



## The Attorney General of Texas

August 28, 1985

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Mr. Keith Stretcher  
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Open Records Decision No. 432

Re: Whether negatives of photographs taken by police office at the scene of an accident is subject to disclosure under the Open Records Act, article 625 17a, V.T.C.S.

Dear Mr. Stretcher:

Your request letter states:

It is the policy of the City of Midland Police Department to investigate traffic accidents that occur within the city limits. On or about August 11, 1983, the Midland Police Department investigated an accident which had resulted in a fatality. As per the policy of the department, pictures were taken of the accident scene and the film was processed but photographs were never produced. Photographs are usually not developed unless criminal charges are involved or litigation is pending against the city.

I am requesting your opinion or decision under the Open Records Act, article 6252-17a, V.T.C.S., as to whether negatives that have not been developed showing the scene of an accident are public records subject to disclosure.

If you determine that the negatives are public records, please consider whether or not the negatives showing the deceased are exempt from disclosure by constitutional or common law privacy under section 3(a)(1). Please consider whether the release of these pictures may infringe on the deceased's family's right of privacy.

I would also like you to consider whether the negatives are exempt under [section 3(a)(8)]. . . .

Section 2(2) of the Open Records Act defines "public records" as

the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information.

Section 3(a) provides that "public information" includes

[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business. . . .

It has been suggested that these negatives are not "public records" because they are not "developed materials." We disagree. Section 1 of the act states that one of the act's purposes is to ensure that "all persons [will] . . . at all times [be] entitled to full and complete information regarding the affairs of government." It also provides that "the provisions of this Act shall be liberally construed." This office has stated, moreover, that "the form in which information is stored should have nothing to do with the issue of its availability under the Open Records Act." Open Records Decision No. 352 (1982).

These negatives are certainly "materials." See V.T.C.S. art. 6252-17a, §2(2). They contain "information collected, assembled, or maintained by [a governmental body] . . . in connection with the transaction of official business." See *id.* §3(a). In our opinion, they should be deemed "public records." In this context, we note that photographs are "public records," see, e.g., Open Records Decision No. 423 (1984), and we perceive no logical basis for concluding that photographs are subject to the act but that negatives are not. We also note that you have stated that "pictures were taken of the accident scene and the film was processed but photographs were never produced." Processed film fits into the category of "developed materials."

We next consider your second 3(a)(8) argument. In Open Records Decision No. 287 (1981), this office said:

The section 3(a)(8) exception protects a law enforcement agency's records and notations if their release would unduly interfere with law enforcement. Cf. Ex parte Pruitt, 551 S.W.2d 706

(Tex. 1977). The best judge of whether the release of information would do so is ordinarily the law enforcement agency in possession of it, but the agency cannot arbitrarily relegate information to that category. When the 'law enforcement' exception is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of it would unduly interfere with law enforcement.

In your request letter you advanced no arguments in support of your section 3(a)(8) claim. Subsequently, this office sent a letter to you informing you that we did not have sufficient information on which to base a conclusion that section 3(a)(8) applies in this instance and inviting you to "furnish additional support for your arguments." We have received no such support.

These negatives were developed in order to allow us to examine their contents. Having done so, we conclude that they "[do] not supply the explanation on [their] face, how and why [their release] would unduly interfere with law enforcement." Open Records Decision No. 287 (1981). As noted, you have furnished no arguments in support of your section 3(a)(8) claim. We therefore cannot sustain this claim.

The remaining question is whether the negative showing the deceased individual may be withheld on grounds of privacy. Two recent federal court decisions provide guidance on this issue.

In Justice v. Belo Broadcasting Corporation, 472 F. Supp. 145 (N.D. Tex. 1979), a man and his employer were murdered. The man's parents sued a television station and one of its newscasters for invasion of privacy resulting from a broadcast concerning this murder, during which the newscaster had stated that, "Investigators are quoted as saying that they believe the two had a homosexual relationship." 472 F. Supp. at 146. The parents alleged that as a result of the dissemination of this false information concerning the homosexual relationship between their son and his employer, the parents had been subjected to humiliation and ridicule. After reviewing the facts, the court reviewed the Texas law on privacy:

Texas has only recently begun to recognize any cause of action for invasion of the right of privacy. [Citations omitted]. Having reviewed the above cited cases, the court believes that Texas has or will recognize all four categories of the tort of invasion of privacy[:] (1)

Appropriation, i.e., commercial exploitation of the property value of one's name or likeness; (2) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (3) Public Disclosure of Private Facts; and (4) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation. . . . In the present case, plaintiffs' action could fall within either of the latter two categories.

Under at least three of the categories, the right of privacy is considered personal in nature. The Restatement of Torts 2d provides that:

Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.

Comment.

a. The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his.

Under the majority view, the deceased's relatives may not maintain an action for invasion of privacy, either based on their own privacy interests or as a representative for the deceased, where the alleged invasion was directed primarily at the deceased. . . .

. . . .

In summary, the court believes that the majority rule should be applicable under Texas law. Therefore, the plaintiffs cannot maintain this action for invasion of privacy where the defendant's broadcast makes no reference to them. They likewise cannot maintain an action for invasion of their son's right of privacy since the right is personal. (Citations omitted.) (Emphasis added).

472 F. Supp. at 146-47, 148.

In Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), a woman and her husband sued Hustler magazine for invasion of privacy. During a camping trip the husband had taken photographs of his wife in the nude. A neighbor stole these photographs and submitted them to Hustler, which published them. After the publication of these photographs the wife received obscene telephone calls and had to undergo psychological counseling for several weeks.

The appeals court affirmed the lower court's judgment for the wife but reversed its judgment for the husband. The lower court had found that Hustler invaded the husband's privacy by publishing a caption entitled "photo by husband" along with the photo of the wife. Disclosure of the fact that he took photos of his wife in the nude would be highly offensive to a reasonable person, the court reasoned, and by disclosing this fact the magazine had invaded the husband's privacy. The court also found that the caption placed the husband in an offensive false light because it indicated that his purpose in taking the picture was to have it published in the magazine. The appeals court, however, disagreed. It said:

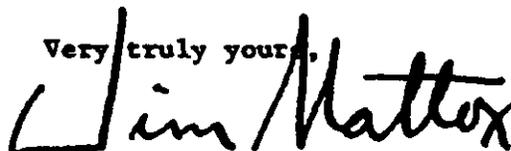
The district court was clearly erroneous in finding that Billy suffered mental anguish for the invasion of his privacy. (Emphasis in original). Texas does not permit a plaintiff to recover for injury caused by the invasion of another's privacy. See Moore v. Charles B. Pierce Film Enterprises, Inc., 589 S.W.2d 489 (Tex. Civ. App. - Texarkana 1979, writ ref'd n.r.e.); Justice v. Belo Broadcasting Corp., 472 F.Supp. 145 (N.D. Tex. 1979); Restatement (Second) of Torts §652I (1976). We do not doubt that Billy suffered as a result of LaJuan's injury. The record, however, shows no evidence of any mental anguish or suffering caused by any invasion of Billy's right of privacy. (Emphasis added). Indeed, Billy testified that he was not injured and that his anger stemmed from the tension and pressure created within his family as a result of the publication. Billy attributed these feelings to his concern for the effect that the publication had and would have on his wife.

736 F.2d at 1093.

Several important principles emerge from these cases. First, Texas law does not permit the family of a deceased person to maintain an action for the deceased's right of privacy since that right is

personal. Since the right of privacy is personal, the relatives of a deceased person may maintain an action only for the invasion of their right of privacy. No such action will succeed, however, if the information that is published does not refer to them. In the present instance, none of the photographs refer to the family of the deceased. Their publication, therefore, would not infringe on the deceased's family's right of privacy. As noted, the family of the deceased cannot maintain an action for invasion of privacy on the deceased's behalf. The publication of these photographs of the deceased, therefore, will not violate section 3(a)(1) of the Open Records Act.

Very truly yours,



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