NO. 03-07-00102-CV

IN THE THIRD COURT OF APPEALS
AT AUSTIN, TEXAS

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,

Plaintiff/Appellant/
Cross-Appellee,

v.

ATTORNEY GENERAL OF TEXAS,

Defendant/Appellee,

and

THE DALLAS MORNING NEWS, L.P.,

Intervenor/Appellee/
Cross-Appellant.

Appeal from the 126th Judicial District Court of Travis County, Texas
(Hon. Lora Livingston, Presiding and Hon. Stephen Yelenosky, Presiding)

BRIEF FOR APPELLEE/CROSS-APPELLANT

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ORAL ARGUMENT REQUESTED

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Attorney General of Texas	Defendant/Appellee
The Dallas Morning News, L.P.	Intervenor/Appellee/Cross-Appellant

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STATEMENT OF THE CASE

Nature of the case: Declaratory judgment action arising from a request by The Dallas Morning News, L.P. ("*The News*") pursuant to the Texas Public Information Act, Texas Government Code Section 552.001 *et seq.* ("TPIA" or the "Act"), to the Texas Comptroller of Public Accounts ("Comptroller"). CR 5.

The News made a request to the Comptroller for information from the state employee payroll data base, including date of birth information. CR 10. Only the date of birth information is in dispute. CR 64, 66. Attorney General Abbott issued Letter Ruling OR 2006-01938 (2006) finding that the date of birth data was public and must be released. CR 3-25. The Comptroller filed suit against the Attorney General seeking to overturn the ruling. *The News* intervened.

Parties on appeal: Appellant/Plaintiff: Comptroller
Appellee/Defendant: Attorney General of Texas
Appellee/Intervenor/Cross-Appellant: *The News*

A.G. letter ruling: In response to a request for a letter ruling by the Comptroller, the Attorney General concluded that state employees' date of birth information is public information and therefore subject to disclosure under the TPIA. CR 14, 23.

Trial court: 126th Judicial District Court, Travis County, Texas; Hon. Lora J. Livingston, Presiding and Hon. Stephen Yelenosky, Presiding respectively.

Disposition: Judge Livingston granted partial summary judgment for *The News* on September 6, 2006, concluding that state employees' date of birth information is public information and therefore subject to disclosure under the TPIA. CR 169.

Judge Yelenosky denied summary judgment for the *The News* on January 26, 2006 on the issue of attorney's fees, concluding that *The News* was not entitled to attorney's fees under TPIA Section 552.323(b) or Chapter 37 of the Texas Civil Practice and Remedies Code. CR 183-84, 186 (Appendix 1 & 2).

REPLY TO APPELLANT'S ISSUE

1. The date of birth of a public employee contained in the state payroll database maintained by the Comptroller is public information under the TPIA and not excepted from disclosure by the TPIA or any other law.

ISSUES PRESENTED ON CROSS-APPEAL

1. Did the trial court err in failing to grant *The News*' motion for summary judgment on the issue of attorney's fees under Section 552.323(b) of the TPIA after it had previously granted summary judgment for *The News* on its TPIA claim?

2. Did the trial court err in failing to grant *The News'* motion for summary judgment on the issue of attorney's fees under Chapter 37 of the Texas Civil Practice and Remedies Code after it had previously granted summary judgment for *The News* on its declaratory judgment claim?

TO THE HONORABLE COURT OF APPEALS:

This appeal arises out of a public information request made by The Dallas Morning News, L.P. ("*The News*") to the Texas Comptroller of Public Accounts ("Comptroller") pursuant to the Texas Public Information Act, Texas Government Code Section 552.001 *et. seq.* ("TPIA" or the "Act"). *The News* requested information from the state employee payroll database, including date of birth information of state employees. This Court should affirm the trial court's summary judgment that state employees' date of birth information is public information and is not exempted from disclosure under the TPIA. The trial court, however, should be reversed on the issue of attorney's fees because it failed to award *The News* its attorney's fees under either the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code after it entered a declaratory judgment in favor of *The News* on the merits.

STATEMENT OF FACTS

The News maintains a number of public information databases that are used for news gathering and reporting. 1st Supp. CR 49. On November 18, 2005, Jennifer LaFleur, the computer-assisted reporting editor at *The News*, requested information from the Comptroller by e-mailing a written request to the Comptroller's Public Information Officer. CR 10; 1st Supp. CR 48-50. In particular, *The News* requested information from the state employee payroll database, including date of birth information of state employees.[1]

[1] Ms. LaFleur also requested other categories of employee identifying information which the Comptroller does not contest in this proceeding. CR 10.

The request was made for routine purposes in order to obtain the most current version of the database available. 1st Supp. CR 49. *The News* had previously requested and received the state employee payroll database, including date of birth information, from the Comptroller. *Id.*

The Comptroller refused to release the date of birth information and sought an opinion from the Attorney General. CR 4, 11. The Comptroller conceded to the Attorney General that employee identification information, such as name, race, sex, and work address, is public information. CR 64, 66. The Comptroller, however, argued that TPIA Section 552.101 in connection with common law and constitutional rights of privacy excepted date of birth information from disclosure.[2] CR 65-67. Specifically, the Comptroller argued that a date of birth, when coupled with other personally identifying information, is sensitive information that requires special protection because of the risk of identity theft. CR 67-68.

The News provided comments to the Attorney General demonstrating that date of birth information is not protected from disclosure. CR 71. *The News* argued that date of birth is not the type of information protected by either common law or constitutional privacy because it is not highly intimate or embarrassing information and does not concern the "most intimate aspects of human affairs." CR 71-73. *The News* further argued that the public has a legitimate and significant interest in the disclosure of the

[2] The Comptroller did not raise TPIA Section 552.102. The Attorney General, however, ruled *sua sponte* that date of birth information is not protected under Section 552.102. CR 15, 17.

information that outweighs the minimal privacy interest state employees have in protecting their date of birth information. CR 73.

Attorney General Abbott agreed with *The News*. CR 74-77. Consistent with prior opinions, the Attorney General ruled that date of birth information is not protected under Sections 552.101 and 552.102. CR 77.

Thereafter, the Comptroller filed the underlying suit for declaratory judgment seeking relief from the Attorney General's opinion ordering the disclosure of state employees' date of birth information. CR 3. *The News* intervened to obtain a declaration that date of birth information is public information under the TPIA and that the exceptions to disclosure asserted by the Comptroller do not apply to state employees' date of birth information as a matter of law. *The News* immediately moved for summary judgment. CR 37, 50.

As part of its summary judgment evidence, *The News* presented the affidavit of Pam Maples, the assistant managing editor/projects-and-investigations for *The News*. 1st Supp. CR 53. Ms. Maples testified that reporting by *The News* often focuses on the job performance of public employees, officials, applicants, and candidates. In order to evaluate those individuals' fitness and qualifications for public office or employment and job performance, date of birth information is frequently utilized by *The News*. 1st Supp. CR 53-54.

Ms. Maples also testified that *The News* does not intend to publish the public employee database wholesale in its newspaper or on its website or sell or make the information available to third parties. 1st Supp. CR 54. Further, Ms. Maples testified that

The News would publish a date of birth only when it had particular relevance to a news story of public interest or concern. 1st Supp. CR 55. Finally, Ms. Maples testified that the *The News* takes steps against the unauthorized acquisition or disclosure of the information held in its newsroom databases, and that she has no knowledge of any person that has ever used a date of birth from a TPIA request or from *The News*' database to commit identity theft. 1st Supp. CR 55. The Comptroller presented no controverting evidence and all of the summary judgment evidence by *The News* was undisputed.

The Honorable Lora J. Livingston granted partial summary judgment for *The News* on September 6, 2006, concluding that state employees' date of birth information is public information and therefore subject to disclosure under the TPIA. CR 169. The Honorable Stephen Yelenosky later denied summary judgment for the *The News* on the issue of attorney's fees, concluding that *The News* was not entitled to its attorney's fees under Section 552.323(b) of the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code. CR 186. This appeal follows.

SUMMARY OF THE ARGUMENT

Public employee date of birth information is not intimate or embarrassing information that is protected by common law privacy. The date of birth information of state employees contained in the Comptroller's payroll database is public information and is not excepted from disclosure under the TPIA or any other law. As a threshold matter, the three common law privacy theories advanced by the Comptroller as exceptions to disclosure under the TPIA are not properly before this Court because each has been abandoned, waived, or asserted for the first time on appeal. Regardless, each of the

common law privacy theories asserted by the Comptroller do not except state employees' date of birth information from disclosure under the TPIA. Likewise, the constitutional privacy interest asserted by the Comptroller does not except state employees' date of birth information because such information clearly does not fall within the constitutionally protected "zone of privacy."

The Comptroller's unproven assertion that date of birth disclosure creates a risk of identity theft is not sufficient to provide exemption from disclosure under the TPIA. The Comptroller's argument is fatally flawed for three reasons. First, it ignores the steps already taken by the Legislature to protect personal financial information that *do not include* the protection of date of birth information. Second, the Texas Supreme Court has already expressly rejected a nearly identical argument by the Comptroller in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). Third, the Attorney General has consistently rejected the Comptroller's assertion in multiple letter rulings.

Moreover, the other non-disclosure arguments made by the Comptroller are barred by TPIA Section 552.006, which requires that exceptions to disclosure be express, not implied as the Comptroller suggests. The Comptroller notably overlooks that the Legislature has determined that the TPIA is to be liberally construed in favor of granting a request for information and that exceptions to disclosure are narrowly construed. The Comptroller's argument that information in the state employee payroll data base is protected from disclosure under the TPIA because it is excepted from disclosure under the Texas Employees' Retirement System statute is fatally flawed. In effect, the conclusion urged by the Comptroller would shut down the disclosure of any information

about state employees held by the Comptroller or any other governmental body if that information is also located in the pension records maintained by the pension system. Such a conclusion would effectively eviscerate the TPIA.

Finally, the trial court erred in failing to award *The News* its attorney's fees under the TPIA, Texas Government Code Section 552.323(b), or Chapter 37 of the Texas Civil Practice and Remedies Code after it entered a declaratory judgment in favor of *The News* on the merits. *The News* is entitled to its attorney's fees under both statutes.

ARGUMENT

I. The TPIA's broad definition of public information reaches state employees' date of birth information.

The Act defines public information to presume that *all* information created or held by governmental bodies or officials is subject to the TPIA:

> "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body[.]

TPIA § 552.002(a). This definition is to be interpreted as broadly as it appears. "The Act does not limit the availability of public information except as expressly provided." *Thomas v. Cornyn*, 71 S.W.3d 473, 480 (Tex.App.—Austin 2002, no pet.); TPIA Section 552.006. The definition reaches "any" information within its ambit. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 358 (Tex. 2000).

Accordingly, since there is no dispute that state employee date of birth data is information "collected, assembled or maintained" by the Comptroller, it *is* public information subject to disclosure upon request. If a governmental body, such as the

Comptroller's office, wishes to withhold public information from disclosure, it bears the burden of showing that the information is expressly excepted from disclosure by the TPIA or other law. *Thomas*, 71 S.W.3d at 480-481.

II. TPIA Section 552.101 does not except state employees' date of birth information from disclosure.

TPIA Section 552.101 excepts information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Comptroller argues that date of birth information should be excepted from disclosure under Section 552.101 for two reasons: (1) the right to privacy found in Texas common law, and (2) the right to privacy found in the Texas Constitution. Appellant's Brief at 5-8. As demonstrated next, neither common law nor constitutional privacy interests except state employees' date of birth information from disclosure under the TPIA.

A. State employees' date of birth information is not excepted from disclosure under the TPIA based on any common law privacy interest.

1. The Comptroller has variously asserted three different common law privacy theories—none of which is properly before this Court.

Texas law recognizes three distinct privacy torts. First, it recognizes the right to be free from the public disclosure of embarrassing private facts, which is the only privacy interest that applies in TPIA cases. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Second, it recognizes the tort of intrusion upon seclusion. *See Billings v. Atkinson*, 489 S.W.2d 858, 859-60 (Tex. 1973). Third, it recognizes the tort of unlawful appropriation of a person's name or likeness for commercial use. *See Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 900 (Tex.App.—Dallas 2001, no pet.).

In the trial court, the Comptroller, quoting *Industrial Foundation*, argued that date of birth information was excepted from disclosure because "(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 public concern." CR 88. The Comptroller also cited *Industrial Foundation* for the proposition that invasion of privacy can be based on the misappropriation of one's identity. CR 89.

Now, for the first time on appeal, the Comptroller, citing *Billings*, argues that *The News'* request violates "the right to freedom from intrusion upon a person's seclusion or solitude, or into his private affairs." Appellant's Brief at 5. The Comptroller also asserts, again citing *Billings*, that *The News'* request violates "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." Appellant's Brief at 7.

The significance of the Comptroller's shift in privacy theories is twofold. First, the Comptroller has abandoned its privacy theory based upon the public revelation of highly intimate and embarrassing private facts under *Industrial Foundation*. Second, the Comptroller has asserted a new privacy theory, which was not presented to the trial court, based on intrusion upon seclusion under *Billings*. "[I]t is the *Billings*' [sic] analysis which should be applied here and not the *Industrial Foundation's* [sic] analysis." Appellant's Brief at 7.

As a result of the Comptroller's explicit abandonment of its public revelation of private facts theory, that issue is not before this Court and need not be reached here. Additionally, it is well established that the Comptroller may not rely upon a new legal

theory—here, intrusion upon seclusion—for the first time on appeal. *See Adams v. First Nat'l Bank*, 154 S.W.3d 859, 871 (Tex.App.—Dallas 2005, no pet.) (an issue may not be raised for the first time on appeal); *E.F. Hutton & Co., Inc. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987) (argument that the DTPA is inapplicable to securities transactions was never presented to the trial court and therefore waived). Thus, the Court also need not reach the issue of whether the theory of intrusion upon seclusion applies to the facts of this case.

The final privacy theory relied upon by the Comptroller, the misappropriation of one's identity, has been waived because of inadequate briefing. There is not a single sentence in the Comptroller's brief that attempts to explain how the theory applies here; therefore, the Court need not reach the issue. *See Johnson v. Davis*, 178 S.W.3d 230, 240-241 (Tex.App.—Houston [14th Dist.] 2005, pet. denied) (a single sentence assertion without any argument, analysis, or citation to legal authority amounted to waiver because it was not sufficient to articulate a clear and concise argument even under a "liberal construction" of the brief); *Franklin v. Enserch, Inc.*, 961 S.W.2d 704, 711 (Tex.App.—Amarillo 1998, no pet.) (attenuated, unsupported arguments are waived).

In summary, for these reasons, the Comptroller is left without a single common law privacy theory on appeal. Thus, the Court should affirm the summary judgment in favor of *The News*.

Regardless, as demonstrated below, each of the common law privacy theories that the Comptroller has asserted, either below or now for the first time on appeal, fails to except state employees' date of birth information from disclosure under the TPIA.

2. Date of birth information is not a highly intimate or embarrassing fact excepted from disclosure under the TPIA.

To establish an exception to the TPIA under common law privacy, the Comptroller is required to demonstrate that "(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 public concern." *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976); *see also Morales v. Ellen*, 840 S.W.2d 519, 524 (Tex.App.—El Paso 1992, writ denied). Date of birth information clearly does not constitute the type of information protected under common law privacy and, in any event, the public has a legitimate interest in being able to clearly identify state employees.

First, date of birth information is not the type of highly objectionable information that is protected by the common law right to privacy. Only highly intimate or embarrassing facts, such as sexual assaults, victims of mental or physical abuse, illegitimate children, psychiatric patients, persons who attempted suicide, or persons suffering injuries to sexual organs, are protected under the common law of privacy. *Vandiver v. Star Telegram, Inc.*, 756 S.W.2d 103, 106 (Tex.App.—Austin 1988, no writ); *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex.App.—Austin 1983, writ ref'd n.r.e.). In contrast, employee salary information, for example, is not highly embarrassing or of an intimate nature that, if publicized, would be highly objectionable to a reasonable person. *The Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 n.6 (Tex.App.—Houston [14th Dist.] 2004, no pet.).

The Comptroller argued below that "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." CR 7. However, this is not part of the test to determine if information is excepted as private under the TPIA. Indeed, the Texas Supreme Court rejected a nearly identical argument in *Industrial Foundation*. There, the Industrial Accident Board cited the introductory statement to the TPIA, which provides that it is the policy of the state "that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." *Indus. Found.*, 540 S.W.2d at 675-76. The Industrial Accident Board argued that names of individual worker's compensation claimants "do not constitute 'affairs of government' or 'official acts' of public officials" and, therefore, that their release would not further the purposes of the TPIA. *Id.* The Court, however, held that a decision of whether information is public must be based on the specific provisions of the TPIA. *Id.* Because the information was declared public under section 552.002(a), and there was no exception that applied, the Court refused to judicially craft an exception not created by the Legislature. *Id.* at 675-76. Likewise, in this case, the Comptroller cannot escape the fact that there is no exception under the TPIA protecting the information from disclosure.

Second, no Texas court has ever found a public employees' date of birth to be the sort of highly intimate or embarrassing information protected by common law privacy, and neither has the Attorney General. The Attorney General has consistently rejected the Comptroller's argument that date of birth information is protected by common law

privacy. *See* Tex. Att'y Gen. Op. MW-283 (1980); Tex. Att'y Gen. OR2003-5954 (2003); Tex. Att'y Gen. OR2005-08056 (2005). Specifically, OR2003-5954 clearly states, "[w]e particularly note, however, that information revealing a public employee's date of birth is not protected by common-law privacy." Tex. Att'y Gen. OR2003-5945, at 6 (citing Tex. Att'y Gen. Op. MW-283 (1980)). Indeed, as recently as September 1, 2005, the Comptroller asked the Attorney General to determine if date of birth information was protected information that could be withheld. Consistent with its prior rulings, the Attorney General held that "common law privacy does not protect dates of birth."[3] Tex. Att'y Gen. OR2005-08056 (2005).

3. Even if a date of birth is highly intimate or embarrassing information, the public has a legitimate interest in knowing the information.

The Comptroller makes no attempt in this Court to meet the second prong of the controlling test under *Industrial Foundation*. That is, even if a date of birth is highly intimate or embarrassing information, the TPIA requires disclosure if the information is of legitimate interest to the public. *Indus. Found.*, 540 S.W.2d at 682. The Comptroller bore the burden of proving no legitimate public interest. *Thomas*, 71 S.W.3d at 480-481. The Comptroller, however, offered no such proof, and the record is undisputed that there is a legitimate public interest.

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[3] The Attorney General has found only the following types of information protected: medical information or information indicating disabilities or specific illnesses, personal financial information not relating to a financial transaction between the individual and a governmental body, information concerning the intimate relations between individuals and their family members, and the identities of the victims of sexual abuse. Tex. Att'y Gen. ORD-659, at 3 (1999) (summarizing opinions).

"[T]he public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner." Tex. Att'y Gen. ORD-269, at 2 (1981); *accord* Tex. Att'y Gen. ORD-444 (1986) (job-related test results, and reasons for dismissal, demotion, promotion, resignation of a public employee constitute legitimate public interests that are outside the test for common law privacy); Tex. Att'y Gen. ORD-405 (1983) (the manner in which employee performs job similarly constitutes a legitimate public interest that is outside the test for common law privacy); Tex. Att'y Gen. ORD-278 (1981) (similarly, the reasons and circumstances surrounding a public employee's resignation or termination are not exempt).

Under Texas common law, moreover, the issue is not whether the allegedly private facts themselves are of legitimate public concern, but only whether they bear a logical nexus to other matters that are of legitimate pubic concern. *Ross v. Midwest Commc'n, Inc.*, 870 F.2d 271, 274 (5th Cir. 1989); *Star-Telegram, Inc. v Doe*, 915 S.W.2d 471, 474 (Tex. 1995). The undisputed summary judgment evidence put forward by *The News*, which is discussed in detail below, established that public employee date of birth information allows *The News* and other members of the public to identify and distinguish between public employees to determine whether they are carrying out their duties in an efficient and law abiding manner, as contemplated by the TPIA. 1st Supp. CR 54. Thus, there is a logical nexus between date of birth information and matters of legitimate public concern.

Further, the logical nexus the date of birth of public officials and state employees has with matters of legitimate public interest is apparent from the numerous age-related requirements provided by the Texas Constitution and numerous Texas statues, including:

- Texas Constitution, Article 3, Sections 6 and 7 – Setting minimum age requirements for persons holding the offices of state senator and representative;
- Texas Constitution, Article 4, Section 4 – Setting minimum age requirement for person holding the office of governor;
- Texas Constitution, Article 5, Section 2 – Setting minimum age requirements for person holding the office of justice or chief justice of the Texas Supreme Court;
- Texas Election Code § 141.001 – Setting minimum age requirement for candidate for public elective office;
- Texas Insurance Code §§ 1551.102, 1551.111 and 1551.112 – Providing age requirements for public employees to participate in the Employees Retirement System of Texas, the Texas Municipal Retirement System, the Texas County and District Retirement System, and the Texas Turnpike Authority retirement benefits;
- Texas Government Code §§ 839.101, 844.202 – Providing age requirements for state employees to receive service retirement annuity benefits and vesting rights;
- Texas Local Government Code § 231.06 – Providing maximum age requirement for service on a county zoning commission; and
- Texas Government Code § 75.104 – Providing maximum age requirement for senior district judges.

Obviously, date of birth information is essential for a member of the news media or the public to determine if these legal requirements have been met or abused by public officials and employees.

Additionally, the common law privacy test does *not* involve balancing the public's interest in knowing the information against the individual's interest in preventing disclosure. This Court squarely rejected a balancing test under the common law of privacy:

> As the Supreme Court held in *Industrial Foundation*, the proper way to evaluate a claimed invasion of privacy is to apply the state tort law dealing with that injury. . . .Application of this test will result in the proper 'balancing' of an individual's right to privacy and the articulated purpose of the Open Records Act—that the people are entitled to full and complete information regarding the affairs of the government and the acts of its officials.

Hubert, 652 S.W.2d at 550. In other words, the task of balancing an individual's right of privacy against the public's right to know had already been performed by the Legislature when it precluded disclosure of information deemed confidential by judicial decision. Hence, despite the Comptroller's assertion, the common law tort of invasion of privacy does not include a balancing test, so neither does the TPIA. *See id.*

In summary, common law privacy does not protect the date of birth information of state employees because it is not highly intimate or embarrassing such that disclosure would be highly objectionable to a reasonable person, and the public has a legitimate interest in its disclosure.

4. Date of birth information is not protected under the theory of intrusion upon seclusion.

The Comptroller's argument that the disclosure of state employees' date of birth information amounts to a violation of the tort of intrusion upon seclusion is wholly without merit. Appellant's Brief at 7. The Texas Supreme Court first recognized a

privacy tort for intrusion upon seclusion in *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

In *Billings*, the Court identified the wiretapping of a person's home telephone line as a prime example of intruding upon a person's seclusion. *Id.* at 860. The Court later defined intrusion as "(1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person." *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). Intrusion upon seclusion under Texas law is "typically associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying." *GTE Mobilnet of South Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex.App.—Houston [14th Dist.] 2001, pet. denied).

The TPIA request by *The News* for public employee date of birth information is the antithesis of an intrusion protected by this branch of the privacy tort. No action by *The News* in making the request—or even the Comptroller in compiling date of birth data—entails or equates to a physical trespass or eavesdropping. Rather, *The News* is simply exercising a legal right provided by a Texas statute in accordance with the prescribed procedures to obtain public information. Accordingly, the tort of intrusion upon seclusion clearly does not apply to *The News'* public information request to the Comptroller.

5. Date of birth information is not protected by the theory of misappropriation of one's identity.

Similarly, the Comptroller's argument that the disclosure of state employees' birth date information amounts to a misappropriation of "the right to be free from the unwarranted appropriation or exploitation of one's personality" is wholly without merit. Appellant's Brief at 7.

Texas law does recognize a privacy tort for the unauthorized appropriation of a person's name or likeness. *Steinbeck*, 53 S.W.3d at 900. As its elements demonstrate, however, the tort plainly does not apply to facts before this Court. The three elements of the invasion of privacy by misappropriation are: "(1) the defendant appropriated the plaintiff's name or likeness for the value associated with it; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant." *Id.* As the Dallas Court of Appeals has put it, "[g]enerally, an appropriation becomes actionable when the name is used 'to advertise the defendant's business or product, or for some similar commercial purpose.'" *Id.* (quoting RESTATEMENT (SECOND) TORTS § 652(c), cmt. b (1977)). A former college football star, for example, stated a valid claim for invasion of privacy by misappropriation when his picture was used to advertise softdrinks. *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 723 (Tex.Civ.App.—Eastland 1975, writ ref'd n.r.e.).

In this case, the Court may easily dispose of the Comptroller's argument that the disclosure of state employees' birth date information amounts to invasion of privacy by misappropriation. Importantly, there is absolutely nothing in the record about the

misappropriation of a person's name or likeness for a commercial purpose. Thus, Court need inquire no further.

In any event, the First Amendment permits the use of a plaintiff's name or likeness in the context of, and reasonably related to, a publication concerning a matter that is newsworthy or of legitimate public concern. *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001) (citing *Lane v. Random House, Inc.*, 985 F. Supp. 141, 146 (D.D.C. 1995)); *see also Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) (a name cannot be appropriated by reference to it in connection with the legitimate mention of public activities). This same First Amendment protection undoubtedly bars the claim that the mention of a person's date of birth in connection with a newsworthy event amounts to invasion of privacy by misappropriation.

Accordingly, for these reasons, the Comptroller's misappropriation theory should be rejected by this Court.

B. State employees' date of birth information is not protected by the constitutional right to privacy.

As noted, the Comptroller asserts that releasing date of birth information would violate a state employee's constitutional right of privacy, making such information protected from disclosure under Sections 552.101 and 552.102. A court considering whether information is protected from disclosure by the United States Constitution or Texas Constitution must answer the following questions:

1. Does the information involve matters within any recognized "zone of privacy"? If not, does the information involve "the most intimate aspects of

human affairs"? If the answers to these questions are "no," the inquiry ends and the information must be disclosed. If the answers are "yes," then Court must answer question 2.

2. Does the public's interest in knowing the information outweigh the individual's interest in protecting the information? If the answer is "yes," then information is public.

In this case, these questions must be answered as follows.

1. The information requested is not the type protected by the United States Constitution or the Texas Constitution.

The United States Constitution and the Texas Constitution both provide the same amount of protection for personal information. *Compare Tex. State Employees Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1988), and *Martin v. Darnell*, 960 S.W.2d 838, 844 (Tex.App—Amarillo 1997, orig. proceeding); with *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977), and *Ramie v City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985).

First, only information that "pertains to activities and experiences" within a recognized "zone of privacy" is protected by the right of privacy. *Indus. Found.*, 540 S.W.2d at 680; Tex. Att'y Gen. ORD-455, at 3 (1987). The United States Supreme Court has recognized that only issues concerning marriage, procreation, abortion, child rearing, and family relationships are protected "zones of privacy." *Indus. Found.*, 540 S.W.2d at 680. Here, the disclosure of date of birth information clearly does not affect an individual's ability to make decisions regarding marriage, procreation, abortion, child

rearing, and family relationships. Thus, understandably, the Comptroller has not even attempted to make this showing. Appellant's Brief at 8.

No Texas court, moreover, has ever found that state employees' date of birth information falls within the zone of privacy protected by constitutional law, nor has the Comptroller cited any federal case holding as much. In fact, Texas courts have rejected such protection for related information. In *Martin v. Darnell*, for example, the Amarillo Court of Appeals held that a public employee did not have a constitutional right of privacy in his personal financial information. 960 S.W.2d at 844-45. Certainly if personal financial records are not protected, date of birth information is not either. *See id.; see also Apodaca v. Montes*, 606 S.W.2d 734, 736 (Tex.Civ.App.—El Paso 1980, no writ) (bondsman's financial statement not protected by constitutional right of privacy). And again, the Attorney General has ruled that date of birth information does not contain information that is confidential under constitutional privacy. *See* Tex. Att'y Gen. OR2005-08056, at 4 (2005).

Second, if the information does not fall within the "zone of privacy," it may still be constitutionally protected, but the scope of this protection is narrower than that under the common law doctrine of privacy in that the information must concern the 'most intimate aspects of human affairs.'" Tex Att'y Gen. OR2005-01691, at 4 (2005); Tex. Att'y Gen. ORD-455, at 5; *see Ramie*, 765 F.2d at 492. In this case, the Comptroller cannot make this showing. In fact, Comptroller has even admitted it cannot demonstrate that date of birth information is the "highly intimate" type of information that is protected by the Constitution. CR 90. In the Comptroller's own words, "*[c]oncededly, one's date*

of birth information is not an 'intimate fact' as that term is defined in Whalen *and* MHMR*J*." CR 90 (emphasis added). This concession indisputably ends this inquiry.

2. The public's interest in monitoring state employees outweighs state employees' privacy interests, if any.

Even if the Court somehow found that date of birth is within the zone of constitutional privacy, the Comptroller must still demonstrate that the public's interest in knowing the information is outweighed by state employees' right to privacy. The Comptroller cannot satisfy this test because the privacy rights of state employees are lower than those of the average individual, and the public's interest in monitoring the activities of state employees and officials is high.

"The privacy rights of a private citizen . . . are different from the rights of a public employee or officer." Tex. Att'y Gen. ORD 455, at 8-9 (1987); Tex. Att'y Gen. ORD 423, at 2 (1984) (scope of state employee privacy is narrow); Tex. Att'y Gen. ORD 212, at 3 (1978); *see also Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex.Civ.App.—Houston [14th Dist.] 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974). Indeed, by accepting public employment, state employees have subjected their rights as private citizens to the right of the public to an efficient and credible government. *Richardson*, 500 S.W.2d at 177; *see also Plante v. Gonzalez*, 575 F.2d 1119, 1136 (5th Cir 1978) ("Even in financial matters, public officials usually have less privacy than their private counterparts.").

Moreover, as noted, "the public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner."

Tex. Att'y Gen. ORD-269, at 3 (1981); *accord* Tex. Att'y Gen. ORD-444, at 3-4 (1986). Public disclosure of information about state employees and officials serves a legitimate public interest because it makes "voters better able to judge their elected officials and candidates for those positions." *Plante*, 575 F.2d at 1135. In fact, the Fifth Circuit has held that public officials' interest in financial privacy is outweighed by the public's need to monitor those officials' conduct. *Id.* at 1136. The same is true for the employees those officials hire because many of them hold positions of public trust or that affect public safety. Any privacy interest held in date of birth information is clearly outweighed by the public's interest in monitoring the government.

In summary, for these reasons, because the Comptroller cannot meet its burden to establish that disclosure constitutes a constitutional privacy violation, the information must be disclosed here.

C. The general public interest in monitoring state institutions—not the particular use of the requestor—determines disclosure under the TPIA.

The "legitimate public interest" factors the Court considers under common law and constitutional privacy are not to be confused with a consideration of the requestor's purpose for requesting the information—or a hypothetical misuse—which may not be considered. In *Industrial Foundation*, the Texas Supreme Court distinguished the two inquiries, stating that "[w]e should make clear that the particular interest of the requestor, and the purposes for which he seeks the information, are not to be considered in determining whether the matter requested is of legitimate concern to the public, except

insofar as the requester's interest in the information is the same as that of the public at large." 540 S.W.2d at 685.

In the context of information about public employees and officials, courts and the Attorney General have given substantial weight to the public's general interest in monitoring the activities of the government. In *Hubert*, for example, this Court considered whether the release of the names of candidates for the presidency of a state university violated the candidates' rights of privacy. 652 S.W.2d at 551. This Court held that "the taxpayers of this state finance one of the larger systems of higher education in the country. That highly qualified and conscientious administrators are selected and entrusted to conduct the affairs of these institutions is a matter of legitimate public interest." *Id.* Thus, the general public interest in monitoring state institutions—not the particular use of the requestor—was sufficient to require disclosure. *Id.*

In any event, if the Court considers *The News*' particular uses of the date of birth information, it will see that the uses are legitimate and, in fact, support disclosure. First of all, *The News* is obviously a well-respected member of the media whose purpose is to publish articles on matters of legitimate public concern. Much of the reporting done by *The News* focuses on the job performance of public employees, officials, applicants, and candidates. 1st Supp. CR 53. *The News*, as well as other Texas media organizations, frequently report on allegations relating to and investigations into illegal, unlawful, unethical, or criminal activities of public officials and employees. 1st Supp. CR 54. Date of birth information makes this reporting possible. *Id.* Typically, date of birth information is the only publicly available data that can be used by the media to accurately

distinguish public employees or officials with the same or similar names and accurately match and analyze information from different public databases. *Id.*

For example, in one article, *The News* used date of birth information to cross-reference public employees' names to criminal conviction records to determine whether school districts and hospitals were hiring criminals, including child-sex offenders. 1st Supp. CR 54. The legitimate public interest in this sort of check on the government is beyond dispute. *The News* has been and should be allowed access to information necessary to perform its government watchdog function. Without date of birth information, *The News* cannot perform its function of monitoring the government to determine whether it has hired applicants qualified for public office. *Id.*

D. The cases the Comptroller cites from other jurisdictions are inapposite here.

The Comptroller points to cases from other jurisdictions that protect date of birth information under their respective information acts. Appellant's Brief at 8-9. Those cases, however, relied on exemption 6 of the Federal Freedom of Information Act, which applies a balancing test that is inconsistent with the TPIA. *Compare Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668. 681-82 (Tex 1976) and *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex.App.—Austin 1983, writ ref'd n.r.e.); with *Oliva v. U.S.*, 750 F. Supp. 105, 107 (E.D.N.Y. 1991); *Data Tree, LLC v. Meek*, 109 P.3d 1276 (Kan. 2005); *Scottsdale Unified School Dist. v. KPNX*, 995 P.2d 534 (Ariz. 1998); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994).

The Texas Supreme Court has recognized that, unlike the Freedom of Information Act, the TPIA contains a strong statement of public policy favoring access to information, requires that courts accept the Legislature's policy choices, refrain from engaging in a balancing test that allows courts to override those policy choices, and construe the TPIA in favor of granting a request for information. *City of Garland*, 22 S.W.3d at 364; *Indus. Found.*, 540 S.W.2d at 681-82. For these reasons, the cases cited by the Comptroller from other jurisdictions are inapposite here.

III. The speculative and unproven threat of identity theft is insufficient to exempt date of birth information from public disclosure under the TPIA.

Essentially conceding that it cannot meet the standards for common law or constitutional privacy, the Comptroller asserts that an unsubstantiated threat of identity theft is sufficient to provide an exception from disclosure. Appellant's Brief at 9-11. The Comptroller's argument is fatally flawed for three simple reasons. First, it ignores the steps already taken by the Legislature to protect personal financial information that *do not include* the protection of date of birth information. Second, the Texas Supreme Court has expressly rejected a nearly identical argument by the Comptroller in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). Finally, the Attorney General has consistently rejected the Comptroller's arguments.

A. The Comptroller's argument is inconsistent with the rest of the TPIA.

The Legislature clearly knows how to protect personal financial information. Section 552.117 of the Government Code exempts from disclosure certain addresses, telephone numbers, social security numbers, and personal family information. TEX.

GOV'T CODE § 552.117. If the Legislature had intended date of birth information to be exempt from disclosure under the TPIA, it would have included this information in the list of information exempt from disclosure under Section 552.117. But the Legislature chose to make date of birth information public.

B. The Texas Supreme Court has already rejected the Comptroller's argument.

The Comptroller argues that state employees' date of birth information could be used in connection with information identifying those employees to commit identity theft. Appellant's Brief at 11. In *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), however, the Texas Supreme Court rejected a similar argument made by the Comptroller. In that case, the Comptroller argued that certain taxpayer information was confidential under section 552.101 in connection with confidentiality provisions in the Texas Tax Code. *Id.* at 674-75. The Comptroller argued that, despite the fact that the particular information requested was public information, A&T's staff could use that public information combined with other publicly available information to deduce confidential information about the taxpayers. *Id.* at 675. The Court rejected the Comptroller's argument, expressly stating that it could not consider how the information could be used in determining whether 552.101 applies:

> Moreover, neither the comptroller nor this Court may inquire whether A&T intends to use the information it requested to deduce otherwise privileged information about taxpayers. Under TORA, we may not consider the requesting party's purpose or use for the information. . . . In sum, if the requested information is public under TORA and its source is not the taxpayer, the Tax Code cannot preserve its confidentiality, regardless of the requesting party's purpose for seeking it. TORA precludes a factual inquiry into what the party intends to do with disclosed information.

Id. at 676.

The TPIA, like TORA, precludes an inquiry into the intended use of the information by the requestor. TEX. GOV'T CODE §§ 552.222, 552.223. Thus, under *Sharp*, the Comptroller's argument that state employees' birth dates might be used in conjunction with state employees' other identifying information to commit identity theft is an impermissible ground for ruling that 552.101 prohibits disclosure.

C. The Attorney General has consistently rejected the Comptroller's argument.

Attorney General opinions are entitled to great weight. *Heard v. Houston Post Company*, 684 S.W.2d 210, 212 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). In several letter rulings, including in the present case, the Attorney General rejected the argument that because date of birth information could potentially be used along with other identifying information to commit identity theft, it was protected under Section 552.101. Tex. Att'y Gen. Op. OR2002-4043, at 2 (2002). In fact, the Attorney General has ruled that the release of birth dates and other financial information did not constitute "exceptional circumstances" warranting an exception to disclosure, reserving that exception for "truly exceptional circumstances such as, for instance, an imminent threat of physical danger." Tex. Att'y Gen. Op. OR2002-4321, at 2 (2002). Identity theft carries no such imminent threat of physical danger; thus, exceptional circumstances do not exist here under the Attorney General's formulation of this test. In sum, any exception based on a wholesale and generalized fear of identity theft must come from the Legislature. *Id.*

D. The Comptroller's identity theft argument is unsupported by the record.

There is no evidence in the record that the any person has ever used date of birth information from a public information request or from the *The News'* database to commit identity theft. 1st Supp. CR 55. No proof offered by the Comptroller linked the availability of a public employee's date of birth to identity theft. Further, as the record demonstrates, *The News* does not intend to publish wholesale the state employee payroll database in the newspaper or on its website, nor does *The News* intend to sell or make the information available to third parties. *Id.* Indeed, the record shows that *The News* would only publish a date of birth when it had a particular relevance to a news story of public interest or concern. *Id.* *The News*, moreover, uses generally-accepted, commercially available computer system security methods to guard against the unauthorized acquisition or disclosure of the information held on its newsroom databases. *Id.* In sum, the Comptroller's mere speculation that date of birth information could be used by *The News* or anyone else to commit identity theft does not except the information from disclosure.

IV. The other sections of the TPIA relied upon by the Comptroller do not establish the legislative intent to exempt state employees' date of birth information from disclosure.

The Comptroller argues that the Legislature never intended for a state employee's date of birth information to be subject to disclosure under the TPIA because the TPIA clearly sets out "what limited information is available to be released on public employees." Appellant's Brief at 11. In support of its argument, the Comptroller quotes Government Code sections 552.022, 552.102, 552.130, and 552.115. Appellant's Brief at

12-13. With minimal analysis, the Comptroller then concludes it is "obvious" that when the TPIA is read as an entire statutory scheme the Legislature "[did] not intend for date of birth information to be revealed in conjunction with other identifying information on an individual." Appellant's Brief at 13.

However, the TPIA on its face prohibits this stitching together of disparate provisions to imply an exception to disclosure not expressly stated by the Legislature:

> 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.

TPIA Section 552.006 (emphasis added). Because no exception expressly makes date of birth information confidential, such an intent cannot be implied from the Act.

The Comptroller also overlooks the important fact that exceptions to disclosure under the TPIA are narrowly construed. *Sharp*, 904 S.W.2d at 680; *City of Garland*, 22 S.W.3d at 364; *Arlington Indep. Sch. Dist. v. Texas Attorney General*, 37 S.W.3d 152, 157-58 (Tex.App.—Austin 2001, no pet.). In short, all of these exceptions to disclosure under the TPIA, neither singularly nor together, can be read to make the dates of birth of state employees excepted from disclosure.

A. Government Code Section 552.022 does not exempt date of birth information from disclosure.

The Comptroller asserts that date of birth information is not public information because it is not expressly listed in Section 552.022(a)(2) of the Government Code. Appellant's Brief at 12. This is an erroneous reading of the TPIA that ignores the statute's plain language and underlying policies.

Section 552.022(a)(3) makes public "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *Id.* § 552.022(a)(3). *The News* requested the state employee payroll database, which is an account, voucher, or contract relating to the expenditure of public funds. Date of birth information is included in the database; therefore, that information is expressly public without exception under the TPIA.

Importantly, Section 552.022(a) begins with the broad admonition that its list of examples of public information is not exclusive: "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. . . ." TEX. GOV'T CODE § 552.022(a) (emphasis added). Further, subsection (b) denies courts the right to protect information not expressly made confidential under other law. *Id.* § 552.022(b). Thus, under the plain language of the statute, even if date of birth information was not expressly listed, it is still presumptively public information unless excepted by the TPIA or other law. *Id.* Given that the Legislature chose to exclude from required disclosure only information that is expressly made confidential by other law, the Comptroller's argument is simply incorrect.

Second, the Comptroller ignores the stated purpose of the TPIA and the policies underlying its express language. Section 552.001 sets out the policy and requires that the TPIA's interpretation further the stated policy:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. *The provisions of this chapter shall he liberally construed to implement this policy.*

TEX. GOV'T CODE § 552.001(a) (emphasis added).

Subsection (b)'s mandate, moreover, is absolute: "This chapter shall be liberally construed in favor of granting a request for information." *Id.* § 552.001(b); *City of Garland*, 22 S.W.3d at 355.

The Comptroller dismissed these express statements of legislative intent and essentially argues that times have changed. Appellant's Brief at 11. What the Comptroller overlooks, however, is that the Legislature has had many opportunities over the years to remedy the alleged inadequacy in the TPIA but has declined to do so. In fact, in the most recently completed regular legislative session, the Legislature added birth date to the list of personal information that cannot be released by a county from a voter registration card. *See* TEX. ELEC. CODE § 13.004. The Legislature clearly knows how to protect date of birth information—but in the case of employees who are accountable to the taxpayers that pay their salaries, it has not. In brief, because the Legislature has not exempted from public disclosure date of birth information of state employees, the Legislature has already made the policy decision that such information is public.

B. Government Code Section 552.102 does not exempt date of birth information from disclosure.

The Comptroller also cites to Government Code Section 552.102, which is an exception to the TPIA for certain information contained in a state employee's personnel file. Appellant's Brief at 12. Initially, the Comptroller does not provide any analysis regarding how it applies to dates of birth or any supporting authority to that effect. Further, Section 552.102 only protects information in personnel files that, if disclosed, would constitute an "unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102(a). Thus, all of the arguments set forth above concerning the lack of common law and constitutional privacy interests in state employees' date of birth information apply equally to Section 552.102.

C. Government Code Sections 552.130 and 552.115 do not exempt date of birth information from disclosure.

The Comptroller also cites Government Code Sections 552.130 and 552.115 as further support for its argument that the Legislature intends for date of birth information to be excepted from disclosure generally under the TPIA. Appellant's Brief at 12-13. Briefly, Section 552.130 is an exception for certain motor vehicle records, while Section 552.115 is an exception for birth and death records maintained by the bureau of vital statistics of the Texas Department of Health.

As an initial matter, the Comptroller did not bring these sections to the trial court's attention. Thus, even assuming for the sake of argument that these sections supported the Comptroller's position, the trial court did not have the benefit of considering them and,

therefore, they may not be relied upon for the first time on appeal. *See Adams*, 154 S.W.3d at 871; *Youngblood*, 741 S.W.2d at 364.

Further, the Comptroller has waived its reliance on these sections in this Court because of inadequate briefing. Notably, the Comptroller fails to provide a single sentence explaining why Section 552.115 supports its argument. *See Johnson*, 178 S.W.3d at 240-241 (a single sentence assertion without any argument, analysis, or citation to legal authority amounted to waiver because it was not sufficient to articulate a clear and concise argument even under a "liberal construction" of the brief); *Franklin*, 961 S.W.2d at 711 (attenuated, unsupported arguments are waived). Likewise, the Comptroller's single conclusory sentence that Section 552.130 excepts all personally identifying information contained in a driver's license, including date of birth information, from being disclosed pursuant to the TPIA is insufficient, particularly in light of the fact that Section 552.130 does not even mention date of birth information. *See Johnson*, 178 S.W.3d at 240-241.

Finally, as to the merits, the Comptroller's argument overlooks the important fact that exceptions to disclosure under the TPIA must be express and are narrowly construed. *Sharp*, 904 S.W.2d at 680; *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157-58; TPIA Section 552.006. The Comptroller has not provided a single reason why either Section 552.115 or Section 552.130 should be construed so broadly as to preclude disclosure here.

V. The Employees Retirement System's statute does not establish the legislative intent to exempt state employees' date of birth information from disclosure.

The Comptroller also argues that information in the state employee payroll database is protected from disclosure under Texas Government Code Section 815.503(a), which is the Employees Retirement System (ERS) statute, and that such protection removes member records from the coverage of the TPIA. Appellant's Brief at 13-14. To that end, the Comptroller asserts—without any support in the evidence—that its payroll database contains the same birth date information on pubic employees and retirees as does the ERS database. Appellant's Brief at 14. The conclusion urged by the Comptroller, moreover, would shut down any information about state employees held by the Comptroller or any other governmental body that is also located in the pension records of the pension system. Such a conclusion would violate the mandatory disclosure requirement of Section 552.022(a)(2) and effectively eviscerate the TPIA. Accordingly, it should be rejected by this Court.

VI. The trial court erred in failing to award *The News* its attorney's fees.

A. *The News* is entitled to its attorney's fees under the TPIA.

1. *The News* satisfied all of the elements for recovery of its attorney's fees under Section 552.323(b).

Section 552.323(b) authorizes a court to award costs of litigation and reasonable attorney's fees to a substantially prevailing party. It provides:

> (b) In an action brought under Section 552.353(b)(3), the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff *or defendant* who substantially prevails. In exercising its discretion under this subsection, the court shall consider whether the *conduct of the officer for public information of the governmental body* had a reasonable basis in law and whether the litigation was brought in good faith.

TEX. GOV'T CODE § 552.323(b) (emphasis added).

As an initial matter, the Comptroller argued below that *The News* is not entitled to its attorney's fees under Government Code Section 552.323(a) because the Comptroller, not *The News*, is the plaintiff in this case. 1st Supp. CR 114. *The News*, however, sought its attorney's fees pursuant to 552.323**(b)**, not 552.323**(a)**. 1st Supp. CR 101. Thus, *The News* is not required to be a plaintiff to recover its attorney's fees under the TPIA under the statute's plain language.

To recover attorney's fees under Section 552.323(b), *The News* was required to show that (i) the action was brought under Section 552.353(b)(3); (ii) that it, as a defendant, was the party who substantially prevailed; and (iii) the officer for public information of the governmental body did not have a reasonable basis in law to refuse disclosure of the information or the litigation was brought in bad faith. TEX. GOV'T CODE § 552.323(b).

First, the action was brought under Section 552.353(b)(3), as incorporated by Section 552.324. The Comptroller's petition pleaded that suit was brought pursuant to Section 552.324. CR 3. Section 552.324, in turn, provides that a governmental body may only file suit in accordance with Section 552.353. CR 183. Section 552.353 provides in pertinent part:

> (a) An officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter.

> (b) *It is an affirmative defense to prosecution under Subsection (a) that the officer for public information reasonably believed that public access to the requested information was not required and that the officer:*
>
> (3) *not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, filed a petition for a declaratory judgment, a writ of mandamus, or both, against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, and a petition is pending.*

TEX. GOV'T CODE § 552.323(a), (b)(3) (emphasis added).

Second, *The News* intervened in the action as a matter of right under Section 552.325(a) as a defendant to the Comptroller's claims and substantially prevailed. CR 31. As Texas courts have long recognized, "when filing [a plea in intervention] the intervenor either 'joins the plaintiff in claiming what is sought by the complaint or (unites) with the defendant in resisting the claims of the plaintiff, or (demands) something adversely to them both.'" *Wilson v. Wilson*, 601 S.W.2d 104, 105 (Tex.Civ.App.—Dallas 1980, no writ) (quoting 1 R. McDonald, Texas Civil Practice § 3.46, at 393-94). In this case, *The News* intervened as a defendant, uniting with the Attorney General to resist the relief requested by the Comptroller. 1st Supp. CR 101. The Comptroller has basically conceded as much by arguing that *The News'* position is redundant of the Attorney General's. 1st Supp. CR 115. And, as noted, *The News* substantially prevailed when the trial court granted *The News'* summary judgment, finding that the Comptroller must release the date of birth information requested by *The News*. CR 169.

Finally, as demonstrated above, the Comptroller had no reasonable basis in law to argue that date of birth information is excepted from required public disclosure under the

TPIA. This is particularly clear in light of the fact that the Comptroller has abandoned its public revelation of private facts theory on appeal. Brief at 7-8. The Comptroller, moreover, has failed to cite a single Attorney General opinion or any Texas appellate decision holding that date of birth information can be withheld. CR 2-9, 86-94.

2. The trial court's reasoning for failing to award *The News* its attorney's fees under Section 552.323(b) is unpersuasive.

The trial court declined to award *The News* its attorney's fees under Section 552.323(b) for two reasons. First, the trial court, imposing a narrow construction on Section 552.323(b), found that an award of attorney's fees was not appropriate because the suit was not brought by a "public information officer" but rather by a "governmental body," i.e., the Comptroller. CR 184. In reaching its conclusion, the trial court relied upon Section 552.324(b), which states: "The governmental body must bring suit not later than the 30th calendar day....This subsection does not affect the earlier deadline for purposes of Section 552.353(b)(3) for a suit brought by an officer for public information." The trial court found that this section "dispels any doubts that [Section 552.323(b)] recognizes a distinction between a [public information officer and a governmental body]." CR 184. Second, the trial court also found that because the Comptroller did not bring suit "by the 10th calendar day" after receipt of the Attorney General's letter ruling that *The News'* request for attorney's fees was defeated. CR 184.

The trial court's reasoning is fatally flawed. Initially, under the TPIA, "governmental body," among other things, "means (i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or

legislative branch of state government and that is directed by one or more elected or appointed members." TEX. GOV'T CODE § 552.003(1)(a)(i). The Comptroller's office is unquestionably a governmental body. The TPIA, however, does not define "public information officer." *See* TEX. GOV'T CODE § 552.003. That said, Section 552.323(b), for the purpose of attorney's fees and costs, assumes that a public information officer is acting as the governmental body. Once more, Section 552.323(b) provides:

> In an action brought under Section 552.353(b)(3), the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. In exercising its discretion under this subsection, the court shall consider whether the *conduct of the officer for public information of the governmental body* had a reasonable basis in law and whether the litigation was brought in good faith.

TEX. GOV'T CODE § 552.323(b) (emphasis added).

In other words, Section 552.323(b) assumes that the actions of a public information officer are those of the governmental body. Simply stated, the trial court drew a superficial, hyper-technical distinction between "public information officer" and "governmental body." This is particularly true since *The News* made its request directly to the Comptroller's public information officer. CR 10. This Court should reject the trial court's hyper-technical analysis.

Further, the notion that an award of attorney's fees can be defeated by a governmental body waiting more than ten (10) days to file suit is supremely unfair. Surely the Legislature did not intend to preclude litigants who received a favorable ruling from the Attorney General to be precluded from recovering their attorney's fees based

solely on the date the adverse party—i.e., the governmental body—appealed the Attorney General's ruling.

In conclusion, for these reasons, the trial court erred in failing to award *The News* its attorney's fees under the TPIA.

B. *The News* is entitled to its attorney's fees under the Uniform Declaratory Judgment Act.

1. *The News'* request for its attorney's fees is "equitable and just."

The Comptroller brought this action pursuant to the Uniform Declaratory Judgment Act ("UDJA"), Texas Civil Practice and Remedies Code Section 37.001 *et seq.* CR 5, 8. Likewise, *The News* first requested declaratory relief in its initial pleading in the trial court. CR 35. *The News*, moreover, specifically stated in its initial motion for summary judgment, which was filed concurrently with its Petition in Intervention, that it was seeking a declaration of its rights under Texas Civil Practice and Remedies Code Section 37.004(a). CR 53.

Texas Civil Practice and Remedies Code Section 37.009 provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." When, as here, the plaintiff has invoked the UDJA, the Court may award attorney's fees against the plaintiff in favor of another party. *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Dist.*, 198 S.W.3d 300, 318 (Tex.App.—Texarkana 2006, pet. denied) ("The rule that a mirror-image counterclaim for declaratory relief will not support an award of attorney's fees only applies when a plaintiff does not request declaratory relief."). In other words, in cases brought under the

UDJA, an award of attorney's fees is not limited to the plaintiff or to a party who first sought affirmative relief. *Knighton v. Int'l Bus. Machines Corp.*, 856 S.W.2d 206, 210 (Tex.App.—Houston [1st Dist.] 1993, writ denied) ("When a claimant, like Knighton, has properly invoked the declaratory judgment statute, either party may plead for and obtain attorney's fees."). Thus, a court may award attorney's fees to either a plaintiff bringing a declaratory judgment action or a defendant defending the plaintiff's request for declaratory judgment—the trial court is not required to award attorney's fees to the party bringing suit. *Save Our Springs Alliance*, 198 S.W.3d at 318.

Generally speaking, it is proper to award attorney's fees to the prevailing party in a declaratory judgment action. *Spiller v. Spiller*, 901 S.W.2d 553, 560 (Tex.App.—San Antonio 1995, writ denied). As noted, all that UDJA requires is that an award of attorney's fees be "equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. In this case, it is certainly "equitable and just" to award attorney's fees because *The News* is the prevailing party and because, as demonstrated, the Comptroller has no legal basis to support its position. In short, when, as here, a governmental body unreasonably refuses to turn over information that is clearly intended for public disclosure by statute, it is equitable and just to award attorney's fees to the requestor. *The News* should not have to bear its own costs for obtaining information that the Comptroller had no right to withhold.

2. The trial court's reasoning for failing to award *The News* its attorney's fees under the UDJA is unpersuasive.

After concluding that the trial court granted summary judgment for *The News* under the TPIA, the trial court found that *The News* was not entitled to its attorney's fees under the UDJA because the Legislature established the TPIA as an exclusive remedy. CR 184. In reaching its conclusion, the trial court found it persuasive that the TPIA provides for declaratory relief. CR 184. The trial court also noted that the TPIA's "shall award...except" and "may...shall consider" directives are incompatible with the "equitable and just" directive of the UDJA. *Id.*

However, the trial court's assertion that the TPIA provides a remedy exclusive of the UDJA has been rejected by the Texas Supreme Court. In *City of Garland*, the Texas Supreme Court stated that the TPIA and UDJA were not mutually exclusive. 22 S.W.3d at 357. In the words of the Court,

> The Declaratory Judgments Act gives courts the power to declare rights, status and other legal relations, whether further relief is claimed or could be claimed. *See* TEX. CIV. PRAC. & REM. CODE § 37.003(a). While the Public Information Act does not expressly recognize a governmental body's right to bring a declaratory judgment action, it does not expressly prohibit a governmental body from bringing a declaratory judgment action. Indeed, both requestors and governmental bodies have brought declaratory judgment actions in open records cases since the Act's inception.

Id.

Additionally, contrary to the trial court's conclusion, the "may...shall consider" directive found in Section 552.323(b) is entirely compatible with the UDJA. As noted, Texas Civil Practice and Remedies Code Section 37.009 similarly provides that a court "*may* award costs and reasonable and necessary attorney's fees as are equitable and just."

TEX. CIV. PRAC. & REM. CODE § 37.009 (emphasis added). The fact that the trial court "shall consider whether the conduct of the officer for public information of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith" has no bearing on whether the trial court "may" award attorney's fees and costs. *See* TEX. GOV'T CODE § 552.323(b).

For these reasons, the trial court erred in failing to award *The News* its attorney's fees under the UDJA.

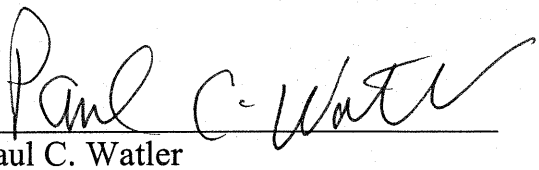
PRAYER

For the foregoing reasons, The Dallas Morning News, L.P. respectfully prays that this Court affirm the trial court, in part, and reverse and remand on the issue of attorney's fees. *The News* also respectfully prays for such further relief, general or special, to which it may be justly entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

Dated: May 11, 2007



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2007 a true and correct copy of the foregoing Brief for Appellee/Cross-Appellant was served on all counsel of record listed below in accordance with Rule 9.5(c) of the Texas Rules of Appellate Procedure via certified mail, return receipt requested:

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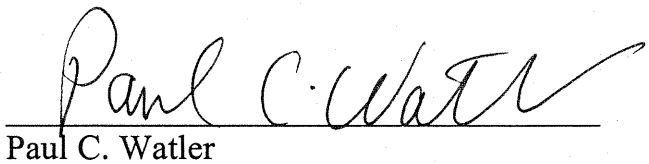

Paul C. Watler

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

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

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

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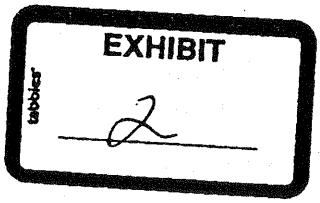
Re: D-1-GN-06-001120; *Texas Comptroller of Public Accounts vs. Attorney General of Texas vs. The Dallas Morning News;* in the 126th Judicial District, Travis County, Texas.

Dear Counsel:

The Dallas Morning News' Second Motion for Summary Judgment states, on page 2, that the suit was brought "by the Comptroller under TPIA Section 552.324 and the UDJA." On page three, however, it states that it was "brought by the Comptroller under TPIA section 552.353 (b) (3)." I will assume that the News is arguing that it was brought under all three statutory provisions. The Comptroller's petition does not cite Section 552.353 (b) (3). I will also, assume, therefore, that the News is arguing that the petition *must be* interpreted as a petition under Section 552.353 (b) (3).

Section 552.353, paragraph (b) states that it is an affirmative defense to criminal prosecution "that the officer" took one or more of three listed actions, (3) of which is "not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, filed a petition for a declaratory judgment, a writ of mandamus, or both ...."



The first problem with the News' argument is that the suit was not brought by a public information officer but rather by the governmental body. Section 552.324 (b) dispels any doubt that the statute recognizes a distinction between the two. There it states "[t]he governmental body must bring the suit not later than the 30th calendar day .... This subsection does not affect the earlier deadline for purposes of Section 552.353 (b) (3) for a suit brought by an officer for public information." Second, the suit was not brought "by the 10th calendar day" after receipt of the attorney general opinion. Therefore, the suit does not meet the description of a suit under the section, and, therefore, the News has failed to establish that provision as authority for awarding fees.

The alternative grounds urged for awarding fees is the UDJA. The Comptroller pled the UDJA as well as the Public Information Act. The partial summary judgment grants relief based on the Public Information Act. The granting of a summary judgment on one cause of action does not constitute a ruling on any other cause of action. If the Comptroller had moved for partial summary judgment on the Public Information Act and had prevailed, it could still seek fees under the UDJA. So too may the News. Neither party, however, is entitled to fees under the UDJA because, through the Public Information Act, the legislature has established an exclusive remedy. The PIA itself provides for declaratory relief, which is the clearest indication that the legislature intended it to exclude the UDJA. Moreover, the PIA specifies when attorney's fees are authorized and, in those instances, the "shall award ... except" and "may ... shall consider" directives are incompatible with the "equitable and just" directive in the UDJA.

Therefore, I will deny the motion. A copy of my order follows.

Sincerely,

STEPHEN YELENOSKY
Judge, 345th District Court
Travis County, Texas

SY/nh

Orig: Ms. Amalia Rodriguez-Mendoza, Travis County District Clerk