ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2012

Sergeant Rocky Bright
Custodian of Records
Ector County Sheriff's Office
P.O. Box 2066
Odessa, Texas 79760

OR2012-15092

Dear Sergeant Bright:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 465598.

Ector County (the "county") received a request for the photographs of all sheriff's office deputies, officers, and jailers. You claim the requested information is excepted from disclosure under sections 552.101 and 552.119 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.[2]

Initially, you note the submitted photographs of civilian employees are not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the county is not required to release non-responsive information in response to this request.

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[1]We note that although you also raise section 552.021 of the Government Code, this is not an exception to disclosure under the Act. *See* Gov't Code § 552.021 (providing public information is available during normal business hours).

[2]This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the county to withhold any information that is substantially different from the submitted information. *See id.* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

You raise section 552.119 of the Government Code which provides as follows:

> (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:
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> > (1) the officer is under indictment or charged with an offense by information;
> >
> > (2) the officer is a party in a civil service hearing or a case in arbitration; or
> >
> > (3) the photograph is introduced as evidence in a judicial proceeding.
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> (b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. We note section 552.119 is applicable only to a photograph of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. You indicate the commissioned officers concerned have not consented to public disclosure of their photographs and the responsive photographs are not subject to subdivisions (1) through (3) of section 552.119(a). You explain that the commissioned officers to whom the photographs pertain may participate in undercover or special assignments at any given moment and release of their photographs would endanger their lives or physical safety. Therefore, based on your representations and our review of the information at issue, we conclude the county must withhold the commissioned officer photographs under section 552.119 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. You claim the remaining responsive information is excepted from required

disclosure under section 552.101 in conjunction with common-law privacy and "special circumstances" because release of the information would likely cause someone to face an imminent threat of physical danger.

For many years, this office determined section 552.101 of the Government Code, in conjunction with the common-law right to privacy, protects information from disclosure when "special circumstances" exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.*, Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 117 (Tex. 2011) (holding "freedom from physical harm is an independent interest protected under law, untethered to the right of privacy"). Thus, the county may not withhold the information pursuant to the "special circumstances" test as stated in Open Records Decision No. 169. However, based on the county's arguments, we understand the county to assert section 552.152 of the Government Code.

Section 552.152 of the Government Code provides:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. In this instance, you state detention officers, at times, work in an undercover capacity. You state release of the photographs at issue would endanger the lives and safety of the detention officers and indicate release would subject them to a substantial threat of physical harm. Based on your representations and our review, we conclude the county must withhold the photographs of detention officers under section 552.152 of the Government Code.

In summary, the county must withhold the responsive commissioned officer photographs under section 552.119 of the Government Code and the responsive detention officer photographs under section 552.152 of the Government Code.[3]

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[3]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/tch

Ref: ID# 465598

Enc. Submitted documents

cc: Requestor
(w/o enclosures)