



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 10, 2008

Mr. Dan P. Bradley  
First Assistant District Attorney  
Chambers County District Attorney's Office  
P.O. Box 1409  
Anahuac, Texas 77514

OR2008-16873

Dear Mr. Bradley:

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# 329641.

The Chambers County District Attorney's Office (the "district attorney") received a request for a forensic examiner's report related to a specific case. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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: (1) that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) 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

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<sup>1</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.

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 Fadlo v. Coon*, 633 F.2d 1172 (5th 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 (5th 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 (9th Cir. 1963)).

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.

You state the responsive information includes media that contains pornographic images of children. Based on your representations, we find that the children depicted in the images at issue have legitimate expectations of privacy in their images that outweigh any public interest in disclosure of the images. We therefore conclude that the district attorney must withhold all of the responsive images under section 552.101 of the Government Code in conjunction with constitutional privacy.

You seek to withhold the remaining information under section 43.26 of the Penal Code, which provides in pertinent 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 argue that “to release [the information at issue] to the Requestor would cause [the district attorney] to commit a felony as proscribed by Tex. Penal Code 43.26.” 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. Thus, we conclude that the district attorney may not withhold any of the remaining 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).

Next, you argue that the remaining information is excepted from public disclosure under section 552.103. Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.*

The district attorney received the request for information on September 5, 2008. You inform us that the requestor has filed an application for writ of habeas corpus on behalf of the

incarcerated individual. We note, however, that you state the requestor did not file the application until September 8, 2008. Based on these representations and our review, we conclude that litigation was not pending when the present request for information was received by the district attorney. Further, you have not provided this office with arguments showing that litigation was anticipated on the date that the district attorney received the present request. Therefore, we find that the district attorney may not withhold any of the remaining information under section 552.103 of the Government Code.

Finally, you raise section 552.108 against disclosure of the submitted information. Section 552.108 of the Government Code excepts from public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . if. . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct if it provides the attorney general with a demonstration that the information relates to the pending case and a representation from a law enforcement entity that it has an interest and wishes to withhold the information. *See Open Records Decision No. 474 at 4-5 (1987)*.

You explain that the requestor’s client may be subject to an ongoing investigation by federal authorities who would be using the remaining information as part of their “investigative database.” However, you do not inform us that any federal authority objects to the release of this information, nor has any such authority argued to this office that the release of the information would interfere with a criminal prosecution. Therefore, the remaining information may not be withheld under section 552.108 of the Government Code. As you raise no other arguments against disclosure, the remaining information must be released.

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). If the governmental body does not file suit over 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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/ma

Ref: ID# 329641

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)