

- State employee date of birth information is not excepted from disclosure under Texas Government Code § 552.101 by reason of “exceptional circumstances.”

SUMMARY JUDGMENT EVIDENCE

The News bases its motion for summary judgment on:

- Letter from Texas Comptroller of Public Accounts to the Attorney General of Texas dated December 14, 2005, attached as Exhibit 1;
- Letter from *The News* to the Attorney General dated December 30, 2005, attached as Exhibit 2;
- Texas Attorney General Open Records Letter No. OR2006-01938, attached as Exhibit 3; and
- the Comptroller’s Original Petition (the “Petition”).

FACTS SUPPORTING SUMMARY JUDGMENT

Jennifer LaFleur, an employee of *The News*, requested information from the Comptroller on November 18, 2005 by e-mailing a written request to the Comptroller’s Public Information Officer. (Petition at p. 8). Specifically, *The News* requested information from the state employee payroll database, including date of birth information of state employees.¹ (Petition at p. 8). The Comptroller refused to release the date of birth information and sought an opinion from the Attorney General. (Ex. 1; Petition at p. 2).

The Comptroller conceded that employee identification information, such as name, race, sex, and work address, is public information. However, she argued that Government Code § 552.101 in connection with the common law and constitutional right of privacy excepted date of

¹ Ms. LaFleur also requested other categories of employee identifying information which the Comptroller does not address in this proceeding. (Ex. 3).

birth information from disclosure.² (Ex. 1; Petition at p. 3). Specifically, she argued that date of birth, when coupled with other personally identifying information, is sensitive information that requires special protection because of the risk of identity theft. Thus, she argued that it should be protected from disclosure. (Ex. 1 at pp. 3-4).

The News provided its comments to the Attorney General, demonstrating that date of birth is not protected from disclosure. (Ex. 2). It argued that date of birth is not the type of information protected by either common law or constitutional privacy, as it is not highly intimate or embarrassing information and does not concern the “most intimate aspects of human affairs.” (Ex. 2 at pp. 2-3). Furthermore, *The News* argued that the public has a legitimate and significant interest in disclosure of the information that outweighs the minimal interest public employees have in protecting their date of birth information. (Ex. 2 at pp. 2-3).

The Attorney General agreed with *The News*. (Ex. 3). It determined, consistent with its prior rulings, that date of birth information is not protected under section 552.101 or section 552.102. It did not find that any “special circumstances” exist to warrant an exception from disclosure. (Ex. 3 at p. 4).

ARGUMENT

Government Code section 552.021 makes virtually all information in the custody of a governmental body available to the public, and the governmental body bears the burden to prove that an exception applies. Tex. Gov’t Code § 552.021; *Thomas v. Cornyn*, 71 S.W.3d 473, 488 (Tex. App.--Austin 2002, no pet); see Open Records Decision No. 542, at 1-2 (1990). The Comptroller argues that date of birth information should be protected from disclosure under

² The Comptroller did not raise Government Code § 552.102. However, the Attorney General ruled that date of birth information is not protected under either 552.101 or 552.102. The Comptroller concedes that both sections provide identical privacy protection. (Ex. 3 at 3).

section 552.101 in connection with the common law right of privacy, constitutional privacy, and an “exceptional circumstances” test that no Texas court has ever adopted. As demonstrated next, this case is ripe for summary judgment. The Comptroller cannot, as a matter of law, demonstrate that an exception to disclosure applies to the requested information.

I. Whether section 552.101 applies is a question of law appropriate for summary judgment.

A party whose rights are affected by a statute may seek a declaration of its rights thereunder. Tex. Civ. Prac. & Rem. Code § 37.004(a). The Government Code expressly provides that a requestor of information may seek a declaration of its rights under the TPIA when a governmental body refuses to comply with a proper request for information. Tex. Gov’t Code § 552.3215; *Id.* § 552.325 (requestor may intervene in governmental body’s suit for declaratory relief against Attorney General).

Texas Government Code section 552.101 protects information “considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Tex. Gov’t Code § 552.101. Section 552.102 protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552.102. As stated above, *The News* requested “an electronic copy of the state employees payroll database,” which includes date of birth information for state employees. Because the request does not raise any factual issues about the nature of the information sought, whether date of birth information is confidential under the TPIA is a legal question appropriate for resolution by summary judgment. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 674-75 (Tex. 1995).

II. Date of birth information is not protected by the common law right of privacy.

The Comptroller alleges that date of birth information is protected by Government Code sections 552.101 and 552.102 and common law privacy. To establish protection under common

law privacy, the Comptroller is required to demonstrate that “(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 public concern.” *Morales v. Ellen*, 840 S.W.2d 519, 524 (Tex. App.—El Paso 1992, writ denied) (citing *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976)). Date of birth information does not constitute the type protected under this doctrine, and in any event, the public has a legitimate interest in being able to clearly identify public employees.

First, date of birth information is not the type of “highly objectionable” information that is protected by common law right to privacy. Only highly intimate or embarrassing facts, such as sexual assaults, victims of mental or physical abuse, illegitimate children, psychiatric patients, persons who attempted suicide, or persons suffering injuries to sexual organs, are protected under the common law of privacy. *Vandiver v. Star Telegram, Inc.*, 756 S.W.2d 103, 106 (Tex. App.—Austin 1988, no writ); *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Employee salary information, for example, is not highly embarrassing or of an intimate nature that, if publicized, would be highly objectionable to a reasonable person. *The Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 n.6 (Tex. App.—Houston 2004, no pet.).

Additionally, the Attorney General’s Office has found the following types of information protected: some kinds of medical information or information indicating disabilities or specific illnesses, personal financial information not relating to a financial transaction between the individual and a governmental body, information concerning the intimate relations between individuals and their family members, and the identities of the victims of sexual abuse. Tex.

Atty. Gen. ORD-659, at 3 (1999) (summarizing opinions). Notably, date of birth information — or anything even remotely similar—is *not* listed.

In fact, the Attorney General has consistently rejected the Comptroller's argument that date of birth information is protected. *See* Tex. Atty. Gen. Op. MW-283 (1980); Tex. Atty. Gen. OR2003-5954 (2003); Tex. Atty. Gen. OR2005-08056 (2005). Specifically, OR2003-5954 clearly states, “[w]e particularly note, however, that information revealing a public employees date of birth is not protected by common-law privacy.” Tex. Atty. Gen. OR2003-5945 at 6 (citing Tex. Atty. Gen. Op. MW-283 (1980)). As recently as September 1, 2005, the Comptroller asked the Attorney General to determine if date of birth information was protected information that could be withheld. Consistent with its prior rulings, the Attorney General held that “common law privacy does not protect dates of birth.” Tex. Atty. Gen. OR2005-08056 (2005).

Second, “[t]he public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner.” Tex. Atty. Gen. ORD-269, at 2 (1981); *accord* Tex. Atty. Gen. ORD-444 (1986) (job-related test results, and reasons for dismissal, demotion, promotion, resignation of a public employee constitute legitimate public interests that are outside the test for common-law privacy); Tex. Atty. Gen. ORD-405 (1983) (the manner in which employee performs job similarly constitutes a legitimate public interest that is outside the test for common law privacy); Tex. Atty. Gen. ORD-278 (1981) (similarly, the reasons and circumstances surrounding a public employee's resignation or termination are not exempt). Public employee date of birth information allows *The News* and other members of the public to identify and distinguish between public employees to determine whether they are carrying out their duties in an efficient and law abiding manner, as contemplated by TPIA.

The Comptroller argues that “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.” However, the Texas Supreme Court rejected this argument in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). There, the Industrial Accident Board cited the introductory statement to the act, which provides that it is the policy of the state “that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” *Id.* at 675-76. It argued that names of individual workmen’s compensation claimants “do not constitute ‘affairs of government’ or ‘official acts’ of public officials,” therefore, their release would not further the purposes of the Texas Public Information Act. *Id.* at 675-76.

The Supreme Court refused this argument, holding that a decision of whether information is public must be based on the specific provisions of the TPIA. *Id.* Because the information was declared public under section 552.002(a) and there was no exception that applies, the Court refused to judicially craft an exception not created by the legislature. *Id.* at 675-76. Likewise, the Comptroller cannot escape the fact that there is no exception protecting the information from disclosure by merely relying on the TPIA’s policy statement.

In sum, the common law of privacy does not protect date of birth information because it is not highly intimate or embarrassing, such that disclosure would be highly objectionable to a reasonable person, and the public has a legitimate interest in its disclosure.

III. Date of birth information is not protected by the constitutional right of privacy.

Additionally, the Comptroller asserts that releasing date of birth information would violate a public employee’s constitutional right of privacy, making it protected from disclosure under sections 552.101 and 552.102. To determine constitutional privacy, there are two

inquiries. Constitutional privacy consists of (1) the right to make certain decisions independently and (2) an individual's right to avoid disclosure of certain personal matters. Tex. Atty. Gen. ORD-455, at 4 (1987).

Information that affects the right to make certain decisions independently within a recognized "zone of privacy" cannot be disclosed. Tex. Atty. Gen. ORD-455 (1987). The United States Supreme Court has recognized that issues concerning marriage, procreation, abortion, child rearing, and family relationships are protected "zones of privacy." *Id.*

If the information does not fall within a protected zone of privacy, it may still be protected, but the scope of this protection is narrower than that under the common law doctrine of privacy in that the information must concern the "most intimate aspects of human affairs." Tex. Atty. Gen. OR2005-01691, at 4 (2005); Tex. Atty. Gen. ORD-455, at 5; *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985). If the information is of this type, it must also survive a balancing test, weighing the individual's privacy interest against the public's interest in knowing the information. *Id.*

Date of birth information clearly does not fall within a protected "zone of privacy," and the Comptroller cannot meet either prong of the test for constitutional privacy outside the zones. First, the Comptroller cannot demonstrate that date of birth information is the "highly intimate" type of information that is protected by the Constitution. In *Martin v. Darnell*, the Amarillo Court of Appeals held that a public employee did not have a constitutional right of privacy in his personal financial information. 960 S.W.2d 838, 844-45 (Tex. App.—Amarillo 1997, orig. proceeding). Certainly if personal financial records are not protected, date of birth information is not either. *See id.*; *see also Apodaca v. Montes*, 606 S.W.2d 734, 736 (Tex. Civ. App.—El Paso 1980, no writ) (bondsman's financial statement not protected by constitutional right of privacy).

And again, the Attorney General's Office has ruled that date of birth information does not contain information that is confidential under constitutional privacy. See Tex. Atty. Gen. OR2005-08056 (2005).

Second, the public's strong interest tips the balance in favor of disclosure. "The privacy rights of a private citizen . . . are different from the rights of a public employee or officer." Tex. Atty. Gen. ORD 455, at 6 (1987); see also *Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974). By accepting public employment, state employees have subjected their rights as private citizens to the right of the public to an efficient and credible government. *Richardson*, 500 S.W.2d at 177. "[T]he public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner." Tex. Atty. Gen. ORD-269, at 2 (1981); accord Tex. Atty. Gen. ORD-444 (1986) (job-related test results, and reasons for dismissal, demotion, promotion, resignation of a public employee constitute legitimate public interests that are outside the test for common-law privacy); Tex. Atty. Gen. ORD-405 (1983) (the manner in which employee performs job constitutes a legitimate public interest). Without date of birth information, *The News* and the public cannot identify and distinguish between public employees to determine whether they are carrying out their duties in an efficient and law abiding manner. Because the Comptroller cannot meet its burden to establish that disclosure constitutes a privacy violation, this information must be released.

IV. The vague threat of identity theft does not constitute "exceptional circumstances" that require protection of date of birth information.

Essentially conceding that she cannot meet the standards for common law or constitutional privacy, the Comptroller asserts that the vague threat of identity theft constitutes "exceptional circumstances" sufficient to provide protection from disclosure under section

552.101. The Comptroller's argument is erroneous for three simple reasons: First, it ignores steps already taken by the Legislature to protect personal financial information that *do not include* protection of birth date information. Second, the Supreme Court has expressly rejected a nearly identical argument *by the Comptroller. A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). And finally, the Attorney General has consistently rejected the comptroller's arguments.

A. The Comptroller's argument is inconsistent with the rest of the TPIA.

The legislature clearly knows how to protect personal financial information. Section 552.117 of the Government Code exempts from disclosure certain addresses, telephone numbers, social security numbers and personal family information. Tex. Gov't Code § 552.117. If the legislature had intended date of birth information to be exempt from disclosure, it would have included this information in the list of information exempt from disclosure under Section 552.117. But the Legislature chose to make date of birth information public.

In fact, just this past legislative session, the legislature added birth date to the list of personal information that cannot be released by a county from a voter registration card. Tex. Elec. Code § 13.004. Because the Texas Legislature has not exempted from public disclosure date of birth information of state employees, and it clearly knows how do so, the Comptroller is bound by this legislative intent and should not attempt to use privacy rights to circumvent it.

B. The Supreme Court has already rejected the Comptroller's argument.

The Comptroller argues that employees' date of birth information could be used in connection with information identifying those employees, which she concedes is public, to commit identity theft. However, in *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995), the Supreme Court rejected a similar argument made by the Comptroller. In that case, the Comptroller argued that certain taxpayer information was confidential under section 552.101 in

connection with confidentiality provisions in the Texas Tax Code. *Id.* at 674-75. The Comptroller argued that, despite the fact that the particular information requested was public information, A&T's staff could use that public information combined with other publicly available information to deduce confidential information about the taxpayers. *Id.* at 675.

The court rejected this argument, expressly stating that it could not consider how the information could be used in determining whether 552.101 applies:

Moreover, neither the comptroller nor this Court may inquire whether A&T intends to use the information it requested to deduce otherwise privileged information about taxpayers. Under TORA, we may not consider the requesting party's purpose or use for the information. . . . In sum, if the requested information is public under TORA and its source is not the taxpayer, the Tax Code cannot preserve its confidentiality, regardless of the requesting party's purpose for seeking it. TORA precludes a factual inquiry into what the party intends to do with disclosed information. *Id.* at 676.

The TPIA, like TORA, precludes an inquiry into the intended use of the information by the requestor. Tex. Gov't Code §§ 552.222, 552.223. Therefore, under *A&T*, the Comptroller's argument that employees' birth dates may be used in conjunction with employee's identifying information to commit identity theft is an impermissible ground for ruling that 552.101 prohibits disclosure.

C. The Attorney General has consistently rejected the Comptroller's argument.

The Attorney General's opinions are entitled to great weight. *Heard v. Houston Post Company*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). In several letter rulings, including in the present case, the Attorney General rejected the argument that because dates of birth could be used along with other identifying information to commit identity theft, it was protected under 552.101. Tex. Atty. Gen. Op. OR2002-4043, *2 (2002). In fact, the Attorney General has ruled that the release of birth dates and other financial information did not constitute "exceptional circumstances" warranting an exception to

disclosure, reserving that exception for “truly exceptional circumstances such as, for instance, an imminent threat of physical danger.” Tex. Atty. Gen. Op. OR2002-4321, *2 (2002).

The Comptroller cites Open Records Decision 169 as support for her theory that because date of birth information has not been released to the requestor and that the comptroller has security measures in place to protect this information, special circumstances exist. However, in that decision, the Attorney General rejected the argument that a “generalized fear of harassment or retribution” was sufficient to establish “exceptional circumstances.” Tex. Atty. Gen. ORD-169 at 6 (1977). Rather, he required an “imminent threat of physical danger.” *Id.* Additionally, he opined that although police work is a dangerous job, it could not allow a *per se* exception from disclosure of police officers’ home addresses based on such a generalized fear of danger—such a distinction required an amendment to the statute. *Id.*

Identity theft carries no such imminent threat of physical danger. Therefore, exceptional circumstances do not exist under the Attorney General’s formulation of this test. Any exception based on a wholesale and generalized fear of identity theft must come from the legislature. *Id.*

V. The Comptroller cannot use the existence of another TPIA action as a ground for declaring information confidential under the Act.


Throwing in the kitchen sink, the Comptroller argues that because an action is pending in the District Court of Travis County, brought by the State Bar of Texas against the Attorney General, she is entitled to a declaration that date of birth information is protected from disclosure. The TPIA protects information made confidential by judicial decision, but the filing of a lawsuit that has not even been resolved certainly does not qualify. Tex. Gov’t Code § 552.101. There simply is no authority for the Comptroller’s position.

Moreover, as the Comptroller's Original Petition demonstrates, that case involves attorneys and judges who may or may not be public employees. The issues in that case involve different public interests than at issue here. The Comptroller's argument should be rejected.

PRAYER

WHEREFORE, PREMISES CONSIDERED, *The News* prays that the Court grant it final summary judgment, or, alternatively, partial summary judgment, and that it have all other relief to which they are justly entitled.

Respectfully submitted,



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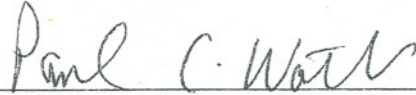
**ATTORNEYS FOR INTERVENOR THE
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon all counsel of record via certified mail, return receipt requested, on this 1 day of June, 2006.

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