



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 27, 2007

Ms. Diane O'Neal, Clerk  
Court of Appeals  
Third District of Texas  
Price Daniel, Sr. Bldg.  
209 West 14<sup>th</sup> Street, Rm. 101  
Austin, Texas 78701

*Via Courier*

Re: No. 03-07-00102-CV; *Texas Comptroller of Public Accounts v. Attorney General of Texas, et al.*, In the Third Court of Appeals, Austin, Texas

Dear Ms. O'Neal:

Enclosed for filing please find the original and eight copies of Appellee's Brief of the Attorney General, in the above-referenced case.

Please file-mark the extra copy of this brief and return it to us for our records. Thank you for your attention to this matter.

Sincerely,

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APR 27 2007

Office of the Attorney General  
Financial Litigation Division

NO. 03-07-00102-CV

IN THE THIRD COURT OF APPEALS  
AT AUSTIN, TEXAS

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TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,  
*Appellant/Cross-Appellee,*

v.

ATTORNEY GENERAL OF TEXAS,  
*Appellee,*

and

DALLAS MORNING NEWS,  
*Appellee/Cross-Appellant.*

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Appealed from the 126<sup>th</sup> District Court of Travis County, Texas  
Cause No. D-1-GN-06-001120  
The Honorable Stephen Yelenosky Presiding

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**APPELLEE ATTORNEY GENERAL'S BRIEF**

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NO. 03-07-00102-CV

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TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,  
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DALLAS MORNING NEWS,  
*Appellee/Cross-Appellant.*

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Appealed from the 126<sup>th</sup> District Court of Travis County, Texas  
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The Honorable Stephen Yelenosky Presiding

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**APPELLEE ATTORNEY GENERAL'S BRIEF**

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TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes Appellee Greg Abbott, Attorney General of Texas, and files his brief in reply to Appellant Texas Comptroller of Public Accounts' brief.

**STATEMENT OF THE CASE**

This is a lawsuit brought pursuant to the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552 (West 2004 & Supp. 2006). The Comptroller sued the Attorney General, over Letter Ruling OR2006-01938 (2006), which held that the dates of birth of state employees located in the Comptroller's state payroll database were subject to public disclosure. CR 3-25, Comptroller's Original Petition (Petition); CR 74-85, *The Dallas*

*Morning News*' Motion for Summary Judgment (*The News*' MSJ), Exhibit 3, Letter Ruling OR2006-09138. The requestor, *The Dallas Morning News*, intervened. CR 30-49, Petition in Intervention.

*The News* and the Comptroller filed cross-motions for summary judgment. CR 50-85, *The News*' MSJ; CR 86-100, Comptroller's Cx-Motion for Summary Judgment (Cx-MSJ). The Attorney General filed a reply to the Comptroller's cross-motion for summary judgment. CR 135-60, Defendant's Reply to Plaintiff's Cross-Motion for Summary Judgment.

The trial court heard the motions on July 27, 2006. The trial court granted *The News*' motion and denied the Comptroller's. CR 169-70, Order on Motion for Partial Summary Judgment. *The News* claimed attorney fees, a hearing was held and the trial court denied *The News*' claim. CR 186, Order Nunc Pro Tunc Denying Intervenor's Second Motion for Summary Judgment. The Comptroller appeals. CR 187-88, Plaintiff Comptroller's Notice of Appeal.

### **REPLY TO ISSUE PRESENTED**

The date of birth of a state employee is not confidential under the PIA.

### **SUMMARY OF THE ARGUMENT**

The Comptroller is asking the Court to rule that the dates of birth of state employees are confidential by law, without providing any legal authority to support such a ruling. A court is not allowed "in its discretion to deny disclosure even though there is no specific exception provided." *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d

668, 682 (Tex. 1976). Tex. Gov't Code § 552.101 does not give courts the discretion to balance the interest in privacy against the interest in disclosure. *Id.* at 681-82. Neither the PIA nor any other statute expressly makes the date of birth of any person confidential or excepted from disclosure. The Comptroller invokes common law privacy and constitutional privacy in support of her claim; however, her application of these two principles of law fall woefully short of meeting the required elements of both. The Comptroller applies the wrong tests for common law privacy and constitutional privacy. None of the cases or statutes cited by the Comptroller in support of her claim are authority for withholding the information at issue. The Comptroller's arguments are policy arguments that are more properly made to the legislature.

## ARGUMENT

*Reply to Issue Presented (restated):*

The date of birth of a state employee is not confidential under the PIA.

**1. Texas common law privacy does not make state employees' dates of birth confidential.**

Common law privacy protects only highly intimate or embarrassing information about one's personal life, the disclosure of which would be highly objectionable to a reasonable person. *Industrial Found.*, 540 S.W.2d at 682, 685. The Comptroller has not met this threshold test. The Comptroller continues to apply the wrong law and test in her effort to have the dates of birth of state employees withheld. Before this Court and for the first time, she claims that this case is governed by the first interest that is protected by common law

privacy, the freedom from unwarranted intrusion into one's private affairs. *See* Appellant's Brief, at 5-8.<sup>1</sup> There is absolutely no legal or factual basis for such a claim, and the Comptroller provides none. The Comptroller never even explains how disclosure of a public employee's date of birth is an intrusion upon the employee's seclusion, solitude, or private affairs. The Comptroller also contradicts herself. In her motion for summary judgment, she argued and applied the correct test under the second interest protected by common law privacy—public disclosure of embarrassing private facts. CR 88-89, Comptroller's Cx-MSJ; *see Industrial Found.*, 540 S.W.2d at 682.

The Comptroller cites to *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973) (recognizing the tort of invasion of privacy and applying the test for the first interest), and *Cain v. Hearst*, 878 S.W.2d 557 (Tex. 1994) (holding that Texas does not recognize the tort of false light invasion of privacy). *See* Appellant's Brief at 5-7. Neither of these cases is a PIA case or authority for the Comptroller's conclusion that "it is the *Billings*' analysis which should be applied here and not the *Industrial Foundation*'s analysis." Appellant's Brief at 7. Over 30 years ago, the Texas Supreme Court set out the test for a claim of common law privacy in the context of a request for information under the PIA. *See Industrial Found.*, 540 S.W.2d at 682, 685. Disclosure of embarrassing private facts under the PIA concerns the

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<sup>1</sup>The Comptroller did not assert the first interest under common law privacy as a ground for summary judgment. In the Comptroller's motion for summary judgment, the Comptroller referred to an "unreasonable intrusion" in the context of her bare claim that constitutional privacy protected the information at issue. CR 90-91, Comptroller's Cx-MSJ. The record is devoid of any assertion of this claim in the trial court. Tex. R. App. P. 33.1 (error not present in trial court may not be raised on appeal).

second interest protected under common law privacy, and it is the test for that interest that is applied in PIA cases. *Id.* at 682-83.

The Comptroller also improperly grafts a balancing requirement onto the test for common law privacy. Appellant's Brief at 8-9. There is no balancing test under Texas common law privacy. This same argument was rejected by the Supreme Court in *Industrial Foundation*. *Industrial Found.*, 540 S.W.2d at 675-76 (holding that the task of balancing competing interests must be left to the legislature). The legislature has already defined public interest through the Act, including limiting non-disclosure only to information that a governmental body proves is subject to one of the exceptions to disclosure. *Id.* at 676. This Court has said that application of the *Industrial Foundation* test, "will result in the proper 'balancing' of an individual's right to privacy" and the purposes of the PIA. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex.App.—Austin 1983, writ ref'd n.r.e.) (construing the scope of the exception for personnel records of public employees). See discussion on Tex. Gov't Code § 552.102 *infra* pp.14-15.

In the cases cited by Appellant, the courts of Arizona, Kansas, and Kentucky and a New York federal district court applied a balancing test—not principles governing the tort of invasion of privacy. See *Scottsdale Unified School Dist. v. KPXX Broadcasting*, 955 P.2d 534, 538-40 (Ariz. 1998); *Data Tree, LLC v. Meek*, 109 P.3d 1226, 1237-38 (Kan. 2005); *Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky.App.1994); *Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y.1991). Kansas rejected application of the principles dealing with

the tort of invasion of privacy. *Data Tree*, 109 P.3d at 1237. These state courts found guidance in federal Freedom of Information Act (FOIA) cases and the balancing test applied in privacy claims under FOIA. *Scottsdale*, 955 P.2d at 538-39; *Data Tree*, 109 P.3d 1237-38; *Zink*, 902 S.W.2d at 828; *see also* FOIA, 5 U.S.C. §§ 552(b)(6), (7)(C) (West 1996 & Supp. 2006). Texas law does not have a balancing component to the test applied to privacy claims under the PIA.

The question here is whether, under the “judicial law” provision of section 552.101 of the PIA, the common-law right of privacy prohibits the disclosure of the information at issue, the dates of birth of state employees. The Texas Supreme Court has determined that this section of the PIA prevents the government from disclosing information if the disclosure would give rise to a tort action for the “invasion of an individual’s freedom from the publicizing of his private affairs.” *Industrial Found.*, 540 S.W.2d at 683. The elements of a tort action for disclosure of private facts are: “(1) publicity was given to matters concerning one’s personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern.” *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995) (citing *Industrial Found.*, 540 S.W.2d at 682).

The common-law right of privacy that the Texas PIA protects differs from the privacy right protected under FOIA exemptions that expressly prohibit the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal



privacy.” See FOIA, 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, courts balance the individual’s privacy interest against the public interest in disclosure. See, e.g., *U. S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989), *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981). The U. S. Supreme Court has explained that the rights of privacy protected under the U. S. Constitution and the common law are different from the privacy interests protected under FOIA. *U. S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 n.13 (1989) (“The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is protected by the Constitution.”). In applying Texas common law, the Fifth Circuit has also rejected FOIA’s balancing of interests test. *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (rejecting “open-ended balancing of interests” and applying *Industrial Foundation* test).

Dates of birth do not meet the test for information protected under common law privacy. See *Industrial Found.*, 540 S.W.2d at 683. Comparing the information protected in *Industrial Foundation* to dates of birth results in only one conclusion: dates of birth are not highly intimate or embarrassing private information under common law privacy. *Id.* (claims of injuries from sexual assault, a claim on behalf of illegitimate children, claim for expenses of pregnancy due to failure of contraceptive device, claims for psychiatric

treatment, claims for injuries stemming from attempted suicide); *see also* *Hubert*, 652 S.W.2d at 551 (distinguishing the “intimate or embarrassing information” in *Industrial Foundation* from the material sought in *Hubert* (names of candidates for A&M president)). The Fifth Circuit Court of Appeals has held that personal information such as age, job title, and street address is not “highly intimate” information under Texas common law privacy. *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995). As noted in *Johnson*, “Prosser, *Law of Torts* § 117 at 858 (4th ed. 1971), states ‘[t]he plaintiff cannot complain when an occupation in which he publicly engages is called to public attention or when publicity is given to matters such as the date of his birth.’” *Johnson*, 47 F.3d at 732-33. Similarly, the Fifth Circuit noted that “[t]he Restatement (Second) of Torts, § 652D, comment *b*, is to the same effect, *viz*: ‘[t]here is no liability for giving publicity to facts about the plaintiff’s life . . . such as the date of his birth . . .’ *Id.* at 385, 386.” *Johnson*, 47 F.3d at 733.

Even when a court finds that information meets the threshold test of being highly intimate or embarrassing personal information, disclosure of which would be highly offensive to a reasonable person, the court does not balance the interests of the requestor versus the privacy interests of the affected individuals to reach the third prong of the test: that the information is not of legitimate public concern. The Supreme Court, in *Industrial Foundation*, says that this last requirement “is necessarily one which can only be considered in the context of each particular case, considering the nature of the information and the public’s legitimate interest in its disclosure.” 540 S.W.2d at 685. The Court goes on to

recognize a presumption that information that has been shown to be of such a private nature under common law privacy will generally not be of legitimate interest to the public. *Id.* Because of this presumption of no legitimate concern, it is imperative that only information that meets the test for private information be accorded this special treatment. Accordingly, the Court must first determine if the Comptroller has met her burden to establish that the information is highly intimate and embarrassing, as required under *Industrial Foundation*, before the requestor is even called upon to show a legitimate public concern. *Id.*; accord: *Morales v. Ellen*, 840 S.W.2d 519, 524-25 (Tex.App.–El Paso 1992, writ denied). The Comptroller has not met her burden here. As a consequence, *The News* has no burden to prove that there is a legitimate public concern in disclosure of state employees' dates of birth. (Even so, *The News*, in its motion and reply to the Comptroller's motion, articulated several reasons why the information is a matter of legitimate public concern.)

**2. Constitutional privacy does not make state employees' dates of birth confidential.**

Once again, the Comptroller considers the issue under the wrong test. The Comptroller claims that the Attorney General has failed to show "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." Appellant's Brief at 8. She cites *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 206 (Tex. 1987) (holding that MHMR's mandatory polygraph policy for its employees violated their rights of privacy under the Texas Constitution) and *Whalen v. Roe*,

429 U.S. 589, 605-06 (1977) (holding that New York's law requiring identification of patients being prescribed dangerous drugs and the maintenance of such records in a centralized computer file did not violate constitutional privacy interests). Appellant's Brief at 8. These cases are not helpful to the Comptroller. They are not public information cases. The Comptroller's case is not a constitutional challenge to the PIA. The burden placed on states in constitutional challenges to statutes does not apply here. The Attorney General has no burden in this case.

The Comptroller has not met her burden to establish that dates of birth are within the zones of privacy protected by the Texas or Federal Constitution. Dates of birth simply do not meet the threshold standard for constitutional protection. “[N]ot every publication of intimate or embarrassing information about an individual constitutes an invasion of a constitutionally protected zone of privacy.” *Industrial Found.*, 540 S.W.2d at 680. The Constitution protects individual privacy only within certain defined zones of privacy—marriage, procreation, family relationships, child rearing and education. *Id.* at 680-81. “Thus, the State’s right to make available for public inspection information pertaining to an individual does not conflict with the individual’s constitutional right of privacy unless the State’s action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution.” *Id.* Personal matters outside the zones of privacy may also be protected under the Constitution. This type of information must still concern the “most intimate aspects of human affairs.” *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th

Cir. 1985). Disclosure of matters outside the zones of privacy may still be permitted if a compelling governmental interest in disclosure outweighs the individual's right of privacy. *Id.* While constitutional privacy does include a balancing of these interests, the balancing is only required, again, after the plaintiff establishes that the information is constitutionally protected.

The Comptroller has not established that date of birth is within any constitutionally protected zones of privacy or that it involves highly intimate personal information. She simply assumes that "date of birth is on a par with other intimate facts." CR 90, Comptroller's Cx-MSJ. This assumption is incorrect. *See Dodge v. Trustees of Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 16-17 (D.D.C. 2004) ("This Court cannot justifiably classify a person's right to privacy based on the protection of his Social Security number with a woman's right to procreate within the 'penumbra' of fundamental rights."). So high is this threshold, the Texas Supreme Court held that even the information at issue in *Industrial Foundation* did not reach the level of constitutional protection. *Industrial Found.*, 540 S.W.2d at 681 (holding that availability of the information, including nature of injuries, would not adversely affect any recognized right within a constitutionally protected zone of privacy). A person's date of birth, including that of a public employee, is not within any zones of privacy recognized by the courts or "on a par" with any constitutionally protected information.

**3. The Comptroller's position rests on a misinterpretation of legislative intent and state law.**

The Comptroller claims that the legislature never intended dates of birth of state employees to be public. Appellant's Brief at 11. There is no support for such statement. As she did in her motion for summary judgment, the Comptroller cites to sections in the PIA that make other records excepted from disclosure. *See* Appellant's Brief at 11-13. She ignores the scope and elements for each of the cited exceptions. Instead, she divines from the absence of language in the PIA "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." Appellant's Brief at 13. No authority is cited for this proposition, and the PIA itself does not support this conclusion.

Legislative intent is determined from the plain language of an act, by what the legislature said, not what it did not say. In construing a statute, the principal aim is to give effect to the legislature's intent. *Continental Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000). It is presumed that every word of a statute has been included or excluded for a reason and the courts will not insert requirements that are not provided by law. *Old Am. County Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004). "[T]he supreme court has indicated its reluctance to engage in wordplay to ascribe meaning to a statute that contradicts the meaning expressed in an unaltered reading of the statute." *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.*, 212 S.W.3d 665, 673 (Tex.App.—Austin 2006, no pet) (citing *City of Garland v. Dallas Morning News*, 22 S.W.3d

351, 358 (Tex. 2000)). Courts must take statutes as they find them and are not responsible for omissions in legislation. *Holmes v. Morales*, 924 S.W.2d 920, 925 (Tex. 1996); *Aaron*, 212 S.W.3d at 673. When determining the meaning of a statute, courts must interpret a statute as written. *In re Doe*, 19 S.W.3d 346, 351 (Tex. 2000); *Aaron*, 212 S.W.3d at 673. The plain language of the provisions cited by the Comptroller defeats her effort to squeeze dates of birth within their protective coverage.

The Comptroller's argument is also founded on an improper assumption that information is confidential unless the legislature states otherwise. The PIA is grounded in a presumption of openness. Section 552.006 of the PIA states: "This chapter does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided by this chapter." "[T]he overall purpose behind the [PIA] is that information is presumed to be subject to disclosure unless an exception to disclosure applies." *Abbott v. Texas Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 663 (Tex.App.—Austin 2006, no pet.). Even on a claim that information is confidential, the Comptroller comes before the trial court with a presumption that the information at issue is open to the public. *Id.*, at 655 (holding that an agency has the burden of proving that an exception to disclosure . . . applies before it may withhold the requested information). None of the PIA exceptions cited by the Comptroller expressly authorize the Comptroller to withhold the dates of birth of state employees.

a. Section 552.022 is not an exclusive list of public information.

The Comptroller cites Tex. Gov't Code § 552.022(a)(2) (West 2004) as an indication of the legislature's intent to except from disclosure dates of birth of state employees. Appellant's Brief at 11-12. The Comptroller sees significance in the legislature's failure to include date of birth in the list of employee information that is expressly mandated for public disclosure in paragraph (2). Appellant's Brief at 11-12; *see also* CR 88, Comptroller's Cx-MSJ, n. 4, at 3. For the categories of information set out in section 552.022(a), no exception provided in the PIA applies, and the listed information has to be released unless other law makes the information confidential. *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001). This express mandate of disclosure does not mean that the legislature intended unlisted information, such as date of birth, to be confidential as the Comptroller suggests.

In fact, subsection (a) begins with a very clear statement to the contrary:

(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 . . . .”

Tex. Gov't Code § 552.022(a) (italics added). There is no application of *expressio unius est exclusio alterius* to section 552.022(a). Every other piece of public information in the hands of government is still presumed open.

b. Section 552.102 uses the same test as common law privacy.

The Comptroller cites to this exception to disclosure without any authority or analysis on why it applies to dates of birth. Appellant's Brief at 12. First, the information here is



located in the state payroll database of the Comptroller—not in the personnel files of state employees maintained by the employing agencies. Second, the test for section 552.102 is the same standard used for common law privacy claims. *Hubert*, 652 S.W.2d at 550. Last, common law privacy does not protect dates of birth. *See* discussion on common law privacy *supra* pp. 3-9.

c. Sections 552.130 and 552.115 apply to other records.

The Comptroller also cites to Tex. Gov't Code §§ 552.115, .130 as further support for her contention that the legislature intended dates of birth to be excepted from disclosure. Appellant's Brief at 12-13. These provisions make specifically described records excepted from disclosure. Neither the general rules of statutory construction nor those governing the PIA extend the coverage of these exceptions to information located in other records of other agencies. Exceptions to disclosure are construed narrowly. *Arlington Indep. Sch. Dist. v. Texas Attorney General*, 37 S.W.3d 152, 157-58 (Tex.App.—Austin 2001, no pet.). The plain language of these provisions sets out the scope of their coverage. These provisions neither expressly nor impliedly except from public disclosure dates of birth found in the Comptroller's records, or even in the records of a state employing agency. *See* Tex. Att'y Gen. ORD-533 (1989) at 6 (city's copy of first injury report filed with the Industrial Accident Board in connection with police officer's worker's compensation claim held public notwithstanding confidentiality of report in Board's possession); Tex. Att'y Gen. ORD-347 (1982) (Tax Code § 22.27(b)(6) expressly permits disclosure of information which, while

confidential on a rendition statement, is maintained by the appraisal office by some other means).

The Attorney General has addressed the exception for birth records maintained by the bureau of vital statistics of the Texas Health Department on at least two occasions. In Tex. Att’y Gen. ORD-338 (1982) at 2, the Attorney General held that the birth and death records maintained by a city health department were subject to disclosure even though section 552.115’s predecessor made them not subject to disclosure in the possession of the bureau. *Id.* More recently, in Tex. Att’y Gen. OR2007-0862 (2007) at 5, the Attorney General reached the same conclusion, holding that section 552.115 did not apply to a birth certificate maintained by a city police department, citing ORD-338. None of these exceptions to disclosure, singularly or together, can be read to make dates of birth of state employees in the state employee payroll database excepted from disclosure by the PIA.

d. ERS Act § 815.503(a) applies to other records.

Similarly, the Comptroller attempts to fold the Comptroller’s records at issue here into the protective coverage of the Employees Retirement System (ERS)’s statute that removes member records from the coverage of the PIA. *See* Appellant’s Brief at 13-14; *see also* Tex. Gov’t Code Ann. § 815.503(a) (West 2004). The Comptroller takes a huge leap in statutory construction and logic without any legal or factual support. The Comptroller cites no summary judgment evidence to support the necessary underlying facts for such argument, including that state employees’ dates of birth are contained in an ERS record, that the

Comptroller obtained the dates of birth from the ERS, or that the Comptroller maintains this information as “an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system.” *Id.*; *see also* CR 173-74, Comptroller’s Motion for New Trial.<sup>2</sup> The requestor sought information from the state employee payroll database. CR 86, Comptroller’s MSJ, at 1. The dates of birth are located in this database. *Id.*

There is no statutory support for this argument. Collection of employee information on a member of the pension begins with a member’s employing agency, not the ERS. *See* Tex. Gov’t Code Ann. § 815.402 (West 2004) (employing agency sends certified copy of payroll to ERS). Likewise, the Comptroller collects information relating to state employees, from employing state agencies, as part of her duties relating to the state’s payroll and accounting system. The Comptroller is charged with maintaining the state’s payroll. *See* Tex. Gov’t Code Ann. §§ 403.015(1)(B) (West 2005) (authorizing Comptroller to establish and operate central electronic computing and data processing center to prepare payrolls and other warrants), 659.004, (West 2004) (authorizing Comptroller to establish uniform procedures for payroll and personnel reporting for all state agencies), 2101.031, .035 (West 2000) (Comptroller’s administration of Uniform Statewide Accounting System (USAS), including uniform statewide payroll system), 2101.037 (West 2000) (state agencies are required to make available all records of the agency for the USAS project). State agencies are required to submit payroll information and personnel information on state employees to

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<sup>2</sup>The Comptroller first raised her ERS argument in a motion for new trial. CR 172-77. She did not provide any affidavits or other evidence to support her factual claims. *Id.*

the Comptroller under her rules for payroll purposes. 34 Tex. Admin. Code § 5.41(b) (2007).

The confidentiality provided by section 815.503 cannot be stretched to reach dates of birth maintained by the Comptroller for payroll purposes. The employing state agencies submitted them to the Comptroller for purposes of administration of the uniform statewide payroll system. The dates of birth are not confidential in the hands of those agencies and did not become confidential when transferred to the Comptroller, notwithstanding the fact that dates of birth of state employees in an ERS record may be confidential under section 815.503. See ORDs 338, 347, 533 and OR2007-0862 and discussion *supra* pp. 15-16.

The Comptroller cites to *Houston Mun. Employees Pension Sys. v. Abbott*, 192 S.W.3d 862, 865 (Tex. App.—Texarkana 2006, pet. denied). That case is not supportive of the Comptroller's argument. The case did not involve records that were maintained by two different governmental bodies. It involved records of only the pension system. The court held that the statute governing the pension system excluded from the PIA all records concerning a member of the system, including the salaries and bonuses of its employees, who are also members of the system. *Id.*

The Comptroller's simplistic construction would shut down any information about state employees held by her or any other governmental body that was also located in the pension records maintained by the pension system. The mandatory disclosure requirement, in section 552.022(a)(2), for basic information regarding public employees would be voided. Such construction decimates the PIA and its purpose to provide to the public information

about those who govern. See Tex. Gov't Code § 552.001(a). For example, the names and salaries of all state employees could be closed, simply because the ERS had this same information. Arguably, under the Comptroller's construction of the ERS statute, the requestor would not have been entitled to any of the information she requested. However, the Comptroller disclosed such information as the name, gross salary, job title, race, sex, and date of employment of approximately 144,000 state employees, without objection. CR 64-65, *The News' MSJ*, Exhibit 1, Comptroller's letter to the AG. The Comptroller's construction of the scope of the ERS statute is unreasonable and would lead to absurd consequences. *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex.1991) (stating that "[i]nterpretations of statutes which would produce absurd results are to be avoided"). In the absence of any legislative directive to the contrary, confidentiality statutes are to be construed narrowly. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995).

e. Legislative action on dates of birth indicates they are public.

The Comptroller claims that fears over identity theft justify withholding dates of birth. Appellant's Brief at 9-11. As recently as the 2005 regular legislative session, the legislature had the opportunity to add date of birth to the list of confidential information on voter registration applications, for the express purpose of preventing identity theft. Tex. H.B. 345, 79th Leg., R.S. (2005) (as filed January 10, 2005) (CR 147-48, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab A)<sup>3</sup>; House Elections Committee, Bill Analysis, Tex. C.S.H.B. 345,

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<sup>3</sup> Legislative information regarding H.B. 345 may be found at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=HB345>.

79th Leg., R.S. (2005) ( (CR 149-50, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab B); Committee Hearing on Tex. H.B. 345, Before the House Committee on Elections, 79th Leg., R.S. (February 16, 2005) (testimony of Representative Burt R. Solomons, author)<sup>4</sup>.

Tex. Elec. Code § 13.004(c) expressly makes confidential a social security number, driver's license number, or number of a DPS personal identification card furnished on a voter registration application. The legislature, including its author, declined to add date of birth to this list of confidential information. Instead, the legislature prohibited county officials only from posting the date of birth, telephone number and the subsection (c) information on the internet. Act of May 24, 2005, 79th Leg., R.S., ch. 487, § 2, sec. 13.004, 2005 Tex. Gen. Laws 1348 (codified at Tex. Elec. Code § 13.004(d)) (CR 151-52, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab C). Dates of birth on voter registration applications are still available if requested under the PIA. Debate on Tex. H.B. 345 on the Floor of the House, 79th Leg., R.S. (April 11, 2005) (Rep. Solomons explaining information in section 13.004(d) is available from a county clerk, but not on the clerk's website).<sup>5</sup>

In her motion for summary judgment, the Comptroller pointed to the Identity Theft Enforcement and Protection Act, enacted in 2005, as further indication that the birth date of a public employee "should be recognized under the [PIA]." CR 89, Comptroller's Cx-MSJ

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<sup>4</sup>tapes available from the House of Representatives Audio/Video Services or on the web: <http://www.house.state.tx.us/committees/audio79/broadcasts.php?session=79&committeeCode=240>, starting at 1':16.

<sup>5</sup>tapes available from the House of Representatives Audio/Video Services or on the web: <http://www.house.state.tx.us/media/chamber/79.htm>, starting at 1:10:34.

at 4; *see* Tex. Bus. & Com. Code Ann. ch. 48 (West Supp. 2005) (Act of May 27, 2005, 79th Leg., R.S., ch. 294, § 2, 2005 Tex. Gen. Laws 885) (CR 154-60, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab D). The Comptroller stated that chapter 48 protects birth dates, as personal identifying information (PII), from disclosure under certain circumstances. CR 89, Comptroller's Cx-MSJ at 4.

It is true that date of birth is considered PII under section 48.002(1)(A). It is not true that date of birth is protected from disclosure, under any circumstance. This law prohibits the use or possession of PII without consent and with the intent to obtain anything of value in another person's name. Tex. Bus. & Com. Code § 48.101(a). The law also requires businesses, but not governmental bodies, to maintain procedures to protect from unlawful use or disclosure of "sensitive personal information" (SPI). Tex. Bus. & Com. Code § 48.102. Significantly, date of birth is not SPI under chapter 48; only a person's name in conjunction with a social security number, driver's license or official identification number or an account or credit/debit card number is. Tex. Bus. & Com. Code § 48.002(2). Chapter 48 of the Business and Commerce Code and section 13.004(d) of the Election Code are the legislature's latest efforts toward protecting Texas citizens against identity theft. That protection does not include making date of birth confidential.

The legislature has had several opportunities to protect public employees' dates of birth directly in the PIA. In 1985, the legislature added former section 3A to Tex. Rev. Civ. Stat. Ann. 6252-17a (predecessor to Tex. Gov't Code ch. 552), giving public employees the

right to choose whether the public had access to their home addresses and telephone numbers. Act of May 24, 1985, 69th Leg., R.S., ch.750, § 3, 1985 Tex. Gen. Laws 2574. In 1995, the legislature amended this section (now section 552.024) to give that same choice for social security numbers and names of family members of public employees. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 5, sec. 552.024(a), 1995 Tex. Gen. Laws 5130. In 1999, the legislature rejected two attempts, on the House Floor, to except from disclosure a person's address, phone number, and other personal identifiers. The amendments did not include date of birth, and they expressly excluded public employee information. H. J. of Tex., 76th Leg., R.S. 2909-10 (1999) (S.B. 1851, on Second Reading, Amendment No. 6 offered by Rep. Hupp); H. J. of Tex., 76th Leg., R.S. 2985 (1999) (S.B. 1851, on Third Reading, Amendment No. 1 offered by Rep. Hupp). There is no state statute that makes the dates of birth of public employees confidential or otherwise excepted from disclosure. The actions of the legislature to date reflect an intent that dates of birth remain public under Texas laws.<sup>6</sup>

### **CONCLUSION AND PRAYER**

The Comptroller fails to meet her burden under the PIA to demonstrate that dates of birth of state employees are excepted from disclosure under Tex. Gov't Code § 552.101. Common law privacy and constitutional privacy do not make such information confidential. The Comptroller has not articulated any other legal basis or provided sufficient summary

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<sup>6</sup>Three bills have been filed this session of the legislature relating to the PIA and dates of birth of public employees: S.B. 281 (H.B. 1580), S.B. 1848 (H.B. 3767), and H.B. 836.



judgment proof to justify reversal of the trial court's judgment. The PIA does not allow a court to hold that information may be withheld from the public without a specific exception that makes it so. *Industrial Found.*, 540 S.W.2d at 682. Section 552.001(b) of the PIA requires that the Act "shall be liberally construed in favor of granting a request for information." "The practical effect of a statutory directive for liberal construction of an act is that close judgment calls are to be resolved in favor of the stated purpose of the legislation." *Hubert*, 652 S.W.2d at 552. As a matter of law, the information here is subject to disclosure.

Defendant Greg Abbott, Attorney General of Texas, respectfully asks the Court to affirm the decision of the trial court and hold that the dates of birth of state employees are subject to disclosure under the PIA.

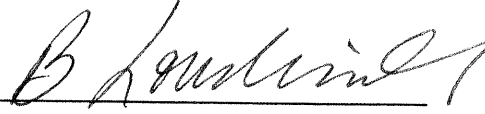
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