

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

AMICI CURIAE BRIEF OF
FREEDOM OF INFORMATION FOUNDATION OF TEXAS
AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
IN SUPPORT OF RESPONDENTS

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<p>A public employee's birth date is not excepted from disclosure by the common law privacy exception to the Texas Public Information Act and the privacy tort of intrusion on seclusion should not be expanded to include the publishing of dates of birth. Further, withholding date of birth information from release under the Public Information Act will critically undermine the ability of Texas citizens to properly monitor the functioning of Texas governmental bodies.</p>	
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The Freedom of Information Foundation of Texas and Reporters Committee for Freedom of the Press present this amici curiae brief and would show the Court as follows:

INTEREST OF AMICI CURIAE

The Freedom of Information Foundation of Texas ("FOIFT") is a non-profit Texas based organization representing a broad spectrum of Texas citizens concerned

about the free flow of information and dedicated to open government. Since its founding in 1978, its mission has been to serve as a statewide clearinghouse of information on open government and First Amendment issues and to take action in the public interest on open government and First Amendment problems. FOIFT has not received nor will receive any fee for preparing this brief.

The Reporters Committee for Freedom of the Press ("RCFP") is an unincorporated association of reporters and editors which works to defend First Amendment rights and freedom of information interests of the news media. RCFP has provided representation, guidance and research in First Amendment litigation since 1970.

RCFP is an unincorporated association that has no parent and issues no stock.

RCFP has not received nor will receive any fee for preparing this brief.

SUMMARY OF ARGUMENT

The Comptroller's argument that dates of birth of employees of governmental bodies should be withheld to protect their privacy falls short of the mark because dates of birth are not recognized as a privacy interest under the common law. Specifically, the tort of intrusion on seclusion, the only tort the Comptroller argues applies in this case, simply does not apply to release of information under Texas Supreme Court precedent. Expanding this tort to include release of birth date information is not supported by good policy considerations, and the results of such an expansion of the

common law would change the nature of the tort under Texas law and unwisely extend its reach not only regarding the Public Information Act but as to the use of such an expanded tort by the plaintiffs' bar. The Public Information Act is to be interpreted liberally to provide for release of information and the Court should accordingly strictly limit any confidentiality provision or judicial decision that would prevent disclosure of public information. Date of birth information is vitally important to monitoring the actions of public officers and their employees.

BACKGROUND FACTS

FOIFT and RCFP adopt *The Dallas Morning News*' ("The News") statement of the facts in this matter.

ARGUMENT AND AUTHORITY

Respondents Attorney General and *The News* have done a top drawer job in their briefs to the Court. They have correctly pointed out a number of shortcomings on the Comptroller's positions in this matter, not least of which is that the Comptroller is making an argument on appeal that it did not make before the trial court. Their papers also make clear that no existing case law or statute supports withholding release of birth dates as an invasion of privacy, a point the Comptroller appears to concede. Respondents have also asked the Court to take note of the legislature's failure to pass a statute that would have given the Comptroller the specific relief that she now seeks before this Court. The Amici would add the below additional analysis and discussion

regarding the unworkability and imprudence of expanding the common law tort of intrusion on seclusion to prevent publication of dates of birth. The Amici would also add argument and authority on the importance of maintaining access to dates of birth as necessary to proper functioning of the Texas Public Information Act, which, by its own terms, is to be liberally interpreted to allow for release of information.

While numerous privacy theories have been relied upon by the Comptroller at various points in the history of this case, it is clear from her briefs that she is asking this Court to extend the holding in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) to prevent release of the dates of birth of governmental employees through (1) expanding the judicial decisions recognized as affecting release of information pursuant to the PIA to include the privacy interest of freedom from intrusion on seclusion, and (2) expanding the tort of intrusion upon seclusion to include publication of birth dates.

However, expanding intrusion upon seclusion to cover publication of birth dates will not only prevent persons from obtaining this information under the PIA, but will dramatically expand this tort to permit privacy tort claims that will not be easily distinguished from this case. The intrusion upon seclusion tort requires proof of (1) an intentional intrusion, physical or otherwise, upon another's solitude, seclusion, or private affairs or concerns, and (2) the intrusion being highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

An inescapable fact about birth dates is that everybody has one. It would not be surprising that, among the various offices where the nearly 145,000 state employees with date of birth information on file work, some number celebrate the birthdays of the employees by means of office cake or a card. Rather than finding this recognition offensive, most people feel some level of warm feeling about it. Indeed, most people find nothing offensive at all about others knowing their date of birth, although no doubt everybody finds identity theft to be offensive and a clear invasion of privacy. However, it is not possible to simply equate the two, even if birth dates may assist in the latter. As frequently mentioned in the Comptroller's brief, a governmental employee's name is also necessary to identify theft. Yet, no one would seriously propose making release of people's names a cause of action for intrusion upon seclusion.

Changing the common law to make release of dates of birth a matter subject to the tort of intrusion upon seclusion makes any employer who celebrates employee birthdays potentially subject to the tort. The information of the month and date along with widely known knowledge regarding the age of fellow employees would at least arguably put these celebrations within the expanded tort urged by the comptroller.

As opposed to the information at issue in *Industrial Found. of the South v. Texas Indus. Accident Board*, 540 S.W.2d 668 (Tex. 1976), which contained health care records that some persons may have and others may not, and that were collected by the governmental body as a result of work accidents, the date of birth records at issue in

this case are on file for every single employee of the state of Texas and its subdivisions and are usually right on the application for employment. This information is also generally obtained in commercial activities by banks or other vendors or service providers as well as most if not all private employers. As opposed to information that a prospective employee has cancer or multiple sclerosis or AIDS, for example, which may be denied to any employer, including the government, a prospective employee who claimed release of his date of birth was protected by his right of privacy would quickly be denied employment.

The fervency with which the Comptroller has made her arguments appear to have blinded her to their broader implications. However, the Court should take a clear-eyed view of the ramifications of expanding the tort of intrusion upon seclusion to include release of date of birth information. The Comptroller is not only asking this Court to the broadly restrict dates of birth from release under the Public Information Act, but necessarily to expand the tort to affirmatively allow for a tort cause of action for release of birth date information and therefore to set jurisprudence for the tort bar in this state. However, the Comptroller has shown the Court no basis for such an extension, such as has preceded other developments in the common law. *See, e.g., Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993). The Comptroller has never even hinted that she has evidence that public employees are at greater risk of identity theft in general or even that any one public employee has suffered identity theft, and, in fact, studies have shown that the

majority of identity theft involves theft by relatives or close friends. The Comptroller does not even give the Court an example of a non-media Public Information Act request for dates of birth. And the Comptroller has touched on none of the factors outlined in *Graff* for expanding the common law.

The Comptroller has only shown the Court generally that identity theft is a problem, which is obviously a given. That fact is underscored by the legislation on the books attempting to deal with the larger issue of identity theft and misuse of personal information. Some of this legislation has taken the form of making specific information confidential for purposes of the Public Information Act, for example, Tex. Gov't Code § 552.136 (credit card numbers); § 552.117 (addresses, telephone numbers, social security numbers and personal family information of peace officers); § 552.147 (social security numbers generally). Indeed, the Public Information Act gives all public employees the choice as to whether to make his or her address and phone number available to the public. § 552.024. However, the legislature has not seen fit to make confidential dates of birth, and it is fully aware of the current law allowing their release. Indeed, the legislature has specifically considered doing so and has declined to enact such a law. This also militates strongly against an expansion of the common law. In an analogous case, the Court refused to extend the common law with this principle in mind. *Graff*, 858 S.W.2d at 919. (“We think it significant in appraising Beard’s request to recognize common-law social host liability that the legislature has considered

and declined to create such a duty.”); *see also Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334, 338 (Tex. 1979) (the deletion of a provision of a pending bill discloses the legislative intent to reject the proposal and courts should be slow to put back that which the legislature has rejected).

Further, whereas *Industrial Foundation* adopted the common law tort of public disclosure of private facts as *already written* in the Restatement of Torts and held this tort applied to information subject to the Texas Public Information Act, the Comptroller is asking the Court to *broadly extend* the tort of intrusion upon seclusion. The *Industrial Foundation* factors incorporating the “public disclosure of private facts” tort works well with regard to whether information held by a governmental body is entitled to protection as opposed to the broad policy pronouncement the Comptroller asks the Court to make through expansion of the tort of intrusion upon seclusion. Indeed, this Court in *Industrial Foundation* specifically recognized that the “interest asserted by [the governmental body] ... most closely resembles the interest defined by Prosser as freedom from public disclosure of embarrassing private facts.” *Id.* at 682.

The reasons for this are clear from even a brief examination of the two torts-- only the tort of public disclosure of embarrassing private facts involves *publication* of information. The *Industrial Foundation* Court explained, given a requester’s right to use information freely once obtained, that when a governmental body “makes information in its files available for public inspection, the information is sufficiently

'publicized' to invoke the protection accorded such matters by the tort law." *Id.* at 684.

However, the privacy right protected by the tort of intrusion upon seclusion does not require publication at all, but is invoked by the intrusion itself. The seminal Texas case of *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973) involved a wiretap where no evidence of publication of the information was shown or required, merely listening in on the telephone conferences was enough. In *Valenzuela*, the issue was whether picketing outside plaintiffs' home constituted intrusion on seclusion, and no personal information of plaintiffs even appears to have been at issue. Accordingly, the tort of intrusion upon seclusion is inappropriate as a decision criteria regarding release of public information. This is further underscored by the fact that, when the *Industrial Foundation* Court carefully crafted its test, it emphasized that even if the information at issue met the first prong of the test, that it contain "highly intimate or embarrassing facts about a person's private affairs," it must also be of no "legitimate concern to the public." This protection, in addition to coming straight from the Restatement (Second) of Torts, is consistent with the basic mandate by the legislature that the Public Information Act must be construed liberally in favor of release of information.

The tort of intrusion on seclusion has no such protection. The analysis of this Court in holding that there is no "false light" invasion of privacy in Texas is relevant here not only because it dealt with another specie of invasion of privacy, but because

the Court declined to extend the common law to recognize false light not only because it effectively duplicated the torts of libel and slander, but also because it did not include the constitutional and procedural safeguards for freedom of speech that inhere to a defamation claim. *See Cain v. Hearst*, 878 S.W.2d 577, 580-83 (Tex. 1994). In the instant case, expansion of the tort of intrusion on seclusion to include publication of information, birth dates or otherwise, would not only be redundant of the tort of wrongful publicity of private facts, but would not include the protections and limitations for use of private information where there is a legitimate public concern, as set out by *Industrial Foundation* and the Restatement.

It is fairly apparent that the Comptroller abandoned her claim under *Industrial Foundation* because there is no question that dates of birth provide a valuable piece of information for monitoring the activities of our governmental bodies and their employees and are therefore of legitimate public concern. While the dates of birth themselves have no real significance, their value to the public is to be able to specifically identify the public employee in question. This information is particularly valuable in distinguishing between governmental employees with the same first and last names of which there are approximately 2,000 state employees. Using dates of birth, *The Dallas Morning News* documented the Dallas Independent School District had hired employees with criminal records and that the state had licensed convicted felons as nurses. *The News* also identified 266 Texas Youth Commission employees with

criminal backgrounds. See <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/050709dnprodateofbirth.3fcf743.html>. Not having this information will prevent the press from doing some stories involving governmental employees out of concern they have the wrong person, and valuable information the public needs to be an effective citizenry and electorate will go unpublished.

Underlying all of these considerations is the fact that the Public Information Act *mandates* a liberal construction to implement the policy of providing the public with access at all times to “complete information about the affairs of government and the official acts of *public officials and their employees.*” *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351, 355-56 (Tex. 2000) (emphasis added). Of course, this presupposes that one can identify these public officials and their employees to begin with.

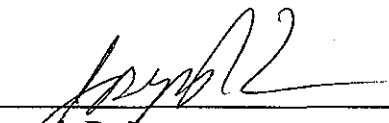
SUMMARY AND CONCLUSION

The Freedom of Information Foundation of Texas and Reporters Committee for the Freedom of the Press urge this Court to reject the Comptroller’s invitation to expand the common law tort of intrusion on seclusion as a mechanism to zero in on publication of birth dates as unwise, unworkable and inconsistent with the Court’s own prior jurisprudence. Caution in expanding the common law of the State of Texas is a conservative principle. Access to information that aids the American people in monitoring their public officials and employees is a conservative principal that is

fundamentally important to preserving our American form of limited government. Ronald Reagan once famously said "trust but verify." While that statement was with regard to verification of nuclear arms reduction, it applies equally to the relationship of Texans to their public officials and employees. The legislature has given Texas a strong Public Information Act. We ask this Court to rule consistently with its own prior jurisprudence in keeping it so.

Respectfully submitted this 19th day of January, 2010.

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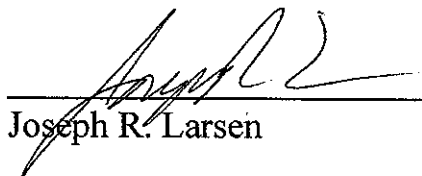
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record listed below in accordance with Rule 9.5(c) of the Texas Rules of Appellate Procedure via U.S. First Class Mail and/or facsimile on this the 10th day of January, 2010 as follows:

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