



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 21, 1996

Mr. Bryan M. Perot
Executive Officer
Polygraph Examiners Board
5805 North Lamar
P.O. Box 4087
Austin, Texas 78773-0001

Letter Opinion No. 96-034

Re: Whether a peace officer may request a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense under Penal Code section 21.11, 22.011, 22.021, or 25.02 (ID# 33693)

Dear Mr. Perot:

You ask us to interpret a recently enacted statute that generally prohibits a polygraph examination of an individual who charges or seeks to charge in a complaint the commission of sexual assault. See Act of April 6, 1995, 74th Leg., R.S., ch. 24, 1995 Tex. Sess. Law Serv. 286. The statute, which became effective September 1, 1995, *id.* § 2, at 287, is codified as article 15.051 of the Code of Criminal Procedure, and it provides as follows:

(a) A peace officer may not require a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense under Section 21.11,¹ 22.011,² 22.021,³ or 25.02,⁴ Penal Code.

(b) If an attorney representing the state requests a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense listed in Subsection (a), the attorney must inform the complainant that the examination is not required and that a complaint may not be dismissed solely:

(1) because a complainant did not take a polygraph examination; or

¹Under section 21.11 of the Penal Code, a person who engages in indecency with a child commits an offense.

²Section 22.011 of the Penal Code deems sexual assault a felony of the second degree.

³Pursuant to section 22.021 of the Penal Code, an individual who commits aggravated sexual assault has committed a felony of the first degree.

⁴Under section 25.02 of the Penal Code, engaging in certain kinds of sexual conduct, enumerated in that section, is a felony of the third degree.

(2) on the basis of the results of a polygraph examination taken by the complainant.

(c) An attorney representing the state may not take a polygraph examination of a person who charges or seeks to charge the commission of an offense listed in Subsection (a) unless the attorney provides the information in Subsection (b) to the person and the person signs a statement indicating the person understands the information.

(d) A complaint may not be dismissed solely:

(1) because a complainant did not take a polygraph examination; or

(2) on the basis of the results of a polygraph examination taken by the complainant. [Footnotes added.]

You question whether subsection (a) prohibits a peace officer from requesting, as well as requiring, the complainant in a sexual assault case to submit to a polygraph examination. You thereby suggest that a peace officer may not compel such a complainant to submit to a polygraph examination but may ask the complainant voluntarily to submit to a polygraph examination, and if the complainant agrees, the peace officer may have a polygraph examination administered. We believe this interpretation is contrary to the legislative intent, and we accordingly conclude subsection (a) prohibits a peace officer from requesting or requiring such a polygraph examination.

Article 15.051 represents the enacted version of Senate Bill 222. As finally passed, Senate Bill 222 was identical to the House Committee Substitute for House Bill 126, Senate Bill 222's companion. As introduced, House Bill 126 prohibited both a peace officer and a prosecuting attorney from requesting or requiring the victim of a sexual assault to take a polygraph examination:

A peace officer or attorney representing the state may not request or require a polygraph examination of a person who charges or seeks to charge in a complaint the commission of an offense under Section 21.11, 22.011, 22.021, or 25.02, Penal Code.

Representative Danburg, the author of House Bill 126, explained to the House Committee on Criminal Jurisprudence that, with regard to peace officers, the committee substitute for House Bill 126 provided the same as the original: it "would ban the use of polygraphs [by] peace officers."⁵ Hearings on H.B. 126 Before the House Comm. on

⁵Representative Danburg explained to the House Committee on Criminal Jurisprudence that the committee substitute for House Bill 126 was prepared at the request of the District and County Attorneys' Association. Hearings on H.B. 126 Before the House Comm. on Criminal Jurisprudence, 74th Leg.

Criminal Jurisprudence, 74th Leg. (Mar. 13, 1995) (statement of Representative Danburg) (tape available from House Video/Audio Services Office). With regard to prosecutors, however, the committee substitute would permit a prosecuting attorney to request a polygraph examination in a circumscribed set of circumstances. *Id.*

The history of article 15.051 thus suggests a legislative understanding that the provision would absolutely prohibit a peace officer from requesting or requiring a polygraph examination of a complainant in a sexual assault case. In our opinion, the language of article 15.051 is consistent with the legislature's intent. A comparison of subsection (a) to subsection (b) illustrates our point.

Article 15.051(b) carefully delineates the circumstances in which a prosecutor may request the complainant in a sexual assault case to take a polygraph examination. Specifically, the prosecutor must inform the complainant that the polygraph examination is not mandatory. The prosecutor also must inform the complainant that the complaint will not be dismissed solely because the complainant refused to submit to the polygraph examination. Additionally, the prosecutor must inform the complainant the complaint will not be dismissed solely on the basis of the results of the complainant's polygraph examination. Finally, pursuant to subsection (c), the complainant must indicate in writing that he or she understands the information the prosecutor has provided.

By contrast, subsection (a) contains no requirements with which a peace officer must comply before administering a polygraph examination to a complainant in a sexual assault. The subsection does not require a peace officer to inform the complainant that a polygraph examination is purely voluntary or that the complaint will not be dismissed solely on the basis of the complainant's refusal to submit to a polygraph examination or the results of the examination. Nothing in article 15.051 requires the complainant to sign a written statement that he or she understands the information the peace officer has provided. We believe that, if the legislature wished to authorize a peace officer to request a polygraph examination of the complainant in a sexual assault case, the legislature would have set out certain requirements with which the peace officer must comply before administering the voluntary polygraph examination to the complainant. Consequently, we conclude that subsection (a) does not authorize a peace officer to request of the complainant in a sexual assault case that he or she submit to a polygraph examination.

(footnote continued)

(Mar. 13, 1995) (statement of Representative Danburg) (tape available from House Video/Audio Services Office).

We note that Mark Clark, the director of governmental relations for the Combined Law Enforcement Association of Texas, testified in favor of the committee substitute for House Bill 126. See Hearings on H.B. 126 Before the House Comm. on Criminal Jurisprudence, 74th Leg. (Mar. 13, 1995) (statement of Mark Clark) (tape available from House Video/Audio Services Office). In Mr. Clark's opinion, "in this day and time, polygraphs have no place." *Id.*

S U M M A R Y

Article 15.051 of the Code of Criminal Procedure does not authorize a peace officer to request a person who charges or seeks to charge in a complaint the commission of an offense under Penal Code section 21.11, 22.011, 22.021, or 25.02 voluntarily to submit to a polygraph examination.

Yours very truly,



**Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee**