

**ASSISTANT COUNTY ATTORNEYS**

Deanna Belknap  
Nicole Stratso  
Renaë Whitsitt

**CRIMINAL DIVISION**

Paulinda Proffitt  
Justin Stobaugh

**HOT CHECK DIVISION**

Pam Crocker

**HOOD COUNTY ATTORNEY'S OFFICE**

1200 W. PEARL ST., GRANBURY, TEXAS 76048



**PHONE**

(817) 579-3215  
(817) 579-3216

**FAX**

(817) 579-3257  
(817) 579-3218

WWW.CO.HOOD.TX.US

**OFFICE MANAGER**

Lorraine Manning

**CIVIL & JUVENILE**

**DIVISION**

Linda Parr

**VICTIM SERVICES**

Julie Pritchett

**INVESTIGATOR**

Birt "Pete" Wilkerson

**LORI J. KASPAR, COUNTY ATTORNEY**

June 11, 2014

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

**RECEIVED**  
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**OPINION COMMITTEE**

**RQ-1207-C**

**FILE #** ML-47595-14

**I.D. #** 47595

Dear Attorney General Abbott:

At the request of the sheriff of Hood County, I seek your opinion concerning the disposition of surplus property purchased with proceeds from the sheriff's commissary account. The sheriff would like to transfer the surplus property to another office within his department.

Texas Local Government Code §351.0415 controls commissary operations but provides no rules for disposing of surplus property purchased with commissary proceeds. While several attorney general opinions provide guidance regarding commissary operations and disposition of county property, none directly addresses the disposition of property purchased with commissary proceeds.

The county requests an opinion on whether a sheriff may transfer surplus property purchased with commissary proceeds to another department without violating the provisions of §351.0415. In the alternative, the county requests an opinion on whether the proceeds from the auction of surplus commissary property belong to the commissary account or to the county.

Attached to this request letter is a brief detailing the county's position on these issues. If you have any questions, please do not hesitate to contact my office.

Sincerely,

Lori J. Kaspar, Hood County Attorney

## **Attorney General Opinion Request**

### **Brief on behalf of Hood County**

#### **Facts**

The sheriff of Hood County, Texas operates a jail commissary for the benefit of the inmates in accordance with rules adopted by the Commission on Jail Standards. From time to time, the sheriff purchases office equipment for use by the commissary staff in operating the commissary.

The sheriff has purchased a new computer printer for the commissary office with commissary proceeds. The used computer printer is no longer needed in the commissary office, but is still functional.

Another office in the sheriff's department is in need of a computer printer.

#### **Questions Presented**

##### **Question 1:**

May the sheriff transfer surplus office equipment that was purchased with commissary funds to another office in the sheriff's department or another department in the county without violating § 351.0415 Local Government Code?

##### **Question 2:**

If the sheriff's department cannot transfer surplus office equipment purchased with commissary funds to another office or another department, must the surplus office equipment be sold at auction and if so, would the

proceeds be deposited back into the commissary account or into the general account of the county?

### **Applicable Law**

#### **Commissary Proceeds**

A sheriff has exclusive control of the commissary funds. Commissary funds may only be used to (1) fund, staff, and equip a program addressing the social needs of the inmates, including an educational or recreational program and religious or rehabilitative counseling; (2) supply inmates with clothing, writing materials, and hygiene supplies; (3) establish, staff, and equip the commissary operation and fund the salaries of staff responsible for managing the inmates' commissary accounts; (4) fund, staff, and equip both an educational and a law library for the educational use of inmates; or (5) fund physical plant improvements, technology, equipment, programs, services, and activities that provide for the well-being, health, safety, and security of the inmates and the facility. Interest earned on commissary accounts belongs to the commissary fund and not to the county.<sup>1</sup> A commissioners court may not use commissary proceeds to fund the budgetary operating expenses of a county jail.<sup>2</sup>

Although the sheriff has exclusive control over operation of the commissary, commissary proceeds are still subject to county oversight. Documentation kept related to

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<sup>1</sup> Tex. Att'y Gen. Op. No. GA-791 (2010); Tex. Local Government Code Ann. §113.021.

<sup>2</sup> Tex. Loc. Gov't Code Ann. §351.0415.

commissary activities are governmental records.<sup>3</sup> The county auditor must examine the commissary accounts at least once per year.<sup>4</sup>

### Surplus County Equipment

Surplus equipment is property that is not salvage property, would not be ordinarily discarded as waste, is not currently needed by its owner, is not required for the owner's foreseeable needs, and it possesses some usefulness for the purpose for which it was intended.<sup>5</sup>

The commissioners court of a county is responsible for disposing of surplus county property.<sup>6</sup> The court may sell surplus equipment by competitive bid or auction, offer it as a trade-in for new property of the same general type, order the property to be destroyed, or donate the property to a charitable organization.<sup>7</sup> The commissioners court may not accept a bid offering non-monetary consideration in exchange for surplus county equipment.<sup>8</sup>

### Disposition of Surplus Equipment – Special Exceptions

Equipment obtained by forfeiture and then transferred to the county for official use retains its character as forfeited property and must be disposed of under the forfeiture statute.<sup>9</sup> Therefore, once commissary equipment is designated as surplus by the county, it

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<sup>3</sup> *Mills v. State*, 941 S.W.2d 204, 208 (Tex. App.—Corpus Christi 1996, pet. ref'd).

<sup>4</sup> Tex. Loc. Gov't Code Ann. §351.0415.

<sup>5</sup> Tex. Loc. Gov't Code Ann. §263.151.

<sup>6</sup> Tex. Loc. Gov't Code Ann. § 263.152.

<sup>7</sup> *Id.*

<sup>8</sup> Tex. Att'y Gen. Op. No. JC-0104 (1999).

<sup>9</sup> Tex. Code of Crim. Proc. Ann. art. 59.

should be sold at public auction and the proceeds should be returned to the commissary account and not to the county.<sup>10</sup>

### **Argument**

- I. The used office equipment purchased with commissary proceeds qualifies as surplus property under Local Government Code § 263.151.

The sheriff has indicated the commissary office no longer wants or needs the used computer printer. The sheriff believes another office in the sheriff's department can use the computer printer. Therefore, the used printer meets the definition of surplus property under Local Government Code § 263.151.

- II. The sheriff may transfer used office equipment purchased with commissary funds to another office within the sheriff's department—or to another department within the county—without violating § 351.0415 Local Government Code.

Section 351.0415 makes it clear that purpose of the commissary law is to benefit inmates, and not to generate revenue.<sup>11</sup> Commissaries benefit inmates in two ways: they provide inmates the means to purchase basic supplies and the profits from commissaries

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<sup>10</sup> See Tex. Att'y Gen. Op. No. JM-1184 (1990).

<sup>11</sup> Tex. Loc. Gov't Code Ann. §351.0415. A sheriff must operate a commissary "for the use of the inmates."

funds programs for inmates.<sup>12</sup> A county may not require that proceeds from a commissary account fund basic jail operations.<sup>13</sup>

Although there is no authority directly on point, other attorney general opinions suggest that long as inmates or inmate programs may benefit from commissary proceeds, those proceeds must be used according to the guidelines in §351.0415. For example, proceeds from the sale of prepaid phone cards in the county jail commissary are credited to the commissary account rather than to the general fund of the county.<sup>14</sup> Interest accrued on commissary proceeds must be returned to the commissary account and do not belong to the county.<sup>15</sup>

Because the sheriff has exclusive control has exclusive control of the commissary funds and the discretion to spend the funds within the guidelines in §351.0415, the sheriff should also have discretion to transfer the surplus equipment to another office or department once he determines it is surplus.<sup>16</sup>

Despite the sheriff's exclusive control of the commissary funds, he would not be free to use the commissary account to order equipment for other offices.<sup>17</sup> Under this proposed rule, any transfers by the sheriff would still be subject to judicial review under the abuse of discretion standard.<sup>18</sup> In addition, the required oversight by the county auditor should provide ample protection for commissary funds.<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Tex. Att'y Gen. Op. No. GA-0814 (2010).

<sup>15</sup> Tex. Att'y Gen. Op. No. GA-791 (2010).

<sup>16</sup> Tex. Loc. Gov't Code Ann. §351.0415.

<sup>17</sup> Tex. Att'y Gen. Op. No. GA-791 (2010); Tex. Loc. Gov't Code Ann. § 113.021.

<sup>18</sup> *Fort Bend Cnty. Wrecker Ass'n v. Wright*, 39 S.W.3d 421, 425-26 (Tex. App.—Houston [1st Dist.] 2001, no pet); Tex. Atty. Gen. Op. GA-0901 (2011) at \*2.

<sup>19</sup> Tex. Loc. Gov't Code Ann. §351.0415.

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Because the sheriff has exclusive control of the commissary funds and the discretion to spend the funds within the guidelines in §351.0415, the sheriff should also have discretion to transfer the surplus equipment to another office or department once he determines it is surplus.<sup>16</sup>

Despite the sheriff's exclusive control of the commissary funds, he would not be free to circumvent §351.0415 and use this transfer process to obtain equipment for other offices.<sup>17</sup> Any transfers by the sheriff would still be subject to judicial review under the abuse of discretion standard.<sup>18</sup> In addition, the required oversight by the county auditor should provide ample protection for commissary funds.<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Tex. Att'y Gen. Op. No. GA-0814 (2010).

<sup>15</sup> Tex. Att'y Gen. Op. No. GA-791 (2010).

<sup>16</sup> Tex. Loc. Gov't Code Ann. §351.0415.

<sup>17</sup> Tex. Att'y Gen. Op. No. GA-791 (2010); Tex. Loc. Gov't Code Ann. § 113.021.

<sup>18</sup> *Fort Bend Cnty. Wrecker Ass'n v. Wright*, 39 S.W.3d 421, 425-26 (Tex. App.—Houston [1st Dist.] 2001, no pet); Tex. Atty. Gen. Op. GA-0901 (2011) at \*2.

<sup>19</sup> Tex. Loc. Gov't Code Ann. §351.0415.

Finally, once the transferred property is no longer usable, it would become waste and may be disposed of according to §263.152 of the Local Government Code.<sup>20</sup>

- III. In the alternative, if the sheriff cannot transfer the used equipment to another department (or does not wish to transfer the used equipment) the equipment should be sold at auction and the proceeds should be returned to the commissary account.

The county maintains the sheriff should have discretion in disposing of surplus equipment purchased with commissary funds.<sup>21</sup> However, if the law does not allow such transfers, the equipment should be sold at auction.<sup>22</sup>

Equipment purchased with commissary proceeds should retain its character as “commissary” property, even at auction.<sup>23</sup> Therefore, regardless of whether surplus equipment has remained in service under §351.0415 or the equipment has been transferred, proceeds from an auction should belong to the commissary account.<sup>24</sup>

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<sup>20</sup> Tex. Loc. Gov't Code Ann. §263.152.

<sup>21</sup> *Fort Bend Cnty. Wrecker Ass'n v. Wright*, 39 S.W.3d 421, 425-26 (Tex. App.—Houston [1st Dist.] 2001, no pet); Tex. Atty. Gen. Op. GA-0901 (2011) at \*2.

<sup>22</sup> Additionally, even if the transfer of commissary property is legal under §351.0415, at some point the property might again become surplus property and be subject to auction.

<sup>23</sup> See Tex. Atty. Gen. Op. No. JM-1184 (1990).

<sup>24</sup> Tex. Loc. Gov't Code Ann. § 263.156 (West) (proceeds from the sale of surplus or salvage property are credited to the general fund or the fund from which the property was purchased); See Tex. Atty. Gen. Op. No. GA-791 (2010) (Interest earned on a commissary account belongs to the commissary account and not to the county.)