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, LTD,
Respondents.

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS' COMBINED REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

DAVID C. MATTAX
Division Chief, Financial Litigation Division

JACK HOHENGARTEN
Deputy Division Chief
State Bar No. 09812200
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
TEL: (512) 463-2018
FAX: (512) 477-2348
ALT. FAX: (512) 480-8327
Counsel for Petitioner
Texas Comptroller of Public Accounts

ORAL ARGUMENT REQUESTED

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ARGUMENT

The Comptroller of Public Accounts files this combined reply to the responses filed by *The Dallas Morning News* (the "*News*") and the Office of the Attorney General (the "OAG") and shows the following:

A. The OAG and the *News* do not address the compelling policy issue presented by the Comptroller's petition.

Both the *News* and the OAG miss the point. The Comptroller emphasizes in her petition the policy considerations that compel recognition of common-law privacy rights in date of birth: rapid technological change contributing to the problem of identity theft. Petition at 3-5; *see Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535-36 (N.Y. Sup. 2004) (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators,* 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)).

That the availability of an individual's date of birth, in combination with other personal identifiers, makes identity theft easier is a point not seriously disputed by anyone, including the Respondents. *See Daly*, 782 N.Y.S.2d at 535-36 (N.Y. Sup. 2004); *see also Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998); Tex. Att'y Gen. OR2006-09138 at 3. 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 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).

And identity theft, as the Comptroller also points out in her petition, is one of the fastest growing criminal and consumer offenses in the 21st Century. Petition at 3-4; Tex. Att'y Gen. OR2006-09138 at 3; *Daly*, 782 N.Y.S.2d at 535. In view of these societal developments, judicial and legislative trends in other jurisdictions have run strongly in favor of protecting such information from public disclosure. Petition at 3-5.

In response to these developments, the Respondents simply shrug and note that no Texas case has expressly recognized common-law protection for personal identifiers such as date of birth. According to the Respondents, because the invasion of privacy in *Billings v. Atkinson*, 489 S.W.2d 858, 682 (Tex. 1973), involved wiretapping, then wiretapping it shall be forevermore. This response is, of course, no response at all.

Respondents suggest the common law now stands immutable, with Texas courts required to replicate the precise holding in *Billings*, regardless of recent technological developments. *See* OAG Response at 4; *News* Response at 4. But nothing in *Billings* forecloses the wise adaptation of legal principles discussed in that case to new or changed circumstances; quite the opposite:

> 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 [an individual'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. A legally enforceable right of privacy is deemed to be a proper protection against this type encroachment upon the personality of the individual.

Id. at 860 (quoting 62 Am. Jur. 2d Privacy § 4).

Indeed, if the *Billings* court had taken the approach Respondents advocate, it would not have recognized that "unwarranted invasion of the right to privacy constitutes a legal injury for which a remedy will be granted." *Id.* at 860. And it would not have concluded that wiretapping, though it did not involve physical invasion of a person's property, was still actionable. *Id.* (citing *Katz v. United States,* 389 U.S. 347, 366, 88 S.Ct. 507, 519 (1967) (Black, J. dissenting).

The courts, including this one, have long noted that "[t]his flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Davis v. Davis*, 521 S.W.2d 603, 608 (Tex. 1975) (quoting *Hurtado v. California*, 110 U.S. 516, 530, 4 S.Ct. 111, 118 (1884)). In *Funk v. United States*, 290 U.S. 374, 382, 54 S.Ct. 212 (1933), the Supreme Court admonished that:

> To concede this capacity for growth . . . and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law . . . a 'flexibility and capacity for growth and adaptation' . . .

Funk, 290 U.S. at 383 (quoting *Holden v. Hardy*, 169 U.S. 366, 385-87 (1898)).

B. Each of the cases cited by Respondents is readily distinguishable.

Moreover, none of the cases cited by the OAG and the *News* — for the proposition that invasion of privacy has been typically associated with either a physical invasion of property or eavesdropping with the aid of wiretaps, microphones, or spying — are remotely similar to this case. Nor do they implicate the policy concerns raised by the Comptroller.

In *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App. — Tyler 2005, pet. denied), an employee who worked for a medical billing company sued a doctor who had contracted with that company for billing services for intentional infliction of emotional distress and invasion of privacy, alleging the doctor had repeatedly asked her inappropriate questions about her sex life and had intentionally misread the results of her gallbladder scan. In *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, 618 (Tex.App.–Houston [14th Dist.] 2001, pet. denied), landowners brought an invasion-of-privacy claim against the owner of a 126-foot cellular tower. The court held that evidence that maintenance workers had peered into the plaintiffs' adjoining yard was legally insufficient to establish conduct that would be highly offensive to a reasonable person.

Finally, in *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), the court held that a discharged employee could not prevail on his invasion of privacy claim, in which he alleged that his former employer had not allowed him to confront co-workers accusing him of sexual harassment. None of these cases preclude recognition that individuals have a right of privacy that protects personal identifiers such as date of birth from public disclosure.

C. The *News* and the OAG primary arguments confuse legislative facts with adjudicative facts.

Next, the Respondents make two evidentiary arguments. First, they argue the Comptroller failed to prove 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." *News* Petition at 6. They also contend that her claim must fail because it is based on concerns about the potential misuse of such information and the PIA expressly precludes a factual inquiry into the reasons for the public information request. OAG Response at 6-9; *News* Response at 4-7; *see* TEX. GOV'T CODE ANN. § 552.222(a) (Vernon Supp. 2007).

Both arguments confuse legislative facts with adjudicative facts. Adjudicative facts are those relating to the immediate parties—who did what, where, when, how and with what motive or intent. 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 15 (1958).[1] Legislative facts, on the other hand, help the court to determine the content of law and policy and help it to exercise its judgment and discretion in determining what course of action to take. *Id.* at § 15.03.

In *Population Services, International v. Wilson*, 398 F. Supp. 321 (S.D.N.Y 1975), *aff'd sub nom., Carey v. Population Services, International*, 431 U.S. 678, 97 S.Ct. 2010 (1977), for example, the district court determined the constitutionality of a statute restricting the sale of contraceptives. In doing so, it judicially noticed, as legislative facts, that persons under the age of sixteen engage in sexual intercourse, and that the result is "often venereal disease, unwanted pregnancy, or both." *Id.* at 332-333; *see also Hawkins v. United States*,

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[1]*See also* Kenneth C. Davis, *Judicial Notice*, 55 Colum.L.Rev. 945 (1955); Davis, *An Approach to Problems of Evidence in the Administrative Law Process,* 55 Harv. L.Rev. 364, 404-07 (1942); Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in Perspectives of Law 69, 82 (1964), cited in FED. R. EVID. 201(a) advisory committee's note.

358 U.S. 74, 78, 79 S.Ct. 136, 138 (1958) (affirming privilege of accused to prevent spouse from testifying on policy grounds of maintaining family harmony).

Texas courts have also used legislative facts. In *Chapa v. State*, 729 S.W.2d 723 (Tex. Crim. App. 1987), the issue was whether a taxicab passenger had a reasonable expectation of privacy. Responding to a dissenting judge's objection to consideration of ordinances in Houston and other Texas cites, the majority opinion explained: "Whether a particular expectation of privacy is one society is willing to recognize, however, is in the nature of a legal rather than factual inquiry." *Id.* at 728, n. 3. The court concluded: "Thus, we notice the Houston ordinance and others not as 'adjudicative facts,' . . . . Rather, we notice the existence of these ordinances as a social, or 'legislative fact,' helpful in resolution of the constitutional question whether in the context proven, society recognizes the asserted expectation of privacy as a reasonable one." *Id.*(citation omitted); *see also Aboussie v. Aboussie*, 270 S.W.2d 636, 639 (Tex. Civ. App.–Fort Worth 1954, writ ref'd), *overruled in part by Felderholf v. Felderholf*, 473 S.W.2d 928 (Tex. 1971) (interests of children best served by rule that unemancipated minors cannot sue their parents for acts of ordinary negligence).

The *News* argues that the Comptroller was required to make an evidentiary showing that reasonable persons would find the release of date-of-birth information and the increased risk of identity theft to be highly offensive. Setting aside the impracticality of such a requirement, the *News* is mistaking legislative facts for adjudicative ones. The issue of

whether reasonable persons would be offended by the release of this information is a general one and, as such, falls within the domain of law and policy.

The OAG and the *News* also misunderstand the Comptroller's purpose in citing the law in other jurisdictions. As the Comptroller has shown in her petition, a majority of states now protect an individual's birth date from public disclosure. Respondents counter with the obvious: that none of that authority is controlling here. But, like the majority in *Chapa*, the Comptroller has cited that authority not as controlling precedent, but rather, as a "legislative fact" tending to establish that the release of such information would be highly offensive to reasonable persons in view of the significant risk of identity theft and recent societal responses to this growing problem.

In short, it is not beyond the power of this Court to ascertain, as a matter of policy and law, that public disclosure of personal identifiers increases the risk of identity theft—and that reasonable persons subjected to this increased risk as a condition of their employment would find that "highly offensive."

The Respondents' second argument fails for the same reason. They note that the PIA precludes an inquiry by the Court or any government official into the intended use of the information requested, citing *A & T Consultants, Inc. v. Sharp*, 904 S.W. 2d 668, 676 (Tex. 1995). *See also* TEX. GOV'T CODE ANN. § 552.222 (Vernon Supp. 2007). But the issue is not whether the *News* will misuse the information or commit identity theft. Rather, the issue is more general; it is whether the availability of date-of-birth information *to the public* will

exacerbate the problem of identity theft. Nothing in the PIA or this court's precedents forecloses inquiry into this general policy question.

The issue, after all, is not limited to the *News*. If the birth date is public information in this case, then it is public information, period. As Respondents correctly point out, government officials cannot distinguish among requestors or inquire into the intended use—or potential misuse—of the requested information. *See* TEX. GOV'T CODE Ann. § 552.222(a) (Vernon Supp. 2007). If an individual's date of birth must be disclosed to the *News*, it must be disclosed to any person who makes the same open-records request. 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 cannot serve as grounds for denying the request. Because the question in this case goes well beyond the immediate parties, it is one of policy, not adjudicative fact.

CONCLUSION AND PRAYER

In her response to the *News's* cross-petition the Comptroller addresses each of Respondents' contentions regarding attorneys' fees. Therefore, she incorporates that response by reference as if fully set herein. The Comptroller requests that her petition for review be granted and that the open-records declaratory judgment be reversed and rendered.

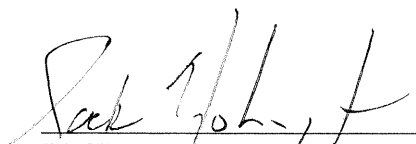
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Litigation

DAVID C. MATTAX
Chief, Financial Litigation Division



JACK HOHENGARTEN
Deputy Division Chief
State Bar No. 09812200
Financial Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548
TEL: (512) 463-2018
FAX: (512) 477-2348
ALT. FAX: (512) 480-8327
Counsel for Petitioner
Texas Comptroller of Public Accounts

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document, **Texas Comptroller of Public Accounts' Combined Reply Brief,** was delivered as indicated on the 7th day of July 2008, to the following counsel of record:

Brenda Loudermilk — *Via Hand Delivery*
Administrative Law Division
OFFICE OF THE ATTORNEY GENERAL
300 W. 15th St., 12th Floor
Austin, TX 78701

Paul C. Watler — *Via CMRRR No. 7004 1160 0000 7309 8297*
JACKSON WALKER, LLP
901 Main Street, Suite 6000
Dallas, TX 75202

JACK HOHENGARTEN