

NO. 08-0172

IN THE SUPREME COURT OF TEXAS

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,

Petitioner,

v.

ATTORNEY GENERAL OF TEXAS

and

THE DALLAS MORNING NEWS, L.P.,

Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

**THE DALLAS MORNING NEWS, L.P.'S RESPONSE
TO PETITION FOR REVIEW**

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THE DALLAS MORNING NEWS,
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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

INDEX OF AUTHORITIES..... iii

REPLY TO PETITIONER’S ISSUES.....vi

ISSUE PRESENTEDvi

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT2

ARGUMENT3

I. This Court should decline to review this case because the court of appeals correctly concluded that the release of a public employee’s birth date, in conjunction with the employee’s name, does not violate any common-law right to privacy, thereby entitling that information to be withheld under the confidential-information exception of the TPIA.....3

 A. The release of a public employee’s birth date, in conjunction with the employee’s name, is not an intrusion upon seclusion entitling a birth date to be withheld under the confidential-information exception of the TPIA.....4

 B. The release of a public employee’s birth date, in conjunction with the employee’s name, does not constitute a public disclosure of embarrassing private facts entitling that information to be withheld under the confidential-information exception of the TPIA.7

 C. The release of a public employee’s birth date, in conjunction with the employee’s name, does not constitute a violation of the tort of wrongful appropriation of one’s name or likeness entitling that information to be withheld under the confidential-information exception of the TPIA.....10

II. The Court should reject the Comptroller’s implicit invitation to ignore or rewrite the TPIA.....12

III. The Comptroller’s federal and out-of-state authorities are wholly inapposite to the determination of the TPIA issue presented here.....14

IV. The Court should decline to exercise its discretionary jurisdiction to analyze the attorneys' fees issue presented by the Comptroller because the Comptroller is *not* seeking more favorable relief than it was awarded below.....15

V. The court of appeals erred when it determined that the Comptroller had not waived its argument that a public employee's birth date is not excepted from disclosure by the TPIA based on the theory of common-law invasion of privacy. (unbriefed issue)16

PRAYER.....16

CERTIFICATE OF SERVICE17

INDEX OF AUTHORITIES

Cases:

<i>A & T Consultants, Inc. v. Sharp</i> , 904 S.W.2d 668 (Tex. 1995).....	3, 6, 13
<i>Billings v. Atkinson</i> , 489 S.W.2d 858 (Tex. 1973).....	4
<i>Cain v. Hearst Corp.</i> , 878 S.W.2d 577 (Tex. 1994).....	4
<i>City of Garland v. Dallas Morning News</i> , 22 S.W.3d 351 (Tex. 2000).....	14
<i>Clayton v. Wisener</i> , 190 S.W.3d 685 (Tex.App.–Tyler 2005, no pet.)	5
<i>Data Tree, LLC v. Meek</i> , 109 P.3d 1276 (Kan. 2005)	14
<i>Express One International v. Steinbeck</i> , 53 S.W.3d 895 (Tex.App.–Dallas 2001, no pet.)	10, 11
<i>GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet</i> , 61 S.W.3d 599 (Tex.App.–Houston [14th Dist.] 2001, pet. denied)	5
<i>Heard v. Houston Post Company</i> , 684 S.W.2d 210 (Tex.App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.).....	9
<i>Hubert v. Harte-Hanks Texas Newspapers, Inc.</i> , 652 S.W.2d 546 (Tex.App.–Austin 1983, writ ref'd n.r.e.).....	14
<i>Industrial Foundation of the South v. Texas Industrial Accident Board</i> , 540 S.W.2d 668 (Tex. 1976).....	4, 6, 7, 8, 10, 13, 14
<i>Joe Dickerson & Associates, LLC v. Dittmar</i> , 34 P.3d 995 (Colo. 2001).....	11
<i>Kimbrough v. Coca-Cola/USA</i> , 521 S.W.2d 719 (Tex.Civ.App.–Eastland 1975, writ ref'd n.r.e.).....	11

<i>Lane v. Random House, Inc.</i> , 985 F. Supp. 141 (D.D.C. 1995)	11
<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994)	11
<i>Oliva v. U.S.</i> , 750 F. Supp. 105 (E.D.N.Y. 1991)	14
<i>Scottsdale Unified School District v. KPNX</i> , 995 P.2d 534 (Ariz. 1998).....	14
<i>Texas Comptroller of Public Accounts v. Attorney General of Texas</i> , 244 S.W.3d 629 (Tex.App.–Austin 2008, pet. filed).....	3, 4, 6, 7, 8, 10
<i>The Baytown Sun v. City of Mont Belvieu</i> , 145 S.W.3d 268 (Tex.App.–Houston [14th Dist.] 2004, no pet.).....	8-9
<i>Thomas v. Cornyn</i> , 71 S.W.3d 473 (Tex.App.–Austin 2002, no pet.)	10
<i>Valenzuela v. Aquino</i> , 853 S.W.2d 512 (Tex. 1993).....	4
<i>Wilhite v. H.E. Butt Co.</i> , 812 S.W.2d 1 (Tex.App.–Corpus Christi 1991, no writ), <i>overruled on other grounds</i> , <i>Cain v. Hearst Corp.</i> , 878 S.W.2d 577 (Tex. 1994).....	5
<i>Zink v. Commonwealth</i> , 902 S.W.2d 825 (Ky. Ct. App. 1994)	14
Statutes:	
TEX. BUS. & COM. CODE § 35.48(a) (Vernon Supp. 2007)	12, 13
TEX. GOV'T CODE § 552.006 (Vernon 2004)	13
TEX. GOV'T CODE § 552.136 (Vernon 2004).....	12, 13
TEX. GOV'T CODE § 552.147 (Vernon 2007).....	12, 13

TEX. GOV'T CODE § 552.222 (Vernon 2007).....6

Texas Attorney General:

Tex. Att’y Gen. ORD-659 (1999).....9

Tex. Att’y Gen. Op. MW-283 (1980)9

Tex. Att’y Gen. OR2003-5954 (2003).....9

Tex. Att’y Gen. OR2005-08056 (2005).....9

Rules:

TEX. R. APP. P. 53.115

TEX. R. APP. P. 53.2(i).15

REPLY TO PETITIONER'S ISSUES

1. The birth date of a public employee contained in the state payroll database maintained by the Comptroller is public information under the Texas Public Information Act ("TPIA" or the "Act"). Such information is not excepted from disclosure by the Act under the common-law right to privacy.
2. *The News* is entitled to its attorneys' fees under either the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code in light of the trial court's declaratory judgment in favor of *The News* on the merits. In the event that the Court resolves to grant the Comptroller's petition for review, the Court should grant *The News*' conditional cross-petition to reverse the court of appeals' judgment on the issue of attorneys' fees.

ISSUE PRESENTED

Did the court of appeals err when it determined that the Comptroller had not waived its argument that a public employee's birth date is not excepted from disclosure by the TPIA under the common-law right to privacy? (unbriefed issue)

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Dallas Morning News, L.P. (“*The News*”) submits this response to the Texas Comptroller of Public Accounts’ (“Comptroller”) petition for review. In an unanimous opinion, the Third Court of Appeals, like the Attorney General and the trial court before it, correctly concluded that a state employee’s date of birth is public information not exempted from disclosure under the Texas Public Information Act (“TPIA” or the “Act”). Accordingly, the Court should decline to exercise its discretionary jurisdiction to review the issue.

Alternatively, in the event that the Court resolves to grant the Comptroller’s petition for review, the Court should then grant *The News*’ conditional cross-petition to reverse the court of appeals’ judgment on the issue of attorneys’ fees. *The News* is entitled to its attorneys’ fees in this action under either the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code in light of the trial court’s declaratory judgment in favor of *The News* on the merits.

STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case. *The News*, however, submits the following additional facts not included in the court of appeals’ opinion:

The News maintains a number of public information databases that are used for news gathering and reporting. 1st Supp. CR 49. In 2005, *The News* requested information from the state employee payroll database, including date-of-birth information of state employees. CR 10; 1st Supp. CR 48-50. 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.*

As part of its undisputed 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 and officials. *Id.* In order to evaluate those individuals' fitness and qualifications for public office or employment and their job performance, date-of-birth information is frequently used by *The News*. 1st Supp. CR 53-54. Ms. Maples further testified that *The News* does not intend to publish the public employee database wholesale in its newspaper or on its website or to sell or make the information available to third parties, that *The News* would only publish a birth date when it had particular relevance to a news story of public interest or concern, that *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 who has ever used a birth date obtained from *The News*' databases to commit identity theft. 1st Supp. CR 54-55.

SUMMARY OF THE ARGUMENT

Not one of the three common law privacy theories asserted by the Comptroller excepts a public employee's birth date from disclosure under the TPIA. Accordingly, the Third Court of Appeals, like the Attorney General and the trial court before it, correctly

concluded that the release of a public employee's birth date, in conjunction with the employee's name, does not violate the common-law right to privacy.

Further, the Comptroller's unproven assertion that the release of a public employee's birth date creates a risk of identity theft does not exempt birth dates from disclosure under the TPIA. This Court has already expressly rejected an identically structured argument by the Comptroller in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995).

Finally, the court of appeals should be reversed for affirming the trial court's failure to award *The News* its attorneys' fees under the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code in light of its declaratory judgment in favor of *The News* on the merits. *The News* is entitled to its attorneys' fees under either statute.

ARGUMENT

I. This Court should decline to review this case because the court of appeals correctly concluded that the release of a public employee's birth date, in conjunction with the employee's name, does not violate any common-law right to privacy, thereby entitling that information to be withheld under the confidential-information exception of the TPIA.

Initially, as the court of appeals correctly observed, it is undisputed that state employees' dates of birth are public information under the TPIA because they are collected and maintained by the Comptroller's office in connection with its official business. *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 244 S.W.3d 629, 635 (Tex.App.–Austin 2008, pet. filed) (“Comptroller”). The issue presented for review, therefore, is whether a public employee's birth date falls within a

statutory exception to disclosure under the TPIA. In support of its position, the Comptroller asserts that the disclosure of a public employee's date of birth, in conjunction with that employee's name, violates the employee's common-law right to privacy, thus prohibiting disclosure under Section 552.101 of the TPIA because the information is "confidential...by judicial decision." (Pet. at 8).

Texas courts recognize three separate types of invasion of privacy: (1) intrusion upon one's seclusion or solitude or into one's private affairs, (2) public disclosure of embarrassing private facts, and (3) wrongful appropriation of one's name or likeness. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994); *Indus. Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976) (quoting William L. Prosser, *Privacy*, 48 Cal. L.Rev. 383, 389 (1960)). The Comptroller asserts all three in support of its position. (Pet. 8).

A. The release of a public employee's birth date, in conjunction with the employee's name, is not an intrusion upon seclusion entitling a birth date to be withheld under the confidential-information exception of the TPIA.

The court of appeals correctly concluded that the release of state employees' date-of-birth information is not an intrusion upon seclusion entitling that information to be withheld under the confidential-information exception of the Act. *Comptroller*, 244 S.W.3d at 637-38.

The tort of intrusion upon seclusion was first recognized by the Texas Supreme Court in *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973). This Court later explained that it is proved by showing (1) an intentional intrusion, physical or otherwise,

upon another's solitude, seclusion, or private affairs or concerns, (2) that the intrusion would be highly offensive to a reasonable person, and (3) that the person suffered an injury as a result of the intrusion. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). The theory 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." *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex.App.—Tyler 2005, no pet.); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex.App.—Houston [14th Dist.] 2001, pet. denied).

The Comptroller cites no authority, and neither we nor the court of appeals have found any, where a Texas court determined that a party suffered an intrusion upon his seclusion absent evidence of a physical invasion or eavesdropping. *Comptroller*, 244 S.W.3d at 636. On the contrary, moreover, several courts have held that a party could not recover under this theory because there was no allegation that a physical invasion or eavesdropping had taken place. *See, e.g., Clayton*, 190 S.W.3d at 697; *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex.App.—Corpus Christi 1991, no writ), *overruled on other grounds, Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

In any event, *The News'* TPIA request for public employees' date-of-birth information is the antithesis of an intentional physical trespass or eavesdropping. A request pursuant to the TPIA cannot amount to an intentional trespass. This conclusion logically, and necessarily, follows from the premise that *The News* is simply exercising a legal right in accordance with the prescribed procedures established by the Legislature in

the TPIA to obtain public information. Further, as the court of appeals correctly concluded, even assuming for the sake of argument that this privacy interest can be violated without a physical invasion or eavesdropping, the Comptroller has failed to show that releasing date-of-birth information constitutes an intentional intrusion upon state employees' seclusion or private affairs that would be highly offensive to a reasonable person. *Comptroller*, 244 S.W.3d at 636.

Implicitly admitting that it has no authority for its position, the Comptroller seeks that the Court change Texas law. More exactly, the Comptroller seeks that the Court expand the scope of the tort of intrusion upon seclusion beyond physical trespass and eavesdropping to the access and release of information on a state database. (Pet. at 10). The Court should reject the Comptroller's invitation to expand the scope of this privacy interest beyond its well established boundaries. The Comptroller offers no authority in support of its request for the Court to take such an enormous jurisprudential leap.

The core of the Comptroller's argument is that date-of-birth information, if made available, might be *used* in connection with other identifying information to commit identity theft. (Pet. at 10). This argument, however, must fail. As the Court has consistently declared, the TPIA precludes an inquiry by the Court or any government official into the intended use, or potential misuse, of the information requested. *A & T Consultants*, 904 S.W.2d at 676 ("we may not consider the requesting party's purpose or use for the information") (emphasis added); *Indus. Found.*, 540 S.W.2d at 686 ("the Act prohibits consideration of the motives of the requesting party in determining whether

information must be disclosed”); *see also* TEX. GOV’T CODE ANN. § 552.222 (Vernon 2004). In the same vein, the TPIA does not permit public information to be withheld because it might be used in conjunction with other publicly available information, thereby allowing the requestor to deduce confidential information. *See A & T Consultants*, 904 S.W.2d at 676. For these reasons, the Comptroller’s argument that date-of-birth information should be treated as confidential because it might be *used* with other information available on the internet to commit identity theft is contrary to the precedents of this Court.

B. The release of a public employee’s birth date, in conjunction with the employee’s name, does not constitute a public disclosure of embarrassing private facts entitling that information to be withheld under the confidential-information exception of the TPIA.

The Comptroller asserts that state employees’ date-of-birth information is confidential because its release would constitute the public disclosure of embarrassing private facts under *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). (Pet. at 12). That assertion is meritless, as the court of appeals correctly concluded. *Comptroller*, 244 S.W.3d at 638-39.

Under this branch of the privacy tort, this Court has explained that the injured party “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.” *Indus. Found.*, 540 S.W.2d at 682. The Court has interpreted these requirements to mean that the information must contain “highly intimate or embarrassing facts about a person’s

private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities.” *Id.* at 683.

We emphasize that the Comptroller does *not* argue that a state employee’s birth date is a highly intimate or embarrassing fact; rather, the Comptroller argues that the *use* to which someone might put that information by committing identity theft would be highly objectionable. (Pet. at 12). As discussed in the section immediately above, however, the purported *use* of the information and the purpose of the requestor cannot be considered when determining whether public information is subject to an exception from disclosure under the TPIA. Thus, the Court need inquire no further to resolve this issue against the Comptroller.

In any event, as the court of appeals correctly concluded, a state employee’s birth date, if known to the general public, is neither highly intimate nor embarrassing. *Comptroller*, 244 S.W.3d at 636. No Texas court has ever found to the contrary. This Court’s opinion in *Industrial Foundation* has long illustrated the sort of information that Texas law considers to be highly intimate or embarrassing. In that case, the Texas Industrial Accident Board claimed that certain of its workman’s compensation claim files were confidential because the files contained matters of “extreme privacy which, if released, would cause extreme embarrassment to the claimant.” *Indus. Found.*, 540 S.W.2d at 683. Examples cited by the Board included a claim for injuries arising from sexual assault, death benefit claims on behalf of illegitimate children, claims for psychiatric treatment of mental disorders, claims for injuries to sexual organs, and a

claim for injuries stemming from an attempted suicide. *Id.* This Court agreed with the Board that at least some of these claims were “of such a nature that their publication would be highly offensive to a reasonable person.” *Id.* We submit that such examples are a far cry from one’s date of birth. As support, we observe that not even an employee’s salary information is highly embarrassing or of such 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 Attorney General, moreover, has consistently rejected the Comptroller’s argument that date of birth information is protected by the common-law right to privacy. *See* Tex. Att’y Gen. Op. MW-283 (1980); Tex. Att’y Gen. OR2003-5954 (2003); Tex. Att’y Gen. OR2005-08056 (2005). For instance, 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 could be withheld. Consistent with its prior rulings, the Attorney General held that “common law privacy does not protect dates of birth.”¹ Tex. Att’y Gen. OR2005-08056 (2005).

¹ 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).

These 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.).

Even assuming for the sake of argument that a public employee's birth date could somehow be a highly intimate and embarrassing fact, the Comptroller's argument still fails. As in the court of appeals, Comptroller makes no attempt to show that the information sought is not of legitimate public concern. Under *Industrial Foundation*, even if a birth date was considered to be a highly intimate or embarrassing fact, the TPIA still requires disclosure of the information if it is of legitimate interest to the public. *Indus. Found.*, 540 S.W.2d at 682. In this case, although the Comptroller bore the burden of proving that public employees' dates of birth are not of legitimate public interest, Comptroller offered no such proof. See *Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex.App.–Austin 2002, no pet.).

C. The release of a public employee's birth date, in conjunction with the employee's name, does not constitute a violation of the tort of wrongful appropriation of one's name or likeness entitling that information to be withheld under the confidential-information exception of the TPIA.

As a preliminary matter, the court of appeals correctly concluded that the theory of wrongful appropriation of one's identity was not before it. To that end, the court of appeals appropriately remarked: "The Comptroller apparently concedes that wrongful appropriation is not at issue in this case, having cited to no authorities or anything in the record indicating that this theory provides a basis for finding that employees' birth dates are confidential." *Comptroller*, 244 S.W.3d at 635 n. 4. Regardless, the Comptroller asserts in its petition for review, again without citation to a single Texas case, that

wrongful appropriation is the “most compelling” privacy interest at issue “for it is this privacy interest that cuts to the heart of identity theft.” (Pet. at 13). In short, because the Comptroller’s wrongful appropriation argument was waived in the court of appeals, it is not properly before this Court.

At any rate, the Comptroller’s wrongful appropriation argument is without merit. Texas law recognizes a privacy tort for the unauthorized appropriation of a person’s name or likeness. *Express One Int’l v. Steinbeck*, 53 S.W.3d 895, 900 (Tex.App.–Dallas 2001, no pet.). 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 Fifth 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)). For example, a former college football star stated a valid claim for invasion of privacy by misappropriation when his picture was used to advertise softdrinks. *See Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 723 (Tex.Civ.App.–Eastland 1975, writ ref’d n.r.e.). Applying these principles and precedents here, the Court may easily dispose of the Comptroller’s argument that the disclosure of state employees’ date-of-birth information amounts to wrongful appropriation because there is absolutely nothing in the record

concerning the misappropriation of a person's name or likeness for a commercial purpose.

As a final but important point, 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 wrongful appropriation.

II. The Court should reject the Comptroller's implicit invitation to ignore or rewrite the TPIA.

The Comptroller cites several statutes from foreign jurisdictions, Sections 552.136 and 552.147 of the TPIA, and Section 35.48 of the Texas Business and Commerce Code, in support of its position that the disclosure of a public employee's date of birth constitutes an invasion of privacy. (Pet. at 6-7). These statutes, however, are wholly inapposite to the issue presented.

First of all, it goes without saying that the policy choices of foreign legislatures do not trump the policy choices of the Texas Legislature. What matters here is that the Texas Legislature has not seen fit to exempt a public employee's birth date from disclosure under the TPIA. Since the inception of the former Open Records Act,

of records containing “personal identifying information,” including an individual’s date of birth, that are maintained by private businesses, not the state. TEX. BUS. & COM. CODE § 35.48(a) (Vernon Supp. 2007). Accordingly, it does not provide any guidance for the Court in determining whether information is confidential under the TPIA.

III. The Comptroller’s federal and out-of-state authorities are wholly inapposite to the determination of the TPIA issue presented here.

The Comptroller points to cases from other jurisdictions that protect date of birth information under their respective information acts. 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. of the South 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).

This 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 v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Indus. Found.*, 540 S.W.2d at 681-82. For these reasons, the cases cited by the Comptroller from other jurisdictions are inapposite here.

IV. The Court should decline to exercise its discretionary jurisdiction to analyze the attorneys' fees issue presented by the Comptroller because the Comptroller is *not* seeking more favorable relief than it was awarded below.

As the Court knows, *The News* has filed a conditional cross-petition for review on the issue of its entitlement to attorneys' fees under either the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code in light of the trial court's declaratory judgment in favor of *The News* on the merits. Although *The News* is not satisfied with the entire judgment of the court of appeals, *The News* is willing to accept it conditionally and intends to withdraw its cross-petition in the event that the Court declines to grant review of the Comptroller's petition.

As to the merits, *The News* will not repeat here in any detail the arguments fully stated in its conditional cross-petition for review. We observe here, however, that the Comptroller is *not* seeking more favorable relief from this Court than it was awarded by the court of appeals on the attorneys' fees issue. *See* TEX. R. APP. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review."). Rather, the Comptroller essentially argues that the trial court and court of appeals got to the right result but employed the wrong analysis in getting there. (Pet. at 13). Thus, as a practical matter, granting review of this issue solely to affirm the judgment of the court of appeals on other grounds, would have no bearing on the result below.

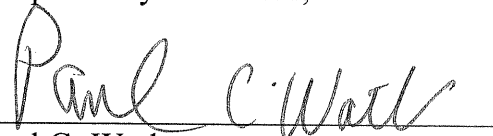
- V. **The court of appeals erred when it determined that the Comptroller had not waived its argument that a public employee's birth date is not excepted from disclosure by the TPIA based on the theory of common-law invasion of privacy. (unbriefed issue)**

Briefing on this issue is reserved for *The News'* Brief on the Merits, if one is requested by this Court. TEX. R. APP. P. 53.2(i).

PRAYER

For the foregoing reasons, the Comptroller's petition for review should be denied. In the alternative, should the Court grant review, the court of appeals should be reversed on *The News'* claim for its attorneys' fees. *The News* should have been awarded its attorneys' fees under either the TPIA or Chapter 37 of the Texas Civil Practice and Remedies Code in light of the trial court's declaratory judgment in favor of *The News* on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I hereby certify that on the 5th day of June, 2008 a true and correct copy of the foregoing 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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