



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 21, 1997

The Honorable James Warren Smith, Jr.
Frio County Attorney
500 East San Antonio Street, Box 1
Pearsall, Texas 78061-3100

Letter Opinion No. 97-053

Re: Whether a privately employed jailer who is certified by the Texas Commission on Law Enforcement Officer Standards and Education may be permitted to carry a weapon in the official discharge of his or her duties (ID# 39436)

Dear Mr. Smith:

You have asked this office whether private employed jailers certified by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") may carry weapons on their persons in the discharge of their duties. We conclude that they may do so, but that this does not authorize them to carry such weapons off-duty.

As you correctly point out, sections 46.02 and 46.03 of the Penal Code outline the offenses of unlawfully carrying a weapon and unlawfully carrying a weapon in a prohibited place. Further, section 46.15 of the Penal Code makes these offenses inapplicable to peace officers, "regardless of whether the officer is engaged in the actual discharge of the officer's duties while carrying the weapon." You suggest, however, that the guards in question are not peace officers, and that this exception to the penal statutes therefore does not apply to them. While we agree that the private jailers in question are not peace officers within the meaning of article 2.12 of the Code of Criminal Procedure, in our view they are covered by statutory exceptions under sections 46.02(b)(1) and 46.03(d)(2) of the Penal Code.

As you inform us, two detention facilities in Frio County, which are being purchased by the county on a lease-purchase arrangement, are now operated and managed by a private vendor. The question has arisen whether guards and jailers employed by that private vendor may wear or carry weapons when supervising prisoners.

Generally, as a letter from Jack E. Crump, Executive Director of the Texas Commission on Jail Standards, attached to your brief points out, privately managed detention facilities of the sort at issue here are authorized by chapter 351 of the Local Government Code. In Attorney General Opinion JM-1152, this office considered whether jailers employed by such facilities were "county

jailers” within the meaning of section 85.005 of the Local Government Code. The opinion concluded that this was not the case. However, while such contract jailers are not county jailers, JM-1152 concludes that they are county jail personnel subject to standards for certification by TCLEOSE under section 415.0541 of the Government Code. Attorney General Opinion JM-1152 (1990) at 5.

Another attachment to your letter brief draws our attention to *Deltenre v. State*, 808 S.W.2d 97 (Tex. Crim. App. 1991), in which the court of criminal appeals held that a county jailer was not necessarily a peace officer within the terms of article 2.12 of the Code of Criminal Procedure. You argue, in effect, that if under *Deltenre* a jailer employed by the sheriff is not a peace officer, then *a fortiori* a jailer employed by a private contractor is not. We agree. Private contract jailers are not peace officers within the contemplation of article 2.12. Accordingly, they are not excepted by section 46.15 of the Penal Code from the provisions of sections 46.02 and 46.03.

However, we note that those sections themselves contain an exemption sufficient to permit such guards to carry weapons on-duty. Under section 46.02(b)(1), it is a defense to prosecution that one is “in the actual discharge of his official duties as . . . a guard employed by a penal institution.” Similarly under section 46.03(d)(2), it is a defense that possession of the weapon occurred while the actor was “traveling to or from the actor’s place of assignment or in the actual discharge of duties as . . . (2) a guard employed by a penal institution”

While contract jailers are not, under JM-1152, “county jailers,” they are “other county jail personnel,” employed by the jail and subject to TCLEOSE standards. Attorney General Opinion JM-1152 at 5. A county jail, defined by section 511.001 of the Government Code, formerly V.T.C.S. article 5115.1, as “a facility operated *by or for* a county for the confinement of persons accused or convicted of an offense” is a penal institution. (Emphasis added.) See *Legg v. State*, 594 S.W.2d 429, 432 (Tex. Crim. App. 1980). Accordingly, jailers employed by private contractors who operate and manage detention facilities for a county are “guards employed by a penal institution” for the purposes of sections 46.02(b)(1) and 46.03(d)(2) of the Penal Code. They may therefore carry weapons in the actual performance of their duties.

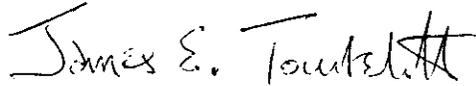
We note, however, that the operative Penal Code exceptions here are more restrictive than that of section 46.15 for peace officers. They do not grant a general license to contract jailers to carry weapons while not in the discharge of an official duty. They are, however, as we have indicated, sufficiently broad to answer the specific question you ask in the affirmative.

S U M M A R Y

A jailer employed by a private contractor which operates and manages a detention facility for a county is not a peace officer within the meaning of article 2.12 of the Code of Criminal Procedure, and is therefore not excepted from prohibitions on the carrying of weapons by section 46.15 of the Penal Code. However, such a jailer, when in the actual performance of his or her

duties, is a "guard employed by a penal institution" entitled to the defenses established by sections 46.02(b)(1) and 46.03(d)(2) of the Penal Code. Accordingly, such a jailer may carry a weapon in the performance of his or her duties.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee