NO. 08-0172

IN THE SUPREME COURT OF TEXAS

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,
Petitioner,

V.

ATTORNEY GENERAL OF TEXAS
and
THE DALLAS MORNING NEWS, LTD,
Respondents.

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

TEXAS COMPTROLLER'S COMBINED REPLY BRIEF AND RESPONSE TO CROSS-PETITION

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Comptroller of Public Accounts ("Comptroller") files this combined reply to the responsive briefs of *The Dallas Morning News* (the "*News*") and the Office of the Attorney General ("OAG"); and response to the *News's* brief in support of its cross-petition.

SUMMARY OF THE ARGUMENT

First issue: Respondents argue that the Comptroller's position rests solely on policy grounds. While policy considerations do counsel strongly in favor of protecting date-of-birth information, the privacy test in *Billings* and *Valenzuela* also supports confidentiality. Under that test, an "invasion of privacy" is: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, (2) which would be highly offensive to a reasonable person. In view of recent technological developments and the growing risk of identity theft, reasonable persons would view the disclosure of date-of-birth information as an intrusion into their "private affairs" or "concerns" that is highly offensive.

The absence of an express statutory exemption does not prevent this Court from deeming the information confidential if its disclosure would constitute an "invasion of privacy" under common law. In such instances, the powers of the judiciary and the Legislature to protect such information are co-extensive. Respondents' contention that this issue falls within the exclusive province of the Legislature is contrary to section 552.101, and should be rejected.

Second issue: It is well settled in Texas that for the Legislature to waive the state's sovereign immunity, a statute must contain clear and unambiguous language to that effect. The *News* argues it is entitled to recover attorney's fees under section 552.323(b), which provides: "In an action brought under 552.353(b)(3), the court may assess the costs of

litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails." The *News* is not entitled to fees under this statute for at least three reasons.

First, it would require this Court to ignore statutory language that distinguishes between suits brought by a "governmental body" under 552.325, and those brought by a "public information officer" under section 552.353(b)(3). Here, the agency, as a "governmental body," brought suit under section 552.325. *Second*, it would require this Court to brush aside the deadline for filing suit under section 552.353(b)(3), which is different than the deadline for suits filed under section 552.325. The Comptroller filed its suit well after the 10-day deadline in section 552.353(b)(3) had expired, but within the 30-day deadline for suits filed under section 552.325. *Third*, even assuming *arguendo* that the Comptroller's suit arose under section 552.353(b)(3), it would require extending the statutory waiver in section 552.323(b) to "intervenors" even though the statute refers only to a "*plaintiff or defendant* who substantially prevails."

ARGUMENT AND AUTHORITIES

I. The Comptroller's position is supported by not only compelling policy considerations, but also Texas common law that protects against intrusion into an individual's private affairs or concerns.

Respondents contend the Comptroller's position rests solely on policy considerations. OAG Response at 1; *News* Response at 10. This is incorrect. Policy considerations do counsel in favor of protecting date-of-birth information. But Texas common law, which is

incorporated into the PIA, also supports recognition of a privacy interest in such information.[1]

A. The *Billings* test supports protection of date-of-birth information, in view of recent technological developments and the growing problem of identity theft.

Texas common law recognizes the tort of "invasion of privacy." *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). "Invasion of privacy" is actually of recognition of several privacy interests and several distinct torts. *Id.* One such tort is: "(1) an intentional intrusion, *physically or otherwise*, upon another's solitude, seclusion, or *private affairs* or *concerns,* which (2) would be highly offensive to a reasonable person." *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (emphasis added). The cause of action is based on this Court's decision in *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973).

Billings and *Valenzuela* support privacy protection for an individual's date of birth, in view of recent technological developments and the growing problem of identity theft. Comptroller's Opening Brief at 3-6; Petition at 3-5; *see Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535-36 (N.Y. Sup. 2004) (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators,* 76-Feb.

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

N.Y. St. B.J. 10, 15 (February, 2004)); Federal Trade Commission, *Identity Theft Survey Report,* Sept. 2003, *available at* <http://www.ftc.gov/os/2003/09/synovatereport.pdf>.

The availability of an individual's date of birth, in combination with other personal identifiers, clearly increases the risk of identity theft. *See Daly*, 782 N.Y.S.2d at 535-36 (N.Y. Sup. 2004); *see also Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998); Tex. Att'y Gen. OR2006-09138 at 3. Reasonable persons would therefore view the disclosure of such information as an intrusion into their "private affairs" or "concerns" that is highly offensive. *See Valenzuela*, 853 S.W.2d at 513. The court of appeals erred when it concluded that the elements of this privacy claim required the Comptroller to prove that the release of such information "will result in the commission of identity theft." *See Texas Comptroller of Public Accounts v. Attorney Gen. of Texas,* 244 S.W.3d 629, 637 (Tex. App.–Austin 2008, pet. filed).

This reasonable expectation of privacy is amply demonstrated by judicial decisions and legislative trends in other jurisdictions that have uniformly favored the protection of an individual's date of birth. *See* Comptroller's Opening Brief at 3-8. These authorities—along with the FTC's survey on identity theft, the Attorney General's Identity Theft Victim Kit and the Legislature's Bill Analysis for H.B. 698[2]—may be noticed as

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[2] *See* Federal Trade Commission, *Identity Theft Survey Report,* Sept. 2003, *available at* <http://www.ftc.gov/os/2003/09/synovatereport.pdf>; Texas Attorney General's Identity Theft Victim Kit, *available at* http://www.oag.state.tx.us/ag_publications/pdfs/; Tex. H.B. 698, 79th Leg., R.S. (2005) (Committee Report Substituted), and Tex. S.B. 122, 79th Leg., R.S. (2005) (Committee Report Unamended).

"legislative facts." *See Chapa v. State*, 729 S.W.2d 723 (Tex. Crim. App. 1987) (consideration of city ordinances as legislative facts to determine whether a taxicab passenger had a reasonable expectation of privacy); *Aboussie v. Aboussie*, 270 S.W.2d 636, 639 (Tex. Civ. App.– Fort Worth 1954, writ ref'd), *overruled in part by Felderholf v. Felderholf*, 473 S.W.2d 928 (Tex. 1971) (interests of children best served by rule that unemancipated minors cannot sue their parents for acts of ordinary negligence); *see also* 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 15.03 (1958).

The *Billings* court, moreover, expressly recognized that technological developments may play a role in the growth of common-law principles regarding an intentional intrusion into another's private affairs or seclusion:

> One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization . . . have increased [an individual's] need for privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be a proper protection against this type encroachment upon the personality of the individual.

Billings, 489 S.W.2d at 860 (quoting 62 AM. JUR. 2d, *Privacy* § 4); *see also Valenzuela*, 853 S.W.2d at 513 (defining element of tort as intentional intrusion "physically or otherwise"). Texas common law before *Billings* did not protect against wiretapping. But this did not deter the *Billings* court from concluding that a cause of action had been stated. Indeed, the very essence of the common law has been its capacity for growth and adaptation to changing

circumstances. *Davis v. Davis*, 521 S.W.2d 603, 608 (Tex. 1975); *Hurtado v. California*, 110 U.S. 516, 530, 4 S.Ct. 111, 118, 28 L.Ed. 232 (1884).

B. Cases cited by the court of appeals and Respondents, which limit the holding in *Billings*, are readily distinguishable.

Following other lower courts in Texas, the court below interpreted the holding in *Billings* as being limited to either a physical invasion of a person's property or eavesdropping. *Comptroller*, 244 S.W.3d at 636. Although this interpretation might have been reasonable thirty years ago when *Billings* was first handed down—when the internet did not yet exist and the crime of identity theft was virtually unknown—it is hardly sound in view of present-day realities.

Moreover, none of the cases cited as authority for limiting the holding in *Billings* are remotely similar to this case. Nor do they implicate the policy concerns raised by the Comptroller. In *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.–Tyler 2005, pet. denied), an employee who worked for a medical billing company sued a doctor who had contracted with that company for billing services. The employee asserted causes of action for intentional infliction of emotional distress and invasion of privacy, alleging the doctor had repeatedly asked her inappropriate questions about her sex life and had intentionally misread the results of her gallbladder scan.

In *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App.–Houston [14th Dist.] 2001, pet. denied), landowners brought an invasion-of-

privacy claim against the owner of a 126-foot cellular tower. The court held that evidence that maintenance workers had peered into the plaintiffs' adjoining yard was legally insufficient to establish conduct that would be highly offensive to a reasonable person.

Finally, in *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.– Corpus Christi 1991, no writ), *overruled on other grounds*, *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994), the court held that a discharged employee could not prevail on his invasion-of-privacy claim, in which he alleged that his former employer had not allowed him to confront co-workers accusing him of sexual harassment. None of these cases preclude recognition that individuals have a right of privacy that protects personal identifiers such as date of birth from public disclosure.

C. Though the Legislature has not expressly exempted date of birth from disclosure, this Court may still apply the common law to protect such information.

The *News* and the OAG emphasize that the PIA does not contain an express statutory exemption for date-of-birth information. They also cite legislative history showing that bills to exempt such information from disclosure have been introduced, but have not passed. *News* Response at 11-12; OAG Response at 12. This would, of course, be relevant in a case involving statutory interpretation, but this is not such a case. The Comptroller does not contend that the PIA currently contains a statute exempting such information. Rather, she contends that common-law principles afford such protection, and that those principles are incorporated into the Act under section 552.101.

The absence of an express statutory exemption does not prevent this court from deeming the information confidential if its disclosure would constitute an "invasion of privacy" under common law. In such instances, the powers of the judiciary and the Legislature to protect such information are co-extensive. In *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976), this Court observed:

> Defendants assert that, if a government unit's action in making records available to the general public would be an invasion of an individual's freedom from the publicizing of his private affairs, then the information in those records should be deemed confidential by judicial decision under section 3(a)(1) [currently section 552.101] of the Act. We agree.

Industrial Foundation, 540 S.W.2d at 682-83.

By including an exemption for information made confidential by "judicial decision," the Legislature expressly authorized the courts to clarify common-law privacy interests through careful adjudication of specific cases and controversies. *See Morales v. Ellen*, 840 S.W.2d 519, 524-25 (Tex. App.–El Paso 1992, writ denied) (concluding names of witnesses and their detailed affidavits in sexual harassment investigative file implicated privacy interests). In doing so, the Legislature clearly recognized the need for a degree of flexibility, given that it could not enact a statutory laundry list exhaustively identifying each and every privacy interest militating against disclosure. Nor could it anticipate every development that might give rise to new privacy interests under the common law. Respondents' contention that this issue falls within the exclusive province of the Legislature is contrary to section 552.101, and should be rejected.

D. The PIA does not prevent this court from considering the increased risk of identity theft if the information is made public.

Respondents continue to urge that this Court cannot consider the policy issues raised by the Comptroller because the PIA precludes an inquiry into the intended use of the information requested, citing *A & T Consultants, Inc. v. Sharp*, 904 S.W. 2d 668, 676 (Tex. 1995). *News* Response at 21. But these policy issues do not require this Court to inquire into how the *News* will treat the information. The issue here goes well beyond the *News*. It is whether date-of-birth information for nearly 145,000 state employees, along with other identifying information, will be freely available *to the public*. Government officials cannot distinguish among requestors or inquire into the intended use—or potential misuse—of the requested information. *See* Tex. Gov't Code Ann. § 552.222(a) (Vernon Supp. 2008). If the information must be disclosed to the *News*, it must be disclosed to all persons who make the same request for information under the PIA. This public availability, in turn, raises the question of whether reasonable persons would consider disclosure of their birth date to be an intrusion into their private affairs that is highly offensive. The *News's* intentions have no bearing on this question.[3]

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[3] The *News* also attempts to downplay concerns about identity theft by highlighting *its* procedures for protecting the information. *News* Response at 2. Because the privacy issue here is not limited to the immediate parties, these procedures have no bearing on the question of law before this court.

E. The court of appeals correctly concluded that the Comptroller did not waive its intrusion upon seclusion argument.

The *News's* waiver argument has already been rejected by the court of appeals. *Comptroller*, 244 S.W.3d at 636. The privacy interest and cause of action identified in *Billings*—freedom from intentional intrusion into ones's seclusion, private affairs or concerns—was raised in the trial court. The Comptroller alleged in its original petition that the OAG had disregarded the privacy rights of public employees—under the common law, and under constitutional and statutory law—by failing to protect those rights pursuant to sections 552.101and 552.102 of the Government Code.[4] (Sections 552.101 and 552.102 protect the same privacy interests).[5] These same grounds were carried forward in the Comptroller's cross-motion for summary judgment in compliance with Texas Rule of Civil Procedure 166a. Both *Billings* and *Industrial Foundation* were cited.[6]

Significantly, the *Industrial Foundation* case discusses each of the "invasion of privacy" torts recognized by Texas common law, including intentional intrusion upon the seclusion of another. *See Industrial Foundation,* 540 S.W.3d at 682. The Comptroller's brief on appeal included additional citations in support of the section 552.101 exemption, as well

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[4] C.R. at 005.

[5] *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.–Austin 1983, writ ref'd n.r.e.).

[6] C.R. at 087-089.

as additional argument, but it did not assert additional grounds. The *News's* waiver argument is without merit, as the court of appeals recognized.

II. The PIA does not expressly abrogate the Comptroller's immunity with respect to a claim for attorney's fees brought by an intervening requestor.

It is well settled in Texas that for the Legislature to waive the state's sovereign immunity, a statute must contain clear and unambiguous language to that effect. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); Tex. Gov't Code Ann. § 311.034 (Vernon Supp. 2008). In the absence of such a waiver, the district court lacks jurisdiction.

The PIA section 552.323(b) provides that: "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." Tex. Gov't Code Ann. § 552.323(b) (Vernon 2004). The *News* theorizes that because another PIA section—section 552.324—contains a reference to both section 552.325 *and* section 552.353, the Comptroller's suit is necessarily one brought under 552.353(b)(3). The *News*, in other words, attempts to blend the lawsuits authorized by the PIA, arguing that the Legislature envisioned a single proceeding to challenge OAG rulings.

The *News's* argument, however, fails to establish a clear and unambiguous waiver of sovereign immunity for at least three reasons. First, it would require this Court to ignore statutory language that distinguishes between suits brought by a "governmental body" and

those brought by a "public information officer," both of which are defined terms under the Act. Second, it would require this Court to brush aside the deadline for filing suit under section 552.353(b)(3), which is different than the deadline for suits filed under section 552.325. Third, even assuming *arguendo* that the Comptroller's suit arose under section 552.353(b)(3), it would require extending the statutory waiver in section 552.323(b) to "intervenors" even though the waiver refers only to a "*plaintiff or defendant* who substantially prevails." Because the *News* cannot point to a clear and unambiguous waiver that applies here, the district court was without jurisdiction to award fees.[7]

A. Sections 552.324, 552.325 and 552.353(b)(3) distinguish between suits brought by governmental bodies and those brought by public information officers.

Section 552.324 distinguishes between suits brought by a "governmental body"under section 552.325 and suits brought by "an officer for public information officer" under section 552.353(b)(3). It provides that:

> (a) The only suit a governmental body or officer for public information may file seeking to withhold information from a requestor is a suit that is filed in accordance with Sections 552.325 and 552.353 and that challenges a decision by the attorney general issued under Subchapter G.
>
> (b) *The governmental body* must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the

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[7] The Comptroller, in responding to the *News's* brief in support of its cross-petition, will not repeat each of the arguments made in Part II of its opening brief. Rather, the Comptroller incorporates that briefing by reference, including its briefing on the UDJA. *See* Comptroller's Opening Brief at 17-24.

> attorney general being challenged. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. This subsection does not affect the earlier deadline for purposes of Section 552.353(b)(3) for a suit brought by an *officer for public information*. (emphasis added)

Tex. Gov't Code Ann. § 552.324 (Vernon 2004).

Both "governmental body" and "public information officer" are specifically defined elsewhere in the Act. Tex. Gov't Code Ann. §§ 552.003(1)(A)(defining "governmental body"); and 552.201 (identifying the officer for public information) (Vernon 2004). The agency, as plaintiff below, was a governmental body and not a public information officer, so it was required to proceed under section 552.325, which it did. C.R. at 0003.

But according to the OAG, the Legislature meant nothing by its use of different defined terms. OAG Response at 2, 17, 19. The OAG's approach is contrary to well-established rules of statutory construction, whereby the courts "read every word, phrase, and expression in a statute as if it were deliberately chosen and presume the words excluded from the statute are done so purposefully." *Mid-Century Ins. Co. v. Texas Workers' Comp. Comm'n*, 187 S.W.3d 754, 758 (Tex. App.–Austin 2006, no pet.). When construing a statute, the courts presume that every word has been included or excluded for a reason.

The OAG also contends there is no practical difference between a "governmental body" and a "public information officer" who brings suit under section 552.353(b)(3). But this contention is inconsistent with principles of sovereign and official immunity. Section

552.353(b)(3) is set out in Subchapter I, entitled "Criminal Violations." The statute provides that a public information officer commits an offense if, with criminal negligence, that officer fails to provide access to public information in accordance with the Act An officer who has acted with criminal negligence has necessarily acted beyond his or her authority in an *ultra vires* manner. Public officials who act wholly without authority are personally liable for their torts and for willful and malicious acts. *See Campbell v. Jones,* 264 S.W.2d 425, 427 (Tex. 1954).

Contrary to the OAG's assertions, a state officer's illegal or unauthorized actions are *not* acts of the state. *Federal Sign v. Texas S. Univ.,* 951 S.W.2d 401, 404 (Tex. 1997) (citing to *Director of the Dept. of Agric. & Env't v. Printing Indus. Ass'n of Texas,* 600 S.W.2d 264, 265-66 (Tex. 1980)). Actions by an officer that may constitute criminal violations of the Act are not, as the OAG suggests, indistinguishable from those of a governmental body.

Section 552.353(b) provides affirmative defenses for public information officers who have allegedly acted *ultra vires* and are facing the possibility of criminal prosecution. The affirmative defenses include the filing of a suit seeking relief from compliance with the OAG's open records decision within 10 days after receipt of the decision. However, in the event the court finds the lawsuit had "no reasonable basis in law," the court may award attorney's fees to the opposing party under PIA section 552.323(b). Section 552.323(b) is intended to discourage public information officers from filing frivolous actions under section 552.353(b)(3) whose only purpose is to set up an affirmative defense to criminal prosecution.

These criminal procedures have nothing to do with a lawsuit timely filed by a governmental body under section 552.325. Here, the Comptroller was acting in her official capacity. Because section 552.353(b)(3) applies only to "Criminal Violations" under Subchapter I and officials who are allegedly acting outside their official capacity, it necessarily does not and cannot apply here.

B. Sections 552.325 and 552.353(b)(3) have different deadlines for filing suit.

The same analysis applies to the different deadlines for filing lawsuits under sections 552.325 and 552.353(b)(3). Section 552.324(b) provides that the governmental body must bring suit not later than the 30th day after it receives the OAG's decision. It adds, however: "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." Tex. Gov't Code Ann. § 552.324(b) (Vernon 2004).

The Comptroller's suit was not brought under section 552.353(b)(3), nor could it have been. Rather, it was filed well after the 10-day deadline in section 552.353(b)(3) had expired, but within the 30-day deadline for suits filed under section 552.325. The Comptroller did not file suit under section 552.353(b)(3) because there was no concern about a possible criminal violation of the Act.

The OAG argues that the different deadlines relate to the same proceeding and are merely intended to give the agency an "option." According to the OAG: "Just because the

Comptroller filed her petition after the 10-day deadline does not mean this suit was not brought under section 552.353(b)(3)." OAG Response at 20-21. The OAG's notion of an "optional" deadline is unpersuasive. The affirmative defense in section 552.353(b)(3) is expressly conditioned on the officer's filing suit within 10 days after receipt of the open records decision.

Once again, the OAG's interpretation is inconsistent with rules of statutory construction requiring the courts to read every word, phrase, and expression in a statute as if it were deliberately chosen. *Mid-Century Ins. Co. v. Texas Workers' Comp. Comm'n*, 187 S.W.3d 754, 758 (Tex. App.–Austin 2006, no pet.). The different deadlines make sense only if it is recognized that the statutory scheme envisions more than one type of lawsuit to challenge rulings by the Attorney General.

C. Even if one assumes the suit arose under Section 552.353(b)(3), there is no clear and unambiguous waiver of immunity for a claim for attorney's fees brought by the intervenor.

Finally, even assuming *arguendo* that the suit was brought under section 552.353(b)(3), an award of attorney's fees would be authorized only with respect to "a plaintiff or defendant who substantially prevails." *See* Tex. Gov't Code Ann. § 552.323(b) (Vernon 2004). The authorization of attorney's fees for a prevailing plaintiff or defendant does not constitute a clear and unambiguous waiver with respect to a claim by an intervening requestor.

Furthermore, PIA section 552.325 carefully balances the requestor's rights and remedies in a suit brought by a governmental body to challenge the OAG's decision. Subsection (a) expressly prohibits governmental bodies from filing suit against the requestor, but subsection (d) allows the requestor to intervene. The statute also contains provisions to ensure the requestor receives notice of the lawsuit.

But the statute does not contain any language authorizing an award of attorney's fees. The exclusion of attorney's fees in section 552.325 makes sense, because the state is already providing a defense of the open records ruling through the Attorney General's office. While the requestor is entitled to intervene in furtherance of its interest, it is not entitled to an award of attorney's fees.

D. This Court should address the issue of attorney's fees in the event it grants the Comptroller's petition and addresses the privacy issue.

Contrary to the statutory scheme, the court of appeals opined that the Comptroller's office had filed suit under section 552.353(b), and that, therefore, the issue of attorney's fees fell within the trial court's discretion. *Comptroller*, 244 S.W.3d at 640. Although the court below ultimately reached the right result in refusing to award fees, its analysis may have a chilling effect on governmental bodies in the future, particularly small agencies that disagree with the Attorney General's decision, but are understandably concerned about the risk of a fee award. This Court has made clear that it assumes jurisdiction over the entire case when jurisdiction is proper as to any part. *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex. 1987); *see*

also Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640, 643 (Tex. 1995). Thus, in the event this Court grants the Comptroller's petition to address whether the PIA exempts date-of-birth information from disclosure, it can take up the issue of attorney's fees as well.

CONCLUSION AND PRAYER

Because the issues raised in this proceeding are important to the jurisprudence of the State, this Court should grant the Comptroller's petition, deny the *News's* cross-petition, reverse the court of appeals with respect to the confidentiality issue and correct its analysis with respect to attorney's fees, and should grant such other and further relief to which the Comptroller shows itself entitled.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document, **Texas Comptroller's Combined Reply Brief and Response to Cross-Petition**, was delivered as indicated on the 18th day of November 2008, to the following counsel of record:

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