



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2013

Mr. William W. Krueger, III
Counsel for Hood County
McKamie Krueger, LLP
2007 North Collins Boulevard, Suite 501
Richardson, Texas 75080

OR2013-03757

Dear Mr. Krueger:

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# 480741 (MK File No. Athey-7188).

The Hood County Sheriff's Office (the "sheriff's office"), which you represent, received one request for surveillance video of holding cells and rubber rooms on two specified dates and three requests from a different requestor for (1) the sheriff's office's policies regarding the use of tasers, handling suspects and inmates who are suicide risks, and the use of restraint chair confinement; (2) audio and video recordings of the use of a taser on a named individual; and (3) any information regarding the administrative suspension or voluntary leave of the jailer or deputy involved in a specified taser incident. We understand the sheriff's office is releasing some of the requested information to the second requestor. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion of the information submitted in response to the second request, which we have marked, is not responsive to the instant requests because it was created after the date the requests were received. This ruling does not address the public availability of non-responsive information, and the sheriff's office is not required to release non-responsive information in response to these requests.

Next, we note the first request for information is narrower than those submitted by the second requestor. Thus, the information submitted in response to the second request is not responsive to the first request. Accordingly, the sheriff's office need not release information to the first requestor that is not responsive to his request.

Section 552.103 of the Government Code provides in part:

(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.

...

(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), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st 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).*

You state the sheriff's office reasonably anticipates litigation because the first requestor is the individual at issue in the submitted information and, before the date the sheriff's office received the requests for information, he made a verbal complaint that "he intended to file a lawsuit against Hood County alleging that his civil rights were violated and he intended to go to the Hood County News." You note the second requestor is a writer for the Hood County News. However, you have not provided this office with evidence the first requestor had taken any objective steps toward filing a lawsuit prior to the date the sheriff's office received the requests for information. *See Gov't Code § 552.301; Open Records Decision No. 331 (1982).* Thus, we find you have failed to establish the sheriff's office reasonably anticipated litigation when it received the present requests for information. Therefore, none

of the responsive information may be withheld on the basis of section 552.103 of the Government Code.

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.¹ Gov’t Code § 552.101. Section 552.101 encompasses the doctrines of constitutional privacy and common-law privacy. 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 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 at 492 (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 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 responsive information contains images of individuals, who all appear to be adults, in various states of undress. For the portions of the submitted videos that depict unclothed individuals, we find the images of the identifiable individuals who are partially or completely nude are excepted from disclosure under section 552.101 of the Government Code based on the constitutional right to privacy. While there is substantial public interest in this information, the individuals depicted have a right to privacy in pictures of their unclothed bodies. *See id.* Thus, we conclude these individuals have a legitimate expectation of privacy in these images that outweighs the public interests. However, we note, the first requestor is one of the individuals whose privacy interest is at issue. Accordingly, the requestor has a special right of access under section 552.023 of the Government Code to the information concerning himself. *See* Gov’t Code § 552.023 (person has a special right of access to information excepted from public disclosure under laws intended to protect

¹The 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).

person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Therefore, we find the sheriff's office must withhold those portions of the submitted videos that depict identifiable individuals who are partially or completely nude, who are not the requestor, from the first requestor, and all portions of the submitted videos that depict identifiable individuals who are partially or completely nude from the second requestor, under section 552.101 of the Government Code in conjunction with constitutional privacy.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered highly intimate or 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. *Id.* at 683. Upon review, we find portions of the information submitted as responsive to the second request are highly intimate or embarrassing and not of legitimate public concern. Therefore, the sheriff's office must withhold the information we have marked in the remaining responsive information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the sheriff's office must withhold those portions of the submitted videos that depict identifiable individuals who are partially or completely nude, who are not the requestor, from the first requestor, and all portions of the submitted videos that depict identifiable individuals who are partially or completely nude from the second requestor, under section 552.101 of the Government Code in conjunction with constitutional privacy. The sheriff's office must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining responsive information must be released; however, the information that is not responsive to the first request need not be released to the first requestor.²

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.

²We note the information to be released contains information to which the requestor has a right of access. *See* Gov't Code § 552.023. Because such information may be confidential with respect to the general public, if the sheriff's office receives another request for this information from a different requestor, the sheriff's office must again seek a ruling from this office.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn R. Mattingly". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 480741

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)