, most importantly, the court stated that the outcome would be different if the officer was purposefully or flagrantly violating the Fourth Amendment.

The Texas Court of Criminal Appeals said that same thing when it considered this issue a few years ago in *State v. Mazuca*. In that case, the

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890

Fax: 512/424-5716

General Counsel Phillip Adkins

Deputy General Counsel Duncan Fox

Deputy General Counsel Valerie Brown

Deputy Chief, Legal Operations Louis Beaty

Sr. Asst. General Counsel Kathleen Murphy

Asst. General Counsel Janette Ansolabehere

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court went to great lengths to explain that it would punish officers who deliberately make unlawful stops in the hopes of discovering outstanding warrants or who egregiously disregard constitutional rights.

Impact on DPS: Cases dealing with the exclusionary rule have no impact on rules governing investigative stops. If an officer mistakenly makes an unlawful stop, any evidence discovered may not be suppressed if the person happens to have a valid, outstanding arrest warrant. But the officer may still be sued or face disciplinary action. Courts are also extremely intolerant of officers who consciously disregard constitutional limitations. So officers should always follow all rules regarding stops. To help with that, here is a reminder of some of the basic rules governing stops:

- An officer can always *ask* a person questions. For instance, if the officer in *Strieff* had simply approached Strieff on the street and asked him what he was doing in the house, instead of demanding that he stop, the consensual encounter would have been constitutional.
- Once an officer, by words or actions, *demand*s that a person stop, the officer must have at least reasonable, articulable suspicion that the person is engaging in criminal activity. In *Strieff*, the officer did not know whether Strieff was a short-term visitor. All he knew was that Strieff was leaving a suspicious house. That alone was not enough to establish reasonable suspicion that he was buying drugs there.
- An officer can also always *ask* for identification. But only a driver of a motor vehicle and a person already lawfully arrested are required to comply. Passengers and pedestrians cannot be arrested for refusing to identify under section 38.02 of the Texas Penal Code. Of course, a person who falsely or fictitiously identifies may be arrested under section 38.02(b) or under section 32.51 for fraudulent use of identifying information.
- A stop initially supported by reasonable suspicion may become unlawful if it is unjustifiably extended. For example, if a passenger consensually identifies, an officer may verify that identity and check for outstanding warrants, but doing so cannot extend the duration of the stop absent reasonable suspicion of criminal activity beyond the traffic offense.
- If an officer develops reasonable suspicion of criminal activity beyond the traffic offense, the detention and investigation may continue for a reasonable time. Otherwise, once the purpose of a traffic stop is complete, the vehicle and its occupants should be released.

Kaylyn Betts, Assistant General Counsel,
Office of General Counsel ❖

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FDA-Approved Substances Are Not PG 2 Offenses

Senate Bill 172 is having significant impact on drug prosecutions for certain scheduled substances. If you are involved in the investigation and charging of these kind of offenses you should be aware of the law which went into effect on September 1, 2015.

SB 172 added a new subsection (d) to Texas Health & Safety Code Section 481.103. The new provision states:

“If a substance listed in this section is approved by the Federal Drug Administration, the inclusion of that substance in this penalty group does not apply, and notwithstanding any other law, a person may not be convicted for the manufacture or delivery of the substance under Section 481.113 or for possession of the substance under Section 481.116.”

In other words, the law excludes any FDA-approved substances from Penalty Group 2, even if they are specifically listed in Section 481.103. That means drugs such as Amphetamine (e.g., Adderall), Lisdexamfetamine (e.g., Vyvanse), and Dronabinol can no longer be charged or prosecuted as Penalty Group 2 offenses (481.113 or 481.116). Prosecution may still be possible as a misdemeanor under Health & Safety Code Section 481.119 based upon the charge that the drug is a miscellaneous substance that is scheduled but not listed in a penalty group.

If you have a case in which you believe a defendant was charged or convicted incorrectly under the old law, please consult with your local prosecutor. If your prosecutor needs help in identifying cases with offense dates on or after September 1, 2015 that had lab results of Amphetamine, Lisdexamfetamine, or Dronabinol, the Crime Lab can provide this information to prosecutors state-wide upon request.

Also, at this point it is unclear what to do with offenses involving FDA-approved substances that have been crushed into powder. We would recommend that officers consult with their local prosecutors about how best to handle charging an individual in this circumstance. Donna Starling, Asst. General Counsel, Office of General Counsel. ❖

Department Employees and Political Activity

As things heat up in local, state and federal political races during this presidential election year it is appropriate to review policy and law relating to other types of political activity by state employees. The Department encourages employees to be informed citizens involved in government at the city, county, state and national levels. However, the political activity of Department employees is subject to certain limitations imposed by law and policy.

The main source of law addressing the political activity of government employees is the Hatch Act (5 U.S.C.A. §1501, *et seq.*). The Hatch Act applies to federal employees and state and local government employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made through federal government sources. The Department has determined that the Hatch Act will apply to all Department personnel. [See General Manual, Chapter 7, Section 07.07.05(1)(c).]

Support of Partisan Campaigns in the Workplace

Pursuant to Department policy employees may not use their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination. [See General Manual Section 07.07.05(1)(a)(2).] Department employees are prohibited from directly or indirectly coercing, attempting to coerce, commanding or advising another employee to pay, lend, contribute anything of value to a party, committee, organization, agency or person for political purposes. [See General Manual Section 07.07.05(1)(a)(3).] Further, an employee may hold a position in a political party (e.g. precinct chair, convention delegate) and/or support the partisan campaigns of others. An employee **may not use state time, state property or other state resources for such activities**. [See General Manual Section 07.07.05(1)(e).]

The practical application of these policy provisions means there are limitations on certain types of activity in which employees may engage while representing themselves as Department employees. Additionally

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there are limitations on political activity while on duty, on state property or using state resources. The following information is provided regarding some frequently raised issues related to this policy.

- A Department employee may not engage in political activity (to include wearing political buttons), while on duty, while in a government occupied office or building, while wearing an official uniform or insignia, or while using a government vehicle; however, employees may park their personal vehicles that bear a partisan political sign or sticker in the parking lot of the state facility while on duty. If a personal vehicle bears a partisan political sign or sticker, the employee may not use that vehicle in the course of official business; and employees may display signs on their lawns, in their residences and in similar personal circumstances.
- Employees may make voluntary contributions for political purposes, but may not use their position or state time, materials, equipment (including the network) to solicit participation in the political process or solicit contributions for political purposes.
- Employees may orally express opinions as an individual privately or publicly on political subjects and candidates. However, employees may not use their governmental authority or influence in an attempt to intimidate, threaten or coerce any person to vote contrary to this or her voluntary choosing.
- Employees may endorse or oppose a partisan

political candidate in a political advertisement, broadcast or literature, or similar material so long as the employee is not on duty and not wearing a uniform, badge or insignia. Employees may not allow one's name or likeness to be used in campaign literature in the employee's professional capacity.

- Employees may not allow their official titles to be used in connection with fundraising activities related to a partisan election.
- Employees are prohibited from using state property, materials, supplies or equipment in connection with political activity. Employees may not post partisan political signs regarding a current partisan race in the office, at their work station or on their state owned computers. For example, a screen saver cannot contain a political endorsement of a candidate in a partisan election. Employees may not use the Department e-mail system for distributing politically based materials.

For Further Information

The U.S. Office of Special Counsel is an independent federal agency tasked with the administration and enforcement of the Hatch Act. The agency provides information regarding the Act including the Act's applicability to state and local employees at <https://osc.gov/pages/hatchact.aspx> . If you have specific questions about Department employees and political activity please contact the Office of General Counsel. - Kathleen Murphy, Sr. Asst. General Counsel, Office of General Counsel.



OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890	Fax: 512/424-5716
General Counsel	Phillip Adkins
Deputy General Counsel	Duncan Fox
Deputy General Counsel	Valerie Brown
Deputy Chief, Legal Operations	Louis Beaty
Sr. Asst. General Counsel	Kathleen Murphy
Asst. General Counsel	Janette Ansolabehere
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DPS LEGAL BULLETIN

Issue 193

For DPS Use Only – Do Not Circulate

November/December 2016

Can I See Some Identification, Please?

When is a person required to identify to an officer? This question was briefly answered in the July/August Edition, but some have asked for more information. It just so happens that the Texarkana Court of Appeals recently issued an opinion on the topic. The court addressed the question of whether a person violates section 38.02(a) of the Texas Penal Code by failing to identify during a traffic stop.

In *Curry v. State*, an officer stopped Curry for a traffic violation. The officer asked Curry for identification, but Curry claimed that he was not subject to any governmental authority because he was a sovereign citizen. After Curry refused to give any information other than his first name, he was arrested for failure to identify and later convicted for the offense.

On appeal, the court overturned the conviction. Although section 38.02(a) used to apply to anyone “lawfully stopped,” it was amended in 1987. Now it states:

- (a) A person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has *lawfully arrested* the person and requested the information.

The court held that Curry was only detained, not arrested, when he refused to give the requested information. Thus, there was no evidence that he violated section 38.02(a).

This result may seem counterintuitive, but it is important to remember that a typical traffic stop is an investigative detention, not an arrest. So unless a person is lawfully arrested for another offense when he or she is asked and refuses to identify, the person has not violated 38.02(a).

You may be thinking, “Hey wait a minute, drivers are required to present identification.” That is true. But you are thinking of section 521.025 of the Transportation Code. That provision requires a person operating a motor vehicle to “display the license on

the demand of a magistrate, court officer, or police officer.” In *Curry*, if the officer asked Curry for his driver license and he refused, the officer could have arrested him for violating section 521.025. Once under arrest, the officer could have asked Curry to identify. If Curry again refused, he could have also been charged with violating section 38.02(a). But keep in mind that section 521.025 does not apply to passengers or pedestrians. So if Curry was a passenger in the car, not the driver, he could not be arrested for violating section 521.025.

However, a driver, passenger, or pedestrian who gives an officer a false or fictitious name during a stop violates section 38.02(b) of the Penal Code, even if the person is not under arrest. That is because, unlike the affirmative duty to answer in section (a), section (b) also applies when a person is “lawfully detained.” For example, in *Curry*, if the driver told the officer that his name was “Moe” while he was detained, he could have been arrested for giving a false or fictitious name. He could have also been arrested for violating section 32.51 of the Penal Code if he gave the officer another’s driver license or other item of identifying information with the intent to harm or defraud.

Remember, you may always ask a person to identify. But, under current law in Texas, not everyone is required to answer. As we learned from the court in *Curry*, only a person already lawfully arrested can be charged with refusing to identify under section 38.02(a). - Kaylyn Betts, Asst. General Counsel, Office of General Counsel. ❖

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DPS LEGAL BULLETIN

Issue 194

For DPS Use Only – Do Not Circulate

January/February 2017

MAGNETIC STRIPS ON GIFT CARDS - WARRANT OR NO WARRANT?

Recently the Fifth Circuit addressed the following question: is a peace officer's scanning of the magnetic stripe¹ on the back of a gift card a search under the Fourth Amendment? The answer: no.

Facts

A Texas officer stopped the driver of a car for no visible license plate light. Neither the driver (Henderson) nor the passenger (Turner) could show a valid driver license. When the officer ran the usual records check, he discovered Turner had an active arrest warrant for possession of marijuana. When Turner exited the vehicle at the officer's request, the officer saw an opaque plastic bag partially protruding from under Turner's seat. The officer believed someone had attempted to conceal the bag by stuffing it under the seat.

The officer placed the handcuffed Turner in the patrol car, and while waiting for warrant confirmation, the officer asked Henderson what was in the bag. In response, Henderson handed the bag to the officer, telling him that "we"—Henderson and Turner—had bought gift cards. When the officer opened the bag he saw approximately 100 cards. Henderson said that they didn't have receipts because they had bought the cards from a person who "sells them to make money." The officer talked to other officers who had experience with such stolen cards, and then seized the gift cards as evidence of criminal activity. Henderson got a ticket for no DL and signed the inventory sheet for 143 gift cards. Turner was arrested on the warrant.

The arresting officer, without a search warrant, proceeded to "swipe" the cards using his in-car computer. Not being able to use the data on the cards, he gave the cards to the Secret Service. Upon examination, the Secret Service found 43 of the cards had been altered—the numbers encoded on the stripe did not match the numbers printed on the card. Video showed Henderson and Turner purchasing gift cards at various stores in Bryan, Texas. Turner was charged with aiding and abetting the possession of unauthorized access devices. Turner's motion to suppress the roadside seizure of the cards and the subsequent examination of the magnetic stripe on the cards was denied. The trial court concluded that Henderson had given consent for the seizure, and that the officer's examination of the magnetic stripes was not a search.

The Court's Analysis

Turner argued that Henderson consented to the officer's initial seizure of the bag when he handed it to the officer when asked about it. However, Turner argued that the officer's retention of the bag required a warrant or other Fourth Amendment justification. The Court ignored the state's consent argument to hold that the seizure of the bag was justified under the plain view rule. (Officer has lawful authority to be where he/she can see the evidence and the incriminating nature of the item is "immediately apparent.") The Court concluded that the facts supported the officer's reasonable belief that the bag contained evidence of criminal activity. Henderson had admitted that neither he nor Turner had receipts for the cards, and had bought them from a person who sold gift cards for profit. These admissions, combined with the officer having

¹ The industry term is "stripe."

continued on page 2

knowledge that large numbers of gift cards are associated with drug dealing, fraud, and theft, was sufficient to establish probable cause that the cards were contraband or evidence of a crime. (Note: the Court dismissed Turner's argument that the officer stated he did not believe he had sufficient evidence to arrest Henderson for gift card crime. Probable cause is objective, and does not turn on an officer's subjective beliefs.)

The Court next addressed whether the officer could scan the card's magnetic stripes without obtaining consent or a warrant. The Court pointed out that some items holding data such as cell phones and computers require either consent or a warrant to search. While a magnetic stripe may hold personal data, it is the card issuer that encodes that data, not the card holder. Moreover, while a card holder has the ability to recode the card, to do so requires an expensive re-encoding device.

The Court concluded that the magnetic stripe on a gift card does not hold enough personal information to rise to the level that would support a reasonable expectation of privacy by

the person possessing the card. Moreover, unlike cell phones and computers whose primary purpose is to store the user's personal information, a gift card's purpose is to purchase something.

Some Final Thoughts

The Court's analysis and holding is limited to gift cards. The Court did not specifically address whether or not an officer may swipe the magnetic stripe on a credit card without consent or a warrant. Also, remember that the officer initially was handed the bag of cards by consent. The officer established that he had consulted with other officers familiar with gift card abuse before determining that the gift cards were contraband or evidence of criminal activity. If you would like to read the opinion for yourself, the opinion is *United States of America v. Courtland Lenard Turner*, Docket No. 15-50788 (United States Court of Appeals for the Fifth Circuit). Search for the terms, Turner and 15-50788, to find the opinion. *Janette LoRie Ansolabehere, Assistant General Counsel, Office of General Counsel* ❖

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890	Fax: 512/424-5716
General Counsel	Phillip Adkins
Deputy General Counsel	Duncan Fox
Deputy General Counsel	Valerie Brown
Deputy Chief, Legal Operations	Louis Beaty
Managing Attorney-Contracting	Meghan Frkuska
Sr. Asst. General Counsel	Kathleen Murphy
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DPS LEGAL BULLETIN

Issue 195

For DPS Use Only – Do Not Circulate

March/April 2017

Received a Public Information Request (PIR)? Do Not Ignore!

If you receive a written request for information, do not ignore it!

Any request for information submitted to the Department in writing is a public information request (PIR). The request does not need to be typed, nor does it need to use the terms “public information” or “open record” or be directed to a specific person. However, if the request is a subpoena or a court order signed by a judge, it is treated differently than a PIR.

A PIR submitted by mail, fax, or in person does not need to be sent to the Office of General Counsel (OGC) for it to be a valid request, and you should not ask a requestor to resubmit the request to OGC.

If you receive a PIR via email, please respond back via email to the requestor as soon as possible with the following statement:

Pursuant to §552.301(c) of the Public Information Act (PIA), the Director has designated the following email address for public information requests: OGC.Webmaster@dps.texas.gov.

An email request must be sent directly to that address or through the Department’s Public Information Request Page on our public website. A request emailed to any other Department email address does not trigger the requirements of the PIA.

Upon receipt of a PIR, date stamp the first page. This serves as proof of the date a request was

received by the Department. The date of receipt is very important if we need to ask the Attorney General’s office (AG) to allow us to withhold records. If the PIR is received after 5PM, on the weekend, or on a skeleton crew day, it is considered to have been received on the next business day.

Identify the records responsive to the request. For example, in some instances, the requestor may be asking for a specific report, whereas in other instances the requestor might want all information the Department has relating to an incident. This is an important distinction because we only need to provide the information requested; however, we need to ensure that we provide all of the information requested. The Department is not required to create documents, do research, or answer questions in response to a PIR. And only the records in existence on the date the request is received are responsive.

If you have the information requested and there is no legal reason not to release it, you may respond to the requestor yourself. Ensure that you maintain a copy of the request and your response. Public information requests must be retained in accordance with the DPS Retention Schedule.

If you believe there is some legal reason that the information should not be released (see *Common Exceptions to Disclosure* below), or if the request is from the media, forward the PIR and all of the responsive records to OGC. Please note that many exceptions to disclosure are waived if we do not ask the AG to rule on the request within 10 business days after the Department (not OGC) receives the request. If the exceptions are waived, the Department will most likely be required to release the requested paperwork.

In some cases, you can simply redact confidential information and release the remainder of the records. An opinion from the AG is not required to withhold the following information:

- Driver license number and state or country of issuance
- Identification card number and state or country of issuance
- photocopy of a license or ID card issued by any state or country, or a local agency authorized to issue an identification documents
- License plate number and state of issuance
- vehicle identification number
- FBI number
- criminal history records (TLETS/TCIC/NCIC)
- Social security number of a living person
- Fingerprints
- DNA records
- Autopsy photos
- Insurance policy, bank account, bank routing, credit card, debit card, and charge card numbers
- e-mail address of a member of the public
- date of birth of a member of the public
- individual handgun license records
- Employee's Personal Information (if

employee has elected to restrict the information)

- Home Address
- Home/Cellular Telephone
- Social Security Number
- Family Information



In some cases, you may be able to charge the requestor for copies of information. Charges for complying with PIRs are set by the AG office, and the charges for some common items are:

- 10¢ per page for letter/legal size
- \$1.00 per CD
- \$3.00 per DVD
- \$1.00 per audio cassette
- the actual cost of reproducing non-digital photos

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- postage, if the copies are not picked up
- \$15 per hour for labor + \$3 per hour for overhead (only if you are providing more than 50 pages of copies)
- \$6.00 per crash report (set by statute)

The Public Information Act does not require that you certify records or provide an affidavit in order to authenticate requested records. If you receive a PIR asking for certification or a business records affidavit, you should inform the requestor that a subpoena is required to provide authenticated records. You may also inform the requestor that only TxDOT may provide a certified Peace Officer's Crash Report (CR-3). Unless the requestor withdraws the PIR, you still need to process the request and provide uncertified copies of the records requested.

Additional information about handling public information requests is available on the [OGC intranet site](#) and the [DPS website](#). If you have any questions, you can call OGC at (512) 424-2890 and ask to speak to the open records staff.

- Personal financial information
- Confidential informant
- Law enforcement records concerning a child
- Investigation of report of child abuse or neglect
- Homeland security

- Law enforcement sensitive
- Litigation
- Bidding in Progress
- Attorney-Client Privilege
- Attorney Work Product
- Audit Working Papers
- Test Items

- *Molly Cost*, Assistant General Counsel, Office of General Counsel ❖

Common Exceptions to Disclosure

The Department cannot withhold any of this information without asking for a timely ruling from the Attorney General's office.

- Ongoing Investigations
- Pending Charges
- Confidential Information
 - Medical/EMS Record
 - Emergency Response Personnel
 - Risk/Vulnerability Assessment
 - Criminal Intelligence System records
 - Polygraph results
 - Identity of sexual assault victim

OFFICE OF GENERAL COUNSEL	
Phone: 512/424-2890	Fax: 512/424-5716
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DPS LEGAL BULLETIN

Issue 196

For DPS Use Only – Do Not Circulate

May/June/July 2017

It's A Wrap, So Time to Order the New Law Book

Another regular legislative session has ended and we will have a lot of changes in the law that have gone into effect or will be going into effect soon. The Office of Governmental Relations (OGR) has done an amazing job coordinating a huge number of bills and major legislative changes that will be important to the DPS. All of us at OGC want to give a big “shout out” of appreciation to OGR for their work this session.

The *Texas Criminal & Traffic Law Manual* will be available in early September. A compilation of the Penal Code, Code of Criminal Procedure, Transportation Code, and selected other statutes that are connected to Department operations, the book costs \$8.76/book. To order, submit an inventory requisition in eProcurement, referencing stock no. 615-15-0070, Criminal/MV Law Book. The book will also be available on the DPS Intranet in September.

OFFICE OF GENERAL COUNSEL

Phone: 512/424-2890	Fax: 512/424-5716
General Counsel	Phillip Adkins
Deputy General Counsel	Duncan Fox
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Key Bills Impacting the DPS Enforcement Work

The 85th Legislative Regular Session is now history. During the regular legislative session, 4960 bills were passed. Fifty (50) of those were vetoed by Governor Greg Abbott. Many of the bills will go into effect on September 1, 2017. The Office of General Counsel (OGC) would like to share with you the key bills that we think will impact Department enforcement work. This article is not a complete list of bills relevant to the Department's work. To read the enrolled bill text and bill history, access the Texas Legislature Online website (<http://www.capitol.state.tx.us/>). Make sure to change the “Legislature” drop down box to the selection “85(R) – 2017”.

Penal Code Changes

HB 9 recognizes and criminalizes some new computer crimes including the use of “ransom ware.”

HB 913 clarifies that the term “improvised explosive device” does not include unassembled components that can be legally purchased and possessed without a license, permit, or other governmental approval.

HB 1935 updates the law relating to illegal knives. The possession of a knife with a blade of over 5 and one-half inches is no longer generally illegal but possession is restricted in certain areas listed in Penal Code 46.02.

HB 2529 expands the definition of “coercion” for the offense of trafficking of persons.

HB 2908 enhances criminal penalties for criminal offenses committed against a person because of bias or prejudice on the basis of the person's status as a peace officer or judge.

SB 1232 creates a new criminal offense of bestiality and makes violators of the offense subject to sex offender registration.

SB 1553 requires a person subject to sex offender registration to immediately notify the administrative office of the school of their presence and registration status.

Code of Criminal Procedure Changes

HB 34 Requires law enforcement agencies to make a complete and contemporaneous electronic recording of any custodial interrogation that occurs in a place of detention if the person is suspected of or charged with committing certain felony offenses. HB 34 also requires all law enforcement officers who perform eyewitness identification procedures to complete a course to be developed by TCOLE and adds additional requirements for photo lineups.

HB 245 creates a civil penalty if a law enforcement agency fails to submit a report required by Articles. 2.139 (Peace Officer Involved Injury or Death Report) and 2.1395 (Report of Injuries to or Death of Peace Officer). After notice provided by the Office of the Attorney General, a law enforcement agency has seven days to submit the report without incurring a penalty.

HB 322 allows for the expunction of criminal records if a person successfully completes a veteran's treatment court program.

HB 355 prohibits registered sex offenders from living in on-campus dormitories or other housing facilities.

HB 557 allows a justice court or a municipal court to expunge criminal records if a person is eligible for the expunction of an offense punishable by fine only.

HB 3872 provides additional grounds for a court to order re-testing of forensic DNA evidence.

SB 631 provides that a hearing regarding right of possession for stolen property may be held in the county where the property is being held or in the county where the property was allegedly stolen.

SB 1576 makes certain operational changes to the operation of the Texas Civil Commitment Office, and updates provisions related to the civil commitment of sexually violent predators.

SB 1849 requires a law enforcement officer to make a good faith effort to divert a person suffering a mental health crisis or suffering from the effects of substance abuse to a proper treatment center in very narrow circumstances.

Government Code Changes

HB 281 requires the Department to develop and implement a statewide electronic tracking system for evidence collected in relation to a sexual assault or other sex offense.

HB 435 provides certain legal protections to volunteer emergency services personnel who carry their licensed handguns while engaged in providing emergency services.

HB 1290 restricts a state agency from adopting a proposed rule that imposes a cost on a regulated person unless the state agency repeals a rule that would decrease the total costs on the regulated person in an equal amount. Exceptions to this restriction include a rules that are necessary to comply with federal law; rules necessary to protect the health, safety and welfare of the public and rules necessary to implement legislation.

HB 1780 provides for the expansion of the Department's reserve officer corps program to allow for participation by any retired or previously

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commissioned peace officer who retired or resigned in good standing instead of limiting participation to former DPS officers.

HB 2639 expands the silver alert to cover persons with Alzheimer's disease regardless of age.

HB 3051 amends the definition of race or ethnicity used in Article 2.132 of the Code of Criminal Procedure that is used for motor vehicle stop reporting required by Article 2.133. The amended language aligns the definition with the terminology actually used on a Texas driver license or identification card.

HB 3391 creates a public safety employees treatment court program for certain public employees, including peace officers, who commit a criminal offense as a result of suffering from job-related PTSD or other work-related problems.

HB 3784 allows the Department to approve online course providers for the classroom portion of the license to carry proficiency course.

SB 79 allows state agencies to respond to public information requests by referring a requestor to a website if certain requirements are met.

SB 297 allows the Department to calculate overtime for commissioned officers based on working over eight hours in a 24 hour period. The changes also allow officers to take sick leave and other types of leave without risking the loss of earned overtime.

SB 500 makes certain public officials ineligible for service retirement annuities under the applicable public retirement system if convicted of a qualifying felony while in office. This bill also creates a vacancy in the public official's office on the date of final conviction.

SB 840 authorizes use of unmanned aircraft (aka "drones") over real property that is within 25 miles of the United States border for the sole purpose of ensuring border security.

SB 1138 creates a blue alert system to aid in the apprehension of someone suspected of killing or causing serious bodily injury to a law enforcement officer.

SB 1805 authorizes greater use of the Department's intended multiuse training facility as an operations center for tactical operations and law enforcement missions and to house law enforcement assets and equipment.

Transportation Code Changes

HB 62 creates a new offense for using a portable wireless communication device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped.

HB 2306 provides for the use of abandoned motor vehicle proceeds collected by a municipality or county to reimburse law enforcement agencies that have compensated property owners whose property was damaged as a result of a pursuit involving the motor vehicle.

HB 2812 provides that security patrol vehicles may only be equipped with green, amber, or white lights.

HB 3050 is an omnibus driver license bill that amends several portions of Chapter 521, including changing the term instruction permit to learner license and amends to provisions related to procedures for the driver license issued to a peace officer to omit the license holder's actual residential address.

HB 3087 clarifies the types of highway maintenance or service vehicles for which TxDOT adopts lighting specifications by adding a definition of "highway maintenance vehicle" and "service vehicle" to the Transportation Code.

HB 3654 added a definition of "road machinery" to the Transportation Code.

SB 848 amends several driver education requirements, including allowing a non-parent designated by a parent or guardian to provide the instruction in a Parent Taught Driver Education (PTDE) course.

SB 1001 increases the number of trailers not subject to vehicle inspection by increasing the actual or gross vehicle weight amount to 7,500 pounds or less on a trailer, semitrailer, pole trailer, or mobile home.

SB 1102 authorizes a vehicle or combination of vehicles powered by an engine fueled primarily by natural gas to exceed certain vehicle weight limitations by an amount calculated using a specified formula. The bill caps the maximum gross weight of such a vehicle or combination of vehicles at 82,000 pounds.

SB 1187 requires a citation issued for no insurance to indicate that the peace officer was unable at the time of the alleged offense to verify financial responsibility through the TexasSure program.

SB 1524 allows intermodal shipping containers traveling within 30 miles of port of entry or port authority to purchase an annual permit to carry cargo if sealed with a United States customs seal and requires an accident report that involved a combination of vehicles operating under this type of permit to include the weight and number of axles of the vehicle combination.

Other Changes

HB 29 adds language to several offenses involving sexual abuse of children stating that conduct constitutes an offense regardless of whether the actor knows the age of the child at the time of the offense. HB 29 also requires the Department to provide informational materials regarding human trafficking to CDL applicants.

HB 590 exempts from civil liability first responders, including peace officers, who in good faith provide roadside assistance. Roadside assistance includes jump-starting or replacing a battery, lockout assistance and replacing a flat tire.

HB 1983 makes peace officers and other first responders eligible for workers' compensation

benefits for post-traumatic stress disorder if the condition was caused by an event occurring in the course and scope of the first responder's employment.

HB 2552 creates a new offense of sexual coercion.

HB 2561 is the sunset bill for the Texas State Board of Pharmacy. The bill contains many updates related to statewide monitoring and regulation of controlled substances.

SB 16 reduces the fee for a license to carry a handgun.

SB 30 is the Community Safety Education Act which establishes a program to provide information to drivers, the public, students, and training for peace officers, on the expectations that each should have during a contact between officers and the public.

SB 208 creates criminal and administrative penalties for the sale and purchase of explosive devices acquired at metal recycling entities.

SB 263 removes the minimum caliber requirement for firearm proficiency exams.

SB 584 introduces requirements for the Texas Medical Board to create guidelines for the prescription of opioid antagonists to patients at risk of an opioid-related drug overdose.

If you have any questions regarding the bill(s) impact to your area/program/division, please talk with your chain-of-command. - *ML Calcote, Assistant General Counsel, Office of General Counsel* □