



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 13, 2003

Mr. D. Craig Wood  
Langley & Banack  
745 East Mulberry, Suite 900  
San Antonio, Texas 78212-3166

OR2003-5665

Dear Mr. Wood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185142.

The Northside Independent School District (the "District"), which you represent, received a request for the following four categories of information:

1. Any and all photographs that were shown to [a named student] by any officer or employee of [the District].
2. Any and all investigative reports that are being or have been conducted by [the District] into the events leading up to and including exposing [a named student] to the photograph of a naked male[.]
3. Any statements collected during the investigation referred above [sic] including any statement written or signed by [a named student.]
4. Any other document that is relevant to the above referenced incident.

You inform us that the District has released all documents responsive to this request with the exception of the photograph identified as Exhibit B. You ask whether the submitted information is excepted from disclosure under sections 552.101 and 552.114 of the Government Code. We reviewed the information you submitted and considered the issues you raise.

Section 552.101 protects from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrines of common-law and constitutional privacy. For information to be protected from

public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683.

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 that people have a constitutional right of 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), *cert denied*, 376 U.S. 939).

In this instance, you have submitted a photograph of an unidentified male who appears to be younger than eighteen years of age. You state that "the photograph depicts a naked male child." While we agree that the photograph at issue is highly intimate and embarrassing, it does not reveal the identity of the individual or any identifying characteristics. Moreover, you state that "[t]he identity of the child depicted in the photograph is unknown." Normally, under these circumstances, we would find that, because the individual in the photograph is unidentifiable, the privacy interests of the individual have not been implicated. Yet, due to the nature of this particular photograph, we believe other factors warrant consideration.

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 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:

[P]ornography 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 found 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; Tex. Penal Code §§ 43.25, .26. In *Savery v. State*, 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. *Savery v. State*, 767 S.W.2d 242, 245 (Tex. App.–Beaumont 1989, *aff’d*, 819 W.W.2d 837 (Tex. Crim. App. 1991).

Based on our review of the photograph and the foregoing analysis, we find that the individual depicted in the photograph has a legitimate expectation of privacy in this photograph that outweighs any public interest in its disclosure.<sup>1</sup> Thus, we conclude the District must not release the submitted photograph to the requestor under section 552.101 and constitutional privacy. As we make this determination, we need not address your remaining arguments.

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

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<sup>1</sup> In reaching our conclusion, this office takes no position as to whether the photograph at issue depicts sexual conduct as that term is defined by section 43.25(a)(2) of the Texas Penal Code.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Christen Sorrell  
Assistant Attorney General  
Open Records Division

CHS/seg

Ref: ID# 185142

Enc: Submitted documents

c: Mr. Mark Norton  
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(w/o enclosures)