

Cause No. D-1-GN-06-001120

TEXAS COMPTROLLER OF
PUBLIC ACCOUNTS,
Plaintiff,

v.

ATTORNEY GENERAL OF TEXAS,
Defendant,

v.

THE DALLAS MORNING NEWS,
Intervenor.

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IN THE 126th JUDICIAL

DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

FILED IN 126th JUDICIAL DISTRICT COURT OF TRAVIS COUNTY TEXAS

**COMPTROLLER’S CROSS-MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO NEWS MOTION FOR SUMMARY JUDGMENT**

The Comptroller files this cross-motion and response to Intervenor, the Dallas Morning News,’ motion for summary judgment.

I. Background

A. Facts

In November 2005, the Dallas Morning News requested that the Comptroller release the payroll database on 144,000 state employees. The information produced in response to the request was: each employees’ first, middle and last 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), and identification of employees who are peace officers. However, the Comptroller did not produce the date of birth on each employee, even though it is part of the payroll database, out of concern that identity theft is a real threat to state employees’ financial security.

The Comptroller timely requested a ruling from the Attorney General on whether date of birth information must be disclosed pursuant to the Public Information Act. In letter ruling OR2006-01938, the Attorney General ruled that the Comptroller must disclose the information. The Comptroller filed this suit to challenge the ruling.

B. Summary of the Argument

1. The News motion for summary judgment should be denied and the Comptroller's motion for summary judgment should be granted because date of birth information is protected from disclosure by common law and constitutional rights to privacy.

2. Alternatively, the dispositive issue is fact intensive and not appropriate for summary judgment.

COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE

II. The Public Information Act¹ protects from disclosure information considered confidential by law, as a matter of law.

At one time, a person's date of birth was benign, it was not used to steal a person's identity. Consistent with that earlier time, the Attorney General ruled twenty-six years ago that public employees' birthdates were public information under the Open Records Act (now the Public Information Act).² Despite revolutionary changes in the management (and manipulation) of electronic data, the Attorney General has not changed position. This is true even though that opinion allowed for "special circumstances," which exist when an employee can show that he has taken steps to restrict access to the information and demonstrate exceptional circumstances such as imminent threat of physical danger.³ The Comptroller can show that today there exist "special circumstances" which argue against releasing date of birth information.

¹ Chapter 552 of the Tex. Gov't Code.

² See Atty Gen. Op. MW-283, 1980.

³ *Id.* at 2.

Identity theft did not account for much crime when Attorney General Opinion MW-238 was issued in 1980. Even so, the legislature did not include date of birth in the list of information which is specifically made public such as the name, sex, ethnicity, salary, title and dates of employment of public employees.⁴ So, it is fair to characterize the Attorney General's conclusion in MW-238, as merely an inference of legislative intent.

Section 552.101 of the Government Code excepts from public disclosure information "considered to be confidential by law, either constitutional, statutory or by judicial decision." The test for common law right to privacy is set out in a thirty year old case, *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected under a right of privacy 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 685.⁵

Six years later, the Austin Court of Appeals used broader language in describing the common law right of privacy, when it wrote that a "clearly unwarranted invasion of personal privacy" requires a balance between the protection of an individual's right to privacy and the preservation of the public's right to government information.⁶

The above cited cases show the purpose of the doctrine of common law privacy is to protect personal information that would be harmful to the individual if revealed, and which is of no legitimate concern to the public. Viewed in that light, the modern plight of identity theft fits squarely into the protection afforded by common law privacy for date of birth information.

⁴ Section 552.022(a)(2) Tex. Gov't Code.

⁵ See also *Morales*, 840 S.W.2d 519, 524 (Tex. App. – El Paso 1992).

⁶ See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 n.8 (Tex. App. – Austin 1983, writ ref'd n.r.e.)

Furthermore, the *Industrial Foundation* case recognizes that the appropriation of one's identity is a privacy interest deserving of protection.⁷ Relying on the court's opinion in *Billings v. Atkinson*, it states that invasion of privacy at common law constitutes a legal injury for which a remedy will be granted.⁸ While, the mere holding of another's date of birth information does not constitute a tort, the use of that information to obtain goods or services without that person's consent, is a tort and often, a crime. Accordingly, date of birth is considered under Texas law to be "personal identifying information" which is protected from disclosure under certain circumstances by Chapter 48 of the Texas Business and Commerce Code.⁹ Similarly, public employees' right to privacy in their birth date should be recognized under the Public Information Act.

While no Texas court has addressed this issue,¹⁰ other courts around the country have concluded that birthdates are private and their disclosure is a clear invasion of personal privacy. In a case under the Federal Freedom of Information Act, the Eastern District of New York applied the balancing test under exemption 6 of the Act.¹¹ The supreme courts of two states, Arizona and Kansas, and the appellate court of Kentucky, have reached the same conclusion under their state acts.¹² See OR2006-01938*3. Moreover, the majority of states protect date of birth information in government employee personnel files. *Id.*

⁷ *Indus. Found.*, 540 S.W.2d at 682.

⁸ *Id.*, citing to *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

⁹ The Texas Identity Theft Protection Act.

¹⁰ A public information request directed to the State Bar of Texas for date of birth information on bar members is now on appeal to the district court. A motion for summary judgment has been taken under advisement by Judge Scott Jenkins in *State Bar of Texas v. Abbott*, Cause No. GV403520, 353rd District Court of Travis County, Texas.

¹¹ *Oliva v. U.S.*, 750 F.Supp. 105, 107 (E.D.N.Y.1991), 5 U.S.C. s. 552.

¹² *Data Tree, LLC v. Meek*, 109 P.3d 1226 (Kan.2205), *Scottsdale Unified School Dist. v. KPNX*, 995 P.2d 534 (Ariz.1998), *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994).

III. The Public Information Act protects from disclosure information for which there is a constitutional right to privacy.

A. U.S. Constitution

The Constitution protects individuals against invasion of their privacy by the government.¹³ The disclosure strand of the privacy interest includes the right to be free from the government disclosing private facts about its citizens...¹⁴ Ordinarily, the constitutional right to privacy is violated only by invasions of privacy involving the most intimate aspects of human affairs.¹⁵ Concededly, one's date of birth is not an "intimate fact" as that term is used in the cases. The problem is, that fact can be misused to wreck havoc with a person's life, which is very intimate to the person. Assuming date of birth is on a par with other intimate facts, then once the invasion of privacy is shown, the court must decide whether the invasion outweighs the government's legitimate concerns.

The purpose of the Texas Public Information Act is to assure access by private citizens to government records as an assurance that the people may remain informed about the activities of those who represent them.¹⁶ While the state may have an interest in gaining the confidence of its citizenry by offering to make governmental employees' birthdates public, it is certainly outweighed by the employees interest in protecting their identity.

B. Texas Constitution

In 1987, the Texas Supreme Court decided a right to privacy case under the Texas Constitution.¹⁷ The Court ruled that under sections 9 and 25 of the Constitution guarantee the sanctity of the individual's home and person against unreasonable intrusion.¹⁸ The Court held

¹³ *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985). Add'l cites omitted.

¹⁴ *Id.*, citing to *Whalen v. Roe*, 429 U.S. 589, 598-602 (1977).

¹⁵ *Id.*

¹⁶ *Indus. Found.*, 540 S.W.2d at 676.

¹⁷ *Texas State Employees Union v. Tex. Dept. of MHMR*, 746 S.W.2d 203 (Tex. 1987).

¹⁸ *Id.*, at 205.

that the Texas Constitution protects personal privacy from unreasonable intrusion, such as, in this case, required polygraphs for state employees. This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means.¹⁹ Here, the Comptroller has shown by Mr. Soliz's affidavit, that the objective sought to be achieved by the News, can be achieved without resort to employees' birthdates. The state's objective in promoting open government, does not outweigh employees' interest in keeping their birthdates private.

IV. Exceptional circumstances exist under section 552.101 of the Act.

The well acknowledged threat of identity theft creates an issue of "exceptional circumstances" under section 552.101 of the Public Information Act. Because exceptional circumstances clearly exist, the generally applicable rule of open records should not apply here.

V. Alternatively, a summary judgment is not appropriate here because a fact issue is raised.

The Attorney General's letter ruling at issue here states, "[a]lthough 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 the date of birth information in response to this request."²⁰ Accordingly, the Comptroller is endeavoring to show that the release of date of birth information will, in all likelihood, result in harmful financial effects to some number of public employees. Attached hereto are the affidavits of five state employees whose statements bear on the various issues raised by the News request. They are summarized as follows:

¹⁹ *Id.*

²⁰OR2006-01938*4.

1. Barbara Collins, an employee of the Texas Education Agency, who has already been the victim of identity theft on several occasions. When she learned of the News request, she contacted the Comptroller's Office on her own initiative to request that her date of birth not be released.

2. Ruth Soucy, Manager of the Open Records Division for the Comptroller's Office. She has compiled a list of all the state agencies whose employees' dates of birth would be released if the Attorney General's letter ruling were to be upheld. A review of the list shows that the News request cuts a wide swath for the rather limited purpose for which the News contends it needs the information.

3. David Baker, a Major in the Texas Department of Public Safety, Highway Patrol. He states that law enforcement agencies accept as true the name and date of birth information offered by a person who is stopped for a traffic violation, but who does not have a driver's license with them. This policy has unfortunate consequences for the innocent person whose name and date of birth are falsely supplied to the officer. This person may have to deal with criminal proceedings, the loss of their driver's license, attorney's fees, fines and arrest warrants.

4. Marvin Mead is a crime analyst in the Texas Department of Public Safety, Driver's License Division, Fraud Investigation Unit. He explains how the information that the News seeks can be matched with other information available on the internet to create counterfeit driver's licenses to be used in opening checking accounts, and issue counterfeit checks. All unbeknownst to the person whose identity is being used. In addition to having to deal with the criminal justice system, the innocent person faces the daunting task of remedying his credit history.

5. Jesse Soliz is a Systems Analyst in the Fiscal Systems Division of the Comptroller's Office. He verified that 1,909 state employees have the same first, middle, and last names. However, by using all the other information requested by the News, except date of birth, no employee matched another.

In addition, there are numerous government sponsored websites that urge the citizenry to keep their personal information guarded, including the Texas Attorney General's Office. See www.oag.state.tx.us/consumer/idtheft.shtml. The Texas Department of Public Safety offers similar advice.²¹ The Homeland Security Group suggests that citizens visit the Federal Trade Commission's website that mentions birthdates as the type of personal information that thieves can use to steal an identity. See www.consumer.gov/idtheft. There exist many similar other such websites as a quick google will show.

Conclusion

The date of birth information sought by the News is unnecessary to distinguish one state employee from another. The likelihood of financial harm to potentially thousands of people far outweighs the public's interest in knowing public employees' birth dates. For this reason, the News motion for summary judgment should be denied and the Comptroller's cross-motion for summary judgment should be granted. Alternatively, the motions should be denied because they raise fact issues.

Respectfully submitted,

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²¹ See www.txdps.state.tx.us/administration/driver_licensing_control/idtheft/idtheftguide.htm

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was delivered as indicated on the **19th** day of July, 2006, to the following:

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