



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 19, 2022

The Honorable Paul Johnson
Denton County Criminal District Attorney
Post Office Box 2344
Denton, Texas 76202

Via E-Mail

Re: Authority of a school district to contract with a vendor for security services, including facial recognition services, under chapter 503 of the Business and Commerce Code, which regulates the use or capture of biometric identifiers for commercial purposes
(RQ-0473-KP)

Dear Mr. Johnson:

You have requested an Attorney General opinion regarding the authority of a school district to contract with a vendor for security services, including facial recognition services, under chapter 503 of the Business and Commerce Code. Your opinion request is prompted by a lawsuit pending in the 71st Judicial District, Harrison County, Texas, styled *The State of Texas v. Meta Platforms, Inc.*, Cause No. 22-0121. After careful consideration of that lawsuit, we conclude that we cannot answer your question without addressing the subject of the issues raised in that lawsuit. Thus, the issues raised in your opinion request are the subject of pending litigation before a Texas court.

It is the policy of this office to refrain from issuing an Attorney General opinion on questions that we know to be the subject of pending litigation. *See* Tex. Att'y Gen. Op. Nos. GA-0502 (2007) at 3–4, MW-205 (1980) at 1, V-291 (1947) at 5–6. This policy, which has been in effect for more than sixty years, is based upon the fact that attorney general opinions, unlike those issued by courts of law, are advisory in nature. By contrast, court decisions are binding unless and until they have been modified or overturned by a higher court or until the law they construe has been amended. Consequently, when a legal matter is being litigated, the courts are generally the appropriate forum for resolving the issue.

Government Code subsection 402.042(c)(2) requires this office to issue Attorney General opinions within 180 days of receipt of a valid request or to notify the requestor in writing that the opinion will be delayed or not rendered and state the reasons for the delay or refusal. Please consider this letter to be your notice under subsection 402.042(c)(2) of our reasons for declining to issue an opinion.

If your question remains unresolved at the conclusion of the litigation, you may resubmit a request at that time. If you have further questions, do not hesitate to contact me.

Sincerely,

Charlotte M. Harper
Acting Chair, Opinion Committee

CMH/som

Attachment: Request No. 0473-KP

cc: Mr. Mike Morath, Commissioner of Education, Texas Education Agency
Mr. Von Byer, General Counsel, Texas Education Agency
Ms. Joy Baskin, Director of Legal Services, Texas Association of School Boards
Ms. Amy Cresap, General Counsel Division, Office of the Governor

RECEIVED

By Opinion Committee at 2:23 pm, Aug 08, 2022



Paul Johnson

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I.D.# 49157

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August 8, 2022

REGULAR MAIL

Office of the Texas Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

via email: opinion.committee@oag.texas.gov

Re: Request for Attorney General Opinion: Capture or Use of Biometric Identifier under Texas Business and Commerce Code, Title 11 Personal Identity Information, Subtitle A Identifying Information, Chapter 503 Provision Generally Applicable to Biometric Identifiers. TEX. BUS. & COM. CODE Ch. 503.

Dear General Paxton:

Pursuant to Texas Government Code §402.042, the Denton County Criminal District Attorney submits this formal request for an Attorney General Opinion regarding whether Texas Business and Commerce Code § 503.001 allows a local independent school district in Denton County and the school district's police department to retain the services of a firm that captures biometric identifiers for the school district's safety and security program and specifically, whether obtaining such services constitutes a "commercial purpose" under Texas Business and Commerce Code § 503.001.

BACKGROUND

A local school district in Denton County ("school district") and the school district's police department ("school district police department") recently contacted our office to seek an Attorney General Opinion to determine whether the school district and the police department can use the services of a company ("vendor") that provides facial recognition camera software as part of a layered security program to protect students, faculty and staff on school campuses within the school district. The school district police department believes that facial recognition is a valuable tool in identifying individuals approaching and prior to their entering school campuses, and that in the event that an unauthorized individual does gain entry a school, facial recognition is used to locate that individual inside the building facilitating a prompt response to

mitigate a possible threat. The police department has discovered that security data software vendors have recently disabled facial recognition tools, citing the pending lawsuit styled *The State of Texas v. Meta Platforms, Inc.*, and Texas Business and Commerce Code § 503.001, causing vendor concerns over potential liability stemming from their difficulty in determining what may constitute a commercial purpose under Texas Business and Commerce Code § 503.001. Because the security data software vendors retain the data in-house and monitor the data for the local school district and the district police department, rather than simply selling the software to the school district, the security data software vendors are concerned that the sale of that data may constitute a commercial purpose under the Texas Business and Commerce Code §503.001. This issue is hampering the efforts of the police department for the school district in providing the best safety and security for the students, faculty and staff on school campuses and property within the school district.

DEFINITION OF COMMERCIAL PURPOSE

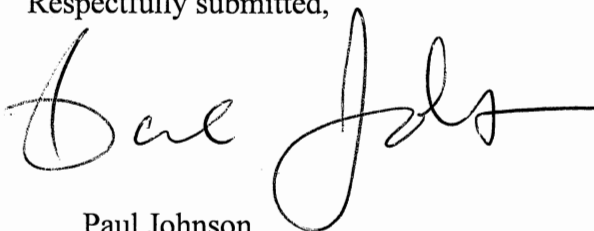
A plain reading of Texas Business and Commerce Code § 503.001, does not define what constitutes a commercial purpose, an omission that would have clarified the extent to which the law applies to the ability of security data software vendor to contract with an independent school district to provide facial recognition tools. The term is defined elsewhere in Texas Statutes, although in each case the definition is said to apply to the particular section of the law in which it is found.

REQUEST

In summary, we request your opinion to determine whether a local independent school district in Denton County and their district police department can lawfully obtain facial recognition services under a contract with a vendor and would this constitute a “commercial purpose” under Texas Business and Commerce Code §503.001? Specifically, can an independent school district in Denton County enter in to a contract with a vendor who will provide facial recognition services to the school district and their district police department which will provide a heightened level of security for students, faculty and staff on their school campuses, in return for financial compensation to the vendor?

Thank you for your time and consideration in this matter. If you need additional information to make a determination in preparing your opinion, please contact this office.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Paul Johnson', written in a cursive style.

Paul Johnson
Denton County Criminal District Attorney