



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 24, 2008

Ms. Jo-Christy Brown  
City Attorney  
City of Bastrop  
1411 West Avenue, Suite 100  
Austin, Texas 78701

OR2008-01095

Dear Ms. Brown:

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# 300809.

The City of Bastrop (the "city") received a request for the personnel file of a former named police officer.<sup>1</sup> You state that you will provide the requestor with most of the requested information, but claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we must address the city's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office, within fifteen business days of receiving the

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<sup>1</sup>As you have not provided this office with a copy of the written request for information, we take our description from your brief.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

request, (1) general written comments stating the reasons why its stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You inform us that the city received this request on November 1, 2007. However, you have yet to submit a copy of the requestor's written request for information. Consequently, we find that the city failed to comply with the procedural requirements of 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 information is public and must be released. Information that is presumed public must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); 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). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address this exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 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 Fado 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 information consists of photographs of unidentified individuals most of whom are children. Although all of 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 city must withhold all of the submitted photographs under section 552.101 of the Government Code in conjunction with constitutional privacy. As our ruling is dispositive, we need not address your argument against disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Jordan Johnson  
Assistant Attorney General  
Open Records Division

JJ/jb

Ref: ID# 300809

Enc. Submitted documents

c: Mr. Tony Plohetski  
*Austin American-Statesman*  
c/o City of Bastrop  
1411 West Avenue, Suite 100  
Austin, Texas 78701  
(w/o enclosures)