



Plaintiff invokes common law and constitutional privacy in support of her argument; however, her application of these two principles of law fall woefully short of meeting the required elements of both. Plaintiff's arguments are policy arguments that are more properly made to the legislature.

### REPLY POINTS

**1. Plaintiff's position rests on a misinterpretation of legislative intent and state law.**

Plaintiff sees significance in the legislature's failure to include date of birth in the list of employee information that is expressly mandated for public disclosure in Tex. Gov't Code Ann. § 552.022(a)(2) (West 2004). P's Cx-MSJ at 3. From that omission, Plaintiff concludes that the Attorney General's key ruling on date of birth of a public employee is "merely an inference of legislative intent." *Id.*; see Op. Tex. Att'y Gen. No. MW-283 (1980).<sup>1</sup> That ruling came after three earlier rulings that held that date of birth in licensing files is subject to disclosure. See Tex. Att'y Gen. ORDs-215(1978), 157 (1977), Op. Tex. Att'y Gen. No. H-242 (1974). These rulings, as well as current rulings, are based on the plain language of the PIA and case law, then and now. In all this time, the legislature has made no move to reverse the Attorney General's rulings on date of birth. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 366 (Tex. 2000) (legislature has acquiesced in interpretation of the PIA by the Attorney General by making no change to pertinent exception); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 328-29 (Tex.App.—Austin 2002, no pet.) (also noting that the legislature's failure at numerous opportunities to address the Attorney General's construction of the Act adds to the persuasiveness of his opinions).

All information in the hands of government is presumed open under the PIA, including the information maintained by the Comptroller in her state payroll records. Unless an exception to

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<sup>1</sup>Plaintiff cites to MW-238 in her motion, at 3. This is a transposition of numbers, not a different ruling.

disclosure applies, information must be released. For certain categories of information set out in section 552.022(a), no exception provided in the PIA generally applies and the listed information has to be released. This express mandate of disclosure does not mean that the legislature intended unlisted information, such as date of birth, to be confidential as Plaintiff seems to suggest. In fact, subsection (a) begins with a very clear statement to the contrary:

(a) *Without limiting the amount or kind of information that is public information under this chapter*, the following categories of information are public information and not excepted from required disclosure under this chapter . . . .”

(italics added). Tex. Gov't Code § 552.022(a). There is no application of *expressio unius est exclusio alterius* to section 552.022(a). Every other piece of public information in the hands of government is still presumed open.

As recently as the past regular legislative session, the legislature had the opportunity to add date of birth to the list of confidential information provided 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) (Appendix, Tab A)<sup>2</sup>; House Elections Committee, Bill Analysis, Tex. C.S.H.B. 345, 79th Leg., R.S. (2005) (Appendix, Tab B); Committee Hearing on Tex. H.B. 345, Before the House Committee on Elections, 79th Leg., R.S. (February 16, 2005) (testimony of Representative Burt R. Solomons, author)<sup>3</sup>. Tex. Elec. Code § 13.004(c) expressly makes confidential a social security number, driver's license number, or number of a DPS personal identification card furnished

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<sup>2</sup>The undersigned attorney certifies by her signature that the documents in the Appendix, Tabs A-C, are true and correct copies of documents printed from the official website of the Texas Legislature. Legislative information regarding H.B. 345 may be found at [http://www.capitol.state.tx.us/cgi-bin/db2www/tlobillhist/actions.d2w/report?LEG=79&SESS=R&CHAMBER=H&BILLTYPE=B & BILL SUFFIX=00342](http://www.capitol.state.tx.us/cgi-bin/db2www/tlobillhist/actions.d2w/report?LEG=79&SESS=R&CHAMBER=H&BILLTYPE=B&BILL SUFFIX=00342).

<sup>3</sup>tapes available from the House of Representatives Audio/Video Services or on the web: <http://www.house.state.tx.us/committees/broadcasts.php?cmte=240&session=79>, starting at 1:16.

on a voter registration application. The legislature declined to add date of birth to this list of confidential information. Instead, the legislature prohibited county officials only from posting the date of birth, telephone number and the subsection (c) information on the internet. Act of May 24, 2005, 79th Leg., R.S., ch. 487, § 2, sec. 13.004, 2005 Tex. Gen. Laws 1348 (codified at Tex. Elec. Code § 13.004(d)) (Appendix, Tab C). Dates of birth on voter registration applications are still available if requested under the PIA.

Plaintiff points to the newly enacted Tex. Bus. & Com. Code Ann. ch. 48 (West Supp. 2005) (Identity Theft Enforcement and Protection Act, 79th Leg., R.S. ch. 294, § 2, 2005 Tex. Gen. Laws 885) (Appendix, Tab D), as further indication that the birth date of a public employee "should be recognized under the [PIA]." P's Cx-MSJ at 4. Plaintiff states that chapter 48 protects birth dates, as personal identifying information (PII), from disclosure under certain circumstances. *Id.* It is true that date of birth is considered PII under section 48.002(1)(A). It is not true that date of birth is protected from disclosure, under any circumstance. This law prohibits the use or possession of PII without consent and with the intent to obtain anything of value in another person's name. 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). 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). Chapter 48 of the Business and Commerce Code and section 13.004(d) of the Election Code are the legislature's latest efforts toward protecting Texas citizens against identity theft. That protection does not include making date of birth confidential by law.

The legislature has also had opportunities to protect public employees' dates of birth directly

in the PIA. In 1985, the legislature added former section 3A to Tex. Rev. Civ. Stat. Ann. 6252-17a (predecessor to Tex. Gov't Code ch. 552), giving public employees the right to choose whether the public had access to their home addresses and telephone numbers. Act of May 24, 1985, 69th Leg., R.S., ch. 750, § 3, 1985 Tex. Gen. Laws 2574. In 1995, the legislature amended this section (now section 552.024) to give that same choice for social security numbers and names of family members of public employees. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 5, sec. 552.024(a), 1995 Tex. Gen. Laws 5130. There is no state statute in Texas that makes the dates of birth of public employees confidential or otherwise excepted from disclosure. The actions of the legislature to date reflect an intent that such information be public under Texas laws.

**2. Texas common law privacy does not make public employees' dates of birth confidential.**

As already stated in the Attorney General's letter ruling and Intervenor's motion for summary judgment, common law privacy protects only highly intimate or embarrassing information, disclosure of which would be highly objectionable to a reasonable person. See Tex. Att'y Gen. OR2006-01938 at 1-4 (2006). P's MSJ at 4-7. Plaintiff has not met this threshold test. In her cross-motion, Plaintiff asserts that the Third Court of Appeals used broader language than the Supreme Court used in *Industrial Found.* when it announced the above test for disclosure under the PIA. Plaintiff refers to *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.) and claims that, under *Hubert*, common law 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.” P's Cx-MSJ at 3.

Plaintiff uses the wrong test and misconstrues the Third Court's analysis in *Hubert*. *Hubert* applied the predecessor provision to Tex. Gov't Code § 552.102, section 3(a)(2) of art. 6252-17a, the exception for personnel files of public employees. That section states that such information is

excepted from disclosure if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” Tex. Gov’t Code § 552.102(a). The Third Court held that the test under this exception is the same test announced by the Supreme Court in *Industrial Found.*, for Tex. Gov’t Code 552.101’s predecessor, art. 6252-17a § 3(a)(1). *Hubert*, 652 S.W.2d at 550. Moreover, the Third Court did broaden the test for section 3(a)(2), but not in the way claimed by Plaintiff; it made establishing an invasion of privacy more difficult. The Court held that under the “clearly unwarranted” requirement, “the statute places a further burden on litigants who successfully establish that publication of material would result in an invasion of privacy.” *Id.* at 551.

Date of birth does not meet the test for information protected under common law privacy. *See Industrial Found.*, 540 S.W.2d at 683. Comparing the information protected in *Industrial Found.* to date of birth results in only one conclusion: it is not highly intimate or embarrassing private information under common law privacy. *Id.* (claims of injuries from sexual assault, a claim on behalf of illegitimate children, claim for expenses of pregnancy due to failure of contraceptive device, claims for psychiatric treatment, claims for injuries stemming from attempted suicide); *see also Hubert*, 652 S.W.2d at 551 (distinguishing the “intimate or embarrassing information” in *Industrial Found.* from that material sought in *Hubert* (names of candidates for A&M president)). The Fifth Circuit Court of Appeals has held that personal information such as age, job title, and street address is not “highly intimate” information under Texas common law privacy. *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995). As noted in *Johnson*, “Prosser, *Law of Torts* § 117 at 858 (4th ed. 1971), states ‘[t]he plaintiff cannot complain when an occupation in which he publicly engages is called to public attention or when publicity is given to matters such as the date of his birth.’” *Johnson*, 47 F.3d at 732-33. Similarly, the Fifth Circuit noted that “[t]he Restatement (Second) of Torts, § 652D, comment *b*, is to the same effect, viz: ‘[t]here is no liability for giving publicity to

facts about the plaintiff's life . . . such as the date of his birth . . . ' *Id.* at 385, 386." *Johnson*, 47 F.3d at 733.

Even if a court found that information met the threshold test of being highly intimate or embarrassing personal information, disclosure of which would be highly offensive to a reasonable person, the court does not balance the interests of the requestor versus the privacy interests of the affected individuals to reach the third prong of the test: that the information is not of legitimate public concern. There simply is no balancing under common law privacy. In *Hubert*, the Third Court rejected any concept of balancing the protection of the individual's right to privacy and the public or the specific requestor's right to know. 652 S.W.2d at 550-51. Application of the *Industrial Found.* test "result[s] in the proper 'balancing' of an individual's right to privacy" and the purpose of the PIA. *Id.*, at 550 & n. 7.

The Supreme Court, in *Industrial Found.*, says that this last requirement "is necessarily one which can only be considered in the context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure." 540 S.W.2d at 685. The Court goes on to recognize a presumption that information that has been shown to be of such a private nature under common law privacy will generally not be of legitimate interest to the public. *Id.* Because of this presumption of no legitimate concern, it is imperative that only information that meets the test for private information be accorded this special treatment. Accordingly, the Court must first determine if Plaintiff has met her burden to establish that the information is highly intimate and embarrassing, as required under *Industrial Found.*, before the requestor is even called upon to show a legitimate public concern. *Id.*; accord: *Morales v. Ellen*, 840 S.W.2d 519, 524-25 (Tex.App.—El Paso 1992, writ denied).

Lastly, the Supreme Court reiterates its concern that the motives or particular interest of the

requestor not be considered "in determining whether the matter requested is of legitimate concern to the public, except insofar as the requestor's interest in the information is the same as that of the public at large." *Id.* Plaintiff has not met her burden here. As a consequence, the *Dallas Morning News* has no burden to prove that there is a legitimate public concern in disclosure of state employees' dates of birth. (Even so, Intervenor in its motion and reply to Plaintiff's motion, as well as at the hearing, articulated several reasons why the information is a matter of legitimate public concern.)

### **3. Constitutional privacy does not protect public employees' dates of birth.**

Date of birth simply cannot meet the threshold test for constitutional protection. "[N]ot every publication of intimate or embarrassing information about an individual constitutes an invasion of a constitutionally protected zone of privacy." *Industrial Found.*, 540 S.W.2d at 680. The Constitution protects individual privacy only within certain defined zones of privacy—marriage, procreation, family relationships, child rearing and education. *Id.* at 680-81. "Thus, the State's right to make available for public inspection information pertaining to an individual does not conflict with the individual's constitutional right of privacy unless the State's action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution." *Id.* Personal matters outside the zones of privacy may also be protected under the Constitution. This type of information must still concern the "most intimate aspects of human affairs." *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5<sup>th</sup> Cir. 1985). Disclosure of matters outside the zones of privacy may still be permitted if a compelling governmental interest in disclosure outweighs the individual's right of privacy. *Id.* While constitutional privacy does include a balancing of these interests, the balancing is only required, again, after the plaintiff establishes that the information is constitutionally protected.



Plaintiff has not established that date of birth is within any constitutionally protected zones of privacy or that it involves highly intimate personal information. She simply assumes that "date of birth is on a par with other intimate facts." P's Cx-MSJ at 5. This assumption is incorrect. See *Dodge v. Trustees of Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 16-17 (D.D.C. 2004) ("This Court cannot justifiably classify a person's right to privacy based on the protection of his Social Security number with a woman's right to procreate within the 'penumbra' of fundamental rights"). So high is this threshold, the Texas Supreme Court held that even the information at issue in *Industrial Found.* did not reach the level of constitutional protection. *Industrial Found.*, 540 S.W.2d at 681 (holding that availability of the information, including nature of injuries, would not adversely affect any recognized right within a constitutionally protected zone of privacy). Date of birth is simply not within any zones of privacy recognized by the courts or "on a par" with any constitutionally protected information.

**OBJECTION TO PLAINTIFF'S SUMMARY JUDGMENT EVIDENCE  
AND AMICUS CURIAE MEMORANDUM AND AFFIDAVIT**

Defendant joins with Intervenor in its objections to Plaintiff's summary judgment affidavits and to the affidavit of Jerome Michael Gross attached to the Memorandum of *Amicus Curiae* by the Texas State Employees Union (TSEU). Moreover, the Memorandum should not be considered. The purpose of an amicus brief is to present arguments by a nonparty in support of a party. TSEU's memorandum adds no legal argument to this case; it simply refers to Plaintiff's cross-motion for summary judgment. Like the plaintiff's, TSEU's position is more properly made to the legislature.

**CONCLUSION AND PRAYER**

Plaintiff fails to meet her burden under the PIA to demonstrate that dates of birth of state employees are excepted from disclosure under Tex. Gov't Code § 552.101. Clearly, common law

privacy and constitutional privacy do not make such information confidential by law. Plaintiff has not articulated any other legal basis or provided sufficient summary judgment proof to allow this Court to grant her cross-motion for summary judgment. The PIA does not allow a court to hold that information may be withheld from the public without a specific exception that makes it so. *Industrial Found.*, 540 S.W.2d at 682. Section 552.001(b) of the PIA requires that the Act "shall be liberally construed in favor of granting a request for information." "The practical effect of a statutory directive for liberal construction of an act is that close judgment calls are to be resolved in favor of the stated purpose of the legislation." *Hubert*, 652 S.W.2d at 552. As a matter of law, the information here is subject to disclosure.

Defendant Greg Abbott, Attorney General of Texas, respectfully asks the Court to deny Plaintiff's cross-motion for summary judgment and grant Intervenor's motion for summary judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply to Plaintiff's Cross-Motion for Summary Judgment of Defendant Greg Abbott, Attorney General of Texas, has been served, on August 4, 2006, on the following attorneys-in-charge:

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