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.

RESPONDENT ATTORNEY GENERAL'S BRIEF

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Reply to First Issue

The date of birth of a state employee is not confidential under the PIA.

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The Court of Appeals did not abuse its discretion in denying attorney fees to *The News*, and no reversible error requires review by the Court.

TO THE HONORABLE SUPREME COURT OF TEXAS

Respondent Greg Abbott, Attorney General of Texas, files this Brief in response to the Brief on the Merits of the Texas Comptroller of Public Accounts.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly applied Texas law in holding that dates of birth of state employees are public information subject to disclosure under the Public Information Act (PIA). The Comptroller is asking the Court to rule that the dates of birth of state employees are confidential by law, without providing any legal authority to support such a ruling. Rather than claiming that disclosure of date of birth violates established common law principles, the Comptroller now is asking the Court to make a policy decision that date of birth is confidential because of the potential misuse of the information to commit identity theft. Petitioner no longer claims that disclosure of date of birth equates to public disclosure of embarrassing private facts or wrongful appropriation of one's name or likeness. Petitioner only gives lip service to proving up a claim under wrongful intrusion of a person's seclusion. Instead, the Comptroller wants the Court to hold that "availability of date-of-birth information *to the public* will exacerbate the problem of identity theft," and, based on that policy decision declare a state employee's date of birth confidential under the PIA. Comptroller's Br. 16.

Such action by the Court goes far beyond expanding common law principles in recognition of changing times. The Court has set out the basic principle underlying the statutory framework of the PIA: a court is not allowed "in its discretion to deny disclosure

even though there is no specific exception provided." *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). Under section 552.101 of the PIA, confidentiality must be based on a statute, constitutional provision, or a judicial decision. None of these legal sources make the date of birth of a state employee confidential. The Comptroller's policy arguments are more properly made to the Legislature.

The Court of Appeals correctly ruled on *The Dallas Morning News*' claim for attorney fees, in favor of the Comptroller. The Comptroller is not dissatisfied with the holding, only with the reasoning of the Court of Appeals. But the Comptroller is not prejudiced by the holding. *The News* conditioned its cross-petition for review on the Comptroller's seeking review of the Third Court of Appeals' disposition of the attorney fee issue. Under these circumstances, there is no controversy over attorney fees in this case. Neither petitioner has demonstrated an error of importance to the jurisprudence of this state regarding *The News's* claim for attorney fees.

The Comptroller claims that, as a matter of law, *The News* is not entitled to attorney fees, because the suit was brought by the Office of the Comptroller of Public Accounts, under section 552.324–not by the Comptroller of Public Accounts, under section 552.353(b)(3). A suit against the Attorney General over an open records ruling by a governmental body is provided by sections 552.324, .325, 353(b)(3) of the PIA. These sections are read together to provide for one suit against the Attorney General for a declaration that the information at issue is excepted from disclosure, regardless of whether

the suit is by the agency or its public information officer. The Comptroller seeks the Court's intervention to hold that a governmental body is never subject to attorney fees when it challenges a ruling by the Attorney General–when the only question before the trial court was whether an intervening requestor was entitled to fees under section 552.323(b). The Comptroller is seeking an advisory opinion that extends far beyond the parties, the facts and the law of this case as well as the decisions of the trial court and the court of appeals.

ARGUMENT

Common law privacy

Reply to First Issue (restated)

The date of birth of a state employee is not confidential under the PIA.

1. Dates of birth are not confidential under common law privacy.

Common law privacy protects only highly intimate or embarrassing information about one's personal life, the disclosure of which would be highly objectionable to a reasonable person. *Industrial Found.*, 540 S.W.2d at 682. The Third Court correctly held that the Comptroller did not meet this threshold test. *Texas Comptroller of Pub. Accounts v. Attorney General of Texas*, 244 S.W.3d 629, 638 (Tex.App.–Austin 2008, pet. filed). The Comptroller continues to apply the wrong law and test in her effort to have the dates of birth of state employees withheld. In her petition for review, the Comptroller sought to bring dates of birth under every recognized privacy interest, no matter how tenuous their applicability to disclosure of dates of birth under the PIA was or whether a claim had been properly

preserved for appellate review. *See* Comptroller's Pet. 2, 8.[1] Now Petitioner claims that date of birth is an independent privacy interest, not exclusively tied to any one interest recognized under common law privacy, except perhaps wrongful intrusion of a person's seclusion. Comptroller's Br. 3-16. Instead of arguing that common law privacy protects date of birth from disclosure under the PIA, she argues that common law privacy "*supports* recognition of a privacy interest in date-of-birth information." Comptroller's Br. 9.

This Court has recognized three distinct torts for 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); *Industrial Found.*, 540 S.W.2d at 682 (quoting William L. Prosser, *Privacy*, 48 Cal. L.Rev. 383, 389 (1960)); *Billings v. Atkinson*, 489 S.W.2d 858, 859-61 (Tex. 1973); *Texas Comptroller*, 244 S.W.3d at 635. None of the privacy torts are adaptable to protecting dates of birth in the Comptroller's records against disclosure under the PIA.[2]

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[1]The Comptroller did not assert the first or third interests recognized under common law privacy as grounds for summary judgment. In the Comptroller's motion for summary judgment, the Comptroller noted that privacy protects against appropriation of one's "identity" and referred to an "unreasonable intrusion" in the context of her bare claim that constitutional privacy protected the information at issue. CR 89, 90-91, Comptroller's Cx-MSJ. Tex. R. App. P. 33.1 (error not presented in trial court may not be raised on appeal).

[2]Because the Comptroller has not briefed the applicability of public disclosure of embarrassing facts or misappropriation of one's likeness or name, Respondent has not provided any counter argument in this Brief. If the Comptroller should resurrect these arguments in her Reply Brief, the Court is referred to Respondent's briefing in the court of appeals and his Response to the Petitions for Review.

Petitioner attempts to argue that the first interest, the freedom from unwarranted intrusion into one's private affairs, can be expanded to apply to a date of birth. Comptroller's Br. 9-12; Comptroller's Pet. 9-11. There is no legal or factual basis for such claim, and the Comptroller provides none. The Comptroller never explains how disclosure of a public employee's date of birth pursuant to the PIA is an intrusion upon the employee's seclusion, solitude, or private affairs. As explained by the Third Court, an intrusion upon seclusion usually requires a physical invasion of a person's property, or eavesdropping. *Texas Comptroller*, 244 S.W.3d at 636. This privacy tort was recognized by the Texas Supreme Court in *Billings*. 489 S.W.2d at 860-61. "The core of this claim is the offense of prying into the private domain of another, not publication of the results of such prying." *Blanche v. First Nationwide Mortg. Corp.*,74 S.W.3d 444, 455 (Tex.App.–Dallas 2002, no pet.) (citing *Clayton v. Richards*, 47 S.W.3d 149, 153 (Tex.App.–Texarkana 2001, pet. denied)).

In arguing for an extension of common law to protect dates of birth, Petitioner notes that before *Billings*, Texas common law did not recognize an action for wiretapping under common law privacy. Comptroller's Br. 9-10. That is true, but until *Billings*, Texas did not recognize any cause of action based on common law privacy. *Billings*, 489 S.W.2d at 859-60; *see also Diamond Shamrock Refin. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 204 (Tex. 1992). The Court, in *Billings*, did not expand common law privacy to include an action against wiretapping or eavesdropping. *Billings* adopted the principles of privacy and allowed recovery for actions that met the elements of invasion of privacy, which wiretapping did.

Billings, 489 S.W.2d at 858-61. Petitioner's claim does not meet the elements for unwarranted intrusion.

Petitioner argues that the Court of Appeals erred because it failed to distinguish adjudicative facts from legislative facts. Comptroller's Br. 13. Petitioner claims that the Court of Appeals ruled incorrectly 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." Comptroller's Br. 14. The Court of Appeals did not so hold. The Third Court concluded that the Comptroller had not shown that release of date of birth is an intentional intrusion and had not presented either argument or authority even suggesting that the release of date of birth would be highly objectionable even if it was an intentional intrusion upon the employees' private affairs. *Texas Comptroller*, 244 S.W.3d at 637.

Petitioner argues that the practicalities of proving such elements are too difficult. Comptroller's Br. 14-15. However, it is Petitioner's burden to establish that information is excepted from disclosure. Mere conclusions do not satisfy that burden. Moreover, whether an intentional intrusion occurred and whether it was highly offensive are fact questions appropriate for a jury to answer in a tort action. *See K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 636-37 (Tex.App.–Houston [1st Dist.]1984, writ ref'd n.r.e.). The Court of Appeals did not err in refusing to hold that disclosure of dates of birth under the PIA invoked the common law privacy interest protecting against unlawful intrusion.

2. The Comptroller's reconstruction of common law privacy is not supported by Texas law.

Petitioner seeks to dilute the test for common law privacy, by allowing a cause of action for information that does not meet the tests for any of the three types of actions recognized in Texas under common law privacy. The first and second interests protected by common law privacy require that the conduct be "highly offensive" to a reasonable person. An unwarranted intrusion upon seclusion is proved by (1) an intentional intrusion, physical or otherwise, upon another's solitude, seclusion, or private affairs or concerns, and (2) the intrusion being highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993). Disclosure of highly intimate or embarrassing facts is a violation if disclosure of such information would be highly offensive to "a reasonable person of ordinary sensibilities." *Industrial Found.*, 540 S.W.2d at 682; *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473-74 (Tex. 1995). The *Restatement (Second) of Torts § 652D cmt. b* (1977) states that protection under the tort of invasion of privacy is given "only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man." "As with the outrageousness requirement for intentional infliction of emotional distress and the requirement in slander cases that words be capable of a defamatory meaning, whether something is 'highly offensive' is first a matter of law; a certain threshold of offensiveness is required." *Polansky v. Southwest Airlines Co.*, 75 S.W.3d 99, 105 (Tex.App.–San Antonio 2002, no pet.) (summary judgment proceeding). "[A]n actionable invasion of privacy by intrusion must consist of an unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude

as to cause an ordinary individual to feel severely offended, humiliated, or outraged." *K-Mart*, 677 S.W.2d at 636. Some minimum standard must apply; otherwise, the line between protected and unprotected information or conduct disappears.

Petitioner wants to lower the bar for information that is protected under common law privacy, not only by permitting non-intimate or non-embarrassing information to be protected from disclosure, but also by restricting public access to information that may lead to other information that should be protected, whether or not it qualifies as highly intimate or embarrassing information. Petitioner's argument acknowledges that disclosure of a date of birth in and of itself is not highly offensive. Comptroller's Pet. 12. Instead, Petitioner argues that disclosure of date of birth "is highly offensive because it can be used to access other 'highly intimate' or sensitive information." Comptroller's Pet. 12. Without any legal support, Petitioner claims that the Court of Appeals erred because "[i]information that be [sic] used to access sensitive information is itself sensitive information, the release of which would be highly offensive to [sic] reasonable person as a matter of law." Comptroller's Pet. 12. Petitioner appears to have backed off this position to some degree. Comptroller's Br. 16. She now claims that it is the fact that disclosure of a date of birth "will exacerbate the problem of identity theft." Comptroller's Br. 16; *but see* Comptroller's Br. 3 (stating that "[t]here 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"). Regardless of how Petitioner phrases her argument, her view is in direct

conflict with the Court's admonition against considering the possible uses or misuses of information when determining whether specific information is confidential.

In *Star-Telegram*, the Court considered a privacy claim based upon the disclosure of details surrounding a rape. The victim claimed that reporting the factual details was a violation of privacy even though the newspaper did not report her name, address, or telephone number. In an argument similar to Petitioner's, the plaintiff argued that "[b]y piecing the details together, those who knew her well could deduce her identity as the victim." *Star-Telegram*, 915 S.W.2d at 474. The Court refused to hold the newspaper to a higher standard beyond proving that the information in question was of legitimate public concern:

> Facts which do not directly identify an innocent individual but which make that person identifiable to persons already aware of uniquely identifying personal information, may or may not be of legitimate public interest. To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public.

Star Telegram, 915 S.W.2d at 474-75.

Information that is otherwise public cannot be withheld, because someone can deduce confidential information from it in light of other information that he or she may possess. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 675-76 (Tex. 1995); *see also City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465 (Tex.App.–Austin 1999, no pet.) (holding that city could not withhold accident reports or public dispatch logs, even though the requestor could

obtain from the logs the two pieces of information needed to request the otherwise confidential accident reports). The Third Court followed the Court's lead. *Texas Comptroller*, 244 S.W.3d at 637; *see also* Tex. Gov't Code § 552.204(1). In arguing for an expanded scope of the type of information that should be covered under common law privacy, Petitioner would have a requestor, the Attorney General and the courts "sort, deliberate, and catalogue"each piece of information to determine if, in part or whole, disclosure of the information would reveal confidential information. This is not the test under common law privacy or under the PIA.

While other jurisdictions may consider date of birth to be confidential, those jurisdictions apply a different standard than that used in Texas or rely on express statutory authority. None of the cases or statutes cited by the Comptroller are authority for withholding the dates of birth under Texas's public information act. In the cases from other jurisdictions cited by Petitioner, the courts applied a balancing test–not principles governing the tort of invasion of privacy as recognized in Texas. *See, e.g., Scottsdale Unified School Dist. v. KPNX Broadcasting*, 955 P.2d 534, 538-40 (Ariz. 1998); *Data Tree, LLC v. Meek*, 109 P.3d 1226, 1237-38 (Kan. 2005); *Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky.App.1994); *Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y.1991). Kansas rejected application of the principles dealing with the tort of invasion of privacy. *Data Tree*, 109 P.3d at 1237. These state courts found guidance in federal Freedom of Information Act (FOIA) cases and the balancing test applied in privacy claims under FOIA. *Scottsdale*, 955

P.2d at 538-39; *Data Tree*, 109 P.3d 1237-38; *Zink*, 902 S.W.2d at 828; *see also* FOIA, 5 U.S.C. §§ 552(b)(6), (7)(C) (2007).

The common-law right of privacy that the Texas PIA protects differs from the privacy right protected under FOIA exemptions that expressly prohibit the disclosure of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* FOIA, 5 U.S.C. §§ 552(b)(6), (7)(C). To determine whether the FOIA exemptions prohibit disclosure, courts balance the individual's privacy interest against the public interest in disclosure. *See, e.g., U. S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989). Texas does not have a balancing component to the test applied to privacy claims under the PIA. *Industrial Found.*, 640 S.W.2d at 681-82 (declining to follow FOIA).

The U. S. Supreme Court has explained that the right of privacy protected under the U. S. Constitution and the common law are different from the privacy interests protected under FOIA. *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.13 (1989) ("The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."). In applying Texas common law, the Fifth Circuit has also rejected FOIA's balancing of interests test. *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (rejecting "open-ended balancing of interests" and applying *Industrial Foundation* test).

Neither is the definition of private information the same. The U.S. Supreme Court uses a broad definition of "privacy" for the purposes of FOIA: "[I]nformation may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or groups or class of persons: not freely available to the public.'" *Reporters Comm.*, 489 U.S. at 763-64 (quoting *Webster's Third New International Dictionary* 1804 (1976)). The Court cannot simply lift the tests of other jurisdictions or announce new policy; it is constricted by the limitations in section 552.101 that require confidentiality to be grounded in the constitution, a statute, or a judicial decision. *See Industrial Found.*, 640 S.W.2d at 681-83.

3. Legislative action on date of birth indicates the Legislature intended this information to remain open.

The Comptroller's legitimate concern for identity theft drives this petition for review. Protection of the dates of birth to counter identity theft, however, lies in the province of the Legislature. Last session, three bills were introduced to protect dates of birth of public employees. None passed.[3] In 2005, the Legislature had the opportunity to add date of birth to the list of confidential information on voter registration applications, for the express purpose of preventing identity theft. Tex. H.B. 345, 79th Leg., R.S. (2005) (as filed January 10, 2005) (CR 147-48, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab A); House Elections Committee, Bill Analysis, Tex. C.S.H.B. 345, 79th Leg., R.S. (2005) ((CR 149-50, AG's Reply to Comptroller's Cx-MSJ, Appendix, Tab B); Committee Hearing on Tex. H.B.

[3]Tex. S.B. 281 (Tex. H.B. 1580), Tex. S.B. 1848 (Tex. H.B. 3767), and Tex. H.B. 836, 80th Leg., R.S. (2007).

345, Before the House Committee on Elections, 79th Leg., R.S. (February 16, 2005) (testimony of Representative Burt R. Solomons, author).[4]

Codified as Tex. Elec. Code § 13.004(c), the bill expressly made confidential a social security number, driver's license number, or number of a DPS personal identification card furnished on a voter registration application. The Legislature, including the bill's author, declined to add date of birth to this confidential list. Instead, the Legislature prohibited county officials from posting date of birth, telephone number, and the subsection (c) information on the internet. Tex. Elec. Code Ann. § 13.004(d) (Vernon Supp. 2008). Dates of birth on voter registration applications are still available if requested under the PIA. Debate on Tex. H.B. 345 on the Floor of the House, 79th Leg., R.S. (April 11, 2005) (Rep. Solomons explaining information in section 13.004(d) is available from a county clerk, but not on the clerk's website).[5]

Also, in 2005, the Legislature enacted the Identity Theft Enforcement and Protection Act. Tex. Bus. & Com. Code Ann. ch. 48 (Vernon Supp. 2008) (Act of May 27, 2005, 79th Leg., R.S., ch. 294, § 2, 2005 Tex. Gen. Laws 885). Date of birth is considered personal identifying information (PII) under section 48.002(1)(A). Section 48.101 prohibits anyone

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[4] Tapes available from the House of Representatives Audio/Video Services or on the web: www.house.state.tx.us/committees/audio79/, click on Elections Committee, February 16 hearing time, testimony starting at 1 minute:16 sec.

[5] Tapes available from House of Representatives Audio/Video Services or on the web: http://www.house.state.tx.us/media/chamber/79.htm, click on Regular Session, April 11, testimony starting at 1:10:34.

from using another person's PII without consent for the purposes of financial gain. Tex. Bus. & Com. Code § 48.101(a). The law also requires businesses, but not governmental bodies, to maintain procedures to protect from unlawful use or disclosure of "sensitive personal information" (SPI), collected or maintained by a business. Tex. Bus. & Com. Code § 48.102. Significantly, date of birth is not SPI under chapter 48; only a person's name in conjunction with a social security number, driver's license or official identification number or an account or credit/debit card number is. Tex. Bus. & Com. Code § 48.002(2). Also, the Legislature enacted requirements for disposing of business records that contain PII, with penalties for non-compliance. Tex. Bus. & Com. Code Ann. § 35.48 (Vernon Supp. 2008). These statutes represent the Legislature's efforts to curb identity theft; at present those efforts do not include making a state employee's date of birth confidential under the PIA.

Attorney Fees

Reply to Second Issue (Restated)

> The Court of Appeals did not abuse its discretion in denying attorney fees to *The News*, and no reversible error requires review by the Court.

1. Petitioner fails to demonstrate error and the issue is not ripe for review.

The Comptroller claims that "[a]s a matter of law, . . . neither the Attorney General nor the intervenor were entitled to attorneys' fees," but the Attorney General did not seek attorney fees, and Intervenor's claim was denied by both the trial court and the court of appeals. Comptroller's Br. 2; *see also* Comptroller's Pet. 13; CR 26-27, AG's Orig. Answer. The Comptroller seeks review of the Court of Appeals' decision in her favor, not because she

has been *harmed* by the holding on attorney fees, but because she does not agree with the Third Court's basis for its decision that *The News* is not entitled to attorney fees. But for the Comptroller's petition on this issue, there would be no live controversy for the Court to consider.[6] The Comptroller seeks this Court's review because the Court of Appeals left "open the possibility that government officials in the future . . . may be liable for attorneys' fees." Comptroller's Br. 17. The Comptroller is seeking an advisory opinion for some future contingencies that are not in controversy here and that may never arise.[7]

The Comptroller has not established sufficient reason for the Court to review the lower court's decision on *The News's* claim for attorney fees. Even if the Court of Appeals should have ruled on the jurisdictional arguments of the parties, Petitioner has failed to show how the Court of Appeal's decision applying the abuse of discretion standard is reversible error. Tex. R. App. P. 44.1. From the Comptroller's perspective, the right decision was still made; she is not liable for attorney fees in this case. *See Luxenberg v. Marshall*, 835 S.W.2d 136, 141-42 (Tex.App.–Dallas 1992, orig. proceeding) (holding that a trial court cannot

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[6]*The News* would not be appealing this adverse ruling but for the Comptroller raising the issue in her petition for review. *The News'* Pet. 1.

[7]The claim of *The News*, as a requestor, is not a common occurrence. Respondent's counsel is not aware of any other requestor who has claimed attorney fees under section 552.323(b). For all practical purposes, this issue may never arise again. Attorney fees are generally mandatory in mandamus suits by the Attorney General and a requestor if plaintiff substantially prevails. Tex. Gov't Code §§ 552.321, .323(a). A requestor may bring an action for mandamus when it intervenes in a suit over an Attorney General's ruling. *Thomas v. Cornyn*, 71 S.W.3d 473, 482 (Tex.App.–Austin 2002, no pet.). Accordingly, a requestor need not rely on either section 552.323(b) or the Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1997). If a requestor prevails, fees will most certainly be awarded under section 552.323(a). For whatever reason, *The News* did not bring a mandamus action when it intervened in this suit.

abuse its discretion if it reaches the right result, even for the wrong reasons); *Hawthorne v. Guenther*, 917 S.W.2d 924, 931(Tex.App.–Beaumont 1996, writ denied) (holding that even though a trial court gives an incorrect reason for its decision, the trial court's assignment of a wrong reason is not reversible error). The Comptroller provides no legal argument explaining why the Court of Appeals decision was decided on the wrong basis or resulted in reversible error.

The Attorney General is the defendant in every suit contesting an open records ruling issued under the PIA. Tex. Gov't Code §§ 552.324, .325(b)(3), .353(b)(3) & (c). The Attorney General and governmental bodies utilize Tex. Gov't Code § 552.323(b) as statutory authorization for a claim of attorney fees against the other in suits over an open records ruling. The Attorney General has opposed requests for attorney fees, particularly by entities other than a governmental body that are made under section 37.009 of the UDJA; *see also* Tex. Gov't Code §§ 552.325, .353(c) and *Property Cas. Insurers Ass'n v. Texas Dep't of Insurance*, No. 07-07-0057-CV, 2008 WL 4425520, *3 (Tex.App.–Amarillo, September 20, 2008, no pet.h.) (mem. opinion) (Third party association seeking to prevent disclosure of information denied attorney fees under the UDJA). The Comptroller claims that a governmental body is not subject to attorney fees when it sues over a ruling. This claim goes beyond the claim for attorney fees of the requestor, as an Intervenor, and has consequences for the Attorney General and other parties long after this lawsuit between these two parties.

2. An action over an open records ruling is a suit under section 552.353(b)(3).

It is undisputed that this is a suit against the Attorney General over an open records ruling. The Comptroller filed suit seeking relief from compliance with the decision.[8] Comptroller's Original Petition 6, 8; *see* Tex. Gov't Code § 552.353(b)(3) (public information officer may file suit seeking relief from compliance with ruling). *The News* intervened as is its right under the PIA. Tex. Gov't Code § 552.325.

The Comptroller bases her argument on two incorrect assumptions: (1) that a lawsuit by a governmental body under section 552.324 is not the same lawsuit filed by a public information officer (PIO) referenced in section 552.353(b)(3); and (2) that in a lawsuit brought more than 10 days after receipt of an open records ruling, a substantially prevailing plaintiff (the governmental body) or defendant (the Attorney General) cannot seek attorney fees under section 552.323(b). *See* Comptroller's Br. 19-20. The Court of Appeals correctly held that this suit is a suit under section 552.353(b)(3), even though it was brought in the name of the governmental body and filed more than 10 days after the Comptroller's receipt of the ruling. *Texas Comptroller*, 244 S.W. at 640.

The Comptroller acknowledges that she brought her suit under Tex. Gov't Code §§ 552.324 and 552.325. Comptroller's Br. 21. She disclaims bringing it under Tex. Gov't

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[8]Plaintiff here is identified as "a state agency," not as the public official. CR 3, Comptroller's Original Petition. In this brief, Petitioner is referred to by "she" rather than "it," recognizing at the same time that the Comptroller sued as a governmental body rather than as the agency's public information officer. For purposes of the Attorney General's argument, it makes no difference in what name the Comptroller sued.

Code § 552.353(b)(3). Comptroller's Br. 20-21. Section 552.324(a) states that the only suit a governmental body may bring is a suit against the Attorney General challenging the ruling and one that is filed in accordance with sections 552.325 and 552.353 of the PIA.

The Comptroller argues that section 552.353 does not apply here because of the absence of any criminal prosecution pursuant to that section or any complaint by *The News* under section 552.3215 of the PIA. Comptroller's Br. 20-21. The Comptroller's argument that her suit was not filed under section 552.353(b)(3) is based on a misreading of section 552.3215. Tex. Gov't Code § 552.3215 is not a procedure for invoking criminal prosecutions under section 552.353. *See* Comptroller's Br. 20. A requestor who intervenes under section 552.325 has no duty to file a complaint under section 552.3215 as claimed by Petitioner. *See* Comptroller's Br. 20-21. Section 552.3215 provides an additional and independent civil remedy for declaratory actions in civil court by a local district or county attorney or the Attorney General for violations of the PIA. Tex. Gov't Code § 552.3215(b)-(d), (k). Section 552.3215 is not a criminal statute. It has nothing to do with criminal prosecutions under section 552.353 or a suit against the Attorney General over an open records ruling under section 552.353(b)(3). It has no role in determining whether attorney fees are available in a suit against the Attorney General over a ruling.

3. The PIA authorizes a single suit by a governmental body over a ruling.

There is no distinction between a suit filed under section 552.324, *in accordance with* section 552.353, and a suit filed *under* section 552.353(b)(3). There is no distinction

between a suit brought by a governmental body and one brought by a public information officer. Suits brought in the name of the governmental body or in the name of the PIO are the same suit. A suit challenging a ruling of the Attorney General is for one purpose: to obtain a ruling from the court that the governmental body does not have to disclose information as ordered by the Attorney General.

This conclusion is grounded in the principle that there is no legal distinction between a governmental body and its officials or employees. A governmental body acts through its agents. A suit by an individual in an official capacity is a suit by the governmental body. *See Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex.App.–Austin 1994, writ denied); *De Santiago v. West Tex. Community Supervision & Corrections Dep't.*, 203 S.W.3d 387, 399 (Tex.App.–El Paso 2006, no pet.). A public official has no separate legal capacity from that of the governmental body that she represents. *Battin v. Samaniego*, 23 S.W.3d 183, 186 (Tex.App.–El Paso 2000, pet. denied) (holding that suing the Sheriff in his official capacity is just another way of pleading a suit against the County, for which the Sheriff serves as agent). A suit by the Comptroller in her official capacity is the same suit as a suit by the governmental body, the Office of Comptroller of Public Accounts. The Comptroller and the Office of Comptroller of Public Accounts are not separate legal entities.

There is no reason to recognize a distinction between a suit by the PIO and a suit by the governmental body, generally under the PIA, or, specifically for the award of attorney fees. Suits under the PIA are brought in the name of the governmental body, in the name of

the PIO, and both.[9] Regardless of the name of the plaintiff, they are all the same suit. Suit is filed because a governmental body disagrees with a ruling of the Attorney General, and a governmental body desires a *de novo* judicial ruling on whether the information is subject to disclosure. The issue in an open records case is always the same, regardless of the cause of action: is the information subject to an exception to disclosure. *Thomas*, 71 S.W.3d at 482; *see also Dominguez v. Gilbert*, 48 S.W.3d 789, 793 (Tex.App.–Austin 2001, no pet.); *Property Cas. Insurers Ass'n*, 2008 WL 4425520, *3.

Subsection (b) of section 552.324 deviates from section 552.353(b)(3) in one respect: a governmental body is given the option of a 30-day deadline in which a suit challenging the ruling may be brought or the 10-day deadline provided in section 552.353(b)(3) to preserve a public information officer's affirmative defense to criminal prosecution under the PIA. Otherwise, the governmental body has to disclose the information. Tex. Gov't Code § 552.324(b). Just because the Comptroller filed her petition after the 10-day deadline does

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[9]**Gov't body:** *Abbott v. City of Corpus Christi*, 109 S.W.3d 113 (Tex.App.–Austin 2003, no pet.); *Abbott v. Tex. Dep't of MHMR*, 212 S.W.3d 648 (Tex.App.–Austin 2006, no pet.); *Abbott v. State Bar of Tex.*, 241 S.W.3d 604 (Tex.App.–Austin 2007, pet. filed); *Arlington Indep. Sch. Dist. v. Texas Attorney General*, 37 S.W.3d 152 (Tex.App.–Austin 2001, no pet.); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex.App.–Austin 1993, writ denied); *City of Waco v. Abbott*, 209 S.W.3d 104 (Tex. 2006); *Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex.App.–Austin 1999, no pet.); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex.App.–Austin 2000, pet. denied); *Texas Comptroller*, 244 S.W.3d 629. **Gov't body & PIO:** *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex.App.–Austin 2006, no pet.); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex.App.–Austin 2002, no pet.); *City of Lubbock v. Cornyn*, 993 S.W.2d 461 (Tex.App.–Austin 1999, no pet.); *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). **PIO:** *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996); *Thomas v. Cornyn*, 71 S.W.3d 473 (Tex.App.–Austin 2002, no pet.).

not mean this suit is not brought under section 552.353(b)(3). Section 552.324(b) simply gives a governmental body an option on the deadline for suing the Attorney General. If it wants to preserve the affirmative defense to criminal prosecution provided in section 552.353(b)(3) for its PIO, a suit against the Attorney General over a ruling has to be filed within the 10-day deadline; otherwise, it may be filed by the 30th day after receipt of the ruling. Tex. Gov't Code § 552.324(b). The Third Court of Appeals reads these provisions together. *See Thomas*, 71 S.W.3d at 490-91; *Texas Comptroller*, 244 S.W.3d at 640.

4. Section 552.353(b)(3) provides jurisdiction for a suit over an open records ruling.

Prior to the enactment of sections 552.324 and 552.325, in 1995, the only reference to a suit brought to contest the ruling of the Attorney General was in section 552.353(b)(3) or its predecessor, section 10 of Tex. Rev. Civ. Stat. art. 6252-17a (Vernon Supp. 1992) (now repealed). Section 552.353(b)(3) and its predecessor have always served two purposes: providing for an affirmative defense to criminal prosecution for a PIO and providing a cause of action over an open records ruling that ordered information to be disclosed. Both the courts and the parties used section 552.353 as the jurisdictional basis for suits contesting a ruling that ordered information to be disclosed. *See Holmes v. Morales*, 906 S.W.2d 570, 572, 574 (Tex.App.–Austin 1995), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996) (citing section 552.353(b)(3) as authority for "[a] *governmental body* to decline to comply with the attorney general's decision and obtain judicial review of its correctness in a district court of Travis County by filing within a specified time 'a petition for a declaratory

judgment, a writ of mandamus, or both, against the attorney general . . . seeking relief from the decision.'") (italics added); *Johnson v. Lynaugh*, 789 S.W.2d 704, 705 (Tex.App.–Houston [1st Dist.] 1990, no writ) (citing to section 10(c)(3) as the jurisdictional basis for a public officer to bring a mandamus against the Attorney General when he disagrees with a ruling); *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 548 (Tex.App.–Austin 1983, writ ref'd n.r.e.) (stating that the PIA provides for filing of a cause of action seeking relief from compliance with the opinion and citing section 10(c)(3)). Without section 552.353(b)(3), there would have been no statutory waiver of the sovereign immunity of the Attorney General allowing a governmental body to sue over a ruling. Absent the state's consent to suit, a trial court lacks subject matter jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex.1999) (per curiam).

The PIA waives the sovereign immunity of the Attorney General to the extent that it permits suit against the Attorney General to seek relief from an open records ruling, either by mandamus or declaratory judgment, whichever is appropriate under the circumstances. Presently, Tex. Gov't Code §§ 552.324, .325, .353(b)(3) and .353(c) provide the jurisdictional basis for suits under the PIA against the Attorney General, whereas, prior to 1995, only section 552.353(b)(3) and (c) did. These provisions provide the exclusive remedy by which a governmental body or another entity may seek relief from compliance with an open records decision of the Attorney General. If a cause of action and remedy are derived not from the common law but from a statute, then the statutory provision is mandatory and

exclusive. *Tex. Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n*, 706 S.W.2d 644, 646 (Tex. 1986).

5. The Legislature intended section 552.353(b)(3) to serve as a jurisdictional basis for suits over rulings and attorney fees.

The Legislature first enacted a provision proving for a suit over an open records ruling that ordered disclosure of information, in 1979, six years after the PIA was enacted. Act of May 25,1979, 66th Leg., R.S., ch. 414, § 1, 1979 Tex. Gen. Laws 906 (Appendix, Tab A).[10] Section 10 of article 6252-17a was amended, adding subsections (b) through (d) to make it a criminal offense to refuse to provide public information and to provide affirmative defenses for a custodian of public records (now a PIO) who was charged with such offense. *Id.* Subsection (c)(3) (now § 552.353(b)(3)) provided an affirmative defense to a custodian who filed within three working days of receipt of a ruling a "cause of action seeking relief from compliance with [the open records ruling]. . . ." *Id.* The 1979 amendment did not name the party to be sued or the type of suit to be filed. *Id.* It was not until 1989 that section 10(c)(3) was amended to name the Attorney General as the party to sue over a ruling and the type of relief to be sought–declaratory judgment or mandamus. Section 8 was also amended to provide, for the first time, attorney fees in a suit for writ of mandamus under section 8 or in a suit by an "officer for public records" under section 10(c)(3). Act of May 29, 1989, 71st Leg., R.S. ch. 1248, §§ 15, 17, secs. 8, 10, 1989 Tex. Gen. Laws 4996, 5027-28 (Appendix,

[10]Tab A also contains an excerpt from the original version of the PIA, showing section 10 as it reads before being amended in 1979.

Tab B). Section 8(b) (now § 552.323(b)) required the court to consider the conduct of the governmental body–not the conduct of the public records officer–in deciding whether to award attorney fees in a suit brought under section 10(c)(3). (Appendix, Tab B)

In 1995, the Legislature enacted sections 552.324 and 552.325 for the purpose of prohibiting governmental bodies, their public information officers and other parties seeking to withhold information from suing a requestor. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 358 (Tex. 2000); *Thomas*, 71 S.W.3d at 483 n.8; Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 24, 1995 Tex. Gen. Laws 5127, 5140 (Appendix, Tab C). The Legislature was not creating a different type of suit over an Attorney General's ruling for governmental bodies in addition to the cause of action already provided in section 552.353(b)(3). As adopted in 1995, section 552.324 did not have the 30-day deadline option. Any suit filed by a governmental body or its PIO had to be in accordance with both section 552.325 and 552.353. The Legislature adopted the 30-day deadline option in 1999. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 30, sec. 552.324(b), 1999 Tex. Gen. Laws 4500, 4513 (Appendix, Tab D).

Even today, the courts and the parties continue to use to section 553.353(b)(3) as the basis for a suit against the Attorney General under the PIA. *See Thomas*, 71 S.W.3d at 479 ("The sheriff disagreed [with the ruling] and sought a declaratory judgment under sections 552.325 and 552.353 of the Act against the attorney general that the information was not subject to disclosure."). In 2000, the Supreme Court, in *City of Garland*, cited section

552.353(b)(3) as the statute entitling a *governmental body* to sue the Attorney General. 22 S.W.3d at 357. In 2001, the Third Court of Appeals considered a PIA case brought by Arlington Independent School District that sought declaratory judgments and writs of mandamus against the Attorney General. *Arlington Indep. Sch. Dist. v. Tex. Attorney General*, 37 S.W.3d 152, 155-56 (Tex.App.–Austin 2001, no pet.). The Third Court cited sections 522.324, .325 & .353, in referencing the District's causes of action. *Id.*

6. Petitioner's interpretation results in unintended or absurd consequences.

The Comptroller is putting form over substance. If her construction is correct, all suits to challenge a ruling have to be in the name of the public information officer in order for the affirmative defense protection to be effective or for a governmental body to be held liable for, or even to seek, attorney fees under the PIA. Under Petitioner's interpretation, a governmental body could dictate the type of remedies available simply by the timing of its suit and by the name in which it files a petition. This construction makes no sense when a suit by a governmental body or by an official is the same suit. Equally absurd would be a construction that calls for two separate suits, one by the governmental body under section 552.324, and another one, for the same relief, by the PIO, under section 552.353(b)(3). As the list of cases in footnote 4, *infra*, illustrates, most suits are in the name of the governmental body, not the PIO. Surely, not all of these governmental bodies intended to forego the affirmative defense available to their PIO's or their agents.

There is no logical purpose to restricting attorney fees for a substantially prevailing

plaintiff or defendant in this manner in a suit against the Attorney General over a ruling. Section 552.323(b) announces a clear directive from the Legislature that attorney fees are to be awarded in suits against the Attorney General to a substantially prevailing plaintiff or defendant unless certain factors are found to prevail in the governmental body's favor. An award of attorney fees under section 552.323(b) is not dependent on the name in which the governmental body sues or when it files suit. It is dependent on which party substantially prevails.

CONCLUSION AND PRAYER

When this case began, Petitioner sought a declaration that state employees' dates of birth were confidential under the PIA by virtue of common law privacy. Petitioner now seeks a policy change from the Court that recognizes a new interest under Texas common law, disclosure of dates of birth. In order for the Court to grant Petitioner's request, Petitioner is asking the Court to ignore the required elements for each interest protected under common law privacy, the correct standard for PIA claims under common law privacy, and the basic principles set out by the Legislature and this Court that govern disclosure of public information under the PIA. The Comptroller provides a persuasive policy argument on why the Legislature should at least consider making dates of birth confidential. But the Comptroller had the opportunity to make that argument to the Legislature last year. The Legislature considered the issue and rejected making the very information at issue in this case confidential. Petitioner's position is contrary to legislative intent and controlling judicial

decisions. The Court of Appeals correctly determined that the Comptroller failed to meet her burden under the PIA to demonstrate that dates of birth of state employees are excepted from disclosure. The Court of Appeals applied established law. It did not make new law.

The issue of attorney fees is a non-issue and review should be denied. If the Comptroller's petition for review is denied, *The News* will withdraw its petition. *The News'* Pet. 1. No error of importance to the jurisprudence of this state is presented to merit review by the Court. Under the procedural posture of this case, Petitioner is seeking an advisory opinion that is not supported by the facts or law of this case. Nevertheless, the Comptroller's interpretation of the PIA is unreasonable and not supported by the language of the PIA as a whole or its legislative history.

Respondent Greg Abbott, Attorney General of Texas, respectfully asks the Court to deny the Comptroller's petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Respondent Greg Abbott, Attorney General of Texas, has been served, on , 2008, in the manner indicated, on the following attorneys of record:

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APPENDIX

TAB

APPENDIX A

OPEN RECORDS—DENIAL OF ACCESS—CRIMES AND OFFENSES

CHAPTER 414

H. B. No. 1969

An Act relating to access and copying of public information; amending Section 10, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252—17a, Vernon's Texas Civil Statutes), affixing punishments; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Section 10, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252—17a, Vernon's Texas Civil Statutes), is amended [35] to read as follows:

Distribution of confidential information prohibited

Sec. 10. (a) Information deemed confidential under the terms of this Act shall not be distributed.

(b) A custodian of public records, or his agent, commits an offense if, with criminal negligence, he or his agent fails or refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act.

(c) It is an affirmative defense to prosecution under Subsection (b) of this section that the custodian of public records reasonably believed that the public records sought were not required to be made available to the public and that he:

(1) acted in reasonable reliance upon a court order or a written interpretation of this Act contained in an opinion of a court of record or of the attorney general issued under Section 7 of this Act;

(2) requested a decision from the attorney general in accordance with Section 7 of this Act, and that such decision is pending; or

(3) within three working days of the receipt of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with such decision of the attorney general, and that such cause is pending.

(d) It is an affirmative defense to prosecution under Subsection (b) of this section that the defendant is the agent of a custodian of public records and that the agent reasonably relied on the written instruction of the custodian of public records not to disclose the public records requested.

(e) Any person who violates Section 10(a) or 10(b) of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail not to exceed six (6) months or fined in an amount not to exceed $1,000, or by both such fine and confinement. A violation under this section constitutes official misconduct.

Sec. 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read

35. Vernon's Ann.Civ.St. art. 6252—17a, §

on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on May 18, 1979, by a non-record vote; passed by the Senate on May 25, 1979, by a viva-voce vote.

Approved June 6, 1979.

Effective Aug. 27, 1979, 90 days after date of adjournment.

OCCUPATIONAL DRIVER'S LICENSES—RESTRICTIONS—HOURS PER DAY

CHAPTER 415

H. B. No. 2026

An Act relating to restrictions applicable to occupational driver's licenses.

Be it enacted by the Legislature of the State of Texas:

Section 1. Subsection (a), Section 23A, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941, as amended (Article 6687b, Vernon's Texas Civil Statutes), is amended [36] to read as follows:

(a) Any person whose license has been suspended for causes other than physical or mental disability or impairment may file with the judge of the county court or district court having jurisdiction within the county of his residence, or with the judge of the county court or district court having jurisdiction within the county where an offense occurred for which his license was suspended, a verified petition setting forth in detail an essential need for operating a motor vehicle in the performance of his occupation or trade. The hearing on the petition may be ex parte in nature. The judge hearing the petition shall enter an order either finding that no essential need exists for the operation of a motor vehicle in the performance of the occupation or trade of the petitioner or enter an order finding an essential need for operating a motor vehicle in the performance of the occupation or trade of the petitioner. In the event the judge enters the order finding an essential need as set out herein, he shall also, as part of such finding, determine the actual need of the petitioner in operating a motor vehicle in his occupation or trade and shall restrict the use of the motor vehicle to the petitioner's actual occupation or trade and the right to drive to and from the place of employment of the petitioner, and shall require the petitioner to give proof of a valid policy of automobile liability insurance in accordance with the provisions of the Texas Safety Responsibility Law, Article 6701h, Vernon's Annotated Texas Statutes. Such restrictions shall be definite as to hours of the day, days of the week, type of occupation and areas or routes of travel to be permitted, except that the petitioner shall not be allowed to operate a motor vehicle more than ten (10) hours in any twenty-four (24) consecutive hours. On a proper showing of necessity, however, the court may waive the 10-hour

36. Vernon's Ann.Civ.St. art. 6687b, § 23A, subsec. (a).

suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on April 4, 1973: Yeas 140, Nays 3; that the House refused to concur in Senate amendments to H. B. No. 4 on May 25, 1973, and requested the appointment of a Conference Committee to consider the differences between the two Houses; and that the House adopted the Conference Committee Report on H. B. No. 4 on May 28, 1973: Yeas 141, Nays 4; passed by the Senate, with amendments, on May 24, 1973, by a viva-voce vote; at the request of the House, the Senate appointed a Conference Committee to consider the differences between the two Houses; and that the Senate adopted the Conference Committee Report on H. B. No. 4 on May 28, 1973: Yeas 31, Nays 0.

Approved June 14, 1973.

Effective June 14, 1973.

63rd Session 1973

GOVERNMENTAL BODIES—ACCESS TO INFORMATION BY PUBLIC

CHAPTER 424 [67]

H. B. No. 6

An Act relating to the accessibility of information in the custody of certain governmental agencies and bodies; prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Declaration of policy

Section 1. Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

67. Vernon's Ann.Civ.St. art. 6252—17a, §§ 1 to 15.

the public records making every effort to match the charges with the actual cost of providing the records.

(c) It shall be the policy of all governmental bodies to provide suitable copies of all public records within a reasonable period of time after the date copies were requested. Every governmental body is hereby instructed to make reasonably efficient use of each page of public records so as not to cause excessive costs for the reproduction of public records.

(d) The charges for copies made in the district clerk's office and the county clerk's office shall be as otherwise provided by law.

(e) No charge shall be made for one copy of any public record requested from state agencies by members of the legislature in performance of their duties.

(f) The charges for copies made by the various municipal court clerks of the various cities and towns of this state shall be as otherwise provided by ordinance.

Distribution of confidential information prohibited

Sec. 10. (a) Information deemed confidential under the terms of this Act shall not be distributed.

(b) Any person who violates Section 10(a) of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail not to exceed six (6) months or fined in an amount not to exceed $1,000, or by both such fine and confinement.

Sec. 11. A bond for payment of costs for the preparation of such public records, or a prepayment in cash of the anticipated costs for the preparation of such records, may be required by the head of the department or agency as a condition precedent to the preparation of such record where the record is unduly costly and its reproduction would cause undue hardship to the department or agency if the costs were not paid.

Penalties

Sec. 12. Any person who wilfully destroys, mutilates, removes without permission as provided herein, or alters public records shall be guilty of a misdemeanor and upon conviction shall be fined not less than $25 nor more than $4,000, or confined in the county jail not less than three days nor more than three months, or both such fine and confinement.

Procedures for inspection of public records

Sec. 13. Each governmental body may promulgate reasonable rules of procedure by which public records may be inspected efficiently, safely, and without delay.

Interpretation of this act

Sec. 14. (a) This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; *provided that such records shall then* be available to any person.

(b) This Act does not authorize the withholding of information or limit the availability of public records to the public, except as expressly so provided.

This [illegible] authority to withhold information from

APPENDIX B

(d) The commissioner and board of the microenterprise support program may reserve a portion of the total fund for use in cooperative loan programs established with the participation of other public or private lenders.

(e) Financial assistance in the form of a loan may not be used to refinance an existing debt of a proposed or existing microenterprise.

SECTION 7. Section 44.012, Agriculture Code, is amended to read as follows:

Sec. 44.012. MONEY FOR GRANTS *AND LOANS*. The commissioner may accept gifts and grants of money from the federal government, local governments, or private corporations or other persons for use in making grants *and loans* under the agricultural diversification program *and the rural microenterprise support program*. The legislature may appropriate money for grants *and loans* under the *programs* [~~program~~].

SECTION 8. Chapter 44, Agriculture Code, is amended by adding Section 44.013 to read as follows:

Sec. 44.013. RURAL MICROENTERPRISE DEVELOPMENT FUND. The rural microenterprise development fund is a fund in the state treasury. Money appropriated to the Agricultural Diversification Board for use in making loans under the rural microenterprise support program, other amounts received by the state for loans made under the program, and other money received by the board for the program and required by the board to be deposited in the fund shall be deposited to the credit of the fund. The fund shall operate as a revolving fund, the contents of which shall be applied and reapplied for the purposes of the rural microenterprise support program.

SECTION 9. This Act takes effect September 1, 1989.

SECTION 10. Section 58.031, Agriculture Code, as added by this Act, is contingent on the adoption of the constitutional amendment proposed by H.J.R. No. 51, Acts of the 71st Legislature, Regular Session, 1989. If that proposed constitutional amendment is not approved by the voters, Section 58.031, Agriculture Code, as added by this Act, has no effect.

SECTION 11. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on May 18, 1989, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 1111 on May 28, 1989, by a non-record vote; passed by the Senate, with amendments, on May 26, 1989, by a viva-voce vote.

Approved June 16, 1989.

Effective Sept. 1, 1989, except as provided in § 10 of this act.

CHAPTER 1248

H.B. No. 1285

AN ACT

relating to the creation, maintenance, preservation, microfilming, destruction, and other disposition of, and access to, governmental records; providing penalties.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subtitle C, Title 6, ~~Local~~ Government Code, is amended to read as follows:

(c) The officer for public records or the officer's agent shall treat each request for information uniformly without regard to the position or occupation of the person making the request or the person on whose behalf the request is made or because the individual is a member of the media.

SECTION 14. Section 7, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252–17a, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 7. ATTORNEY GENERAL OPINIONS. (a) If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten *calendar* days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

(b) The attorney general shall forthwith render a decision, consistent with standards of due process, to determine whether the requested information is a public record or within one of the above stated exceptions. The specific information requested shall be supplied to the attorney general but shall not be disclosed *to the public or the requesting party* until a final determination has been made *by the attorney general or, if suit is filed under the provisions of this Act, until a final decision has been made by the court with jurisdiction over the suit. In a suit filed under this Act, the court may order that the information at issue be discovered only pursuant to a protective order until a final determination is made. If the governmental body wishes to withhold information, it must submit written comments setting forth the reasons why the information should be withheld. Any member of the public may submit written comments setting forth the reasons why the information should or should not be released.* The attorney general shall issue a written opinion based upon the determination made on the request.

(c) In cases in which a third party's privacy or property interests may be implicated, including but not limited to Subdivisions (1), (4), (10), and (14) of Subsection (a) of Section 3 of this Act, the governmental body may decline to release the information in order to request an attorney general opinion. A person whose interests may be implicated or any other person may submit in writing to the attorney general the person's reasons for withholding or releasing the information. In such cases, the governmental body may, but is not required to, submit its reasons why the information should or should not be withheld.

SECTION 15. Section 8, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252–17a, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 8. WRIT OF MANDAMUS. *(a)* If a governmental body refuses to request an attorney general's decision as provided in this Act, or to supply public information or information which the attorney general has determined to be a public record, the person requesting the information or the attorney general may seek a writ of mandamus compelling the governmental body to make the information available for public inspection.

(b) In an action brought under this section or Subdivision (3) of Subsection (c) of Section 10, the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. In exercising its discretion, the court shall consider whether the conduct of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

SECTION 16. Section 9, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252–17a, Vernon's Texas Civil Statutes), is amended by amending Subsections (a), (b), and (d) and by adding Subsections (g) and (h) to read as follows:

(a) The cost to any person requesting noncertified photographic reproductions of public records comprised of pages up to legal size shall not be excessive. The State *Purchasing and General Services Commission* [~~Board of Control~~] shall from time to time determine *guidelines on* the actual cost of standard size reproductions and shall periodically publish these cost figures for use by *governmental bodies* [~~agencies~~] in determining charges to be made pursuant to this Act. The cost of obtaining a standard or legal size photographic reproduction shall be in an amount that reasonably includes all costs related to repro-

ducing the record, including costs of materials, labor, and overhead unless the request is for 50 pages or less of readily available information.

(b) Charges made for access to public records comprised in any form other than up to standard sized pages or in computer record banks, microfilm records, or other similar record keeping systems, shall be set upon consultation between the *officer for public* [~~custodian of the~~] records and the State *Purchasing and General Services Commission* [~~Board of Control~~], giving due consideration to the expenses involved in providing the public records making every effort to match the charges with the actual cost of providing the records. The costs of providing the record shall be in an amount that reasonably includes all costs related to providing the record, including costs of materials, labor, and overhead.

(d) The charges for copies made in the district clerk's office and the county clerk's office *may not be greater than the actual cost of the copies as provided in Subsections (a) and (b) of this section unless a certified record, the cost for which is set by law, is requested* [~~shall be as otherwise provided by law~~].

(g) Public records shall be furnished without charge or at a reduced charge if the governmental body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(h) If a governmental body refuses or fails to provide copies of public records at the actual cost of reproducing the records as provided in Subsections (a) and (b) of this section, a person who overpays shall be entitled to recover three times the amount of the overcharge; provided, however, that the governmental body did not act in good faith in computing the costs.

SECTION 17. Subsections (b), (c), (d), and (e), Section 10, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252–17a, Vernon's Texas Civil Statutes), are amended to read as follows:

(b) *An officer for* [~~A custodian of~~] public records, or his agent, commits an offense if, with criminal negligence, he or his agent fails or refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act.

(c) It is an affirmative defense to prosecution under Subsection (b) of this section that *the officer for* [~~custodian of~~] public records reasonably believed that the public records sought were not required to be made available to the public and that he:

(1) acted in reasonable reliance upon a court order or a written interpretation of this Act contained in an opinion of a court of record or of the attorney general issued under Section 7 of this Act;

(2) requested a decision from the attorney general in accordance with Section 7 of this Act, and that such decision is pending; or

(3) within *10 calendar* [~~three working~~] days of the receipt of a decision by the attorney general that the information is public, filed a *petition for a declaratory judgment, a writ of mandamus, or both against the attorney general, in a Travis County district court* [~~cause of action~~] seeking relief from compliance with such decision of the attorney general, and that *the petitions are* [~~such cause is~~] pending.

(d) *It is, further, an affirmative defense to prosecution under Subsection (b) of this section that a person or entity has, within 10 calendar days of the receipt by a governmental body of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with the decision of the attorney general, and that the cause is pending.*

(e) It is an affirmative defense to prosecution under Subsection (b) of this section that the defendant is the agent of a custodian of public records and that the agent reasonably relied on the written instruction of the custodian of public records not to disclose the public records requested.

(f) [~~(e)~~] Any person who violates Section 10(a) or 10(b) of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail not to exceed six (6) months or fined in an amount not to exceed $1,000, or by

both such fine and confinement. A violation under this section constitutes official misconduct.

SECTION 18. Section 14, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes), is amended by adding Subsection (f) to read as follows:

(f) This Act does not affect the scope of civil discovery under the Texas Rules of Civil Procedure. The exceptions from disclosure under this Act do not create new privileges from discovery.

SECTION 19. Sections 10(b), (c), and (d), Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes), are amended to read as follows:

(b) *An officer for* [~~A custodian of~~] public records, or his agent, commits an offense if, with criminal negligence, he or his agent fails or refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act.

(c) It is an affirmative defense to prosecution under Subsection (b) of this section that the *officer for* [~~custodian of~~] public records reasonably believed that the public records sought were not required to be made available to the public and that he:

(1) acted in reasonable reliance upon a court order or a written interpretation of this Act contained in an opinion of a court of record or of the attorney general issued under Section 7 of this Act;

(2) requested a decision from the attorney general in accordance with Section 7 of this Act, and that such decision is pending; or

(3) within three working days of the receipt of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with such decision of the attorney general, and that such cause is pending.

(d) It is an affirmative defense to prosecution under Subsection (b) of this section that the defendant is the agent of *an officer for* [~~a custodian of~~] public records and that the agent reasonably relied on the written instruction of the *officer for* [~~custodian of~~] public records not to disclose the public records requested.

SECTION 20. Section 11, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 11. BOND FOR PAYMENT OF COSTS FOR PREPARATION OF PUBLIC RECORDS OR CASH PREPAYMENT. A bond for payment of costs for the preparation of such public records, or a prepayment in cash of the anticipated costs for the preparation of such records, may be required by the *officer for public records or the officer's agent* [~~head of the department or agency~~] as a condition precedent to the preparation of such record where the record is unduly costly and its reproduction would cause undue hardship to the department or agency if the costs were not paid.

SECTION 21. Section 27(a), Chapter 13, Acts of the 68th Legislature, 2nd Called Session, 1984 (Article 6674r-1, Vernon's Texas Civil Statutes), is amended to read as follows:

(a) The board shall keep a complete written account of all its meetings and other proceedings and shall *maintain the records of the district* [~~preserve its minutes, contracts, records, plans, notices, accounts, audits, receipts, and records of all kinds~~] in a secure manner. *The preservation, microfilming, destruction, or other disposition of the records of the district is subject to the requirements of Subtitle C, Title 6, Local Government Code, and rules adopted under that subtitle.*

SECTION 22. Article 7843, Revised Statutes, is amended to read as follows:

Art. 7843. DISTRICT RECORDS. The directors, through the secretary, shall keep a true account of all matters and proceedings of the board, and shall *maintain the records of the district in a secure manner* [~~preserve all contracts, records and notices, duplicate vouchers, duplicate receipts, and all accounts and records of whatsoever kind, and the same shall be the property of the district and shall be delivered to their successors in office~~]. *The preservation, microfilming, destruction, or other disposition of the*

APPENDIX C

or after the effective date of this Act. A claim or cause of action under that chapter accruing under policies issued prior to the effective date of this Act, filed with the attorney general pursuant to such Act, shall remain eligible for indemnification under such chapter and the former law is continued in effect for that purpose.

SECTION 5. The change in law made by this Act to Article 5.15–4, Insurance Code, applies only to an insurance policy that is delivered, issued for delivery, or renewed on or after the effective date of this Act. A policy that is delivered, issued for delivery, or renewed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed by the House on May 11, 1995: Yeas 131, Nays 0, 1 present, not voting; the House concurred in Senate amendments to H.B. No. 1362 on May 26, 1995: Yeas 99, Nays 45, 2 present, not voting; passed by the Senate, with amendments, on May 25, 1995: Yeas 31, Nays 0.

Approved June 17, 1995.

Effective August 28, 1995, 90 days after date of adjournment.

CHAPTER 1035

H.B. No. 1718

AN ACT

relating to the revision of the open records law.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. The chapter heading to Chapter 552, Government Code, is amended to read as follows:

CHAPTER 552. *PUBLIC INFORMATION* [~~OPEN RECORDS~~]

SECTION 2. Sections 552.002, 552.003, 552.004, 552.006, 552.007, 552.008, and 552.021, Government Code, are amended to read as follows:

Sec. 552.002. DEFINITION OF PUBLIC *INFORMATION; MEDIA CONTAINING PUBLIC INFORMATION* [~~RECORD~~]. *(a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:*

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

(b) The media on which public information is recorded include:

(1) paper;

(2) film;

(3) a magnetic, optical, or solid state device that can store an electronic signal;

(4) tape;

(5) Mylar;

(6) linen;

(7) silk; and

(8) vellum.

Sec. 552.304. SUBMISSION OF PUBLIC COMMENTS. A *person* [~~member of the public~~] may submit written comments stating reasons why the information at issue in a request for an attorney general decision should or should not be released.

SECTION 21. Section 552.305(a), Government Code, is amended to read as follows:

(a) In a case in which information is requested under this chapter and a *person's* [~~third party's~~] privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

SECTION 22. Section 552.306, Government Code, is amended to read as follows:

Sec. 552.306. RENDITION OF ATTORNEY GENERAL DECISION; ISSUANCE OF WRITTEN OPINION. (a) The attorney general shall promptly render a decision requested under this subchapter, consistent with the standards of due process, determining whether the requested information is [~~a public record or is~~] within one of the exceptions of Subchapter C. *The attorney general shall render the decision not later than the 60th working day after the date the attorney general received the request for a decision. If the attorney general is unable to issue the decision within the 60-day period, the attorney general may extend the period for issuing the decision by an additional 20 working days by informing the governmental body and the requestor, during the original 60-day period, of the reason for the delay.*

(b) The attorney general shall issue a written opinion of the determination *and shall provide a copy of the opinion to the requestor.*

SECTION 23. Subchapter G, Chapter 552, Government Code, is amended by adding Section 552.308 to read as follows:

Sec. 552.308. TIMELINESS OF ACTION BY MAIL. When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within the period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within the period.

SECTION 24. Subchapter H, Chapter 552, Government Code, is amended by amending Section 552.321 and by adding Sections 552.324 and 552.325 to read as follows:

Sec. 552.321. SUIT FOR WRIT OF MANDAMUS. A *requestor* [~~person requesting information~~] or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is [a] public *information* [~~record~~].

Sec. 552.324. SUIT BY GOVERNMENTAL BODY. 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.

Sec. 552.325. PARTIES TO SUIT SEEKING TO WITHHOLD INFORMATION. (a) A governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

(b) The governmental body, officer for public information, or other person or entity that files the suit shall demonstrate to the court that the governmental body, officer for public information, or other person or entity made a timely good faith effort to inform the requestor, by certified mail or by another written method of notice that requires the return of a receipt, of:

(1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;

(2) the requestor's right to intervene in the suit or to choose to not participate in the suit;

(3) the fact that the suit is against the attorney general; and

(4) the address and phone number of the office of the attorney general.

(c) If the attorney general enters into a proposed settlement that all or part of the information that is the subject of the suit should be withheld, the attorney general shall notify the requestor of that decision and, if the requestor has not intervened in the suit, of the requestor's right to intervene to contest the withholding. The attorney general shall notify the requestor:

(1) in the manner required by the Texas Rules of Civil Procedure, if the requestor has intervened in the suit; or

(2) by certified mail or by another written method of notice that requires the return of a receipt, if the requestor has not intervened in the suit.

(d) The court shall allow the requestor a reasonable period to intervene after the attorney general attempts to give notice under Subsection (c)(2).

SECTION 25. Sections 552.351 and 552.353, Government Code, are amended to read as follows:

Sec. 552.351. DESTRUCTION, REMOVAL, OR ALTERATION OF PUBLIC *INFORMATION* [~~RECORD~~]. (a) A person commits an offense if the person wilfully destroys, mutilates, removes without permission as provided by this chapter, or alters [~~a~~] public *information* [~~record~~].

(b) An offense under this section is a misdemeanor punishable by:

(1) a fine of not less than $25 or more than $4,000;

(2) confinement in the county jail for not less than three days or more than three months; or

(3) both the fine and confinement.

Sec. 552.353. FAILURE OR REFUSAL OF OFFICER FOR PUBLIC *INFORMATION* [~~RECORDS~~] TO PROVIDE ACCESS TO OR COPYING OF PUBLIC *INFORMATION* [~~RECORD~~]. (a) An officer for public *information* [~~records~~], or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public *information* [~~records~~] to a *requestor* [~~person on request~~] as provided by this chapter.

(b) It is an affirmative defense to prosecution under Subsection (a) that the officer for public *information* [~~records~~] reasonably believed that public access to the requested *information* [~~records~~] was not required and that the officer:

(1) acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record or of the attorney general issued under Subchapter G;

(2) requested a decision from the attorney general in accordance with Subchapter G, and the decision is pending; or

(3) not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, filed a petition for a declaratory judgment, a writ of mandamus, or both, against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, and a petition is pending.

(c) It is an affirmative defense to prosecution under Subsection (a) that a person or entity has, not later than the 10th calendar day after the date of receipt by a governmental body of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with the decision of the attorney general, and the cause is pending.

(d) It is an affirmative defense to prosecution under Subsection (a) that the defendant is the agent of an officer for public *information* [~~records~~] and that the agent reasonably relied on the written instruction of the officer for public *information* [~~records~~] not to disclose the public *information* [~~records~~] requested.

APPENDIX D

CHAPTER 1319

S.B. No. 1851

AN ACT

relating to public access to governmental information and decisions, including revisions to the public information law.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter A, Chapter 552, Government Code, is amended by adding Section 552.0035 to read as follows:

Sec. 552.0035. ACCESS TO INFORMATION OF JUDICIARY. (a) Access to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.

(b) This section does not address whether information is considered to be information collected, assembled, or maintained by or for the judiciary.

SECTION 2. Subchapter A, Chapter 552, Government Code, is amended by adding Section 552.0055 to read as follows:

Sec. 552.0055. SUBPOENA DUCES TECUM OR DISCOVERY REQUEST. A subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter.

SECTION 3. Subchapter A, Chapter 552, Government Code, is amended by adding Sections 552.009 and 552.010 to read as follows:

Sec. 552.009. OPEN RECORDS STEERING COMMITTEE: ADVICE TO COMMISSION; ELECTRONIC AVAILABILITY OF PUBLIC INFORMATION. (a) The open records steering committee is composed of:

(1) a representative of each of the following, appointed by its governing entity:

(A) the attorney general's office;

(B) the comptroller's office;

(C) the Department of Public Safety;

(D) the Department of Information Resources;

(E) the Texas State Library and Archives Commission; and

(F) the General Services Commission;

(2) five public members, appointed by the General Services Commission; and

(3) a representative of each of the following types of local governments, appointed by the General Services Commission:

(A) a municipality;

(B) a county; and

(C) a school district.

(b) The representative of the General Services Commission is the presiding officer of the committee. The committee shall meet as prescribed by committee procedures or at the call of the presiding officer.

(c) The committee shall advise the General Services Commission regarding the commission's performance of its duties under this chapter.

(d) The members of the committee who represent state governmental bodies and the public members of the committee shall periodically study and determine the types of public information for which it would be useful to the public or cost-effective for the government if the type of information were made available by state governmental bodies by means of the Internet or another electronic format. The committee shall report its findings and recommendations to the governor, the presiding officer of each house of the legislature, and the budget committee and state affairs committee of each house of the legislature.

a timely fashion if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within *that* ~~[the]~~ period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within *that* ~~[the]~~ period.

(b) When this subchapter requires an agency of this state to submit or otherwise give to the attorney general within a specified period a request, notice, or other writing, the requirement is met in a timely fashion if:

(1) the request, notice, or other writing is sent to the attorney general by interagency mail; and

(2) the agency provides evidence sufficient to establish that the request, notice, or other writing was deposited in the interagency mail within that period.

SECTION 27. Section 552.321, Government Code, is amended to read as follows:

Sec. 552.321. SUIT FOR WRIT OF MANDAMUS. *(a)* A requestor or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information *that is not excepted from disclosure under Subchapter C.*

(b) A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located. A suit filed by the attorney general under this section must be filed in a district court of Travis County, except that a suit against a municipality with a population of 100,000 or less must be filed in a district court for the county in which the main offices of the municipality are located.

SECTION 28. Subchapter H, Chapter 552, Government Code, is amended by adding Section 552.3215 to read as follows:

Sec. 552.3215. DECLARATORY JUDGMENT OR INJUNCTIVE RELIEF. (a) In this section:

(1) "Complainant" means a person who claims to be the victim of a violation of this chapter.

(2) "State agency" means a board, commission, department, office, or other agency that:

(A) is in the executive branch of state government;

(B) was created by the constitution or a statute of this state; and

(C) has statewide jurisdiction.

(b) An action for a declaratory judgment or injunctive relief may be brought in accordance with this section against a governmental body that violates this chapter.

(c) The district or county attorney for the county in which a governmental body other than a state agency is located or the attorney general may bring the action in the name of the state only in a district court for that county. If the governmental body extends into more than one county, the action may be brought only in the county in which the administrative offices of the governmental body are located.

(d) If the governmental body is a state agency, the Travis County district attorney or the attorney general may bring the action in the name of the state only in a district court of Travis County.

(e) A complainant may file a complaint alleging a violation of this chapter. The complaint must be filed with the district or county attorney of the county in which the governmental body is located unless the governmental body is the district or county attorney. If the governmental body extends into more than one county, the complaint must be filed with the district or county attorney of the county in which the administrative offices of the governmental body are located. If the governmental body is a state agency, the complaint may be filed with the Travis County district attorney. If the governmental body is the district or county attorney, the complaint must be filed with the attorney general. To be valid, a complaint must:

(1) be in writing and signed by the complainant;

(2) state the name of the governmental body that allegedly committed the violation, as accurately as can be done by the complainant;

(3) state the time and place of the alleged commission of the violation, as definitely as can be done by the complainant; and

(4) in general terms, describe the violation.

(f) A district or county attorney with whom the complaint is filed shall indicate on the face of the written complaint the date the complaint is filed.

(g) Before the 31st day after the date a complaint is filed under Subsection (e), the district or county attorney shall:

(1) determine whether:

(A) the violation alleged in the complaint was committed; and

(B) an action will be brought against the governmental body under this section; and

(2) notify the complainant in writing of those determinations.

(h) Notwithstanding Subsection (g)(1), if the district or county attorney believes that that official has a conflict of interest that would preclude that official from bringing an action under this section against the governmental body complained of, before the 31st day after the date the complaint was filed the county or district attorney shall inform the complainant of that official's belief and of the complainant's right to file the complaint with the attorney general. If the district or county attorney determines not to bring an action under this section, the district or county attorney shall:

(1) include a statement of the basis for that determination; and

(2) return the complaint to the complainant.

(i) If the district or county attorney determines not to bring an action under this section, the complainant is entitled to file the complaint with the attorney general before the 31st day after the date the complaint is returned to the complainant. On receipt of the written complaint, the attorney general shall comply with each requirement in Subsections (g) and (h) in the time required by those subsections. If the attorney general decides to bring an action under this section against a governmental body located only in one county in response to the complaint, the attorney general must comply with Subsection (c).

(j) An action may be brought under this section only if the official proposing to bring the action notifies the governmental body in writing of the official's determination that the alleged violation was committed and the governmental body does not cure the violation before the fourth day after the date the governmental body receives the notice.

(k) An action authorized by this section is in addition to any other civil, administrative, or criminal action provided by this chapter or another law.

SECTION 29. Section 552.323, Government Code, is amended to read as follows:

Sec. 552.323. ASSESSMENT OF COSTS OF LITIGATION AND REASONABLE ATTORNEY FEES. (a) In an action brought under Section 552.321 or *552.3215* [~~Section 552.353(b)(3)~~], the court *shall* [~~may~~] assess costs of litigation and reasonable attorney fees incurred by a plaintiff [~~or defendant~~] who substantially prevails, *except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in reasonable reliance on:*

(1) a judgment or an order of a court applicable to the governmental body;

(2) the published opinion of an appellate court; or

(3) a written decision of the attorney general, including a decision issued under Subchapter G or an opinion issued under Section 402.042.

(b) *In an action brought under Section 552.353(b)(3), the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails.* In exercising its discretion under this *subsection* [~~section~~], the court shall consider whether the conduct of the *officer for public information of the* governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

SECTION 30. Section 552.324, Government Code, is amended to read as follows:

Sec. 552.324. SUIT BY GOVERNMENTAL BODY. *(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.

SECTION 31. Subchapter H, Chapter 552, Government Code, is amended by adding Section 552.326 to read as follows:

Sec. 552.326. FAILURE TO RAISE EXCEPTIONS BEFORE ATTORNEY GENERAL. (a) Except as provided by Subsection (b), the only exceptions to required disclosure within Subchapter C that a governmental body may raise in a suit filed under this chapter are exceptions that the governmental body properly raised before the attorney general in connection with its request for a decision regarding the matter under Subchapter G.

(b) Subsection (a) does not prohibit a governmental body from raising an exception:

(1) based on a requirement of federal law; or

(2) involving the property or privacy interests of another person.

SECTION 32. Subchapter D, Chapter 551, Government Code, is amended by adding Section 551.086 to read as follows:

Sec. 551.086. DELIBERATION REGARDING ECONOMIC DEVELOPMENT NEGOTIATIONS; CLOSED MEETING. This chapter does not require a governmental body to conduct an open meeting:

(1) to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations; or

(2) to deliberate the offer of a financial or other incentive to a business prospect described by Subdivision (1).

SECTION 33. Section 325.011, Government Code, is amended to read as follows:

Sec. 325.011. CRITERIA FOR REVIEW. The commission and its staff shall consider the following criteria in determining whether a public need exists for the continuation of a state agency or its advisory committees or for the performance of the functions of the agency or its advisory committees:

(1) the efficiency with which the agency or advisory committee operates;

(2) an identification of the objectives intended for the agency or advisory committee and the problem or need that the agency or advisory committee was intended to address, the extent to which the objectives have been achieved, and any activities of the agency in addition to those granted by statute and the authority for these activities;

(3) an assessment of less restrictive or alternative methods of performing any regulation that the agency performs that could adequately protect the public;

(4) the extent to which the advisory committee is needed and is used;

(5) the extent to which the jurisdiction of the agency and the programs administered by the agency overlap or duplicate those of other agencies and the extent to which the programs administered by the agency can be consolidated with the programs of other state agencies;

(6) whether the agency has recommended to the legislature statutory changes calculated to be of benefit to the public rather than to an occupation, business, or institution that the agency regulates;