



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 11, 2013

Mr. Jody Leake
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2013-17737

Dear Mr. Leake:

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# 502154 (Corpus Christi File# 540).

The City of Corpus Christi (the "city") received a request for information concerning the requestor.¹ You claim portions of the submitted information 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 city's obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed 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. *Id.* § 552.301(e). You state the city received the request for information on June 29, 2013. However, you did not seek a ruling from this office, nor did

¹As you have not submitted a copy of the request for information, we take our description from your brief. We note you have provided the name of the requestor.

you submit a copy of the specific information requested or representative samples or written comments stating the reasons why the claimed exceptions apply until August 6, 2013. In addition, as of this date, you have failed to submit a copy of the written request for information. Accordingly, we find the city failed to comply with section 552.301 of the Government Code.

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 there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Because the city's claim under section 552.101 can provide a compelling reason for non-disclosure, we will address the applicability of this exception to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. Gov't Code § 552.101. Section 552.101 encompasses the doctrines of common-law and constitutional privacy.²

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

Federal courts have recognized individuals have a constitutional right to privacy in their unclothed bodies. Quoting the United States Court of Appeals for the Ninth Circuit, which concluded, "[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 "there is a right to privacy in one's unclothed or partially unclothed body, regardless [of] whether that right

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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)).

We note the submitted information contains images of individuals in various states of undress, some of whom are identifiable and others who are not. We further note, on the basis of our review of the submitted information, that these pictures were obtained from publicly available websites. Accordingly, the individuals depicted are generally not afforded protection under constitutional privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star-Telegram, Inc. v. Walker*, 834 S.W. 2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

However, our review of the submitted information also reveals that some of the individuals depicted may be minors. 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, *aff’d* 819 S.W. 2d 837 (Tex. Crim. App. 1991)). 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.³ As you raise no further exceptions to disclosure, the remaining information must be released.⁴

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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/dls

Ref: ID# 502154

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As our ruling is dispositive for this information, we need not address your argument against its disclosure under section 552.101 of the Government Code in conjunction with common-law privacy.

⁴We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.