

**NO.**

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IN THE SUPREME COURT OF TEXAS

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TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,  
Petitioner,

V.

ATTORNEY GENERAL OF TEXAS  
and  
THE DALLAS MORNING NEWS, LTD,  
Respondents.

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PETITION FOR REVIEW

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**ORAL ARGUMENT REQUESTED**

March 3, 2008

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## STATEMENT OF THE CASE

*Nature of the Case:* The Comptroller of Public Accounts filed suit against the Attorney General challenging an open records ruling that date of birth, in conjunction with a public employee's name and other identifying information, is public information subject to disclosure under the Public Information Act. *The Dallas Morning News*, which had requested the information, intervened and sought attorneys' fees.

*Orders signed by:* Honorable Lora Livingston - declaring a public employee's date of birth is public information.  
Honorable Stephen Yelenosky - denying the *News*' request for attorneys' fees.

*Trial courts:* 261<sup>st</sup> Judicial District Court, Travis County  
345<sup>th</sup> Judicial District Court, Travis County

*Trial Courts' Disposition:* On motions for summary judgment, the district court agreed with the Attorney General, concluding that date-of-birth information is public information subject to disclosure under the Act; but it denied intervenor's request for attorneys' fees. *See Appendix, Tabs A and B.*

*Parties in Court of Appeals:* Plaintiffs/Appellant/Cross-Appellee Texas Comptroller of Public Accounts  
  
Defendant/Appellee Attorney General of Texas  
  
Intervenor/Cross-Appellant *The Dallas Morning News*

*Appellate District:* Third, sitting in Austin, Texas.

*Panel:* Justice Henson, joined by Chief Justice Law and Justice Waldrop

*Citation:*

*Texas Comptroller of Public Accounts v. Attorney General of Texas*; No. 03-07-00102-CV; \_\_\_ S.W.3d \_\_\_, 2008 WL 160173 (Tex.App.--Austin 2008, Jan. 17, 2008, pet. filed). See Appendix, Tab C.

*Court of Appeals' Disposition:* Affirmed

## **STATEMENT OF JURISDICTION**

The Supreme Court has jurisdiction of this case under Government Code section 22.001(a)(6).

## **ISSUES PRESENTED**

1. Is date of birth, in conjunction with a public employee's name and other identifying information, a protected privacy right under common law and thus exempt from disclosure under section 552.101 of the Public Information Act?
2. Can the district court award attorneys' fees and costs to a requestor who intervenes in a suit brought by a government officer to challenge the Attorney General's open records ruling?

## STATEMENT OF FACTS

Pursuant to the Public Information Act (the "Act" or "PIA") *The Dallas Morning News* (the "*News*") requested information from the state employee payroll database maintained by the Texas Comptroller of Public Accounts (the "Comptroller"). CR 10. For each public employee, the requested information included the employee's full name, date of birth, job description, agency, salary, race, sex, work address, date of initial employment, pay rate, and work hours. The information also identified those employees who are peace officers. CR 97-98.

The Comptroller, concerned about the danger of identity theft, offered to provide the *News* with the state employees' ages. This offer was rejected, so the Comptroller sought an opinion from the Attorney General as to whether disclosure was required, asserting that the wholesale release of birth dates for nearly 145,000 state employees, along with other identifying information, implicated common-law and constitutional privacy interests. CR 2-24.

In response, the Attorney General issued Letter Ruling No. OR2006-09138, which concluded that public employees' dates of birth are public information that must be released to the requestor. *See* Appendix, Tab D, CR 14-25.

The Comptroller declined to release the employees' dates of birth and, instead, filed suit under section 552.324 to challenge the Attorney General's ruling. The *News* intervened. CR 30-49. On cross-motions for summary judgment the district court declared that employee

date-of-birth information is public and therefore subject to disclosure under the Act . See Appendix Tab A, CR 169.

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

The Austin Court of Appeals affirmed. See Appendix Tab D.

### SUMMARY OF THE ARGUMENT

*First issue:* Policy considerations compel recognition that date-of-birth information in combination with other identifying data is a protected privacy interest under common law. There is no question that date of birth, in conjunction with other personal information, can be used to commit identity theft, and to access other sensitive information about an individual. For this reason, state and federal courts have concluded that date of birth implicates common-law privacy—a development that has been consistent legislative trends. Texas statutes, including the PIA, also evidence legislative sensitivity toward the release of personally identifying information. Although the precise issue here is one of first impression, at least three separate common-law privacy interests support protection of the information: intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts about the individual; and appropriation of an individual's name or likeness.

*Second issue:* The Comptroller filed suit under sections 552.324 and 552.325. As a matter of law, then, neither the Attorney General nor the intervenor was entitled to attorneys' fees, as those sections do not contain any language that could be reasonably construed as a waiver of sovereign immunity. Section 552.353, which does permit the recovery of attorneys' fees, has nothing to do with the Comptroller's suit, since as a matter of law, it was not—nor could it have been—filed under that section.

### ARGUMENT

**I. The court of appeals erred in concluding that date of birth is not a protected privacy interest under common law.**

**A. Recent technological developments, and legal trends in other states, strongly counsel in favor of common-law protection of date-of-birth information.**

The first issue presented—whether date of birth in conjunction with an employee's name is a protected privacy interest under common law—is one of first impression for this Court. The need to protect date-of-birth information has also generated considerable interest and legal ferment in other states.

Without question, a date of birth obtained in combination with other data about an individual can be used to commit identity theft. *Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535-36 (N.Y. Sup. 2004); *see also Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz.1998). And identity theft, as the Attorney General's letter ruling concedes, is one of the fastest growing criminal and consumer offenses in the 21<sup>st</sup> Century. Tex. Att'y Gen. OR2006-09138 at 3; *Daly*, 782 N.Y.S.2d at 535.

The Federal Trade Commission estimates that during the five-year period prior to 2003, there were 27.3 million reported cases of identity theft, causing billions of dollars in damages in the United States alone. *Daly*, 782 N.Y.S.2d at 535 (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)).<sup>1</sup> The risk of financial harm is not limited to public employees, moreover: many types of government services—including education, occupational licensing, and the provision of health-care benefits—are conditioned on the recipient’s disclosing his date of birth to one or more state agencies. This Court observed in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976) that “[m]uch information is disclosed to the government as a prerequisite to the receipt of government benefits which are of such importance to the recipient that the disclosure of private information incident thereto may hardly be considered voluntary.”

Even setting aside the risk of identity theft, date of birth can be used to obtain other sensitive information about an individual. The Arizona Supreme Court found that a person can use another individual’s name and date of birth to obtain criminal records, arrest records, driving records, states of origin, political party affiliations, current and past addresses, civil

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<sup>1</sup> According to the FTC study, each victim spent an average of 30 hours straightening out the problems caused by identity theft, and an average of 60 hours in cases that involved the fraudulent opening of accounts. *Id*; see also [http://www.oag.state.tx.us/ag\\_publications/pdfs/IDTheft\\_Affidavit.pdf](http://www.oag.state.tx.us/ag_publications/pdfs/IDTheft_Affidavit.pdf) (Attorney General’s Identity Theft Victim Kit).



litigation records, liens, properties owned, credit histories, financial accounts, and possibly medical and military histories and insurance or investment portfolios. *Scottsdale Unified School Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz.1998) Certain public information websites allow individuals to locate this information, using only a name and date of birth. Tex. Att’y Gen. OR2006-09138 at 3.<sup>2</sup>

In view of these developments, state and federal courts have shown little hesitation in concluding date of birth is private information, and that its disclosure is a clear invasion of personal privacy. *See Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y.1991) (applying balancing test under exemption 6 of the federal Freedom of Information Act, 5 U.S.C. § 552); *Scottsdale Unified School Dist. v. KPNX Broad. Co.*, 955 P.2d 534 (Ariz.1998) (applying balancing test under state law); *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan. 2005 ) (same); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994) (same); *see also In re Crawford*, 194 F.3d 954 (9<sup>th</sup> Cir. 1999), *cert denied*, *Fern v. U.S. Trustee*, 528 U.S. 1189 (2000) (grounding individual’s expectation of privacy for his or her social security number in concern for risk of identity theft and other forms of fraud).<sup>3</sup>

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<sup>2</sup> Of course, suspicion on the part of a government official, no matter how well-founded, that a wholesale request for personal identifiers is being made as part of a fraudulent scheme to commit identity theft cannot serve as grounds for denying the request. Indeed, such suspicions cannot even serve as the basis for further inquiry, since the Act expressly precludes inquiry into the intended use—or potential misuse—of the information sought. *See* TEX. GOV’T CODE Ann. § 552.222(a) (Vernon Supp. 2007).

<sup>3</sup> In a request similar to this one, the Delaware Attorney General found that the public release of the dates of birth of all state employees would constitute an invasion of personal privacy under that state’s personnel file exception. *See* Del. Atty. Gen. Op. No. 94-1019 (1994).

Judicial protection of date-of-birth information has been consistent with legislative trends. A majority of the fifty states now exempt date of birth from disclosure when an open records request is made for the personnel files of government employees. Tex. Att’y Gen. OR2006-09138 at 3. Several states protect the information under an “unwarranted invasion of personal privacy” exemption—see Haw. Rev. Stat. § 92F - 13(1); 5 Ill. Comp. Stat. 140/7 (1)(b); Kan. Stat. Ann. § 45-221(30); Ky. Rev. Stat. § 61.878(1)(a); Mass. Gen. Laws Ann. ch. 66, §10; Mich. Comp. Laws Ann. § 15.243; N.H. Rev. Stat. Ann. § 91-A:5; N.J. Stat. Ann. § 47:1A-10; N.Y. Pub. Off. Law § 89(2)(b)(iv); Utah Code Ann. § 63-2-302(2)(d)—while South Carolina grants such protection under a similar “unreasonable invasion of personal privacy” exemption. See S.C. Code Ann. § 30-4-40(a)(2).

Other states protect date of birth as part of an exception for employee personnel records. See Ariz. Admin. Code R2-5-105; Del. Code Ann. tit. 29 § 10002; Kan. Stat. Ann. § 45-221(4); Iowa Code § 22.7; Md. Code Ann., State Gov’t § 10-616(i)(1); Miss. Code Ann. § 25-1-100; N.D. Cent. Code §44-04-18.1; Or. Rev. Stat. § 192.502(3); R.I. Gen. Laws § 38-2-2; Va. Code Ann. § 2.2-3705.1(1); Wyo. Stat. Ann. § 16-4-203. The state of Georgia makes the information confidential “if [it is] technically feasible at a reasonable cost.” See Ga. Code Ann. § 50-18-72 (a)(11.3)(A). Still other states protect the information by unofficial policy. See Tex. Att’y Gen. OR2006-09138 at 4. Finally, the state of Washington provides protection under a state plan to curtail identity theft. *Id.*

**B. Texas statutes also indicate legislative sensitivity toward the release of personal identifying information.**

The Texas Legislature has also recognized the need to protect information that can be used to access other sensitive information, or used to cause financial harm. Section 35.48 of the Business and Commerce Code, for example, mandates that when a business disposes of records containing personal identifiers, it must render the information unreadable or indecipherable—by shredding, erasing or by other means. TEX. BUS. & COM. CODE Ann. § 35.48(d) (Vernon Pamp. 2007).

Section 35.48 specifically defines “personal identifying information” to include an individual’s date of birth. TEX. BUS. & COM. CODE Ann. § 35.48(a) (Vernon Pamp. 2007).

Failure to dispose of records in the manner prescribed can result in civil penalties, and the Attorney General is expressly authorized to bring suit to recover such penalties, as well as costs and reasonable attorneys’ fees incurred in bringing the enforcement action. TEX. BUS. & COM. CODE Ann. § 35.48(f) (Vernon Pamp. 2007).

The PIA, too, protects specific personal identifiers from disclosure. *See* TEX. GOV’T CODE §§ 552.136 (making confidential “a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body”), 552.147 (excepting from public disclosure “the social security number of a living person”).

**C. Texas common law, which is incorporated into the PIA, also supports recognition of a privacy interest in date-of-birth information.**

In addition to specific exemptions, the PIA contains an exemption for “information considered to be confidential by law, either constitutional, statutory or by judicial decision.” TEX. GOV’T CODE Ann. § 552.101 (Vernon 2004) (emphasis added). Texas common law, in turn, has recognized the tort of “invasion of privacy.” *Billings v. Atkinson*, 489 S.W.2d 858, 682 (Tex. 1973); *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. *Industrial Found.*, 540 S.W.2d at 682.

This definition shows that invasion of privacy is actually a recognition of several privacy interests. Professor Prosser has categorized these interests into four distinct categories: (1) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. *Id.* (quoting William L. Prosser, *Privacy*, 48 CAL.L.REV. 383, 389 (1960)). As shown below, three of these privacy interests support protection of date-of-birth information: intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; public disclosure of embarrassing private facts about the plaintiff; and appropriation of an individual’s name or likeness.

**1. Intrusion upon seclusion, or into private affairs.**

The first privacy interest listed above—freedom from unwarranted intrusion—was considered in *Billings v. Atkinson*, 489 S.W.2d 858, 682 (Tex. 1973). There, this Court concluded that the installation of a telephone wiretap was an invasion of privacy for which the common law provided a remedy. Just as with the privacy interest asserted here, Texas before *Billings* did not specifically define common-law privacy to include protection from wiretapping. The lack of a specific precedent, however, did not deter this Court from concluding that common-law privacy interests were implicated.

One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization . . . have increased [man's] need for privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity.

*Id.* at 860 (quoting 62 AM. JUR. 2D *Privacy* § 4). The technological changes discussed in *Billings* required recognition, for the first time, that the common law protected against not only physical eavesdropping but wiretapping as well.

The court below concluded the language in *Billings* did not reach the privacy interest asserted here. It emphasized that the cause of action has been typically associated with either a *physical* invasion of a person's property or with eavesdropping.<sup>4</sup> But, although this

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<sup>4</sup> *Texas Comptroller of Public Accounts v. Attorney General of Texas*; No. 03-07-00102-CV; 2008 WL 160173 at \*5 (Tex. App.—Austin, Jan. 17, 2008, pet. filed).

emphasis may have been reasonable when *Billings* was handed down thirty years ago—when the internet did not yet exist and the crime of identity theft was virtually unknown—it is hardly sound in view of present-day realities. Today, owing to technological changes, concerns about cyberspace are just as compelling as concerns about physical space. The court of appeals analysis did not take into account these present-day realities.

But the very essence of the common law has been its capacity for growth and adaptation to changing circumstances, as this Court emphasized in *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975):

The system and tradition that we call the ‘common law’ is not a body of law which evolved within historic England or a bygone age to stand immutable ever afterward. It is the guide and governance of this Court today in the absence of a mandate of the Constitution or statute. Learned Hand said that our common law is ‘a combination of custom and its successive adaptations. The judges receive it and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas.’ *THE SPIRIT OF LIBERTY* p. 52 (1952). ‘This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.’ *Hurtado v. California*, 110 U.S. 516, 530, 4 S.Ct. 111, 118, 28 L.Ed. 232 (1884). ‘(A)s life is always in flux, so the common law, which is merely life’s explanation as the lawyer and the judge, law’s spokesmen, are always making it, must also be.’ Hutcheson, *The Common Law of the Constitution*, 15 *Tex.L.Rev.* 317, 319 (1937).

*Id.* at 608.

Further, section 552.101 anticipates *and incorporates* evolving common-law principles into the PIA. By including an exemption for common-law privacy interests, the Legislature clearly recognized the need for a degree of flexibility, given that it could not

enact a statutory laundry list exhaustively identifying each and every policy interest militating against disclosure. Nor could it anticipate developments that might give rise to new common-law privacy concerns. For this reason, the judiciary was made a part of the process so that it could clarify common-law privacy interests through careful adjudication of specific cases and controversies. *See Morales v. Ellen*, 840 S.W.2d 519, 524-25 (Tex. App.—El Paso 1992, writ denied) (concluding names of witnesses and their detailed affidavits in sexual harassment investigative file implicated privacy interests).

**2. Public disclosure of private facts.**

The Comptroller also relied on the second privacy interest identified by Professor Prosser: public disclosure of embarrassing or private facts about the individual. In *Industrial Foundation*, section 552.101 was interpreted to include this privacy interest. 540 S.W.2d at 682. There, this Court observed that: “. . . the precise requirements for showing an invasion of this particular right of privacy have not yet been defined by the courts of this state.” *Id.*

But the Court added:

It is generally recognized . . . that an injured party, in order to recover for public disclosure of private facts about himself must show (1) that publicity was given to matters concerning his private life, (2) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities, and (3) that the matter publicized is not of legitimate public concern.

*Id.* (citing WILLIAM L. PROSSER, LAW OF TORTS 809 (4<sup>th</sup> ed. 1971)).

Addressing this privacy interest, the court of appeals concluded that date of birth was not the kind of information that, if published, would be “highly offensive to a reasonable person of ordinary sensibilities.”<sup>5</sup> The court’s analysis, however, failed to recognize that the disclosure of date of birth is highly offensive because it can be used to access other “highly intimate” or sensitive information. *See supra* at 4-5. Information that be used to access sensitive information is itself sensitive information, the release of which would be highly offensive to reasonable person as a matter of law. It was error for the court of appeals to conclude otherwise.

In analyzing this privacy interest, court of appeals believed it could not consider the problem of identity theft—or the potential misuse of the information to obtain other sensitive data—because under the PIA the purpose of an open records request cannot be considered. *See* TEX. GOV’T CODE Ann. § 552.222(a) (Vernon Supp. 2007): But section 552.222(a) applies only to the government official who receives and responds to the open records request. It does not prevent *a court* from considering potential misuse of personal information when it is deciding whether that information implicates a common-law privacy interest. *See Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz.1998).

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<sup>5</sup> *Texas Comptroller of Public Accounts v. Attorney General of Texas*; No. 03-07-00102-CV; 2008 WL 160173 at \*6 (Tex. App.—Austin, Jan. 17, 2008, pet. filed)



**3. Appropriation of an individual's name or likeness.**

Perhaps most compelling is the third privacy interest: an individual's common-law right to be free from appropriation of his name or identity. For it is this privacy interest that cuts to the heart of identity theft, and to the legitimate concerns of individuals who have disclosed personally identifying information to one or more state agencies in order to obtain employment or government services. As the Comptroller has shown above, there is little doubt that date of birth obtained in combination with other data about an individual can be used to commit identity theft. *See supra* at 3-4; *Daly*, 782 N.Y.S.2d 530 at 535-36; *Scottsdale Unified Sch. Dist.*, 955 P.2d 534 at 539.<sup>6</sup>

**II. The Attorney General and Intervenor were not entitled to attorneys' fees as a matter of law.**

**A. A clear waiver of sovereign immunity is required and, here, there is none.**

Although the court of appeals affirmed the district court's order denying attorneys' fees, it did so under an abuse of discretion standard, rather than as a matter of law, leaving open the possibility that government officials in the future who challenge an open records ruling under sections 552.324 and 552.325 may be liable for attorneys' fees.

There is no question that the Comptroller sought relief under sections 552.324 and 552.325 of the PIA. CR 3-25. The question, then, is whether the Legislature created a clear

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<sup>6</sup> *See* [http://www.nydailynews.com/money/2007/06/04/2007-0604\\_excrook\\_has\\_lowdown\\_on\\_guarding\\_your\\_nam.html](http://www.nydailynews.com/money/2007/06/04/2007-0604_excrook_has_lowdown_on_guarding_your_nam.html)

and unambiguous waiver of sovereign immunity for attorneys' fees in suits filed pursuant to these sections. *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006).<sup>7</sup> Clearly, it did not. There is no language in either section that could be reasonably construed as shifting attorneys' fees or waiving sovereign immunity.

It is precisely for this reason that the Comptroller, acting in her official capacity, brought suit under these sections of the PIA. She wished to challenge the Attorney General's letter ruling, as permitted by the Act, without the risk of a mandamus or enforcement action being brought against her or her public information officer pursuant to section 552.323. The legislature enacted section 552.324 so that governmental officers who wish to challenge an open-records ruling could have their day in court without fear of becoming liable to opposing parties for their attorneys' fees.

- B. The waiver in section 552.323(b) has no relevance to the Comptroller's suit, since it was not brought, nor could it have been brought, under section 552.353(b)(3).**

The Attorney General and the *News* argued that suit brought by the Comptroller under sections 552.324 and 552.325 is necessarily a suit under section 552.353(b)(3), and the court of appeals seemed to agree. *Texas Comptroller of Public Accounts v. Attorney General of Texas*; No. 03-07-00102-CV; 2008 WL 160173 at \*8 (Tex. App. - Austin, Jan. 17, 2008, pet. filed). But again, the Comptroller's suit was not brought under section 552.353(b)(3), nor

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<sup>7</sup> See also TEX. GOV'T CODE § 311.034 ("in order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless waiver is effected by clear and unambiguous language").

could it have been. The Comptroller filed her suit well after the 10-day deadline in section 552.353(b)(3) had expired, but within the 30-day deadline set out in section 552.324(b).

Even assuming *arguendo* that the Comptroller had filed suit within the 10-day period in section 552.353(b), subsection (a) makes clear that the statute is limited to criminal prosecution of public information officers who, with criminal negligence, refuse to give access to public information. A public information officer that has acted with criminal negligence has acted beyond his or her authority in an *ultra vires* manner. Under Texas state law, public officials who act wholly without authority become personally liable for their torts and for willful and malicious acts.<sup>8</sup> A state official's illegal or unauthorized actions are not acts of the state.<sup>9</sup> In such situations, a private litigant does not need legislative permission to sue the state for a state official's violations of state law.<sup>10</sup>

In sum, Section 552.353(b)(3) creates an affirmative defense for public officials who have acted *ultra vires* and are facing criminal prosecution. It has nothing to do with a lawsuit timely filed by a government official under section 552.324 and 552.325. Here, the Comptroller was acting in her official capacity. Because section 552.353 applies only to officials who are acting outside their official capacity, it necessarily does not and cannot apply to a state agency or an officer in her official capacity.

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<sup>8</sup> See *Campbell v. Jones*, 264 S.W.2d 425, 427 (Tex. 1954).

<sup>9</sup> *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 404 (Tex. 1997) citing to *Director of the Dept. of Agric. & Env't v. Printing Indus. Ass'n of Texas*, 600 S.W.2d 264, 265-66 (Tex. 1980).

<sup>10</sup> *Director of the Dept. of Agric. & Env't*, 600 S.W.2d 264, 265-66 (Tex. 1980).

**CONCLUSION AND PRAYER**

Because the issues raised in this proceeding are important to the jurisprudence of this State, this Court should grant the Comptroller's petition and should grant such other and further relief to which the Comptroller shows herself entitled.

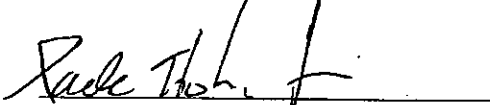
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**CERTIFICATE OF SERVICE**

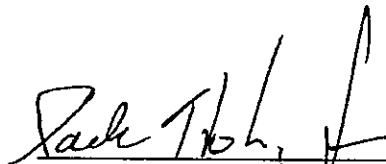
I hereby certify that the above and foregoing document, Petition for Review, was delivered as indicated on the 3<sup>rd</sup> day of March 2008, to the following counsel of record:

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