



**THE ATTORNEY GENERAL
OF TEXAS**

December 9, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Bryan M. Perot
Executive Officer
Polygraph Examiners Board
Austin, Texas 78773-0001

Dear Mr. Perot:

Because of the tremendous increase in the volume of requests for opinions and open records decisions, we are responding to your request with the enclosed Letter Opinion or Open Records Ruling. A Letter Opinion or Open Records Ruling has the same force and effect as a formal Attorney General Opinion or Open Records Decision, and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent Letter Opinion or Open Records Ruling, a formal Attorney General Opinion or Open Records Decision, or a decision of a court of record.

Very truly yours,

A handwritten signature in cursive script that reads "Jim Mattox".

J I M M A T T O X
Attorney General of Texas

JAM/er
Enclosure



**THE ATTORNEY GENERAL
OF TEXAS**

December 9, 1988

**JIM MATTOX
ATTORNEY GENERAL**

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

LO-88-131

Dear Mr. Perot:

By letter of November 22, 1988, supplemented by your letter of November 23, 1988, you asked two questions about the effect of the federal Employee Polygraph Protection Act on the duties of the Texas Polygraph Examiners Board under the Texas Polygraph Examiners Act. On November 7, 1988, this office issued Attorney General Opinion JM-976 (RQ-1485) to answer other questions you asked about the interaction of these two statutes.

You state that the Polygraph Examiners Board routinely inspects Texas licensees for compliance with the Texas Polygraph Act and the Board's rules and regulations by physically inspecting the licensee's work place and work product, such as polygraph charts, question sheets, written reports, data sheets, films, audio and video tapes, and opinions. The federal act and the interim final rules on the application of the Employee Polygraph Protection Act of 1988 published by the United States Department of Labor restrict the disclosure of test information by polygraph examiners. You ask whether these restrictions prohibit the Board's inspection of records of examinations given in accordance with section 7(d), (e), and (f) of the federal law.

The interpretation of the Employee Polygraph Examiners Act of 1988 is a matter for federal authorities. Although we will give you our reading of the statute, we suggest that you also direct your questions to the federal Department of Labor. The Department of Labor issued interim final rules on October 21, 1988, to comply with the statutory requirement that regulations be issued well in advance of the effective date of the Act. 53 Fed. Reg. 41,496. The Department lacked sufficient time to issue an in-depth proposal for comments, review the comments, and promulgate a final

rule in the time provided by the act. It has invited interested persons to submit comments on its regulation by February 27, 1989. 53 Fed. Reg. 41,494, 41,496. Following evaluation of the comments, a proposed rule or a final regulation, modified as necessary, will be published. You might consider whether any of your concerns about the federal act and the interim regulation could be addressed by additions to the regulation and, if so, submit your comments on the interim regulation by February 27, 1989.

We turn to your question about the effect of the federal law and rules on the board's authority to inspect information obtained during a polygraph test administered in accordance with section 7(d), (e), or (f) of the Employee Polygraph Protection Act. 29 U.S.C. § 2006(d), (e), (f). Section 9 of the federal act provides in part:

(a) In General.--A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) Permitted Disclosures.--A polygraph examiner may disclose information acquired from a polygraph test only to--

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the employer that requested the test; or

(3) any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to an order from a court of competent jurisdiction.

29 U.S.C. § 2008.

The Department of Labor has issued the following rule on disclosure of test information:

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer . . . may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee . . . ;

(2) The employer that requested the polygraph test . . . ;

(3) Any court, governmental agency, arbitrator, or mediator that obtains an order from a court of competent jurisdiction requiring the production of such information:

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

. . . .

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records) to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. . . . (Emphasis in original.)

53 Fed. Reg. 41506-07 (to be codified at 29 C.F.R. § 801.35).

The statute and rule strictly limit the examiner's disclosure of information obtained during a polygraph test. There is no provision specifically addressing disclosure of such information to a state licensing board. Therefore, members or employees of the Polygraph Examiners Board may inspect such information only if the examiner discloses it according to a specific authorization in the federal law or valid regulation adopted thereunder, i.e., if the member or employee of the board is specifically designated in writing by the examinee pursuant to section 9(b)(1) or if the examiner is ordered to disclose this information to a board representative by "an order from a court of competent

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jurisdiction" under section 9(b) of the federal statute. 29 U.S.C. § 2008(b)(1), (3). The examiner may not disclose information obtained during a polygraph test to the board without the required authorization.

You next ask about the meaning of "a court of competent jurisdiction." A court of competent jurisdiction is one having jurisdiction to do the particular act or answer the particular question. Texas Employers' Ins. Ass'n v. Nunamaker, 267 S.W. 749, 751 (Tex. Civ. App. - Waco 1924, writ ref'd). A "court of competent jurisdiction" refers to an entity in the judicial branch of government and does not include a state administrative agency. Department of State v. Spano, 274 A.2d 563, 566 (Pa. Commw. Ct. 1971).

We hope this information will be helpful.

Very truly yours,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk, Chief
Letter Opinion Section

SG/er

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