



**THE ATTORNEY GENERAL
OF TEXAS**

August 25, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Lloyd Garza
City Attorney
City of San Antonio
P. O. Box 9066
San Antonio, Texas 78285

Open Records Decision No: 502

Re: Whether photographs of police officers involved in a shooting are excepted from public disclosure under section 3(a)(19) of the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1332)

Dear Mr. Garza:

The city of San Antonio received two requests under the Texas Open Records Act, article 6252-17a, V.T.C.S., for certain photographs of police officers. One request sought photographs of two officers injured in the line of duty during a shooting incident. The other request sought photographs of four off-duty police officers who were involved in an automobile accident.

Subsequent events complicate both requests. With regard to the first request, the photograph of one of the officers appeared in a newspaper article about a public ceremony to honor police officers wounded in the line of duty. The other officer's photograph did not appear, but he received an award during the public ceremony and was named in the newspaper article. The second request, related to the automobile accident, is complicated by the fact that the city released the photographs of the officers to one newspaper but not to another. After the first paper published the photos, the officers sued the city for violation of a new statute that prohibits the release of information from a police officer's personnel file unless the release is required by law or the officer gives

permission for the release. See Acts 1987, 70th Leg., ch. 275, § 6; ch. 300, § 1.¹ This litigation is still pending.

Under the Open Records Act, all information held by governmental bodies is open unless the information is protected from disclosure by one or more of the act's specific exceptions to disclosure. Attorney General Opinion JM-672 (1987). You suggest that these two requests require interpretation of section 3(a)(19), added to the Open Records Act in 1987.² With regard to the second request, related to the officers involved in the automobile accident, you also claim that section 3(a)(3) applies because the city is involved in litigation over the release of the officers' photographs.

Subsection (19) of section 3(a) protects from required disclosure:

(19) photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer unless:

(A) the officer is under indictment or charged with an offense by information; or

Both chapters 275 and 300 of the 70th Legislature purport to add identical versions of section 15A to article 1269m. The 70th Legislature repealed article 1269m when it enacted the Local Government Code. See Acts 1987, 70th Leg., ch. 149, § 49(1). Nevertheless, the repeal of a statute by a code does not affect an amendment of the statute by the same legislature that enacted the code; the amendment is to be given effect as part of the code. See Tax. Gov't Code § 311.031(c).

2. Acts 1987, 70th Leg., ch. 341, § 1, at 1760. The 70th Legislature added two subsections labelled (19) to section 3(a). Throughout this decision, section 3(a)(19) refers to subsection (19) as added by chapter 341.

(B) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(C) the photograph is introduced as evidence in a judicial proceeding.

As originally introduced, House Bill No. 474 provided a blanket exception for "photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code." The Bill Analysis to this provision stated as background:

Currently, a police agency is free to release to the media or public a photograph of a peace officer employed by the agency. There is no prohibition against the release of photographs in the Open Records Act and many media representatives have adopted the position that they are entitled to these photographs. There is concern among some groups who represent police officers that the practice of routinely releasing photographs of officers to the press could endanger the life [sic] of these officers. Officers who work undercover, such as narcotics and vice officers, could be placed in danger if they were recognized by members of the criminal element. These police groups believe that police officers, though public servants, are not public figures.

The Bill Analysis states the purpose of the provision. "As a result of this exception, police agencies would be prohibited from releasing photographs of the peace officers they employ."

The House modified House Bill No. 474 to provide two exceptions to this blanket exception to disclosure. First, photographs were not to be protected if they were introduced as evidence in a judicial proceeding. The second exception took the form of the amendment to another section, section 3(c), allowing disclosure "only if the officer gives written consent to the disclosure." The tape of the House Floor Debate on this version of House Bill No. 474 clearly indicates that the purpose of the amendment to section 3(c) was to remove from the custodian of photographs the

discretion to release them. Floor Debate on Tex. H.B. 474, 70th Leg. (March 25, 1987).

The Senate amended House Bill No. 474 with the language about photographs "the release of which would endanger the life or physical safety of the officer." The amendment also added the exceptions in subsections (A) and (B) of section 3(a)(19) and labelled the exception for evidence in a judicial proceeding as subsection (C). The amendment did not change the language in section 3(c) that required a peace officer's consent to release.

Sections 3(a)(19) and 3(c) are open to conflicting interpretations, depending on the meaning of the phrase "the release of which would endanger the life or physical safety of the officer" in subsection (19) and on how this phrase relates to section 3(c). First, the phrase could be interpreted as a prerequisite to application of the exception. In other words, photographs of peace officers would be protected from disclosure only if the release of the photographs "would endanger the life or physical safety of the officer." You indicate that the city released the photographs of the officers involved in the automobile accident because the officers were not involved in undercover work.³ The city apparently concluded that the release of these photographs would not endanger the safety of the officers. The newspaper requesting these photographs also urges this construction of section 3(a)(19).

Under this interpretation, not all photographs of peace officers would be protected by section 3(a)(19). Section 3(a)(19) would protect only photographs that, if released, would endanger the safety of officers. The "exceptions" to this limited exception from disclosure would require the release of these "endangering" photographs in the three situations detailed in subsections (A), (B), and (C) of section 3(a)(19) and would permit the release of "endangering" photographs if the officer gave written consent to the disclosure as provided in section 3(c).

3. This does not, however, explain why the city released the photographs to one requesting newspaper but not to its competitor. The Open Records Act prohibits "selective disclosure." See V.T.C.S. art. 6252-17a, § 14(a); Open Records Decision No. 463 (1987).

The practical effect of this interpretation would be to reduce the officers' control over access to their photographs. They would have authority to refuse access by refusing to give consent only after the governmental body made a preliminary determination that release of the photographs would endanger the officers. This would emasculate section 3(c).

In the alternative, the "endangering" phrase could be merely descriptive of the purpose of the exception. In other words photographs of peace officers would be protected from disclosure because the release of the photographs "would endanger the life or physical safety of the officer." Under this interpretation, all photographs of police officers would be protected from disclosure, regardless of whether release would endanger the officers, unless the situations in subsections (A), (B), or (C) occurred or the officer gave written consent to the release. The practical effect of this latter construction would be to impose a greater limit on the availability of peace officers' photographs and to give greater power to peace officers' control access to their photographs. The legislative history indicates that the legislature intended this latter interpretation.

Interpreting a statute requires ascertaining the legislature's intent as expressed in the language of the statute. State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979). Read in isolation, the language at issue would ordinarily denote a qualification. In the context of sections 3(a)(19) and 3(c), however, the language is ambiguous. When the language of the statute is ambiguous, interpreting the statute also requires consideration of the old law, the evil to be remedied, and the remedy provided by the amendment. The inclusion of the language in section 3(a)(19) about the release of photographs endangering the lives of officers is ambiguous. It is not clear whether the phrase was intended to prohibit the release of peace officers' photographs "if" or "because" their release would endanger the officers.

As indicated, the purpose of House Bill No. 474, as originally introduced and as modified in the House, was to protect all photographs of peace officers except in certain specified situations and to remove discretion from the custodian of photographs to release the photographs. Section 3(a)(8) of the Open Records Act protects information if its release would unduly interfere with law enforcement efforts. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). Section 3(a)(8) already protects information if its release

would endanger the lives of officers. See Open Records Decision No. 456 (1987). Under section 3(a)(8) the custodian of records must make the initial determination of whether release of information would unduly interfere with law enforcement efforts by endangering the lives of officers. The floor debate in the House makes it clear that the purpose of sections 3(c) and 3(a)(19) was to remove this discretion.

The Senate amended House Bill No. 474 with the language about photographs "the release of which would endanger the life or physical safety of the officer." If this language were interpreted as a prerequisite to protection from disclosure, the new section would be the substantial equivalent of section 3(a)(8) and thus superfluous. It would also be in conflict with the bill as passed by the House, when in fact it was not introduced as "in conflict" with the House version. Its only purpose would be to mandate the release of information in the circumstances listed, not to protect information from disclosure. Inclusion of the provision in the act's exceptions to disclosure would be incongruous.

The treatment of the provision in the hearings before the Senate Committee on Criminal Justice and in the final floor debate on the bill reveals its overriding purpose was to protect peace officers. The testimony and debate also reveal confusion about the scope of section 3(a)(8). Section 3(a)(8) parallels exemption (b)(7) of the federal Freedom of Information Act. 5 U.S.C. § 552(b)(7). There is some indication that the legislature intended the senate amendment to House Bill No. 474 to align the new exception to the "federal act," presumably a reference to exemption (b)(7). As indicated, however, this would render section 3(a)(19), as an exception, merely repetitive of section 3(a)(8). We think it more likely that the language added by the Senate to House Bill No. 474 simply reiterated the overall purpose of the new exception.

Consequently, section 3(a)(19) protects from required disclosure all photographs of peace officers unless the circumstances listed in subsections (A), (B), or (C) of section 3(a)(19) occur or the peace officer gives written consent as provided in section 3(c). As indicated, the first request here, for photographs of the officers involved in the shooting, is complicated by the fact that a photograph of one of the officers appeared in a newspaper article about a public ceremony to honor police officers wounded in the line of duty. Voluntarily posing for a newspaper

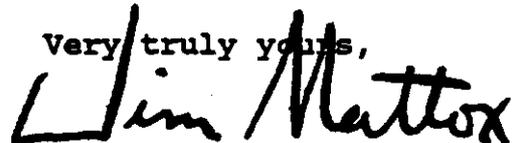
photograph certainly undermines a peace officer's claim that release of photographs would endanger his life. This is not, however, the test under section 3(a)(19). Moreover, the city's release of a staff photograph is not the equivalent of a police officer choosing to pose for a newspaper. Regardless of the inconsistency of a peace officer's actions, unless the circumstances in subsections (A), (B), or (C) of section 3(a)(19) occur, section 3(c) requires the officer's written consent prior to the release by a governmental body of a peace officer's photograph.

You also suggest that we address the applicability of section 15A(g) of article 1269m, V.T.C.S. Because we have resolved this matter on the basis of section 3(a)(19), we need not address the applicability of section 15A.

S U M M A R Y

Section 3(a)(19) of the Texas Open Records Act, article 6252-17a, V.T.C.S., protects from required disclosure all photographs of peace officers unless the circumstances in subsections (A), (B), and/or (C) of section 3(a)(19) occur or the peace officer gives written consent to release as provided in section 3(c).

Very truly yours,



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