

CAUSE NO. 03-07-00102-CV

IN THE
THIRD COURT OF APPEALS
Austin, Texas

Texas Comptroller of Public Accounts,
Plaintiff/Appellant/Cross-Appellee

v.

Attorney General of Texas,
Defendant/Appellee
and
The Dallas Morning News, LP,
Intervenor/Appellee/Cross-Appellant

On Appeal from the 345th Judicial District of Travis County, Texas;
Cause No. D-1-GN-06001120; The Honorable Stephen Yelenosky, Presiding Judge

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES AND COUNSEL

A. Parties and Other Interested Entities

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Defendant/Appellee: Attorney General of Texas
Intervenor/Appellee/
Cross-Appellant The Dallas Morning News, LP

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STATEMENT OF THE CASE

Pursuant to the Public Information Act,¹ the Comptroller filed suit raising invasion of privacy grounds in a challenge to an Attorney General Open Records letter ruling, which held that the date of birth of a governmental employee is public information and, consequently, is to be disclosed to a requestor. Appendix Tab A, CR 002-025. The trial court agreed with the Attorney General by ruling that date of birth information is public. Appendix Tab B, CR 169. The Comptroller took this appeal. CR 187-88.

ISSUE PRESENTED

The Comptroller disclosed to the *Dallas Morning News* information contained in the state employee database, except for birth dates, citing the confidentiality of private information. Afterwards, pursuant to procedures in the Public Information Act, the Attorney General issued a letter ruling that public employee birth dates are not confidential. The issue is whether the release of a public employee's birth date, in conjunction with his name, is an intrusion by the state on an individual's right to privacy.

STATEMENT OF FACTS

The *News* requested the Comptroller's state employee payroll pursuant to the Public Information Act. CR 10. The database contains an employee's full name, date of birth, job description, agency, salary, race, sex, work address, date of initial employment, pay rate, work hours, and identification of employees who are peace officers. CR 97-98.

The Comptroller timely communicated to the Attorney General that the release of dates of birth of nearly 144,000 state employees, along with other identifying information

¹ Chapter 552 of the Texas Government Code.

regarding those employees, implicated *inter alia* common-law and constitutional privacy interests, as well as concerns of identity theft. CR 11-12.

In response, the Attorney General issued Letter Ruling No. OR2006-09138, which stated that a public employee's date of birth is public information and accordingly, is to be included in the database disclosed to the requestor. *See* Appendix, Tab A, CR 14-25.

The Comptroller declined to release the employees' dates of birth to the requestor and instead, timely filed suit against the Attorney General to challenge the ruling. Shortly thereafter, the requestor, the *News*, intervened in support of the Attorney General's position. CR 30-49.

On September 6, 2006, the court granted the *News*' motion for partial summary judgment and denied the Comptroller's motion. *See* Appendix Tab B, CR 169. According to the order, public employees' date of birth information is public and is therefore subject to disclosure under the Act.

On November 16, 2006, the court signed an order denying the *News*' motion for summary judgment for attorney's fees. *See* Appendix Tab C, CR 170. On January 26, 2007, the court signed an order nunc pro tunc correcting the order issued on November 16, 2006. *See* Appendix Tab D, CR 186.

A case styled *Greg Abbott, Attorney General of Texas v. State Bar of Texas*; Case Number 03-06-00592-CV, raises similar issues and is currently on appeal before this court.

SUMMARY OF THE ARGUMENT

Texans enjoy a right to privacy that protects them from the state government's disclosure of personal information to the general public. This right emanates from both the

common law and the Texas Constitution. The Public Information Act itself does not defeat a right to privacy and in fact, recognizes that other law may prevent the release of information held by the state. Consequently, the release of a governmental employee's birth date, in conjunction with his name, is not authorized by the PIA.

ARGUMENT

I. Under the Public Information Act, the Comptroller May Not Release the Date of Birth of State Employees.

A. Section 552.101 of the Act excepts confidential information from disclosure.

Governmental employees enjoy the same common law privacy interests as do members of the general public. Section 552.101 of the PIA excepts from public disclosure information "... considered to be confidential by law, either constitutional, statutory or by judicial decision." The release or publication of a person's birth date is an intrusion on a person's private affairs. It is therefore excepted from disclosure.

B. Under the common law, governmental employees enjoy a right to privacy.

1. There exists the right to be free from intrusion on private affairs and the appropriation of identity.

In the *Billings* case, the Texas Supreme Court recognized two types of privacy rights that are protected from invasion.² The first, which is at issue here, is the right to be free from the unwarranted appropriation or exploitation of one's personality, including the publicizing of private affairs for which the public has no legitimate concern.

² *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S. Right of Privacy § 1. A judicially approved definition of the right of privacy is that it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 *Am.Jur.2d, Privacy § 1*, p. 677, and cases cited.[³]

...

Measured by these considerations, we follow the rule that an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted.[⁴]

“[T]he right of privacy . . . to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern . . .,” as set out in *Billings*, was reaffirmed in the Supreme Court's later ruling in the *Industrial Foundation* case. In that case, the court acknowledged that there are at least four types of privacy interests deserving of protection.⁵

We stated, at 489 *S.W.2d* at 859:

The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S. Right of Privacy § 1. A judicially approved definition of the right of privacy is that it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 *Am.Jur.2d, Privacy § 1*, p. 677, and cases cited.

³ *Id.* at 859. (Underlining and italics added).

⁴ *Id.* at 860.

⁵ *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976).

The above statement of the Court reveals that the tort "invasion of privacy" is actually a recognition of several "privacy interests" considered to be deserving of protection. Professor William L. Prosser has categorized these interests into four distinct torts, each subject to different rules:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

William L. Prosser, *Privacy*, 48 *Cal.L.Rev.* 383, 389 (1960).

The interest recognized as deserving protection in *Billings* was the first listed above, freedom from unwarranted intrusion. The interest asserted by defendants on behalf of claimants most closely resembles the interest defined by Prosser as freedom from public disclosure of embarrassing private facts.^[6]

The first, which is at issue here, is the right to freedom from intrusion upon a person's seclusion or solitude, or into his private affairs.⁷ The second, which was the right to freedom from disclosure of embarrassing facts about a person, was the issue in the *Industrial Foundation* case.⁸ In a more recent case, the Supreme Court again stated that it has recognized the first two types of privacy interests as developed by Professor Prosser. The first is a right to be free from governmental intrusion into one's seclusion, and the second is the right to "... freedom from public disclosure of embarrassing private facts."⁹

Accordingly, it is the *Billings*' analysis which should be applied here and not the *Industrial Foundation*'s analysis.

⁶ *Id.* (Italics added).

⁷ *Id.*

⁸ *Id.*

⁹ *Cain v. Hearst Corp*, 878 S.W.2d 577, 578 (Tex. 1994) (citations omitted).

2. **Only when the government can show that intrusion upon an employee's privacy is reasonably warranted for the achievement of a compelling governmental objective, which can be achieved by no less intrusive, more reasonable means, may such intrusion occur.**

In 1987, the Texas Supreme Court decided a right to privacy case under the Texas Constitution.¹⁰ The Court ruled that Article 1, sections 9 and 25 of the Constitution guarantee the sanctity of the individual's home and person against unreasonable intrusion, including polygraphs administered by a state agency to employees solely because of their employment status.¹¹ Further, this right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.¹²

Here, the Attorney General has not shown that the state's objective in promoting open government by releasing employees' birth dates, does not outweigh employees' interest in keeping their birth dates private. *See also Whalen v. Roe*, 429 U.S. 589, 598-602, 605 (1977), for a discussion of the federal constitutional right to be free from the government disclosing private facts about its citizens.

3. **Cases from other jurisdictions.**

While no Texas court has addressed this specific question, other courts around the country have concluded that birth dates are private and their disclosure is a clear invasion of personal privacy. In a case decided under the Federal Freedom of Information Act, the

¹⁰ *Texas State Employees Union v. Tex. Dept. of MHMR*, 746 S.W.2d 203 (Tex. 1987).

¹¹ *Id.* at 205.

¹² *Id.*

Eastern District of New York applied a balancing test under exemption 6 of the Act.¹³ The supreme courts of two states, Arizona and Kansas, and the appellate court of Kentucky, have reached the same conclusion under their state acts.¹⁴ *For further discussion, see* Tex. Att’y Gen. OR2006-01938*3.

C. The date of birth of a governmental employee is confidential.

The Attorney General’s letter ruling at issue here states, “[a]lthough the crime of identity theft is becoming an increasing problem, neither the Comptroller, nor any of the parties she notified, has presented to this office sufficient evidence to establish that harmful financial consequences will result from the release of the date of birth information in response to this request.”¹⁵ Accordingly, the Comptroller submitted affidavit evidence to the trial court endeavoring to show that the release of date of birth information will increase the likelihood that some number of public employees will be identified when they would prefer to be left alone. They are summarized as follows:

1. Barbara Collins, an employee of the Texas Education Agency, who has already been the victim of identity theft on several occasions. When she learned of the News request, she contacted the Comptroller’s Office on her own initiative to request that her date of birth not be released. CR 95-96.

2. Ruth Soucy, Manager of the Open Records Division for the Comptroller’s Office. She has compiled a list of all the state agencies whose employees’ dates of birth

¹³ *Oliva v. U.S.*, 756 F.Supp. 105, 107 (E.D.N.Y.1991); 5 U.S.C. § 552.

¹⁴ *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan.2205); *Scottsdale Unified School Dist. v. KPNX*, 955 P.2d 534 (Ariz.1998); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994).

¹⁵ Tex. Att’y Gen. OR2006-01938*4.

would be released if the Attorney General's letter ruling were to be upheld. A review of the list shows that the News request cuts a wide swath for the rather limited purpose for which the News contends it needs the information. CR 97-101.

3. David Baker, a Major in the Texas Department of Public Safety, Highway Patrol. He states that law enforcement agencies accept as true the name and date of birth information offered by a person who is stopped for a traffic violation, but who does not have a driver's license with them. This policy has unfortunate consequences for the innocent person whose name and date of birth are falsely supplied to the officer. This person may have to deal with criminal proceedings, the loss of their driver's license, attorney's fees, fines, and arrest warrants. CR 102-103.

4. Marvin Mead is a crime analyst in the Texas Department of Public Safety, Driver's License Division, Fraud Investigation Unit. He explains how the information that the News seeks can be matched with other information available on the internet to create counterfeit driver's licenses to be used in opening checking accounts, and issue counterfeit checks. All unbeknownst to the person whose identity is being used. In addition to having to deal with the criminal justice system, the innocent person faces the daunting task of remedying his credit history. CR 104-105.

5. Jesse Soliz is a Systems Analyst in the Fiscal Systems Division of the Comptroller's Office. He verified that 1,909 state employees have the same first, middle, and last names. However, by using all the other information requested by the News, except date of birth, no employee matched another. CR 106.

It is common knowledge that identity theft is a genuine problem in the U.S. today. Many governmental websites, including the Attorney General's Office, urge citizens to be vigilant in keeping their identifying information private. *See* www.oag.state.tx.us/consumer/idtheft.shtml. The Texas Department of Public Safety offers similar advice.¹⁶ The Homeland Security Group suggests that citizens visit the Federal Trade Commission's website that mentions birth dates as the type of personal information that thieves can use to steal an identity. *See* www.consumer.gov/idtheft. There exist many similar other such websites.

Governmental employees are aware, as is the public in general, that the more personal information publicly available about them, the more likely they are to be a victim of identity theft or marketing companies. The above evidence establishes that their concerns are not unfounded. Because governmental employees enjoy the same right to privacy as any member of the public, their privacy should not be infringed by the release of their birth date.

II. Other Provisions of the Public Information Act Establish Legislative Intent to Make a Governmental Employee's Birth date Confidential.

The legislature never intended for a governmental employee's birth date to be disclosable pursuant to a PIA request. It clearly set out what limited information is available to be released on individual employees.

¹⁶ *See* www.txdps.state.tx.us/administration/driver_licensing_control/idtheft/idtheftguide.htm

A. Section 552.022. Categories of Public Information; Examples

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(2) *the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;*

(Italics added).

The legislature has taken care to protect the private information of governmental employees from invasion by improper use of the PIA. Included in the PIA is an exception for information in a personnel file, where an employee's birth date is usually found.

B. Section 552.102. Exception: Personnel Information

(a) Information is excepted from the requirements of Section 552.021 if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee

In addition to the protection afforded to information contained in a personnel file, the legislature's intent to protect birth date information is found in section 552.130 of the Act, which became effective on September 1, 1997.

C. Section 552.130. Exception: Motor Vehicle Records

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

This statute excepts birth date information, as well as other personally identifying information contained in a driver's license from being disclosed pursuant to the Act.

Finally, the legislature has excepted birth records from the Act.

D. Section 552.115. Exception: Birth and Death Records

(a) A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021,

It is obvious that when the PIA is read as an entire statutory scheme, that the legislature does not intend for birth date information to be revealed in conjunction with other identifying information on an individual.

III. The Employees Retirement System's Statutes Also Establish Legislative Intent to Make a Governmental Employee's Birth Date Confidential.

Governmental employers require employees to reveal their birth date, not only for the purpose of identifying them, but for the purpose of establishing their right to vest in health and retirement benefits. But this information is confidential by statute. The state agency charged with the administration of benefits and retirement for employees is the Employees Retirement System of Texas. *See* Chapter 815 of the Government Code.

Section 815.503(a) of the Government Code, concerning the state Employees Retirement System¹⁷ states:

Records of members,^[18] . . . under retirement plans administered by the retirement system that are in the custody of the system or . . . , or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure, and the retirement system is not required to accept or comply with a request for a record or

¹⁷ "Definitions. In this subtitle: . . . (15) "Retirement system" means the Employees Retirement System of Texas." TEX. GOV'T CODE ANN. § 811.001 (Vernon Supp. 2007).

¹⁸ "Membership in Employee Class. (a) . . . [M]embership in the employee class of the retirement system includes all employees and appointed officers of every department, commission, board, agency, or institution of the state . . ." TEX. GOV'T CODE ANN. § 812.003 (Vernon Supp. 2007).

information about a record or to seek an opinion from the attorney general, because the records are exempt from the public access provisions of Chapter 552,^[19] except as otherwise provided by this section. ^[20]

The Comptroller is the custodian of all securities and cash of the retirement system.²¹

The Comptroller's payroll database contains the same birth date information on individual employees and retirees as does ERS. Because birth date information is contained in a state employee's ERS record, and, because the legislature has passed a law to protect the privacy of ERS members, the purpose of that statute would be defeated if a requestor could obtain the very same information from a cooperating governmental agency, such as the Comptroller, pursuant to a public information request. Obviously, it is the nature of the information requested, and not which state agency or agencies hold the information, that should determine whether the information is public. The legislature's intent to maintain state employees' personal information confidential is evident from this statute, as well as the Public Information Act itself.

¹⁹ Chapter 552 of the Government Code is the Public Information Act.

²⁰ See also *Houston Mun. Employees Pension Sys. v. Abbott*, 192 S.W.3d 862, 865 (Tex. App.—Texarkana 2006, pet. denied).

²¹ Comptroller.

(a) Except as provided by Section 825.302 or 825.303 or by Subsection (e) of this section, the comptroller is the custodian of all securities and cash of the retirement system, including securities held in the name of a nominee of the retirement system.

(b) The comptroller shall pay money from the accounts of the retirement system on warrants drawn by the comptroller and authorized by vouchers signed by the executive director or other persons designated by the board of trustees.

(c) The comptroller annually shall furnish to the board of trustees a sworn statement of the amount of the retirement system's assets in the comptroller's custody.

TEX. GOV'T CODE ANN. § 825.207 (Vernon 2004).

CONCLUSION

The summary judgment ruling in favor of the Attorney General and the *News* should be reversed and judgment in favor of the Comptroller's should be rendered because date of birth information is protected from disclosure by common law and constitutional rights to privacy.


Respectfully submitted,

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Texas Comptroller of Public Accounts

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was delivered as indicated on the 30th day of **March, 2007**, to the following:

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 Office of the Attorney General
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 Austin, Texas 78701

Via Hand Delivery

Paul C. Watler
 Jenkins & Gilchrist
 1445 Ross Av., Suite 3200
 Dallas, TX 75202-2799

Via CMRRR

Maureen Powers
 MAUREEN POWERS

3/30/07

RECEIPT
 7180 6780 7890 0001 4655

FROM:
 LAURA J. EDWARDS
 RE: BirthDate ORR/Appellant B

DP: Financial Litigation Division
 PB: Laura Edwards for Maura Pc

SEND TO:
 PAUL C WATLER
 JENKENS & GILCHRIST PC
 1445 ROSS AVENUE
 SUITE 3200
 Dallas TX 75202

FEES:

Postage	0.00
Certified Fee	0.00
Special	0.00
Restricted	0.00
Receipt	0.00

TOTAL \$ 0.00

POSTMARK OR DATE

LAURA J. EDWARDS OFFICE OF THE ATTORNEY GENERAL FINANCIAL LITIGATION - 017 PO BOX 12548 CAPITOL STATION AUSTIN TX 78711-2548		4. Restricted Delivery? <input type="checkbox"/> Yes (Extra Fee)	3. Service Type CERTIFIED
COMPLETE THIS SECTION ON DELIVERY		2. Article Number 7180 6780 7890 0001 4655	
A. Signature: (<input type="checkbox"/> Addressee or <input type="checkbox"/> Agent) <i>X</i>			
B. Received By: (Please Print Clearly) <i>Paul C Watler</i>		7180 6780 7890 0001 4655	
C. Date of Delivery <i>4-2-07</i>		1. Article Addressed To:	
D. Addressee's Address (If Different From Address Used by Sender) _____ Secondary Address / Suite / Apt. / Floor (Please Print Clearly) _____ Delivery Address _____ City _____ State _____ ZIP + 4 Code _____		PAUL C WATLER JENKENS & GILCHRIST PC 1445 ROSS AVENUE SUITE 3200 DALLAS TX 75202	

APPENDIX

1. Attorney General Letter Ruling No. OR2006-09138 Tab A
2. Order on Motion for Partial Summary Judgment,
signed September 6, 2006 Tab B
3. Order Denying Plaintiff's Second Motion for Summary Judgment,
signed November 16, 2006 Tab C
4. Order Nunc Pro Tunc Denying Intervenor's Second Motion
for Summary Judgment signed January 26, 2007 Tab D

A



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2006

Ms. Amalia Rodriguez-Mendoza
District Clerk
Travis County Courthouse
Austin, Texas 78701

VIA HAND DELIVERY

RE: *Texas Comptroller of Public Accounts vs. Attorney General of Texas;*

Dear Ms. Rodriguez-Mendoza:

Enclosed you will find the original and two copies of COMPTROLLER'S ORIGINAL PETITION. Please file the original and return the two file-stamped copies to our waiting messenger.

Thank you for your attention to this matter.

Sincerely,

DANA STIEFERMAN, Legal Secretary to,
and by permission from,
MAUREEN POWERS
Assistant Attorney General
Financial Litigation Division
TEL: 512 - 475-4202
FAX: 512 - 477-2348

MP:ds

Enclosures

cc: Brenda Loudermilk, AAG
(w/enclosure)

(VIA HAND DELIVERY)



000073956

ORIGINAL

CAUSE NO. D-1-GN-06-001120

TEXAS COMPTROLLER OF
PUBLIC ACCOUNTS,
Plaintiff,

: IN THE 126th JUDICIAL

:

:

:

vs.

:

:

:

:

ATTORNEY GENERAL OF TEXAS,
Defendant.

:

:

DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

FILED

06 MAR 30 PM 2:14

Wanda L. [unclear]
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

COMPTROLLER'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Texas Comptroller of Public Accounts ("Plaintiff" or "Comptroller") and files the following Original Petition, pursuant to sections 552.324 and 552.325 of the Government Code, seeking declaratory relief regarding the Open Records Letter No. OR2006-01938 rendered by the Attorney General of Texas ("Defendant" or "Attorney General") wherein Defendant ruled that the dates of birth of state employees must be released to the public.

I.

Discovery

Level 1.

II.

Parties

Plaintiff Comptroller is a state agency created by the Texas Constitution of 1876 as found in article IV, sections 1 and 23.

Defendant Attorney General is also a state agency located at 209 West 14th Street, 8th floor, Austin, Texas, 78701. No service is necessary at this time.

III.
Venue and Jurisdiction

Venue and jurisdiction is proper in Travis County pursuant to sections 552.324(b) and 552.325 of the Government Code.

IV.
Factual Background

On November 18, 2005, Plaintiff received a written request under the Texas Public Information Act, chapter 552 of the Government Code, from Jennifer LaFleur, an editor with *The Dallas Morning News*. **See Exhibit 1.** Ms. LaFleur subsequently verbally clarified her request to seek identifying information regarding state employees, to specifically include employees' full name, job title or job description, agency or department, salary, race, sex, work address, date of initial employment, available information concerning pay rate (monthly or otherwise), work hours (full-time or part-time), identification of employees who are peace officers, and dates of birth for all employees.¹ The Comptroller offered to provide the categories of information requested, substituting the age of each employee for the requested date of birth. The requestor declined to accept age for date of birth and advised that she would wait to receive any of the requested information until the Attorney General ruled on whether the dates of birth were public.

In accordance with section 552.301(a) of the Texas Government Code (the "Code"), the Comptroller timely asserted to the Attorney General's Office that the wholesale release of dates of birth of nearly 145,000 state employees, along with other identifying information regarding those employees, implicated common-law and constitutional privacy interests under section 552.101; law enforcement interests under section 552.108; and special circumstances under sections 552.101 and

¹ The Comptroller of Public Accounts received a request from another individual, Mirna Araceli Ramos, for what initially appeared to be similar types of confidential information. On that basis, the requests were combined and sent to the Attorney General for a consolidated ruling. However, Ms. Ramos did not seek date of birth information, thus the Attorney General's ruling on that issue was applicable only to Ms. LaFleur's request.

552.108.² The requestor was also timely notified and copied on the referral. *See Exhibits 2 and 3.*

Defendant issued a ruling, Open Records Letter No. OR2006-09138. *See Exhibit 4.* That ruling, dated February 28, 2006, and received by the Comptroller on March 1, 2006, ordered the Comptroller to provide the public release of dates of birth, as well as all state employees' other personally identifying information. Defendant ruled that public employees' dates of birth are not protected under sections 552.101, 552.102, or 552.108, and thus are public information.

In accordance with section 552.324 of the Code, the Comptroller declined to release the employees' dates of birth to the requestor.

V.
Relief Sought

Declaratory Relief

Plaintiff requests, under section 552.324 of the Public Information Act and the Uniform Declaratory Judgments Act, Chapter 37, Texas Civil Practice and Remedies Code, that the Court grant declaratory relief from compliance with Open Records Letter No. OR2006-09138 on the basis that Defendant failed to apply appropriate standards to protect from wholesale public release the dates of births of nearly 145,000 state employees and elected officials. Specifically, Defendant erred as follows:

1. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with privacy rights as provided by the United States Constitution and the Texas Constitution.

²

The Comptroller did not assert as an exception to disclosure section 552.102(a), which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Attorney General's 2006 Public Information Handbook advises that section 552.102(a) is limited in scope, and further advises that privacy protection under section 552.102 is identical to the privacy protection under section 552.101, which exception the Comptroller timely raised as an exception. However, the Attorney General erroneously ruled under both sections 552.101 and 552.102.

2. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with Texas common law.

3. Defendant erred in the application of a special or exceptional circumstances review under section 552.101.

VI.
Arguments

1. Defendant erred when he failed to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code.

Government employees have a constitutional privacy interest in their own dates of birth. The United States Supreme Court and other federal courts have recognized that individuals have a right to privacy and to informational privacy for their personal information. The Texas Supreme Court has recognized a constitutional right to privacy protects the individual, whether state employee or private employee, from unwarranted intrusion. *See Texas State Employees Union v. Texas Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex.1987).

2. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with Texas common law.

Texas government employees have a common-law privacy interest in their own dates of birth. Section 552.001 of the Code states that it is the policy of Texas that each person is entitled "to complete information about the affairs of government and the official acts of public officials and employees." The Texas Attorney General has generally construed information to be protected under common-law privacy under the test set out in *Industrial Foundation* if:

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation*, 540 S.W.2d at 685 (Tex. 1976).

Disclosing the dates of birth of public employees shows nothing about the official affairs of government or about the actions of government officials and employees, but does intrude upon individual privacy interests protected by Texas common law.

3. Defendant erred in the application of a special or exceptional circumstances review under section 552.101.

Defendant erred in the application of his own “special circumstances” or “exceptional circumstances” test. In Open Records Decision No. 123 (1976), the then-Attorney General recognized that there may exist “exceptional circumstances” to protect otherwise public information from public release. The Attorney General indicated that pertinent to this inquiry were facts such as whether the employee made an effort to restrict public access to the requested information. *See also* Op. Tex. Att’y Gen. MW-283 (1980). In Open Records Decision No. 169 (1977), the Attorney General outlined the “special circumstances” under which a public employee’s otherwise public home address could be withheld from disclosure. Those circumstances included the employee maintaining unlisted home addresses, changing of residences, having experienced prior harassment, and having concern that there might be future harassment.

In Defendant’s ruling at issue, Open Records Letter No. OR2006-01938, he applied a special circumstances test to date of birth, stating:

Although the crime of identity theft is becoming an increasing problem, neither the Comptroller, nor any of the parties she notified, has presented to this office sufficient evidence to establish that harmful financial consequences will result from the release of date of birth information [W]ithout more facts[,] . . . we are unable to conclude that the information is private or that “special circumstances” exist that would require protection of date of birth information. Tex. Att’y Gen. ORL-2006-01938 at 4 (2006).

Defendant’s “special circumstances” test to withhold public employee data requires a showing that the information has not been made public and that there are valid concerns about release. The information at issue has not been released to the requestor and the Comptroller has

stringent security measures in place to ensure the state payroll and personnel system is protected.

Another special circumstance raised by the Comptroller that the Defendant should have considered was that at the time this request was made there was (and still is) a pending lawsuit regarding a public information request for release of personal information including date of birth records. *State Bar of Texas v. Abbott*, Cause No. GV 403520 in the 261st District Court of Travis County, Texas. The Texas State Bar holds personal information on attorneys and judges. Some of the same personal information — concerning attorneys employed by the state, District Judges, certain district attorneys and visiting judges, and other attorneys and judges who are elected officials and whose data is on the Comptroller's personnel/payroll system — is data held by both the State Bar and the Comptroller. To the extent that a lawsuit was pending regarding whether date of birth information is private in the hands of one governmental entity holding some of the same governmental records as another entity, this consideration should have been part of the special circumstances considered by the Defendant.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests it have judgment as follows:

(1) A declaration granting relief from complying with Open Records Letter No. OR2006-09138 to reflect that the employees' dates of birth are not subject to release; (2) its costs of suit; and (3) such other relief, both legal and equitable, to which Plaintiff may show itself justly entitled.

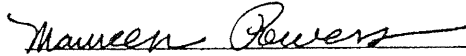
Respectfully submitted,

GREG ABBOTT
Attorney General

BARRY McBEE
First Assistant Attorney General

ED BURBACH
Deputy Attorney General for Litigation

PAGE 6 OF 7



MAUREEN POWERS
Assistant Attorney General
Chief, Financial Litigation Division
State Bar No. 16218679
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
TEL: (512) 475-4202
FAX: (512) 477-2348
Attorney for Plaintiff
Texas Comptroller of Public Accounts

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was delivered as indicated on the ~~29th~~ day of March, 2006, to the following:

~~29th~~ *30th mp*
Brenda Loudermilk
Administrative Law Division
Office of the Attorney General
300 W. 15th St.
Austin, Texas 78701

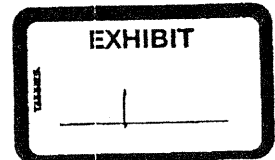
Via Hand Delivery


MAUREEN POWERS

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> -----Original Message-----
> From: LaFleur, Jennifer
> Sent: Friday, November 18, 2005 2:26 PM
> To: 'open.records@cpa.state.tx.us'
> Subject: pia request
>
> Nov. 18, 2005
>
> Texas Comptroller of Public Accounts
> Austin, Texas
> Sent via email (open.records@cpa.state.tx.us)
>
> Dear Public Information Officer:
>
> I am writing to request under the Texas Public Information Act an electronic copy of the state employees payroll database. This request is for the most recent data available. We have received the information in the past, so I've attached the record layout for what we have received before.
>
> I am requesting all fields (full name, date of birth, agency, salary, etc.) in the database. If there are any fields that you must withhold by law (Social Security numbers, for example), please let me know what those fields are. I'm sure we can work out a format that will be workable for your office and the paper. If the format has not changed since we received it before, that is fine.
>
> I frequently deal with large databases. Last time the information came in xls format. I can accept information in several formats, including ASCII, dbf, xls, etc. I can accept the data on a variety of media (computer tape, CD-ROM, FTP, email attachment, etc.). In addition, please include record layouts, code sheets or any other documentation necessary to interpret the data.
>
> In the interest of expediency, and to minimize the research and/or duplication burden on your staff, I would be happy to speak with your database administrator to figure out a method that is easiest for you.
>
> Additionally, if you have questions or need more information, please contact me by telephone or email. My telephone number is: 214-977-8509. My email address is jlafleur@dallasnews.com.
>
> Disclosure of this information is in the public interest because providing a copy of the information primarily benefits the general public. I therefore request a waiver of all fees and charges pursuant to Section 552.267 of the Act. If you will be charging processing fees, please email me an itemized estimate explaining how the costs were calculated.
>
> I look forward to hearing from you promptly, as specified in the law.
>
> Thank you so much for your help!
>
> Regards,
>
> Jennifer LaFleur
> Computer-assisted reporting editor
> The Dallas Morning News
> 214-977-8509

RECEIVED
DEC 07 2005
OPEN RECORDS DIVISION





CAROLE KEETON STRAYHORN
Texas Comptroller

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

P.O. BOX 13528
AUSTIN, TX 78711-3528

RECEIVED

DEC 07 2005

OPEN RECORDS DIVISION

December 7, 2005

The Honorable Greg Abbott
Attorney General of Texas
Price Daniel Building
209 West 14th Street, 6th Floor
Austin, Texas 78711

VIA: HAND DELIVERY

Requestor: Ms. Jennifer LaFleur; *Dallas Morning News*
Date Received: November 18, 2005
AG ID#: Not yet assigned

Requestor: Ms. Mirna Araceli Ramos De La Cruz; *El Norte*
Date Received: November 28, 2005¹
AG ID#: Not yet assigned

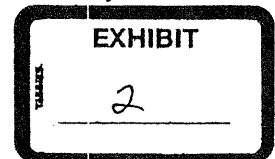
Dear General Abbott:

The Comptroller of Public Accounts received the above-referenced requests for information on November 18 and 23, 2005. The requests ask for voluminous amounts of electronic payroll information concerning all state employees. Copies of the requests are enclosed.

We will timely provide the requestors with responsive public information. However, we decline to release information that we believe may be protected from public disclosure by Sections 552.101 and 552.108 of the Texas Government Code.

Government Code Section 552.301

This request for a decision from your office meets the requirements of Section 552.301 of the Government Code, as follows:



¹ This e-mail request is dated November 23, 2005. However, this agency was on a "skeleton crew" schedule on November 23, 2005. Your office has determined that skeleton crew days are not to be counted as "business days" for purposes of calculating deadlines under the Public Information Act. Therefore, the request was not "received" until the following business day: November 28, 2005.



CAROLE KEETON STRAYHORN
Texas Comptroller

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

P.O. BOX 13528
AUSTIN, TX 78711-3528

December 7, 2005

Ms. Jennifer LaFleur
Dallas Morning News
JLaFleur@dallasnews.com

Ms. Mirna Araceli Ramos De La Cruz
El Norte
mirna.ramos@elnorte.com

RE: Request for information

Dear Ms. LaFleur and Ms. Ramos:

The Comptroller of Public Accounts received your written requests for information. Ms. LaFleur's request has been assigned ID# 1545394788 by this office and Ms. Ramos' request has been assigned ID# 1548507619 by this office.

We believe that portions of the requested information are protected from disclosure by Sections 552.101 and 552.108 of the Texas Government Code. Therefore, we are seeking a decision from the Attorney General concerning this information. A copy of that request for a decision is enclosed for your files.

You have each asked for voluminous amounts of information. The information that is not at issue will be provided to you, but is being compiled at this time. Pursuant to the requirements of Section 552.221 of the Government Code, I certify that we will make the public portion of the requested information available to you on or before December 21, 2005.

If you have any questions or need additional information, please feel free to contact me.

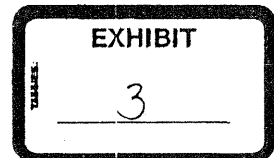
Sincerely,

Ruth H. Soucy
Manager and Legal Counsel
Open Records Division
Phone: (512) 475-0411
Fax: (512) 463-4288

RECEIVED

DEC 07 2005

OPEN RECORDS DIVISION



Enclosure: Copy of December 7, 2005, letter to Attorney General



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2006

Ms. Ruth H. Soucy
Manager and Legal Counsel
Comptroller of Public Accounts
111 East 17th Street
Austin, Texas 78701

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OPEN RECORDS

OR2006-01938

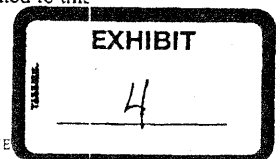
Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 242269.

The Comptroller of Public Accounts (the "Comptroller") received two separate requests for an electronic copy of the state payroll database for approximately 144,000 state employees. You state that the Comptroller released to one requestor the following portions of the requested employee information: name,¹ job title/description, agency/department, and gross salary. You inform us that one of the requestors prefers to wait until the issuance of our ruling on this matter to receive the following public portions of the employee information she requested: name, job title/description, agency/department, gross salary, race, sex, work address, date of employment, pay rate and information regarding work hours. You claim that other portions of the requested information are excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.² We have also considered the comments submitted on behalf of one of the

¹You inform us that employee name includes the employee's first, last, and middle name, which may be a maiden name.

²We 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



requestors, the Teacher Retirement System of Texas ("TRS"), the Employees Retirement System of Texas ("ERS"), the Office of the Attorney General ("OAG"), and the Texas Guaranteed Student Loan Corporation ("TGSLC"). See Gov't Code § 552.304 (concerning submission of public comments in ruling process).

We begin with your claims that sections 552.101 and 552.108 of the Public Information Act (the "Act") protect state employees' dates of birth. Section 552.101 of the Government Code incorporates both common law and constitutional rights to privacy. See Gov't Code § 552.101; *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.108 generally applies to information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. See Gov't Code § 552.108(a). You bring these claims because you "are concerned that the wholesale public release of state employees' identifying information in conjunction with their specific dates of birth could lead to identity theft, and that this situation may constitute a special circumstance" under which dates of birth should be withheld from required public disclosure.

In addition to the two exceptions to required disclosure that you raise, the Act also provides specific protection for the privacy rights of government employees. See Gov't Code § 552.102(a). Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* Early open records decisions of this office determined that information may be withheld under the predecessor of section 552.102 of the Government Code if "special circumstances" show that disclosure would be a "clearly unwarranted invasion of personal privacy." See Open Records Decision Nos. 123 (1976), 169 (1977). These early decisions, both of which considered the privacy of public employee home addresses, considered "special circumstances" to refer to a very narrow set of situations in which either the employee has taken affirmative steps to restrict public access to his or her home address, see Open Records Decision No. 123 at 5, or the release of information would likely cause someone to face "an imminent threat of physical danger," see Open Records Decision No. 169 at 6. The limitation of a "clearly unwarranted invasion of personal privacy" requires a balance between the protection of an individual's right of privacy and the preservation of the public's right to government information. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 n.8 (Tex.App.-Austin 1983, writ ref'd n.r.e.) (establishing test for privacy under exception; citing *Dept. of the Air Force v. Rose*, 425 U.S. 352, 378 n. 16). Twenty to thirty years ago, at the time of these early cases and attorney general decisions, protection for government employees from harm of a physical nature was the only concern. Now, as you point out in your arguments to this office, people face the danger of identity theft.

office.

Identity theft, without question, is becoming one of the fastest growing criminal and consumer offenses in the twenty-first century. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535 (N.Y. Sup. 2004) (denying defendant's motion for summary judgment in negligence action against insurer who disclosed consumers' names, social security numbers, and date of birth information). The Federal Trade Commission estimated 27.3 million reported cases of identity theft, causing billions of dollars in damages, in the five years preceding early 2003. *Id.* (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)). A date of birth obtained in combination with other data about an individual can be used in at least two harmful ways: to obtain sensitive information about an individual and to commit identity theft. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d at 535-36; *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998). According to one court, a person can use another individual's name and date of birth to obtain criminal records, arrest records, driving records, states of origin, political party affiliations, current and past addresses, civil litigation records, liens, properties owned, credit histories, financial accounts, and possibly medical and military histories and insurance or investment portfolios. *See id.* Certain public information websites allow individuals to locate this information in any state, including Texas, using only a name and date of birth.

Courts have held that dates of birth are private and their disclosure is a clear invasion of personal privacy. *See Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y. 1991) (applying balancing test under exemption 6 of the federal Freedom of Information Act, 5 U.S.C. § 552); *Scottsdale Unified School Dist. v. KPNX*, 955 P.2d 534 (Ariz. 1998) (applying balancing test under state law); *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan. 2005) (same); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994) (same). In a request similar to this one, the Delaware Attorney General found that the public release of the dates of birth of all state employees would constitute an invasion of personal privacy under that state's personnel file exception. *See Del. Atty. Gen. Op. No. 94-1019* (1994).

In addition to these judicial and attorney general decisions, the trend in many other states is to protect government employee date of birth information. In conducting a survey of other states' laws and practices concerning the required public disclosure of date of birth information, this office has learned that a majority of the fifty states protect date of birth information in government employee personnel files. *See State Practices for Classification of Date of Birth in Public Records* (on file with Open Records Division of the Office of the Attorney General). According to the survey, states with an "unwarranted invasion of personal privacy" exemption in their open records law protect date of birth information. *See HAW. REV. STAT. § 92F - 13(1)*; *ILL. COMP. STAT. 140/7 (1)(b)*; *KAN. STAT. ANN. § 45-221(30)*; *KY. REV. STAT. § 61.878(1)(a)*; *MASS GEN. LAWS ANN. ch. 66, § 10*; *MICH. COMP. LAWS ANN. § 15.243*; *N.H. REV. STAT. ANN. § 91-A:5*; *N.J. STAT. ANN. § 47:1A-10*; *N.Y. PUB. OFF. § 89(2)(b)(iv)*; *UTAH CODE ANN. § 63-2-302(2)(d)*. One state grants date of birth protection under a similar standard, "unreasonable invasion of personal privacy." *See S.C. CODE ANN. § 30-4-40(a)(2)*. Several states protect date of birth information under an

exception for employee "personnel" records. See ARIZ. ADMIN. CODE R2-5-105; DEL. CODE ANN. tit. 29 § 10002; KAN. STAT. ANN. § 45-221(4); IOWA CODE § 22.7; MD. CODE ANN., STATE GOV'T § 10-616(h)(2)(I); MISS. CODE ANN. § 25-1-100; N.D. CENT. CODE § 44-04-18.1; OR. REV. STAT. § 192.502(3); R.I. GEN. LAWS § 38-2-2; VA. CODE ANN. § 2.2-3705.1(1); WYO. STAT. ANN. § 16-4-203. The state of Georgia protects employee date of birth information under a statute that specifically makes confidential date of birth information "if technically-feasible at a reasonable cost." See GA. CODE ANN. § 50-18-72 11.3 (A). Several states protect date of birth information by unofficial policy. Finally, the state of Washington protects date of birth information under a state plan to curtail identity theft.

In two specific exceptions in the Texas Public Information Act, the Texas legislature has recognized the need to protect information that can be used to provide access to personal or private information or that can be used to cause personal financial harm. See Gov't Code §§ 552.136 (making confidential "a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body"), 552.147 (excepting from public disclosure "the social security number of a living person"). Although the crime of identity theft is becoming an increasing problem, neither the Comptroller, nor any of the parties she notified, has presented to this office sufficient evidence to establish that harmful financial consequences will result from the release of the date of birth information in response to this request. Cf. *In re Crawford*, 194 F.3d 954 (9th Cir. 1999), *cert denied*, 528 U.S. 1189 (2000) (grounding individual's expectation of privacy in his or her social security number in concern for risk of identity theft and other forms of fraud). Thus, in this instance, without more facts presented to this office, we are unable to conclude that the information is private or that "special circumstances" exist that would require protection of the date of birth information. Consequently, the Comptroller may not withhold the employee date of birth information under sections 552.101, 552.102, or 552.108. In future cases, however, based on a presentation of new facts and additional arguments, or based upon legislative changes, it is possible that Texas could join the growing number of states that protect from disclosure broad-based requests for date of birth information.

We turn now to your privacy claim for the employee deductions and net salary. This office has determined that personal financial information that relates only to an individual ordinarily satisfies the first element of the *Industrial Foundation* common law privacy test but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (finding legitimate public interest in information regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determining public's interest on case-by-case basis; "all financial information relating to an individual --

including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.”). Thus, a public employee’s allocation of part of the employee’s salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (concerning participation in TexFlex), 545 at 3-5 (1990) (concerning deferred compensation plan). Likewise, the details of an employee’s enrollment in a group insurance program, the designation of the beneficiary of an employee’s retirement benefits, and an employee’s authorization of direct deposit of the employee’s salary are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12. The fact that the person is a public employee making a financial decision through a payroll deduction program does not bear on the private nature of the information. *See* Open Records Decision No. 545 (1990).

The second part of the *Industrial Foundation* test requires the information in question to be not of legitimate concern to the public. In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds, such as a public employee’s participation in an insurance program funded wholly or partially by his or her employer, or debts owed to governmental entities. Open Records Decision Nos. 600 (1992), 480 (1987), 385 (1983).

In this case, we find that, for portions of the deductions, no facts have been presented, nor are any apparent, which would establish a legitimate public interest in the individual employee deductions at issue. *See Industrial Foundation*, at 685. We therefore find that these portions are private and therefore excepted from public disclosure. *See* Gov’t Code § 552.101. However, for other deductions, we believe the public has a legitimate interest in the information. *See* Open Records Decision Nos. 600 (1992), 480 (1987). We also conclude that the employee net salary is private financial information because, by its revelation, the fact of a private deduction can be ascertained. We have marked the deductions the Comptroller must withhold to protect the employees’ privacy rights.³

³In light of our conclusion on privacy grounds, we need not address your claim that sections 54.43 and 54.714 of the Education Code make confidential the identification of employees and amounts deducted for prepaid tuition and college funds, your claim that section 552.117 excepts from disclosure the deductions for health insurance coverage for employee beneficiaries and any deductions for child and spousal support that are not related to Title IV-D child support cases of the OAG Child Support Division, or your claim that section 815.503 of the Government Code and section 1551.063 of the Insurance Code make confidential certain payroll deductions.

We next consider whether the information that is not private is nevertheless confidential under statutory law. 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 made confidential by other statutes.

TGSLC argues that certain student loan garnishment information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 57.11(d) of the Education Code.⁴ TGSLC explains that once it has determined a defaulted borrower is eligible for wage withholding and employment is verified, a wage withholding order is issued to the borrower's employer. The order requires the employer to deduct portions of the employee's wages and forward them to the TGSLC. TGSLC states that "any information contained in the Comptroller's records relating to garnishment of a Texas state employee's salary pursuant to a wage withholding order is TGSLC's borrower information" and is confidential under section 57.11 of the Education Code.

Section 57.11(d) provides that "[s]tudent loan borrower information collected, assembled, or maintained by the corporation is confidential and is not subject to disclosure under Chapter 552, Government Code." Educ. Code § 57.11(d). This office has recognized that confidential information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. *See* Open Records Decision No. 674 at 4 (2001) (citing thirty years of authority for intergovernmental transfer doctrine). The intergovernmental transfer of the student loan borrower information does not affect the confidential status of the transferred information. *See id.* Consequently, the Comptroller must not release the information concerning deductions required by a TGSLC wage withholding order.

You raise section 825.507(a) of the Government Code for deduction information relating to TRS. In addition, TRS argues that the deductions include certain TRS participant information that is confidential pursuant to section 825.507(a) of the Government Code. Section 825.507(a) states in pertinent part:

- (a) Records of a participant that are in the custody of the retirement system or . . . governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

Gov't Code § 825.507(a). "Participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system. *See id.* § 825.507(g).

⁴This office has determined that information concerning student loans guaranteed by the TGSLC is not private. *See* Open Records Decision No. 480 (1987).

Section 825.507(b)(5) states in part that TRS may release records of a participant to a governmental entity to the extent the retirement system needs to share the information to perform the purposes of the retirement system. *See id.* § 825.507(b)(5). Section 825.507(c) states in part that “the records of a participant remain confidential after release to a person as authorized by this section.” *See id.* § 825.507(c).

You state that the Comptroller holds deduction information relating to the TRS. TRS states that the Comptroller holds TRS participant information on behalf of TRS in conjunction with its role in administering the payroll for the state of Texas. TRS also states that the participant information includes the mandatory deduction amount for participation in the TRS retirement system, the retirement fee deductions (if any),⁵ and deductions for TRS purchase buyback.⁶ We find that the TRS participant deduction information is a record of a participant that is in the custody of a governmental agency acting in cooperation with or on behalf of the retirement system. *See id.* § 825.507(a). We therefore conclude that the deductions concerning TRS participants are confidential under section 825.507(a) and excepted from disclosure under section 552.101.

You state the ERS retirement contribution information may be confidential under section 815.503 of the Government Code. ERS argues certain deductions are private and are confidential under statutory law, specifically, Government Code section 815.503 and Insurance Code section 1551.063.

Section 815.503(a) provides as follows:

- (a) Records of members, annuitants, retirees, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure, and the retirement system is not required to accept or comply with a request for a record or information about a record or to seek an opinion from the attorney general, because the records are exempt from the public access provisions of Chapter 552 [of the Government Code], except as otherwise provided by this section.

Gov't Code § 815.503(a). Section 815.503(b) provides in part that “[t]he retirement system may release the records . . . to another governmental entity having a legitimate need for the information to perform the purposes of the retirement system[.]” *Id.* § 815.503(b). Section

⁵You state that no retirement fees have been assessed to participants during the period covered by this request.

⁶The deduction for TRS purchase buyback is private.

815.503(c) provides in part that "[t]he records of a member, annuitant, retiree, beneficiary, or alternate payee remain confidential after release to a person as authorized by this section." *Id.* § 815.503(c).

As we have already noted, to the extent we have determined that the deductions are private, we need not address ERS's claims under statutory law. However, the deductions for retirement are not private, and so we consider ERS's statutory claim for these deductions. ERS informs us that it administers retirement and employment-related benefits for several classes of public employees, including elected officials, appointed public officers, public employees, certain higher education employees, and their dependents. ERS states that the information necessary to produce some state employees' salary deductions can be produced only by accessing information originating from confidential ERS member and group benefit program records. Thus, we understand that, in administering the payroll for the state of Texas, the Comptroller is acting in cooperation with or on behalf of ERS in collecting and maintaining information about retirement deductions. *See* Gov't Code § 403.011 (concerning general powers of comptroller). We therefore believe the retirement information constitutes "records of members, annuitants, retirees, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of . . . [a] governmental agency acting in cooperation with or on behalf of the retirement system." Thus, these deductions are confidential under Government Code section 815.503 and excepted from disclosure under section 552.101.

You assert that section 231.108 of the Family Code "may make [confidential] certain child support deduction information [the Comptroller holds] on behalf of the OAG's Child Support Division." The OAG asserts that the deductions that pertain to Title IV-D child support cases are confidential under federal law and section 231.108(a) of the Family Code.

The Social Security Act authorizes states to operate Title IV-D child support programs. *See* 42 U.S.C. § 651. In Texas, the OAG is designated as the state's Title IV-D agency. *See* Family Code § 231.101. Under federal law, a state must have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including safeguards against the unauthorized use or disclosure of information relating to actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination. *See* 42 U.S.C. § 654(26). Section 231.108 of the Family Code provides as follows:

- (a) Except as provided by Subsection (c), all files and records of services provided under [chapter 231 of the Family Code], including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential.

(b) Except as provided by Subsection (c), all communication made by a recipient of financial assistance under Chapter 31, Human Resources Code, or an applicant for or recipient of services under this chapter are privileged.

(c) The Title IV-D agency may use or release information from the files and records, including information that results from a communication made by a recipient of financial assistance under Chapter 31, Human Resources Code, or by an applicant for or recipient of services under this chapter, for purposes directly connected with the administration of the child support, paternity determination, parent locator, or aid to families with dependent children programs. The Title IV-D agency may release information from the files and records to a consumer reporting agency in accordance with Section 231.114.

(d) The Title IV-D agency by rule may provide for the release of information to public officials.

(e) The Title IV-D agency may not release information on the physical location of a person if:

(1) a protective order has been entered with respect to the person; or

(2) there is reason to believe that the release of information may result in emotional or physical harm to the person.

(f) The Title IV-D agency, by rule, may provide for the release of information to persons for purposes not prohibited by federal law.

Fam. Code § 231.108; *see also* Open Records Decision No. 417 at 4 (1984) (records relating to recipients of child support collection services are confidential).

The OAG states that the information at issue includes "payroll deductions made from the paychecks of state employees whose cases are IV-D cases enforced by the OAG's Child Support Division. Such information (i.e., the names of the state employees from whose paychecks deductions are taken, and the amount of those deductions) is contained in the files and records of services provided under chapter 231 of the Family Code." The OAG goes on to say that

the Comptroller is performing a federally mandated IV-D function pursuant to 42 U.S.C. § 666(b) for the OAG, i.e., the IV-D agency. In order to collect money from state employees owing child support in Title IV-D cases, the OAG sends withholding orders that are confidential under section 231.108(a) of the Family Code to the state agency, and the state agency then provides the information to the Comptroller for

purposes of withholding the child support from the employees wages. The transfer of IV-D information to the Comptroller via the state agency is in accordance with 42 U.S.C. § 666(b).

The OAG evidently released the withholding orders in accordance with subsection (c) for purposes connected with the administration of the child support program. Again, we note the well-settled policy of this state that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. Because the Act does not undercut that policy, confidential information may be transferred between state agencies without destroying its confidential character. *See, e.g.*, Op. Tex. Att'y Gen. No. H-917 at 1 (1976); Open Records Decision Nos. 674 at (2001), 661 at 3 (1999). Because the Comptroller obtained the information about the Title IV-D cases from the employing agency, which in turn obtained the information from the OAG in accordance with section 231.108, we conclude that the deductions related to Title IV-D child support cases are confidential under section 231.108(a) and excepted from disclosure under section 552.101.

Finally, we consider the required public disclosure of the peace officer designation sought by one of the requestors. The designation, if public, would be released in conjunction with the other employee-identifying information requested, which for this requestor includes the employee's full name, job title/description, agency/department, gross salary, race, sex, work address, date of employment, pay rate and information regarding work hours. You raise no exception to the public disclosure of the peace officer designation information. You state that you notified agencies that may wish to address this aspect of the request. No governmental body has submitted to this office arguments against disclosure of the peace officer designation. Accordingly, we conclude that you have not established that the peace officer designation is excepted from required disclosure and it must be released to the requestor.

In summary, the employees' net salary and certain marked deductions are private and excepted from disclosure under section 552.101. The following deductions are excepted from disclosure under section 552.101 in conjunction with statutory law: deductions required by a TGSLC wage withholding order under section 57.11(d) of the Education Code; deductions concerning TRS participants under Government Code section 825.507(a); deductions for ERS retirement under Government Code section 815.503(a); and deductions related to Title IV-D child support cases under Family Code section 231.108(a). The date of birth information, the peace officer designation, and the remaining deductions are public information and must be released to the requestor.

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 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, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. 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. We note that a third party may challenge this

Ms. Ruth H. Soucy - Page 12

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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/jh

Ref: ID# 242269

Enc: Submitted documents

c: Ms. Jennifer LaFleur, Editor
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B

C

CAUSE NO. D-1-GN-06-001120

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS

Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendant,

v.

THE DALLAS MORNING NEWS, L.P. Intervenor.

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

06/16/16 PM 3:45
W. Yelenosky
11/16/16

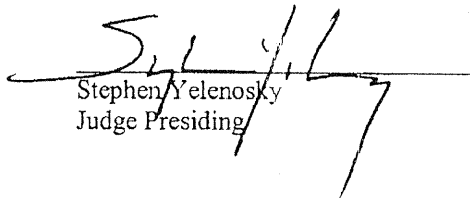
ORDER DENYING PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

The Court reviewed and considered Plaintiff's Second Motion for Summary Judgment and Defendant's response to the motion.

The Court is of the opinion that Plaintiff has not established authority for the award of attorney's fees under either section 552.353 of the Texas Public Information Act or under the Uniform Declaratory Judgments Act, and therefore the Court finds that Plaintiff's requested relief should be DENIED. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Second Motion for Summary Judgment is DENIED.

SIGNED on November 16, 2006.


Stephen Yelenosky
Judge Presiding

BB



D

CAUSE NO. D-1-GN-06-001120

TEXAS COMPTROLLER OF	:	IN THE <u>126th</u> JUDICIAL
PUBLIC ACCOUNTS,	:	
Plaintiff,	:	
v.	:	
	:	
ATTORNEY GENERAL OF TEXAS,	:	DISTRICT COURT OF
Defendant.	:	
v.	:	
	:	
DALLAS MORNING NEWS	:	
Intervenor	:	TRAVIS COUNTY, TEXAS

Filed in The District Court
of Travis County, Texas

JAN 30 2007
8:56 A.M.
Analia Rodriguez-Mendoza, Clerk

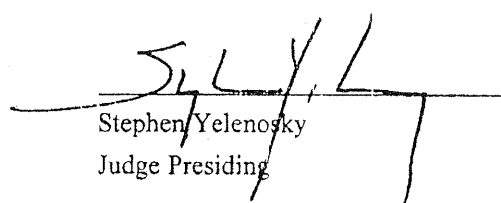
ORDER NUNC PRO TUNC DENYING INTERVENOR'S SECOND MOTION FOR SUMMARY JUDGMENT

The Court reviewed and considered Intervenor's Second Motion for Summary Judgment and Plaintiff's response to the motion.

The Court is of the opinion that Intervenor has not established authority for the award of attorney's fees under either section 552.353 of the Texas Public Information Act or under the Declaratory Judgments Act, and therefore the Court finds that Intervenor's requested relief should be DENIED. Accordingly,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Intervenor's Second Motion for Summary Judgment is DENIED.

SIGNED on January 26, 2007.


Stephen Yelenosky
Judge Presiding

