

NO. 08-0172

IN THE SUPREME COURT OF TEXAS

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,
Petitioner/Cross-Respondent,

v.

ATTORNEY GENERAL OF TEXAS,
Respondent,
and
THE DALLAS MORNING NEWS, L.P.,
Respondent/Cross-Petitioner.

CROSS-PETITION FOR REVIEW

PAUL C. WATLER
State Bar No. 20931600
JACKSON WALKER, L.L.P.
901 Main St., Suite 6000
Dallas, Texas 75202
Phone: (214) 953-6000
Fax: (214) 953-5822

*Attorney for The Dallas Morning News, L.P.,
Respondent and Cross-Petitioner*

April 2, 2008

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Parties to the Trial Court's Orders on Motion for Partial Summary Judgment and Second Motion for Summary Judgment:

Plaintiff/Appellant/Cross-Appellee/Petitioner

Texas Comptroller of Public Accounts

Trial and Appellate Counsel for Petitioner

Jack Hohengarten
Deputy, Financial Litigation
David C. Mattax
Division Chief, Financial Litigation
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 475-3503
Telecopier: (512) 477-2348
jack.hohengarten@oag.state.tx.us

Defendant/Appellee/Respondent

Attorney General of Texas

Trial and Appellate Counsel for Respondent Attorney General of Texas

Brenda Loudermilk
Chief, Open Records Litigation Section
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 475-0292
Telecopier: (512) 320-0167
Brenda.loudermilk@oag.state.tx.us

Intervenor/Cross-Appellant/Respondent/Cross-Petitioner

The Dallas Morning News, L.P.

Trial and Appellate Counsel for Respondent and Cross Petitioner The Dallas Morning News, L.P.

Paul C. Watler
State Bar No. 20931600
Jackson Walker L.L.P.
901 Main St., Suite 6000
Dallas, Texas 75202
Telephone: (214) 953 6000
Telecopier: (214) 953-5822
pwatler@jw.com

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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"), to the Texas Comptroller of Public Accounts ("Comptroller" or "CPA"). CR 5.

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. CPA filed suit against the Attorney General seeking declaration that date of birth information was not public. *The News* intervened as a matter of statutory right, seeking declaratory judgment that the information was public and for the recovery of statutory attorney's fees.

Trial court orders signed by:

Judge Lora Livingston, 261st District Court, Travis County
Judge Stephen Yelenosky, 345th District Court, Travis County

Trial court 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.

Judge Yelenosky denied summary judgment for *The News* on January 26, 2007 on the issue of attorney's fees, concluding that *The News* was not entitled to attorney's fees under section 552.323(b) of the Texas Government Code or Chapter 37 of the Texas Civil Practice and Remedies Code.

Parties in Court of Appeal:

Appellant / Cross-Appellee: Comptroller
Appellee: Attorney General of Texas
Appellee/Cross-Appellant: *The News*

Appellate District:

Third

Panel: Chief Justice Kenneth Law, Justices Diane Henson (author) and Alan Waldrop

Citation: 244 S.W.3d 629 (Tex.App.--Austin 2008, pet. pending). (App. D.)

Court of Appeals' Disposition: Affirmed.

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this case under section 22.0001(a)(6) of the Texas Government Code and of this Cross-Petition for Review under rule 53.7(c) of the Texas Rules of Appellate Procedure.

ISSUES PRESENTED ON CROSS-PETITION

Was *The News* entitled to summary judgment on the issue of attorney's fees under section 552.323(b) of the Texas Government Code or Chapter 37 of the Texas Civil Practice and Remedies Code after it had substantially prevailed on the merits of its Texas Public Information Act and Declaratory Judgment Act claims?

THE HONORABLE SUPREME COURT OF TEXAS:

Cross-Petitioner, The Dallas Morning News, L.P. (*The News*), submits this its Cross-Petition for Review (“cross-petition”) of the portion of the decision of the Third Court of Appeals, which failed to reverse the trial court’s judgment on attorney’s fees. This cross-petition is conditioned upon the Court granting the Petition for Review of the Comptroller. Should the Court deny the Comptroller’s Petition for Review, *The News* will withdraw its cross-petition.

STATEMENT OF FACTS

On November 18, 2005, *The News* made an open records request to the Comptroller for the state employees’ payroll database, including date of birth information of state employees. The request was made for routine purposes in order to obtain the most current version of the database available. First Supp. CR 49. *The News* had previously requested and received the state employees’ 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. Attorney General Abbott ruled that date of birth information is not protected under sections 552.101 and 552.102. CR 77.

Shortly 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* then intervened to obtain a declaration that the 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.

The Honorable Lora J. Livingston granted partial summary judgment for *The News* on September 6, 2006, on the merits of the public information act issue, 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 January 26, 2007 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 Texas Government Code or Chapter 37 of the Texas Civil Practice and Remedies Code. CR 186. The Court of Appeals affirmed both orders.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in failing to reverse the trial court on the issue of attorney's fees. *The News* was entitled to summary judgment that it recover its attorney's fees under the TPIA, section 552.323(b) of the Texas Government Code, or Chapter 37 of the Texas Civil Practice and Remedies Code.

ARGUMENT

I. The lower courts erred in failing to award *The News* its attorney's fees.

A. *The News* is entitled to its attorney's fees under the TPIA, Government Code § 552.323(b).

The News satisfied all of the elements for recovery of its attorney's fees under TPIA § 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).

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).

The Court of Appeals agreed that the suit was brought under section 552.353(b)(3). 244 S.W.3d at 640. The appellate court did not reach the second element, but based its decision on the third element.

The Court of Appeals affirmed the denial of summary judgment to *The News* on the issue of attorney's fees under TPIA, because it found there was no evidence that the Comptroller's suit lacked a reasonable basis in law or was filed in bad faith. *Id.* However, the opinion on the merits is replete with examples of the lack of a reasonable

basis for the suit filed by the Comptroller. Failure to advert to such a record constitutes an abuse of discretion, because it fails to take into account the guiding rules or principles.

For example, the appellate court found that:

- “it was undisputed that state employees’ dates of birth are public information”
- the Comptroller cited “no authority” for its privacy intrusion argument.
- the Comptroller made “unsupported assertions.”
- the Comptroller’s identity theft concerns were “speculative and unproven”
- no Texas court has ever found date of birth information within the zone of constitutional privacy.

244 S.W.3d at 635-640.

The Court of Appeals’ discussion in the fees portion of the opinion that the Comptroller’s argument was not based on an unreasonable interpretation of the law was relegated to a footnote. According to the footnote, the Attorney General acknowledged that some federal courts and courts in other states have recognized privacy protection for date of birth information. 244 S.W.3d at 641 n.9. However, both the Attorney General and the Third Court failed to take into consideration that the Texas Public Information Act materially differs from the federal Freedom of Information Act (“FOIA”) and state acts. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000). “Unlike the FOIA, our Act contains a strong statement of public policy favoring public access to governmental information and a statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information.” *Id.* Thus, the mere fact that other open records statutes treat the information differently

than Texas says nothing about our state law. Furthermore, the Court of Appeals recognized that ultimately it would be for the Texas Legislature to determine whether to exempt state employees' dates of birth from public disclosure. "[T]he Texas Legislature has not yet chosen to create an exception for date-of-birth information." 244 S.W.3d at 641 n.9. The fact that the Legislature might change the law in the future hardly constitutes a reasonable basis for the argument that existing law excepts dates of birth.

The Court of Appeals correctly found in the main part of the opinion that the Comptroller's TPIA argument lacked any semblance of support in the law. However, inexplicably, the court then immediately found that there was no evidence that the Comptroller's suit lacked a reasonable basis in law. This was error and an abuse of discretion, because it fails to implement the guiding rules or principles.

B. *The News'* status as an intervenor as a matter of right in no way precludes an award of attorney's fees under the TPIA.

The Comptroller argued that *The News*, which intervened in this action as a matter of right under section 552.325(a), should not be allowed to recover its attorney's fees, because the TPIA does not authorize an award of attorney's fees to an intervenor. The Third Court declined to reach this issue. 244 S.W.3d at 640-41. However, it should be resolved in favor of *The News* as section 552.323(b) does not exclude an intervenor from recovering its attorney's fees.

As a practical matter, *The News* had to intervene to protect its rights. Section 552.325(c) authorizes the Attorney General to settle with the Comptroller. As a result,

there was a possibility that the Attorney General could have agreed with the Comptroller that “all or part of the information that is the subject of this suit should be withheld.” TEX. GOV’T CODE § 552.325(c). Hence, because the Attorney General and the Comptroller are both represented by attorneys from the Attorney General’s office, *The News* was compelled to protect its rights by hiring independent counsel and intervening in the lawsuit.

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

The Comptroller brought this action pursuant to the Uniform Declaratory Judgment Act (“UDJA”), TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.* CR 5, 8. Likewise, *The News* first requested declaratory relief in its initial pleading in the trial court. CR 35.

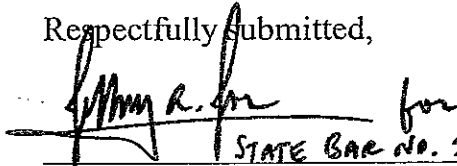
Texas Civil Practice and Remedies Code § 37.009 provides that “[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.” When, as here, the plaintiff has invoked the UDJA, the Court may award attorney’s fees against the plaintiff in favor of another party. *Save Our Springs Alliance, Inc. v. Lazy Nine Municipal 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.”).

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, is it 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.

PRAYER

For the foregoing reasons, The Dallas Morning News, L.P. respectfully prays that, should the Court grant the Petition for Review by the Comptroller, that this Court grant this Cross-Petition for Review 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,


STATE BAR NO. 24048572

Paul C. Watler
State Bar Number 20931600
JACKSON WALKER L.L.P.
901 Main St., Suite 6000
Dallas, Texas 75202
(214) 953-6000
(214) 953-5822 (fax)

**ATTORNEYS FOR CROSS-PETITIONER
THE DALLAS MORNING NEWS, L.P.**

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2008, a true and correct copy of the foregoing CROSS-PETITION FOR REVIEW was served on all counsel of record as listed below in accordance with Rule 9.5(e) of the Texas Rules of Appellate Procedure via certified mail, return receipt requested:

Mr. Jack Hohengarten
Deputy Division Chief
Financial Litigation Division
P.O. Box 12548
Austin, TX 78711-2548
Counsel for Petitioner
Texas Comptroller of Public Accounts

Ms. Brenda Loudermilk
Chief, Open Records Litigation Section
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Trial and Appellate Counsel for Respondent
Attorney General of Texas

