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.

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

COMPTROLLER'S BRIEF ON THE MERITS

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
Counsel for Petitioner
Texas Comptroller of Public Accounts

ORAL ARGUMENT REQUESTED

October 13, 2008

IDENTITY OF PARTIES AND COUNSEL

Parties to the Trial Court's Orders on Partial Motion for 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 Division
Maureen Powers
Assistant Attorney General (retired)
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 475-3503
Telecopier: (512) 477-2348
E-mail: 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
E-mail: brenda.loudermilk@oag.state.tx.us

Intervenor/Cross-Appellant/Respondent

The Dallas Morning News, Ltd.

Trial and Appellate Counsel for The Dallas Morning News

Paul C. Watler, Partner
JACKSON WALKER, LLP
901 Main Street, Suite 6000
Dallas, Texas 75202
Telephone: (214) 953-6069
Telecopier: (214) 855-4300
E-mail: pwatler@jw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASES **PAGE**

STATE CASES

FEDERAL STATUTES

TEXAS STATUTES

OTHER STATE STATUTES

BILL ANALYSES

ADVISORY OPINIONS

FEDERAL RULES

STATE RULES

OTHER AUTHORITIES

INTERNET SOURCES

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, must be disclosed under the Public Information Act ("PIA"). *The Dallas Morning News* (the "*News*"), which had requested the information, intervened and sought attorney's fees.
Orders signed by:	Honorable Lora Livingston - declaring a public employee's date of birth is public information. Honorable Stephen Yelenosky - denying the *News's* request for attorney's fees.
Trial courts:	261st Judicial District Court, Travis County 345th Judicial District Court, Travis County
Trial Court's Disposition:	On motions for summary judgment, the district court agreed with the Attorney General, concluding that date-of-birth information is subject to disclosure under the PIA; but it denied intervenor's request for attorney's fees.
Parties in Court of Appeals:	Plaintiff/Appellant/Cross-Appellee Texas Comptroller of Public Accounts Defendant/Appellee Attorney General of Texas Intervenor/Appellee/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 Gen. of Texas*, 244 S.W.3d 629 (Tex. App. – Austin 2008, pet. filed).
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 attorney's 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"). C.R. at 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. C.R. at 97-98.

Concerned about the danger of identity theft, the Comptroller offered to provide the *News* with the state employees' ages. Her offer was rejected, so the agency sought an opinion from the Attorney General ("OAG") 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, violated common-law and constitutional privacy rights. C.R. at 2-24.

In response, the OAG issued Letter Ruling No. OR2006-09138, which concluded that the birth dates of state employees are public information that must be released to the requestor. C.R. at 14-25.

The Comptroller declined to release the employees' dates of birth and, instead, filed suit under section 552.324 to challenge the open records ruling. The *News* intervened. C.R. at 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 .

C.R. at 169.

On November 16, 2006, the court signed an order denying the *News's* motion for summary judgment for attorney's fees. C.R. at 170. On January 26, 2007, the court signed an order nunc pro tunc correcting the November 16, 2006 order. C.R. at 186.

The Austin Court of Appeals affirmed.

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 an individual's date of birth, in conjunction with other personal information, can be used to commit identity theft, and to access other sensitive information. And identity theft is one of the fastest growing criminal and consumer offenses in the 21st century. In response to this growing problem, state and federal courts have shown little hesitation in concluding that date of birth is a protected privacy interest—a development that has been consistent with legislative trends. Although the precise issue here is one of first impression for the Texas courts, nothing in the Texas common law precludes recognition of this privacy interest.

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 attorney's 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

attorney's 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.

The court of appeals held that common-law privacy does not extend to an individual's date of birth. Policy considerations, however, compel recognition that such information is private under common law and therefore exempt from disclosure under the PIA.[1]

A. Recent technological developments and the growing problem of identity theft compel common-law protection of date-of-birth information.

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:

> With both name and birth date, one can obtain information about an individual's criminal record (which may not include disposition of charges), driving record, *social security number*, current and past addresses, civil litigation records, liens, property owned, credit history, financial accounts, and, quite possibly, information concerning an individual's complete medical and military histories, and insurance and investment portfolios.

Scottsdale Unified Sch. Dist. v. KPNX Broad. Co., 955 P.2d 534, 539 (Ariz.1998) (emphasis added); *see also Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535-36 (N.Y. Sup.

---

[1] The PIA incorporates common-law privacy rights. *See* TEX. GOV'T CODE ANN. § 552.101 (Vernon 2004) (exempting information "considered to be confidential by law, either constitutional, statutory *or by judicial decision*"); *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682-85 (Tex. 1976).

2004). The OAG, referring to the *KPNX Broadcasting* opinion, has itself conceded that: "Certain public information websites allow individuals to locate this information in any state, including Texas, using only a name and date of birth." Tex. Att'y Gen. OR2006-09138 at 3.

Identity theft is one of the fastest growing criminal and consumer offenses in the 21st Century—a point the OAG also concedes. Tex. Att'y Gen. OR2006-09138 at 3 (citing *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 cases of identity theft in the United States. Federal Trade Commission, *Identity Theft Survey Report,* Sept. 2003, *available at* <http://www.ftc.gov/os/2003/09/synovatereport.pdf>. The fact that 9.9 million of those cases occurred in the final year of the period surveyed suggests that this form of fraud is proliferating rapidly. Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004). Losses to consumers totaled $5 billion. *Id.*

And monetary loss is only part of the price a consumer pays. According to the FTC, 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; Daly*, 782 N.Y.S.2d at 535; *see also* Texas Attorney General's Identity Theft Victim Kit, *available at* http://www.oag.state.tx.us/ag_publications/pdfs/.

The risk of financial harm is not limited to public employees. Many types of government services—including education, occupational licensing, and the provision of

health-care benefits—are conditioned on an individual's disclosing 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." *See also Oliva v. United States*, 756 F.Supp. 105, 106 (E.D.N.Y.1991) (court extending FOIA privacy protection to birth dates of homeowners who were eligible for distribution share refunds from HUD).

The Texas Legislature has concluded that Texas has one of the highest rates of identity theft in the nation.[2] According to the Legislature, victims of identity theft spend an average of 600 hours over a two- to four-year period, as well as $1,400.00 or more, trying to clear their names.[3] Identity theft also imposes a substantial cost on businesses. In 2002, the total cost of business losses due to identity theft in the United States was estimated at almost $50 billion.[4] The Legislature specifically recognized "dumpster diving" for discarded business records as a significant means through which identity theft is committed.[5]

---

[2] *See* TEX. H.B. 698, 79th Leg., R.S. (2005) (Committee Report Substituted), and TEX. S.B. 122, 79th Leg., R.S. (2005) (Committee Report Unamended).

[3] *Id.*

[4] *Id.*

[5] *See* TEX. H.B. 698, 79th Leg., R.S. (2005) (Committee Report Substituted). PIA, of course, prohibits government officials from drawing any distinction between "dumpster diving" and the *News*. If an individual's date of birth must be disclosed to the *News*, it must be disclosed to all

The OAG has cited these conclusions with approval on its official website and in filings with other Texas courts. *See http://www.oag.state.tx.us/newspubs/releases/2007/072607 lifetime_pop.pdf.*

B. Judicial and legislative trends in other jurisdictions have run strongly in favor of affording privacy protection to date-of-birth information.

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 KPNX Broad. Co.*, 955 P.2d at 539; *Daly*, 782 N.Y.S.2d at 535-36; *see also Oliva*, 756 F.Supp. at 107 (applying balancing test under exemption 6 of the federal Freedom of Information Act, 5 U.S.C. § 552); *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 (9th 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 about identity theft and other forms of fraud).

In concluding that the balancing test under exemption 6 of the federal Freedom of Information Act, 5 U.S.C. § 552, favored protection of personal identifiers such as date of

---

persons making the same request, including those who would use the PIA to engage in a more sophisticated version of "dumpster diving." 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. 2008).

birth, the court in *Oliva* reasoned that:

> . . . the Supreme Court has noted that the basic policy underlying the act "focuses on the citizens' right to be informed about 'what government is up to.'" For example, information falling within such a purpose is that which "sheds light on an agency's performance of its statutory duties . . ." To that end, the statutory purpose is not furthered by a disclosure of information about private citizens which "reveals little or nothing about an agency's own conduct."

Oliva, 756 F.Supp. at 106 (quoting *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 109 S.Ct . 1468 (1989)).

Legislative action has been consistent with judicial trends. A majority of the fifty states now exempts 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. ANN. § 92F - 13(1) (West 2008); 5 ILL. COMP. STAT. ANN. 140/7 (1)(b) (West 2008); KAN. STAT. ANN. § 45-221(30) (West 2007); KY. REV. STAT. ANN. § 61.878(1)(a) (West 2008); MASS. GEN. LAWS ANN. ch. 66, §10 (West 2008); MICH. COMP. LAWS ANN. § 15.243 (West 2008); N.H. REV. STAT. ANN. § 91-A:5 (West 2008); N.J. STAT. ANN. § 47:1A-10 (West 2008); N.Y. PUB. OFF. LAW § 89(2)(b)(iv) (McKinney 2008); UTAH CODE ANN. § 63G-2-302(2)(d) (West 2008)—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) (West 2007).

Other states protect date of birth as part of an exception for employee personnel records. *See* ARIZ. ADMIN. CODE R2-5-105 (2008); DEL. CODE ANN. tit. 29 § 10002 (West 2008); KAN. STAT. ANN. § 45-221(4) (West 2007); IOWA CODE ANN. § 22.7 (2008); MD. CODE ANN., STATE GOV'T § 10-616(i)(1) (West 2008); MISS. CODE ANN. § 25-1-100 (West 2008); N.D. CENT. CODE §44-04-18.1 (West 2007); OR. REV. STAT. ANN. § 192.502(3) (West 2008); R.I. GEN. LAWS § 38-2-2 (West 2008); VA. CODE ANN. § 2.2-3705.1.1 (West 2008); WYO. STAT. ANN. § 16-4-203 (West 2008). 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) (West 2008). Still other states protect the information by unofficial policy. *See* Tex. Att'y Gen. OR2006-09138 at 4. The state of Washington provides protection under a state plan to curtail identity theft. *Id.*

In Texas, the Legislature has amended section 35.48 of the Business and Commerce Code, so 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 Supp. 2008).

Section 35.48 of the Business and Commerce Code specifically defines "personal identifying information" to include an individual's date of birth. TEX. BUS. & COM. CODE ANN. § 35.48(a) (Vernon Supp. 2008). 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 attorney's fees incurred in bringing

the enforcement action. TEX. BUS. & COM. CODE ANN. § 35.48(f) (Vernon Supp. 2008).

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

Texas common law has recognized the right of privacy. *See 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). That right 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.

The definition is actually a recognition of several privacy interests. Professor Prosser has identified 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)).

1. Nothing in *Billings* precludes recognition of a common-law privacy interest in date of birth.

The first privacy interest listed above—freedom from unwarranted intrusion—was considered in *Billings v. Atkinson,* 489 S.W.2d 858, 860 (Tex. 1973). There, this Court concluded that 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. 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. *Texas Comptroller of Pub. Accounts v. Attorney Gen. of Texas*, 244 S.W.3d 629, 636 (Tex. App.– Austin 2008, pet. filed). But, although this 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 erred in failing to take into account these present-day realities.

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.

Billings, 489 S.W.2d at 860 (quoting 62 AM. JUR. 2d, *Privacy* § 4).

Indeed, if the *Billings* court had taken the approach advocated by Respondents, 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)).

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

> 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.

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' . . .

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

Section 552.101, moreover, 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 every development 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. The court of appeals' analysis confused legislative facts with adjudicative facts.

The court of appeals also concluded that the Comptroller had failed to present evidence on two points: that the public availability of personal identifiers will increase the risk of identity theft; and that the disclosure of such information would be highly objectionable to a reasonable person. *Comptroller*, 244 S.W.3d at 637-38. In so concluding, the court confused 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).[6] 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

---

[6] *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.

disease, unwanted pregnancy, or both." *Id.* at 332-333; *see also Hawkins v. United States*, 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 cities, 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 court of appeals concluded 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

an evidentiary requirement, the court mistook 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.

As shown above, a majority of states now protect an individual's birth date from public disclosure. Like the majority in *Chapa*, the Comptroller has cited that authority 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.

The court of appeals also concluded the Comptroller was required to prove up the connection between the public availability of personal identifiers and the increased risk of identity theft, even though it is a readily ascertainable legislative fact that has already been pointed out by the courts, the Texas Legislature, the legislatures of other states, and, not least, by the OAG itself. *See supra* at 6-9 .

In short, it is not beyond the power of this court to conclude, 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."

3. The PIA does not preclude consideration of the potential misuse of information sought.

The court of appeals also concluded it could not consider the risk of identity theft because the PIA precludes an inquiry 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 whether 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. 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. Because the question in this case goes well beyond the immediate parties, it is one of policy, not adjudicative fact.

II. The PIA does not authorize the shifting of attorney's fees to the Comptroller; nor does it abrogate sovereign immunity with respect to a claim for fees.

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

Contrary to the court of appeals' analysis, two fundamental legal principles bar the *News's* claim for attorney's fees —sovereign immunity and the general rule that each side bears its own attorney's fees—unless the *News* can point to a controlling statute in the PIA that expressly authorizes fee-shifting and that expressly abrogates the Comptroller's immunity. It cannot. In the absence of such statutory language, the trial court had no discretion to award attorney's fees.

A. The common law does not provide for the shifting of private attorney's fees to the State, and in any event, such a claim would be barred by sovereign immunity.

The general rule is that each party pays its own attorney's fees. When, as here, a cause of action is a statutory one, the statute controls the award of fees.

> We have consistently held that a prevailing party cannot recover attorney's fees from an opposing party unless permitted by statute or by contract between the parties. *See, e.g., Travelers Indem. Co. of Conn. v. Mayfield,* 923 S.W.2d 590, 593 (Tex. 1996); *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.,* 835 S.W.2d 75, 77 (Tex. 1992); *First City Bank-Farmers Branch v. Guex,* 677 S.W.2d 25, 30 (Tex. 1984); *New Amsterdam Cas. Co. v. Texas Indus., Inc.,* 414 S.W.2d 914, 915 (Tex. 1967). . . .

. . . .

> . . . . Perhaps this is because of the well-established rule that "[a]n award of attorney's fees may not be supplied by implication but must be provided for by the express terms of the statute in question." *Guex,* 677 S.W.2d at 30. We cannot ignore this principle of statutory construction to authorize attorney's fees when the Legislature has not done so.

Holland v. Wal-Mart Stores, Inc., 1 S.W.3d 91, 95 (Tex. 1999).

Moreover, it is settled in Texas that for the Legislature to waive the State's sovereign immunity, a statute must contain clear and unambiguous language to that effect. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); *see also* TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2008).

B. Section 552.325 does not shift fees or abrogate sovereign immunity; thus, the *News* is not entitled to fees.

Accordingly, sections 552.324 and 552.325 of the PIA control disposition of the claim for attorney's fees. Section 552.324 authorizes a governmental body, such as the Comptroller's Office, to file suit under section 552.325 to challenge the OAG's ruling on a public-information request. Section 552.325 also permits intervention by the requestor, but it does not authorize an award of attorney's fees to the intervenor. Therefore, the *News* is not entitled to fees as a matter of law.

C. Section 552.353 does not apply here; the Comptroller's action was not brought under that section, nor could it have been.

The PIA does, however, authorize the court to assess "costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails *in suits brought under section 552.353(b).* The *News* theorizes that because section 552.324 contains a reference to both section 552.325 *and* section 552.353, the Comptroller's suit is necessarily one brought under 552.353(b).

Section 552.324 provides that:

> (a) The only suit a governmental body or officer for public information may file seeking to withhold information from a requestor is a suit that is filed in accordance with Sections 552.325 and 552.353 and that challenges a decision by the attorney general issued under Subchapter G.
>
> (b) *The governmental body* must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general being challenged. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. *This subsection does not affect the earlier deadline for purposes of Section 552.353(b)(3) for a suit brought by an officer for public information.* (emphasis added)

TEX. GOV'T CODE ANN. § 552.324 (Vernon 2004).

Section 552.324 thus distinguishes between suits brought by *governmental bodies* under section 552.325 and suits brought by *public information officers* under section 552.353(b)(3). The agency, as plaintiff below, was a governmental entity and not a public information officer, so it was required to proceed under section 552.325, which it did.

C.R. at 0003.

The suit was not brought under section 552.353(b)(3), nor could it have been. First, it was filed 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). Second, 552.353 makes clear that it is limited to public information officers who, with criminal negligence, refuse to provide access to public information. Here, the Comptroller brought suit in her official capacity. A public information officer did not bring suit pursuant to section 552.353(b)(3), because there was no misdemeanor criminal prosecution arising out of this controversy, nor did the parties anticipate one.

The procedures for pursuing a criminal violation of the PIA are set out in section 552.3215(e).

> A complainant may file a complaint alleging a violation of this chapter. The complaint must be filed with the district or county attorney. . . . If the governmental body is a state agency, the complaint may be filed with the Travis County district attorney . . . .

TEX. GOV'T CODE ANN. § 552.3215(e) (Vernon 2004).

The *News* intervened in the pending suit pursuant to section 552.325(a). It did not file a complaint with the Travis County district attorney against the Comptroller's public information officer. Consequently, that officer did not file suit in conformity with the requirements of section 552.353(b)(3), in order to have an affirmative defense to prosecution.

The authorization of fees in section 552.353 is consistent with well-established case law regarding official immunity. A public information officer who has acted with criminal negligence has necessarily acted beyond his or her authority in an *ultra vires* manner.

Public officials who act wholly without authority are personally liable for their torts and for willful and malicious acts. *See Campbell v. Jones,* 264 S.W.2d 425, 427 (Tex. 1954). A state official's illegal or unauthorized actions are not acts of the state. *Federal Sign v. Texas S. Univ.,* 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)). In such situations, a private litigant does not need legislative permission to sue for a state official's violations of state law. *Director of the Dept. of Agric. & Env't v. Printing Indus. Ass'n of Texas,* 600 S.W.2d 264, 265-66 (Tex. 1980).

In sum, Section 552.353(b)(3) creates an affirmative defense for public information officers who have acted *ultra vires* and are facing criminal prosecution. It has nothing to do with a lawsuit timely filed by a governmental body 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 here.

Finally, even assuming *arguendo* that suit had been filed under section 552.353(b), an award of attorney's fees would be authorized only with respect to "a plaintiff or defendant who substantially prevails." *See* TEX. GOV'T CODE ANN. § 552.323(b) (Vernon 2004). The

PIA still would not authorize an award of fees to an intervening requestor.

Contrary to this statutory scheme, the court of appeals opined that the Comptroller's office had filed suit under sections 552.323(b) and 552.353. *Comptroller*, 244 S.W.3d at 640. It went on to conclude, however, that the trial court had not abused its discretion in refusing to award attorney's fees, since there was no evidence that the suit lacked a reasonable basis or was filed in bad faith. Although the court below reached the right result, its flawed analysis should be corrected by this Court.

D. The PIA is exclusive of any other remedy, including the UDJA.

The trial court correctly ruled that no party is entitled to fees under the UDJA because, through the PIA, the Legislature has established an exclusive remedy. The trial court observed that: "The PIA itself provides for declaratory relief, which is the clearest indication that the legislature intended to exclude the UDJA."[7] C.R. at 186.

In an earlier case, the Austin Court of Appeals explained why the UDJA does not apply when another statutory scheme sets out the parameters of an action against the state.

> When a plaintiff files a proceeding that only challenges the validity of an administrative rule, the parties are bound by the APA and may not seek relief under the UDJA because such relief would be redundant. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 443-44 (Tex. 1992) (plaintiff not only challenging administrative order, therefore, proceeding not governed solely by APA); *Young Chevrolet, Inc. v. Texas Motor Vehicle Bd.*, 974 S.W.2d 906, 911 (Tex. App. – Austin 1998, pet. denied). This proposition is consistent with appellate-court holdings that have concluded it is an abuse of discretion

---

[7] *See* TEX. GOV'T CODE ANN § 552.3215 (Vernon 2004) for declaratory relief.

> to award attorney's fees under the UDJA when the relief sought is no greater than relief that otherwise exists by agreement or statute. *See Boatman v. Lites,* 970 S.W.2d 41, 43 (Tex. App. – Tyler 1998, no pet.); *University of Texas v. Ables,*914 S.W.2d 712, 717 (Tex. App. – Austin 1996, no writ).

Texas State Bd. of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Texas, Inc., 31 S.W.3d 750, 753 (Tex. App.– Austin 2000, pet. dism'd by agr.); *see also Joseph v. City of Ranger,* 188 S.W.2d 1013, 1015 (Tex. Civ. App. – Eastland 1945, writ ref'd w.o.m.); *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970).

Clearly, the *News's* only goal in pleading the UDJA was to recover attorney's fees, since it obtained all the substantive relief it sought under the PIA *before* it amended its pleadings to add the UDJA claim. Reliance on the UDJA for the recovery of attorney's fees in this type of suit is not permitted and it was not within the trial court's discretion to award fees under that statute—as the trial court itself made clear in its order.

E. In the event the Court grants the Comptroller's petition, it has jurisdiction over the entire case, including the attorney's fees issue.

Finally, the *News* argues that the Court lacks jurisdiction over this issue because the Comptroller is not attempting to alter the judgment regarding attorney's fees. *See* Tex. R. App. P. 53.1. But this Court has made clear that it assumes jurisdiction over the entire case when jurisdiction is proper as to any part. "Under the writ of error practice, it is generally held that when our jurisdiction is properly invoked as to one point set forth in the application

for writ of error, we acquire jurisdiction of the entire case." *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex. 1987); *see also Randall's Food Mkts, Inc. v. Johnson*, 891 S.W.2d 640, 643 (Tex. 1995). Thus, in the event this Court grants the Comptroller's petition to address whether the PIA exempts date-of-birth information from disclosure, it can take up the issue of attorney's fees as well.

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.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID MORALES
Deputy Attorney General for Civil 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
Counsel for Petitioner
Texas Comptroller of Public Accounts

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document, **Comptroller's Brief on the Merits**, was delivered as indicated on the 13th day of October 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 8655*
JACKSON WALKER, LLP
901 Main Street, Suite 6000
Dallas, TX 75202

JACK HOHENGARTEN