IN THE SUPREME COURT OF TEXAS

NO. 09-0530

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER,

v.

COX TEXAS NEWSPAPERS, L.P., AND HEARST NEWSPAPERS, L.L.C., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued September 15, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

JUSTICE WAINWRIGHT delivered a concurring opinion, joined by JUSTICE JOHNSON.

JUSTICE MEDINA and JUSTICE WILLETT did not participate in the decision.

Our common law protects from public disclosure highly intimate or embarrassing facts. We must decide whether it also protects information that substantially threatens physical harm. We conclude that it does. Both sides raise important questions, not just about safety but also about the public's right to know how the government spends taxpayer money. Those issues could not have been fully litigated under the standard that prevailed before today's decision. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

In separate requests, two reporters representing three newspapers asked the Department of Public Safety for travel vouchers from Governor Rick Perry's security detail. One request was limited to the Governor's out-of-state trips in 2001 and 2007; the other was not confined to a specific period of travel. Believing all of the documents to be excepted from disclosure under the Public Information Act (specifically Government Code section 552.101), DPS sought a ruling from the Attorney General's office.

DPS noted that it is responsible for staffing the governor's protective detail and that it does not publicly discuss security practices or the identity or numbers of officers so assigned. DPS offered to release aggregated expense information, warning that releasing the vouchers themselves would "necessarily reveal the number of officers who traveled with the governor and his family," data that "would be valuable information for someone who intended to cause [the governor] harm."

Based solely on DPS's letter and inspection of a subset of the responsive documents, the Attorney General determined that release of the information would place the governor in imminent threat of physical danger. Accordingly, the Attorney General concluded that the information fell within a "special circumstances" aspect of common law privacy that required DPS to withhold the submitted information in its entirety under Government Code section 552.101.[1] Cox and Hearst, publishers of the newspapers in question, sued DPS, seeking a writ of mandamus to compel

[1] Twice before, the Attorney General ruled that similar vouchers had to be disclosed. *See* Tex. Att'y Gen. OR2004-4723; Tex. Att'y Gen. OR2002-0605. In those instances, however, the only exception DPS urged was Government Code section 552.108, which protects certain law enforcement information. *See* TEX. GOV'T CODE § 552.108. Because he believed that exception to be discretionary, however, the Attorney General ruled that it could not be considered in conjunction with section 552.022. *See id.* § 552.022 (making certain information in vouchers public unless expressly confidential under "other law"). DPS did not appeal either of those rulings.

complete disclosure. *See* TEX. GOV'T CODE § 552.321(a). After a bench trial, the trial court found that public disclosure of the information in the vouchers would not put any person in imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat. The trial court ordered the clerk to issue a writ of mandamus compelling DPS to produce the vouchers in their entirety.

The court of appeals affirmed. 287 S.W.3d 390, 398. It held that the Attorney General's "special circumstances" exception conflicted with *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). *Id*. at 394. According to the court of appeals, *Industrial Foundation* "declared its two-part test to be the 'sole criteria' for the disclosure of information to be deemed a wrongful publication of private information under common law." *Id*. (quoting *Industrial Foundation*, 540 S.W.2d at 686). Because DPS conceded that the first prong of that test (that the information contains highly intimate or embarrassing facts) had not been satisfied, the court held that the vouchers could not be withheld based on the common law right of privacy. *Id*. at 395. The court also rejected DPS's claim that the Fourteenth Amendment to the United States Constitution barred disclosure of information that would create a substantial risk of serious bodily harm from a perceived likely threat. *Id*. at 398. The court observed that "[w]hether the privacy interests at issue here *should* merit protection under the PIA is a question for the legislature." *Id.*

We granted the petition for review to examine whether the public's right to information is subject to reasonable limitations when its production may lead to physical harm.[2] 53 Tex. Sup. Ct. J. 1023 (Aug. 20, 2010). DPS asserts that the vouchers are confidential under the common law and under Government Code section 418.176(a)(2).[3] We address each argument in turn.

II. Does "other law" include a common law right to be free from physical harm?

The PIA guarantees access to public information, subject to certain exceptions. *See generally* TEX. GOV'T CODE ch. 552. Those exceptions embrace the understanding that the public's right to know is tempered by the individual and other interests at stake in disclosing that information. *See generally* TEX. GOV'T CODE ch. 552, subch. C. In 1999, the Legislature excluded certain categories of public information from the exceptions. *See id.* § 552.022. This core public information is currently[4] protected from disclosure only if it is "'expressly confidential *under other law*,' meaning law other than Chapter 552 of the Government Code, which is the Public Information Act." *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001) (quoting TEX. GOV'T CODE § 552.022(a)). "Other law" includes other statutes, judicial decisions, and rules promulgated by the judiciary. *Id*. at 332. "A law does not have to use the word 'confidential' to expressly impose confidentiality." *Id*. at 334.

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[2] The Freedom of Information Foundation of Texas submitted an amicus curiae brief in support of Cox and Hearst.

[3] DPS no longer makes an argument based on a constitutional right of privacy.

[4] The Legislature has since amended section 552.022(a). Effective September 1, 2011, core public information may be withheld if it is confidential under either the PIA or other law. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified at TEX. GOV'T CODE § 552.022(a)).

The parties agree that the vouchers contain core public information.[5] *See* TEX. GOV'T CODE § 552.022 (a)(3) (including "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body"). For this reason, that information is presently unaffected by the Legislature's passage, five days after the court of appeals' decision, of an amendment excepting public information from disclosure "if, under the specific circumstances pertaining to the [government] employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm." Act of June 3, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742 (codified at TEX. GOV'T CODE § 552.151). Because this exception is in the PIA, it does not currently apply to core public information.[6] TEX. GOV'T CODE § 552.022(a).

We turn, then, to DPS's argument that "other law" includes a common law right to be free from physical harm. DPS urges an exception for cases in which there is an imminent threat of physical danger. DPS asserts that if the common law protects personal privacy, it must logically protect physical safety as well. Ensuring the physical safety of its citizens, says DPS, is the "primary concern of every government,"[7] and preventing disclosure that would threaten physical safety is deeply rooted in the common law. *See, e.g.*, *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (observing that "'[t]he interest in freedom from intentional and

[5] The parties do not address, and we do not decide, what voucher information is "core" and what is not.

[6] The Legislature recently passed (although the Governor has not yet acted on) an amendment making vouchers confidential, but that amendment would not apply to the vouchers at issue in this case. Act introduced May 31, 2011, 82nd Leg., 1st C.S., S.B. 1, art. 79A (to be codified at TEX. GOV'T CODE ch. 660).

[7] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery'" (quoting WILLIAM L. PROSSER, LAW OF TORTS 32 (3d ed. 1964))).

Freedom from physical harm is indeed a hallmark of our common law. One of our earliest reported cases involving battery was decided by the Supreme Court of the Republic of Texas. Eli Williams sued Jesse Benton for assault and battery. *Benton v. Williams*, Dallam 496, 496 (Tex. 1843). Benton filed a plea asserting that he should not have to answer the complaint because "Williams [was] of African descent, and not entitled by law to maintain his action." *Id*. at 496-97. The Court rejected that contention, even though the constitution at that time provided that the descendants of Africans were not entitled to the rights of citizens and "shall not be permitted to remain permanently in the republic without the consent of congress." *Id*. at 497. The Court held that insulating Benton from Williams's battery claim would be "against law, contrary to the spirit of our institutions, and in violation of the dictates of common humanity." *Id*. The Court affirmed the trial court's judgment against Benton. *Id*.

Our courts have, since then, consistently protected individuals' right to be free from physical harm.[8] Blackstone described three "absolute rights," one of which was "[t]he right of personal security," consisting of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 WILLIAM BLACKSTONE, COMMENTARIES *125 (1769). The

[8] *See, e.g.*, *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 564 (Tex. 1998) (holding that "protecting the health and safety of clinic patients is a compelling state interest justifying restrictions on the demonstrations"); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 5 (stating that "[a]n actor who intentionally causes physical harm is subject to liability for that harm"); *cf. G., C. & S. F. R'y v. Styron*, 2 Posey 275, 276-77 (Tex. Comm'n App. 1883) (not precedential) (noting that the common law recognized actions for injuries "'to the *absolute rights* of persons, as for assaults, batteries, wounding, injuries to the health, liberty and reputation'" (quoting 1 CHITTY ON PLEADINGS 60)(emphasis added)).

common law's recognition of an action for battery emerged as a means of "keep[ing] the peace by affording a substitute for private retribution,"[9] and we have recognized common law battery claims for more than a century. *See, e.g., Sargent v. Carnes*, 19 S.W. 378, 378 (Tex. 1892) (affirming judgment on plaintiff's assault and battery claim). Protection from physical harm is thus more firmly entrenched in our common law than the right of privacy, a relative newcomer. W. PAGE KEETON, ET AL., THE LAW OF TORTS 849 (5th ed. 1984)(noting that "[p]rior to the year 1890, no English or American court ever had granted relief expressly based upon the invasion [of the right of privacy]"). Indeed, we did not formally recognize the privacy tort until 1973, although our courts of civil appeals had hinted at it previously.[10]

Nonetheless, thirty-five years ago, we held that the common law privacy protection exempted documents from disclosure under the PIA. *Indus. Found.*, 540 S.W.2d at 686. We have never addressed whether the common law right to be free from physical harm applies as well. We conclude that it does.

The Legislature has recognized the importance of protecting physical safety, notwithstanding the mandate that courts construe the PIA in favor of disclosure. *See* TEX. GOV'T CODE § 552.001(b). Several PIA exceptions are grounded in a concern for physical safety, and the Legislature's swift

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[9] W. PAGE KEETON, ET AL., THE LAW OF TORTS 41 (5th ed. 1984).

[10] *See Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (holding, for the first time, that "an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted"); *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227, 229 (Tex. Civ. App.—Dallas 1952, no writ) (refusing to allow recovery for violation of right of privacy, because it was "not . . . recognized under the common law, as it existed when we adopted it," but noting that other actions (such as penalties for libel and eavesdropping) provided some protection).

passage of an exception for information that would pose a "substantial threat of physical harm" confirms the primacy of this interest.[11]

Additionally, since the 1970s, the attorney general has applied a "special circumstances" exception to disclosure in over 230 cases. Often, these special circumstances included situations in which disclosure would place individuals in danger of physical harm.[12] The Attorney General has described the exception as covering a "very narrow set of situations in which release of the information"[13] would cause someone to face "an imminent threat of physical danger." Tex. Att'y Gen. ORD1977-0169, at 6. It must be "more than a desire for privacy or a generalized fear of harassment or retribution." *Id*.

The court of appeals held that the Attorney General's "special circumstances" exception conflicted with *Industrial Foundation*, in which we said that the "sole criteria" for determining

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[11] *See, e.g.*, TEX. GOV'T CODE §§ 552.108 (exempting information held by a law enforcement agency or prosecutor if it involves a threat against a peace officer), 552.1176 (making home address, phone number, and social security number of Texas lawyers and judges confidential), 552.119 (making photographs of peace officers confidential), 552.127 (excepting identifying information from participants in neighborhood crime watch organizations), 552.151 (excepting certain information from disclosure if it would pose a "substantial threat of physical harm"); *see also* House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1237, 80th Leg., R.S. (2007) (noting that release of attorney personal information may "subject attorneys including current and former state and federal judges and prosecutors and their family members to harm relating to their personal safety or possible identity theft"); House Comm. on State Affairs, Bill Analysis, Tex. H.B. 273, 75th Leg., R.S. (1997) (commenting on "threats and acts of retaliation against the members of [neighborhood crime watch organizations]"); House Comm. for Public Safety, Bill Analysis, Tex. H.B. 474, 70th Leg., R.S. (1987) (noting that routine release of peace-officer photographs endangers officers' lives).

[12] *See, e.g.*, Tex. Att'y Gen. OR2008-03289 (holding that home address, telephone number, and other identifying information relating to a Dallas Area Rapid Transit employee fell within the special circumstances exception, as information was requested by a former employee who had threatened that individual); Tex. Att'y Gen. OR2008-01570 (determining that special circumstances justified withholding information, as city showed that former employee had made threatening statements to city staff); Tex. Att'y Gen. OR2004-10845 (holding that special circumstances justified withholding identity of alleged crime victim due to potential threat to victim's safety); Tex. Att'y Gen. ORD1977-0169 (holding that employees' addresses could be withheld because employees showed that their lives would be endangered if the information was disclosed).

[13] Tex. Att'y Gen. OR2004-10845, at 2.

whether information was exempt from disclosure as "confidential by judicial decision" was whether the information was of legitimate public concern and whether its publication would be highly objectionable to a reasonable person. 287 S.W.3d at 394 (citing *Industrial Foundation*, 540 S.W.2d at 686). That is an accurate statement for assessing matters involving that branch of the *invasion-of-privacy* tort (the only exception at issue in *Industrial Foundation*), but not for other matters that are confidential under judicial decision. *See, e.g., Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 348 (Tex. App.—Austin 2001, no pet.) (determining that because the "[c]ommon law protects information that meets the traditional six-factor test for trade-secret protection," information was excepted from disclosure under the PIA). The court of appeals' holding is understandable, given that the Attorney General has characterized the "special circumstances" exception as falling under the common law privacy umbrella. *See, e.g.*, Tex. Att'y Gen. OR2005-07052, at 6 (noting that "information also may be withheld under section 552.101 in conjunction with common law privacy upon a showing of certain 'special circumstances'"). But freedom from physical harm is an independent interest protected under law, untethered to the right of privacy.

The privacy interest protects against four distinct kinds of invasions (intrusion upon seclusion, public disclosure of private facts, false light publicity, and appropriation); physical harm is not among them.[14] KEETON, THE LAW OF TORTS 40, 851 (noting that privacy is "not one tort, but a complex of four"). We have characterized privacy as "the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity." *Billings v. Atkinson*, 489 S.W.2d

[14] As we noted in *Industrial Foundation*, the United States Supreme Court has also recognized a constitutional right of personal privacy in certain situations. *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976).

858, 859 (Tex. 1973) (citing 77 C.J.S. Right of Privacy § 1). By contrast, the common law right to be free from physical harm is an interest in personal integrity, distinct from that covered by the privacy interest. KEETON, THE LAW OF TORTS 40.[15] It is integral to a civil society. Although mischaracterized as a privacy related exception, the "special circumstances" doctrine protects the right we have long recognized at common law.

Both the legislative and executive branches have recognized that, as valuable as the right to public information is, a person's physical safety supersedes it. Those branches are not alone. Our common law protects—and has always protected—that interest, making such information confidential. We must decide, then, the appropriate standard for assessing whether disclosure would violate that interest. While we are not bound by the Legislature's policy decisions when we consider protections afforded by the common law, "the boundaries the Legislature has drawn do inform our decision." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 383 (Tex. 1998); *see also Austin v. Healthtrust, Inc.*, 967 S.W.2d 400, 403 (Tex. 1998). We conclude that the "substantial threat of physical harm" standard enunciated by the Legislature appropriately describes the interest protected under the common law, and information may be withheld if disclosure would create a substantial threat of physical harm. *See* TEX. GOV'T CODE § 552.151. We next examine that standard in light of the record produced at trial.

The trial court heard testimony from witnesses and reviewed the relevant documents and other exhibits. Although DPS proferred categories of lump sum expenses, showing amounts spent

[15] *See also Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (describing battery as protecting "[t]he plaintiff's interest in the integrity of his person") (quoting PROSSER, LAW OF TORTS 32 (3d ed. 1964)).

on airfare, lodging, meals, car rental, and related matters, it argued that disclosing the vouchers themselves would give those intent on harming the governor the means to accomplish that goal. DPS contended that the information revealed travel patterns, the number and placement of DPS officers on the detail, and how far in advance officers visit a location prior to the governor's arrival. The publishers presented evidence that the itemized vouchers and related documents disclose more information (and are more valuable to taxpayers, who fund the travel) than do line items with lump sum totals. The trial court concluded, categorically, that "public disclosure of the information in the vouchers requested by Cox and Hearst would not put any person in an imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat"—the standard for the Attorney General's "special circumstances" test and the constitutional exception urged by DPS, respectively. This determination is close, but not identical, to the standard we announce today for the common law right of physical safety.

We have remanded a case to the trial court when we have changed our precedent or when the applicable law has otherwise evolved between the time of trial and the disposition of the appeal. *See, e.g.*, *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (remand in interest of justice because case was tried on legal theory overruled by Court); *Caller-Times Publ'g Co., Inc. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576, 588 (Tex. 1992) (remand in interest of justice because Court announced new liability standard). We have also remanded for a trial court to determine "in light of [our] opinion, whether any of the information should be withheld from disclosure because confidential." *Indus. Found.*, 540 S.W.2d at 686. Here, our decision recognizes, for the first time, a common law physical safety exception to the PIA. And even though the interest protected under

that exception is well-established in our law, we have never before addressed whether or how it applies to the PIA. We conclude that a remand is appropriate.

On remand, the trial court must closely examine each of the disputed documents. DPS is likely correct in one sense: disclosure of *some* of the information in the vouchers may create a substantial threat of physical harm because it reveals specific details about the number of officers assigned to protect the governor, their general location in relation to him, and their dates of travel. Indeed, the vouchers divulge the number of officers the DPS deemed necessary for the governor's security, the specific location (hotel and room number) where the officers resided when providing that security, and the identity of each officer the Department assigned to the governor's protection. Because the past is prologue, at least when it reveals protocol DPS has implemented for ensuring the safety of government officials, we cannot agree that information from prior trips could not be used to inflict future harm.

But this may not justify withholding all but the ultimate dollar figure for trips abroad, as DPS proposes. In this respect, the publishers' request has merit: the documents themselves provide a more complete picture of how taxpayer money is spent than do the general categories and totals produced by DPS. This fact was not lost on the Legislature, which categorized certain information in vouchers as core public information. *See* TEX. GOV'T CODE § 552.022(a). And we agree with the trial court that the public has a legitimate interest in how public money is spent on official state business. The dividing line between disclosure and restraint must be determined by proof. To the extent DPS can show, with detailed evidence or expert testimony, that revelation substantially threatens harm—as it has with respect to the number of guards protecting the governor—then the

information at issue may be withheld. A certain amount of deference must be afforded DPS officers and other law enforcement experts about the probability of harm, although vague assertions of risk will not carry the day. But the public's right to "complete information"[16] must yield when disclosure of that information would substantially threaten physical harm. On remand, the trial court must ascertain, under this standard, what information may be confidential and what must be disclosed. Accordingly, we remand the case for a new trial.

A brief word in response to the concurrence. The concurrence says our holding would "establish judge-made exceptions to the PIA's required disclosure of information to the public, contradicting the unanimous determination in our precedent, *Industrial Foundation of the South v. Texas Industrial Accident Board*." __ S.W.3d at ___. But *Industrial Foundation* recognized that the PIA is subject to the common law and itself adopted a "judge-made" exception to disclosure: the right of privacy. *Indus. Found.*, 540 S.W.2d at 683 (holding that right of privacy acknowledged in *Billings v. Atkinson* was "the type of information which the Legislature intended to exempt from mandatory disclosure" under the PIA provision excepting matters confidential by judicial decision). We squarely held in *In re Georgetown* (a case involving core public information) that "other law" included not just statutes and rules, but "judicial decisions." *Georgetown*, 53 S.W.3d at 332. To reach that holding, we relied on a United States Supreme Court decision that concluded the phrase "all other law," by itself, "indicates no limitation" and did not allow any distinction "between positive enactments and common-law rules of liability." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128-29 (1991), *quoted in Georgetown*, 53 S.W.3d at 333. The

[16] TEX. GOV'T CODE § 552.001(a).

concurrence's position is not unlike the *Georgetown* dissent's, a position we rejected then. We reject it again today. *Compare* ___ S.W.3d at ___ (suggesting that "'other law' must mean other statutory law where the Legislature has declared certain information confidential"), *with Georgetown*, 53 S.W.3d at 339 (Abbott, J., dissenting) (suggesting that only the Legislature could promulgate laws, so that rules of procedure could not be "other law").

The concurrence argues that because the information itself may not implicate privacy concerns, it cannot be protected from disclosure as "expressly confidential under other law." TEX. GOV'T CODE § 552.022. But information does not exist in a vacuum. When disclosure carries with it a serious risk of bodily harm, we cannot ignore those consequences when deciding whether common law protections apply. *Cf. U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) (considering retaliatory action that would occur if information was disclosed).[17] Our common law protects individuals from physical harm, and, consistent with the PIA,[18] that protection extends to the disclosure of information that substantially threatens such harm.

III. Are the vouchers confidential under Government Code section 418.176?

[17] *See also* Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 7 (2003) (noting that "the [Supreme] Court considers derivative uses and secondary effects of disclosure on the privacy side as a matter of course").

[18] TEX. GOV'T CODE § 552.022(a).

Finally, DPS contends the documents are exempt from disclosure under Government Code section 418.176. That statute, passed in 2003,[19] makes certain information relating to emergency response providers confidential. The law provides, in pertinent part:

> Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:
>
> (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
>
> (2) relates to a tactical plan of the provider; or
>
> (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

TEX. GOV'T CODE § 418.176(a).

DPS contends that section 418.176 is "other law" making the vouchers confidential. *See id.* 552.101. Cox and Hearst argue that the vouchers do not meet section 418.176's requirements and, moreover, that DPS waived the issue by failing to raise it in the trial court and the court of appeals. Because we are remanding for a new trial, DPS may pursue this argument in the trial court in the first instance. *Cf. Kallam v. Boyd*, 232 S.W.3d 774, 776 (Tex. 2007) (deferring decision on issue until it had been fully litigated below "'so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question'"(quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992))).

[19] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Gen. Laws 4809, 4813.

IV. Conclusion

We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 60.2 (d).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 1, 2011