

COPY

3-31-06

CAUSE NO. D-1-GA-06-001120

**TEXAS COMPTROLLER OF
PUBLIC ACCOUNTS,
Plaintiff,**

vs.

**ATTORNEY GENERAL OF TEXAS,
Defendant.**

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IN THE 126th JUDICIAL

DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

FILED

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DISTRICT CLERK
TRAVIS COUNTY, TEXAS

COMPTROLLER'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Texas Comptroller of Public Accounts ("Plaintiff" or "Comptroller") and files the following Original Petition, pursuant to sections 552.324 and 552.325 of the Government Code, seeking declaratory relief regarding the Open Records Letter No. OR2006-01938 rendered by the Attorney General of Texas ("Defendant" or "Attorney General") wherein Defendant ruled that the dates of birth of state employees must be released to the public.

I.

Discovery

Level 1.

II.

Parties

Plaintiff Comptroller is a state agency created by the Texas Constitution of 1876 as found in article IV, sections 1 and 23.

Defendant Attorney General is also a state agency located at 209 West 14th Street, 8th floor, Austin, Texas, 78701. No service is necessary at this time.

III.
Venue and Jurisdiction

Venue and jurisdiction is proper in Travis County pursuant to sections 552.324(b) and 552.325 of the Government Code.

IV.
Factual Background

On November 18, 2005, Plaintiff received a written request under the Texas Public Information Act, chapter 552 of the Government Code, from Jennifer LaFleur, an editor with *The Dallas Morning News*. **See Exhibit 1.** Ms. LaFleur subsequently verbally clarified her request to seek identifying information regarding state employees, to specifically include employees' full name, job title or job description, agency or department, salary, race, sex, work address, date of initial employment, available information concerning pay rate (monthly or otherwise), work hours (full-time or part-time), identification of employees who are peace officers, and dates of birth for all employees.¹ The Comptroller offered to provide the categories of information requested, substituting the age of each employee for the requested date of birth. The requestor declined to accept age for date of birth and advised that she would wait to receive any of the requested information until the Attorney General ruled on whether the dates of birth were public.

In accordance with section 552.301(a) of the Texas Government Code (the "Code"), the Comptroller timely asserted to the Attorney General's Office that the wholesale release of dates of birth of nearly 145,000 state employees, along with other identifying information regarding those employees, implicated common-law and constitutional privacy interests under section 552.101; law enforcement interests under section 552.108; and special circumstances under sections 552.101 and

¹ The Comptroller of Public Accounts received a request from another individual, Mirna Araceli Ramos, for what initially appeared to be similar types of confidential information. On that basis, the requests were combined and sent to the Attorney General for a consolidated ruling. However, Ms. Ramos did not seek date of birth information, thus the Attorney General's ruling on that issue was applicable only to Ms. LaFleur's request.

552.108.² The requestor was also timely notified and copied on the referral. *See Exhibits 2 and 3.*

Defendant issued a ruling, Open Records Letter No. OR2006-09138. *See Exhibit 4.* That ruling, dated February 28, 2006, and received by the Comptroller on March 1, 2006, ordered the Comptroller to provide the public release of dates of birth, as well as all state employees' other personally identifying information. Defendant ruled that public employees' dates of birth are not protected under sections 552.101, 552.102, or 552.108, and thus are public information.

In accordance with section 552.324 of the Code, the Comptroller declined to release the employees' dates of birth to the requestor.

V.
Relief Sought

Declaratory Relief

Plaintiff requests, under section 552.324 of the Public Information Act and the Uniform Declaratory Judgments Act, Chapter 37, Texas Civil Practice and Remedies Code, that the Court grant declaratory relief from compliance with Open Records Letter No. OR2006-09138 on the basis that Defendant failed to apply appropriate standards to protect from wholesale public release the dates of births of nearly 145,000 state employees and elected officials. Specifically, Defendant erred as follows:

1. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with privacy rights as provided by the United States Constitution and the Texas Constitution.

²

The Comptroller did not assert as an exception to disclosure section 552.102(a), which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Attorney General's 2006 Public Information Handbook advises that section 552.102(a) is limited in scope, and further advises that privacy protection under section 552.102 is identical to the privacy protection under section 552.101, which exception the Comptroller timely raised as an exception. However, the Attorney General erroneously ruled under both sections 552.101 and 552.102.

2. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with Texas common law.

3. Defendant erred in the application of a special or exceptional circumstances review under section 552.101.

VI. Arguments

1. Defendant erred when he failed to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code.

Government employees have a constitutional privacy interest in their own dates of birth. The United States Supreme Court and other federal courts have recognized that individuals have a right to privacy and to informational privacy for their personal information. The Texas Supreme Court has recognized a constitutional right to privacy protects the individual, whether state employee or private employee, from unwarranted intrusion. *See Texas State Employees Union v. Texas Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex.1987).

2. Defendant erred in failing to apply appropriate standards for state employees' privacy rights under sections 552.101 and 552.102 of the Government Code in conjunction with Texas common law.

Texas government employees have a common-law privacy interest in their own dates of birth. Section 552.001 of the Code states that it is the policy of Texas that each person is entitled "to complete information about the affairs of government and the official acts of public officials and employees." The Texas Attorney General has generally construed information to be protected under common-law privacy under the test set out in *Industrial Foundation* if:

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation*, 540 S.W.2d at 685 (Tex. 1976).

Disclosing the dates of birth of public employees shows nothing about the official affairs of government or about the actions of government officials and employees, but does intrude upon individual privacy interests protected by Texas common law.

3. Defendant erred in the application of a special or exceptional circumstances review under section 552.101.

Defendant erred in the application of his own "special circumstances" or "exceptional circumstances" test. In Open Records Decision No. 123 (1976), the then-Attorney General recognized that there may exist "exceptional circumstances" to protect otherwise public information from public release. The Attorney General indicated that pertinent to this inquiry were facts such as whether the employee made an effort to restrict public access to the requested information. *See also* Op. Tex. Att'y Gen. MW-283 (1980). In Open Records Decision No. 169 (1977), the Attorney General outlined the "special circumstances" under which a public employee's otherwise public home address could be withheld from disclosure. Those circumstances included the employee maintaining unlisted home addresses, changing of residences, having experienced prior harassment, and having concern that there might be future harassment.

In Defendant's ruling at issue, Open Records Letter No. OR2006-01938, he applied a special circumstances test to date of birth, stating:

Although the crime of identity theft is becoming an increasing problem, neither the Comptroller, nor any of the parties she notified, has presented to this office sufficient evidence to establish that harmful financial consequences will result from the release of date of birth information [W]ithout more facts[,] . . . we are unable to conclude that the information is private or that "special circumstances" exist that would require protection of date of birth information. Tex. Att'y Gen. ORL-2006-01938 at 4 (2006).

Defendant's "special circumstances" test to withhold public employee data requires a showing that the information has not been made public and that there are valid concerns about release. The information at issue has not been released to the requestor and the Comptroller has

stringent security measures in place to ensure the state payroll and personnel system is protected.

Another special circumstance raised by the Comptroller that the Defendant should have considered was that at the time this request was made there was (and still is) a pending lawsuit regarding a public information request for release of personal information including date of birth records. *State Bar of Texas v. Abbott*, Cause No. GV 403520 in the 261st District Court of Travis County, Texas. The Texas State Bar holds personal information on attorneys and judges. Some of the same personal information — concerning attorneys employed by the state, District Judges, certain district attorneys and visiting judges, and other attorneys and judges who are elected officials and whose data is on the Comptroller's personnel/payroll system — is data held by both the State Bar and the Comptroller. To the extent that a lawsuit was pending regarding whether date of birth information is private in the hands of one governmental entity holding some of the same governmental records as another entity, this consideration should have been part of the special circumstances considered by the Defendant.

RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests it have judgment as follows:


(1) A declaration granting relief from complying with Open Records Letter No. OR2006-09138 to reflect that the employees' dates of birth are not subject to release; (2) its costs of suit; and (3) such other relief, both legal and equitable, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

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Attorney for Plaintiff

Texas Comptroller of Public Accounts

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was delivered as indicated on
the ~~29th~~ day of March, 2006, to the following:

30th MB

Brenda Loudermilk

Via Hand Delivery

Administrative Law Division

Office of the Attorney General

300 W. 15th St.

Austin, Texas 78701



MAUREEN POWERS

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