



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 13, 2007

Mr. Jeff Lopez  
Assistant General Counsel  
Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2007-14849

Dear Mr. Lopez:

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# 294606.

The Department of Public Safety (the "department") received five requests for all information pertaining to a specified investigation. You state that you have released some information to the requestors. You claim that the submitted photographs are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. The department received the first request for information on August 23, 2007, but did not request a ruling from this office or submit the information at issue until September 12, 2007. Thus, the department failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.101 of the Government Code can provide a compelling reason to withhold information; therefore, we will consider the department's claim under this exception.

You seek to withhold the submitted information on the basis of section 43.26 of the Penal Code, which provides in part:

(a) A person commits an offense if:

(1) the person knowingly or intentionally possesses visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct; and

(2) the person knows that the material depicts the child as described by Subdivision (1).

...

(e) A person commits an offense if:

(1) the person knowingly or intentionally promotes or possesses with intent to promote material described by Subsection (a)(1); and

(2) the person knows that the material depicts the child as described by Subsection (a)(1).

Penal Code § 43.26. You contend that “the requestor[s] would be knowingly in possession of child pornography if [the submitted] material is released.” We note, however, that section 43.26 neither makes information confidential for the purposes of section 552.101 of the Government Code nor otherwise excepts information from public disclosure. We therefore conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 43.26 of the Penal Code. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Section 552.101 also encompasses common-law and constitutional privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

Constitutional privacy encompasses two types of privacy interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fajjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Federal courts have recognized that people have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded that “[w]e cannot conceive of a more basic subject of privacy than the naked body[.]” the United States Court of Appeals for the Second Circuit has found that “there is a right to privacy in one’s unclothed or partially unclothed body, regardless [of] whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment.” *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) (quoting *York v. Story*, 324 F.2d 450, 455 (9<sup>th</sup> Cir. 1963)).

The submitted documents consist of photographs of unidentified males who generally appear to be juveniles. Although these photographs are highly intimate and embarrassing, some of them do not reveal the identities of the individuals who are depicted. Ordinarily, we would find that a photograph of an unidentified individual does not implicate that individual’s privacy interests for the purposes of section 552.101 of the Government Code. Nevertheless, given the nature of these particular photographs, we believe that other factors warrant consideration in this instance.

The United States Supreme Court has recognized that the exploitation of children in the production of pornography has become a serious national problem. *See New York v. Ferber*, 458 U.S. 747, 749 (1982) (holding that First Amendment does not preclude a state from prohibiting child pornography). As a basis for granting states greater leeway in the regulation of pornographic depiction of children, the Court stated the “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *Id.* at 757. The Court quoted an authority on the prevention of sexual exploitation of children, who explained that:

pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in the future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

*Id.* at n.10. Similarly, in *United States v. Winningham*, 953 F.Supp. 1068, 1080 n.21 (D. Minn. 1996), the court noted that “[i]n many instances, the identity of the child is unascertainable to the viewer, but certainly, enduringly, and distressingly, that identity is not unknown to the child involved, who will long bear the physiological and psychological scars that such indecency has been recognized to inflict.” As the Court noted in *Ferber*, Texas, along with numerous other states, has enacted legislation criminalizing child pornography. *See Ferber*, 458 U.S. at 749; Penal Code §§ 43.25, .26; *Savery v. State*, 767 S.W.2d 242, 245 (Tex. App.—Beaumont 1989). In *Savery*, the court addressed the constitutionality of section 43.26 of the Penal Code and found that Texas has a compelling interest in safeguarding its children’s privacy and protecting children from the negative ramifications resulting from child pornography. *See id.* at 245.

Based on our review of the photographs at issue and the foregoing analysis, we find that the individuals depicted in the submitted photographs have legitimate expectations of privacy in their photographs that outweigh any public interest in disclosure of the photographs. We therefore conclude that the department must withhold the submitted photographs under section 552.101 of the Government Code in conjunction with constitutional privacy.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

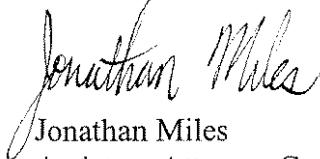
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/jh

Ref: ID# 294606

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