



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 18, 2022

The Honorable DeWayne Burns  
Chair, House Committee on Agriculture and Livestock  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

**Opinion No. KP-0419**

Re: Whether a merchant may offer a theft deterrent course in lieu of arrest and prosecution and whether doing so would expose a merchant or educational provider to civil or criminal liability (RQ-0444-KP)

Dear Representative Burns:

Section 124.001 of the Civil Practice and Remedies Code, known as the shopkeeper's privilege, gives merchants a limited privilege to detain a person suspected of shoplifting. *See* TEX. CIV. PRAC. & REM. CODE § 124.001. You tell us that theft deterrent "[p]rograms similar to defensive driving courses . . . are being offered by merchants as a way to help free up time and resources" of the merchant, law enforcement, and the courts that would otherwise have been spent pursuing shoplifting charges.<sup>1</sup> You ask "whether a merchant, operating under the authority of Section 124.001 . . . may offer a theft deterrent course in lieu of arrest and prosecution . . . ." Request Letter at 2.

**Background**

The Penal Code classifies shoplifting as a species of theft. *See* TEX. PENAL CODE § 31.02 (consolidating theft offenses). The seriousness of the offense depends in large part on the value of the item taken, ranging from a Class B misdemeanor when the value of the property stolen is less than \$100, to various degrees of felonies when the value is \$2,500 or more. *See id.* § 31.03(e). A merchant who is a victim of shoplifting may sue the perpetrator for actual and special damages, costs, and attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE § 134.005. Strictly speaking, the State, not the merchant, decides whether to arrest and prosecute a person suspected of shoplifting. *See Dallas Area Rapid Transit v. Carr*, 309 S.W.3d 174, 178 (Tex. App.—Dallas 2010, pet. denied) ("If, how, and when to arrest a suspect is within a police officer's discretion.") (citation

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<sup>1</sup>*See* Letter from Honorable DeWayne Burns, Chair, House Comm. on Ag. & Livestock, to Honorable Ken Paxton, Tex. Att'y Gen. at 2 (Jan. 11, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0444KP.pdf> ("Request Letter").

omitted); *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (stating “prosecutors have broad discretion in deciding which cases to prosecute”).

### **Shopkeeper’s privilege**

You ask specifically about the authority granted by the shopkeeper’s privilege in section 124.001. Request Letter at 2. The shopkeeper’s privilege to investigate theft provides: “A person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to *investigate ownership of the property.*” TEX. CIV. PRAC. & REM. CODE § 124.001 (emphasis added). The only stated purpose of the privilege is “to investigate ownership of the property.” *Id.* The statute does not specifically address detentions to offer an educational theft deterrent program. *See id.*

That said, a merchant has the discretion to refrain from reporting shoplifting to law enforcement, as no duty to report a crime exists at common law. *See San Benito Bank & Tr. Co. v. Landair Travels*, 31 S.W.3d 312, 322 (Tex. App.—Corpus Christi 2000, no pet.). Also, a merchant’s threat to call the police, without more, is likely lawful. *See Fojtik v. Charter Med. Corp.*, 985 S.W.2d 625, 629 (Tex. App.—Corpus Christi 1999, pet. denied) (“Threats to call the police are not ordinarily sufficient in themselves to effect an unlawful imprisonment.”) (citations omitted). Thus, the decision whether to refer the matter to law enforcement belongs to the merchant. We find no Texas law that prohibits a merchant from offering a person suspected of shoplifting the option of participating in a theft deterrent program in lieu of referring the matter to law enforcement.

**S U M M A R Y**

The shopkeeper's privilege in section 124.001 of the Civil Practice and Remedies Code authorizes a merchant to detain a person suspected of shoplifting to investigate ownership of the property. While that statute does not supply authority for a merchant to offer a theft deterrent course in lieu of referral to law enforcement for arrest and prosecution, we find no other Texas law that specifically prohibits such a practice.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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