IN THE SUPREME COURT OF TEXAS

NO. 08-0172

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, PETITIONER,

v.

ATTORNEY GENERAL OF TEXAS AND THE DALLAS MORNING NEWS, LTD., RESPONDENTS

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

Argued September 10, 2009

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting in part and concurring in part.

The dates of birth of state government employees that the Dallas Morning News requested from the Comptroller in this case are defined as public information—information legitimately collected and maintained by the State of Texas. There is no dispute of that fact. Unlike social security numbers, the Legislature has not expressly excepted birth dates from disclosure.[1] And no one disagrees with the proposition that public information should be handled in ways that provide protections against identity theft. But we should not forget that the more public information is

[1] Bills submitted in the 2009 legislative session that would prevent disclosure of birth dates of public employees failed to pass. Tex. S.B. 1912, 81st Leg., R.S. (2009); Tex. H.B. 4207, 81st Leg., R.S. (2009). So there is still no express preclusion on the requested disclosure of birth dates. There are protections of birth dates in specific circumstances that are not before the Court in this case. *See, e.g.*, TEX GOV'T CODE § 552.1176; TEX ELEC. CODE § 13.004(d)(4).

protected from disclosure to the people, the less information the public gets from the government that serves it. It is a fundamental policy of the State of Texas that its citizens are entitled "at all times to complete information about the affairs of government and the official acts of public officials and employees." *City of Dallas v. Abbott*, 304 S.W.3d 380, 388 (Tex. 2010) (Wainwright, J., dissenting) (citing TEX. GOV'T CODE § 552.001).

The public information at issue has proven quite useful not only to inform citizens of the actions of the government and to arm citizens to hold the public sector accountable but also to highlight problems in the public sector that should be addressed. For example, the information sought in this case, which had been released to the News in prior years, was used to determine that a number of Texas Youth Commission employees had some criminal background and that some employees of a local school district had criminal records.[2] Dates of birth were used to confirm the identities of public employees with criminal records and avoid confusing them with the wrong persons with similar or the same names. These are legitimate uses of public employees' birth dates, which the Court precludes by its opinion.

Obviously, whether to disclose or keep secret public information involves a balancing of policy objectives, including the public's right to transparency in governmental affairs and privacy concerns of public employees. In promulgating the Texas Public Information Act (PIA), the Legislature balanced disclosure and protection of different types of public information about public

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[2] Ryan McNeill, *ID Theft vs. Public Record: State May Hide Workers' Birthdates, but It Sells Same Info on All Drivers*, [hereinafter "McNeill, *ID Theft vs. Public Record*"] DALLAS MORNING NEWS, May 7, 2009, at A1, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/yahoolatestnews/stories/050709dnprodateofbirth.3fcf743.html (reporting that "private companies spent nearly $50 million during the last fiscal year" buying Texas drivers' data, including birth dates).

employees. The Legislature decided that dates of birth are public information, as the Court and the Comptroller concede. And the State of Texas for years has sold birth date information of Texas public employees to businesses, and the parties point to no problems with identity theft arising from those prior disclosures.[3] To address illicit *use* of personal information, the Legislature promulgated the Identity Theft Enforcement and Protection Act with criminal penalties for those parties who engage in identity theft.[4] Before today, no Texas court had held that dates of birth of public employees are confidential or otherwise precluded their disclosure.

This case is fundamentally about which institution decides that balance—the Legislature or the judiciary. Our task in this case is not to decide if we think these birth dates should be confidential. We are charged with deciding whether the Legislature excepted dates of birth of public employees from disclosure under section 552.101 of the PIA. I would hold that it did not. The Court reaches the contrary result, not under section 552.101, but under section 552.102, an issue the Comptroller did not raise in this Court and expressly disclaims as a basis for its position that the information should be protected. I respectfully dissent.

I. Factual and Procedural History

On November 18, 2005, an editor with the Dallas Morning News (News) submitted a PIA request to the Comptroller for an electronic copy of the Texas state employee payroll database. The

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[3] *See* McNeill, *ID Theft vs. Public Record*, at A1.

[4] The Identity Theft Enforcement and Protection Act prohibits use of personal identifying information without the other person's consent to obtain anything of value in the other person's name. TEX. BUS. & COM. CODE § 521.051. Personal identifying information includes name, social security number, date of birth or government-issued identification number. *Id.* § 521.002(a)(1). The penalties for violation may be civil or, in certain types of credit card theft, criminal. *Id.* §§ 521.151, 522.002.

News requested the full name, birth date, job description, agency, salary, race, sex, work address, date of initial employment, pay rate, and work hours of every state employee in the database. Contending that birth dates, certain salary deductions, and an employee's designation as a peace officer are protected from disclosure under sections 552.101 and 552.108 of the Act, the Comptroller submitted a timely request for an attorney general decision determining whether those portions of the public information should be withheld. *See* TEX. GOV'T CODE § 552.301 (mandating that a governmental body that wishes to withhold requested information from public disclosure that it considers to be excepted from disclosure under Subchapter C of the PIA must timely ask for a decision from the attorney general). In an open records letter ruling, the Attorney General concluded that public employees' dates of birth are public information that must be disclosed to the requestor. *See* Tex. Att'y Gen. OR2006–01938.

Arguing that the release of the birth dates could lead to identity theft, the Comptroller filed suit seeking declaratory relief from compliance with the Attorney General's letter ruling as provided by Subchapter H of the PIA. TEX. GOV'T CODE §§ 552.321–.327. The News intervened in the lawsuit and moved for partial summary judgment on the ground that birth dates are not protected from disclosure by the PIA. The Comptroller responded with a cross-motion for summary judgment, contending that the information is protected as a matter of law or, alternatively, that the issue is fact-intensive and not appropriate for summary judgment. The trial court granted the News's motion for partial summary judgment and denied the Comptroller's cross-motion for summary judgment. The Comptroller appealed arguing to withhold the information under 552.101 and 552.102.

The Comptroller argued that the trial court erred in granting the News's partial summary judgment because the release of a public employee's birth date, in conjunction with his name, is a violation of the employee's right of privacy. The court of appeals held that the disclosure of state employees' birth date information would not violate any privacy interests, and thus was not protected under section 552.101 of the PIA. 244 S.W.3d 629, 635 (Tex. App.—Austin 2008, pet. granted). In this Court, however, the Comptroller narrowed her argument and only argues that the birth dates are "confidential" under section 552.101 of the PIA and thus excepted from the PIA's mandatory disclosure requirement. Section 552.101 provides that information is excepted from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. The Comptroller argues that birth date information is excepted as confidential "by judicial decision" because the Texas common law privacy tort of intrusion upon seclusion, described by this Court in *Billings v. Atkinson*, creates a protected privacy interest in this information, thus making it confidential. 489 S.W.2d 858, 859–60 (Tex. 1973).

II. Preservation and Waiver: The Court Decides This Case on an Issue the Comptroller Expressly Disclaimed.

The Comptroller was asked at oral argument specifically if her position included arguments under PIA section 552.102 and employing a balancing test to determine whether to protect the birth dates from disclosure. Her counsel responded:

> Answer: I would say that we are going solely under 552.101 . . . . We are not advocating a balancing test . . . we don't believe a balancing test is applicable under this particular state regulatory system.

* * *

Question: There's an argument that 552.102 is a stronger argument, but you're not making that argument. I want to be clear about that.

Answer: We are not making that argument.

* * *

Answer: [A] balancing test . . . is simply not found in the PIA.

The Comptroller's position on this issue could not be clearer. She unequivocally limited her argument for nondisclosure of birth dates of public employees "solely" to section 552.101 of the PIA and shunned the application of a balancing test. Nevertheless, the Court renders its decision not on section 552.101 of the PIA, but instead bases its decision on section 552.102 and creates a balancing test to determine that the information is excepted from disclosure. The Comptroller presents neither argument and disclaims both. She did not cite, much less discuss, section 552.102 in her petition for review or brief on the merits, and, at oral argument, specifically disclaimed any reliance on either section 552.102 or a balancing test.

On occasion, a case may present a court with a fine line between adjudication and advocacy. However, we should remain on the side of adjudicating only the issues presented, absent rare and extraordinary situations not presented here. *See In re B.L.D.*, 113 S.W.3d 340, 351–55 (Tex. 2003) (recognizing that courts may review fundamental error not assigned). The Legislature and the Attorney General have both decided as a matter of policy not to protect dates of birth from disclosure, yet the Court shuns its substantial precedents on waiver to reach the contrary policy. Moreover, the information the Court protects has already in large part been disclosed. In the summary judgment evidence, the News submitted an affidavit stating that it has received the state

employees database, including the dates of birth of the employees, from the Comptroller's office in response to previous requests for the information.

Our rules of procedure require that a party present the issues to be decided by this Court in the party's petition and brief on the merits. *See* TEX. R. APP. P. 33.1, 53.2(f), 53.4, 55.2(f). "[I]ssues not presented in the petition for review and brief on the merits are waived." *Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1.*, 263 S.W.3d 910, 918 (Tex. 2008) (citing TEX. R. APP. P. 53.2(f)); *Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (per curiam) (refusing to address an argument raised in petitioners' merits brief because petitioners failed to advance it in their petition for review); *City of Austin v. Travis Cnty. Landfill Co.*, *L.L.C.*, 73 S.W.3d 234, 241 n.2 (Tex. 2002) (precluding consideration of an argument raised below because the respondent disclaimed the argument before the Supreme Court). "[W]e should not stretch for a reason to reverse that was not raised." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010). This is true even for constitutional issues. *In re B.L.D.*, 113 S.W.3d at 350–51. We make rare exceptions to our waiver rules to review "fundamental error," but only in situations related to preservation of jurisdictional error and in "quasi-criminal" juvenile delinquency cases. *Id.* The Comptroller does not allege fundamental error.

Waiver rules exist for good reasons. "[A]dhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose." *In re L.M.I.*, 119 S.W.3d 707, 708 (Tex. 2003). The rules, among other things, prevent unfair surprise of the other party and constrain us to perform our constitutional task to decide only existing cases or controversies. *See B.L.D.*, 113 S.W.3d at 350; *L.M.I.*, 119 S.W.3d at 710–11; *see also* TEX.

CONST. art. II, § 1; *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004) (recognizing that the separation of powers clause in article II, section 1 of the Texas Constitution bars this Court from issuing advisory opinions). I dare say that the News will be surprised by the Court's deciding this case on a ground it was not given an opportunity to address.

This is not a typical waiver case in which a party argues that it did raise the issue or that it is fairly included in its petition and briefs. Not only did the Comptroller choose not to raise or analyze the exception from disclosure under section 552.102 in her petition or brief, her counsel affirmatively disclaimed the argument at least four times at oral argument. *See supra* at 5–6 ("[W]e are going solely under 552.101 . . . . We are not making that argument . . . . We are not advocating a balancing test. . . . [A] balancing test . . . is simply not found in the PIA.").

The Court holds that the Comptroller properly withheld birth dates under section 552.102. The Court's reasoning for reaching the section 552.102 issue is: "Given the unique circumstances of this case and the third party interests at stake, we conclude that the Comptroller's petition 'fairly include[s]' an argument that section 552.102 applies. TEX. R. APP. P. 53.2(f)." ___ S.W.3d ___ (further citation omitted). That's an odd conclusion when the beneficiary of the ruling expressly disclaims that very argument. In essence, the Court holds that the Comptroller's section 552.101 argument fairly includes the section 552.102 argument, and it will consider arguments the Comptroller did not make.

The Court indicates it acts on behalf of public employees who do not have a voice in this dispute. But, the PIA provides a mechanism for the public employees affected to submit their arguments to the Attorney General when considering a governmental body's decision not to disclose

public information. The governmental entity shall make a good faith attempt to notify such persons in writing of the request for the attorney general decision and may then submit a brief with reasons why the information should be withheld. TEX. GOV'T CODE § 552.305. Although the record indicates that the mechanism was not utilized, the Court's holding makes the provision irrelevant in this case.

I disagree that the Court should disregard our rules on waiver to decide an issue specifically and repeatedly disclaimed by the Comptroller, without any allegation of fundamental error. Because the Court decides this case under section 552.102, I note some concerns with that analysis. I also analyze this dispute under the statutory framework raised and argued by the parties—whether section 552.101 excepts state employees' dates of birth from disclosure.

III. Risk of Identity Theft

Applying Section 552.102 and adopting a new balancing test articulated by the U.S. Supreme Court in *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), the Court holds that the state employees' privacy interests substantially outweigh the public interest in disclosure. ___ S.W.3d ___.

A. The Sky Is Not Falling: The Court's Characterization of the Privacy Interest at Stake Is Overstated.

Section 552.102 excepts from disclosure information in a personnel file "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102. The *Rose* test, adopted today by this Court, balances an individual's privacy claims against the public interest in disclosure. *Rose*, 425 U.S. at 372. Because Congress only excepted

from disclosure information that constitutes a "clearly unwarranted" invasion of privacy, federal courts have noted that the balance of disclosure interests should be tilted in favor of disclosure and creates a "heavy burden" for an agency invoking the exception. *E.g., Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1128 (D.C. Cir. 2007) (noting that the CIA had the burden to show withholding is necessary under the federal Freedom of Information Act (FOIA) Exemption 6 for records pertaining to a deceased CIA officer, and no privacy interest was articulated); *Wash. Post Co. v. U.S. Dep't of Health & Hum. Servs.*, 690 F.2d 252, 275 (D.C. Cir. 1982). The Court jumps on the bandwagon of a number of other states, or federal trial courts, that have held that birth date information may constitute a clearly unwarranted invasion of personal privacy. While I am sensitive to the privacy rights of public employees and understand the concern of the Court, I believe the Court's reasoning is misguided for three fundamental reasons.

First, the Legislature has not protected dates of birth of public employees from disclosure. Birth dates by themselves are not private or damaging.[5] The Court and the parties have recognized as much. And the Restatement of Torts recognizes as much. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . . ."). And even the U.S. Supreme Court has recognized as much, reasoning that information that is "not intimate" such as "place of birth, date of birth, date of marriage, employment history, and comparable data" may be restricted only in the disclosure of a "personnel" or "medical" file that itself would be a clearly unwarranted invasion

[5] Unless, of course, one is sensitive about one's age. But if that were the case, then the Comptroller's release of employees' ages would be just as offensive as birth dates.

of personal privacy. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). "'[C]ongress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its "personnel" files.'" *Id.* at 601 (quoting *Rose*, 425 U.S. at 372).

The Court points to no evidence that disclosure of birth dates would be offensive to a reasonable person, would cause harm, or would lead to personal harm. Instead, the Court holds, much more tenuously, that disclosure is harmful because birth date information, "taken together" with other information, may "be used to facilitate identity theft," or may be used to locate a Social Security number, which may be used to facilitate identity theft. ___ S.W.3d ___ (quoting *Hearst Corp. v. State*, 882 N.Y.S.2d 862, 875 (N.Y. Sup. Ct. 2009)). In other words, the harm is not in the disclosure of the birth date, but in the possibility that some evildoer *may use* a birth date to gain other information (such as a social security number) which he or she then *may* use to commit identity theft. Never before has the Court held that information is not subject to disclosure under the PIA because the information may lead to other information that may be used to cause harm. By that logic, much information of a personal nature would be immune from disclosure—names of public employees, dates of employment, home addresses. This sort of information, taken together with other information, might lead to the employee's social security number and possibly to identity theft. While the state has outlawed identity theft, and individuals may sue when others misappropriate their private data, the Court should not allow subversion of the open-government policies of the PIA under the risk that some of the public information may later be misused.

As written, FOIA Exemption 6 (substantially identical to section 552.102) likely only protects the information itself, not its derivative uses or problems down the line.

> Perhaps FOIA would be a more sensible law if the Exemption applied whenever disclosure would "cause," "produce," or "lead to " a clearly unwarranted invasion of personal privacy—though the practical problems in implementing such a provision would be considerable. That is not, however, the statute Congress enacted. Since the question under 5 U.S.C. § 552(b)(6) is whether "disclosure" would "constitute a clearly unwarranted invasion of personal privacy"; and since we have repeatedly held that FOIA's exemptions "'must be narrowly construed,'" *it is unavoidable that the focus, in assessing a claim under Exemption 6, must be solely upon what the requested information reveals, not upon what it might lead to*. That result is in accord with the general policy of FOIA, which we referred to in *United States Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 771 (1989) that the particular purposes for which a request is made are irrelevant.

U.S. Dep't of State v. Ray, 502 U.S. 164, 180–81(1991) (Scalia, J., concurring) (emphasis added) (citations and quotations omitted). Birth date information is not highly intimate or embarrassing; birth dates are not generally included in "the type of information that a person would ordinarily not wish to make known about himself or herself." *Assoc. Press. v. U.S. Dep't of Def.*, 554 F.3d 274, 292 (2d Cir. 2009). If it had been raised, the text of section 552.102 does not require consideration of derivative harm.

Interestingly, the Texas Identity Theft Enforcement and Protection Act requires businesses to take reasonable steps to protect "sensitive personal information" collected or maintained by the business in the regular course. TEX. BUS. & COM. CODE § 521.052. Sensitive personal information is generally an individual's name combined with any one or more of the following: social security number, driver's license number or government-issued identification number, or account, credit card or debit card number. *Id.* § 521.002(a)(2). The Legislature has not extended this obligation to dates of birth. *Id.*[6] Notifications to others required by the Identity Theft Act for breaches of computer

[6] "Personal identifying information," different from "sensitive personal information," includes date of birth. TEX. GOV'T CODE § 521.002(a)(1).

security apply only when sensitive personal information is reasonably believed to have been acquired by an unauthorized person. *Id.* § 521.053. Again, the Legislature did not include dates of birth in the same risk category with sensitive personal information.

Second, the support relied on by the Court is far from conclusive. The Court repeats general statements about birth date information but cites to and provides no real data supporting the proposition that birth date information truly leads to identity theft, or that the disclosure of someone's birth date, in and of itself, has caused any person to be the victim of identity theft. The Court points to a study from Carnegie-Mellon University in which researchers were able, with *60% accuracy*, to determine *the first six digits* of a person's Social Security number when given the person's date and location of birth, for persons *born after 1989*. ___ S.W.3d ___ (citing Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers From Public Data*, 106 PROC. NAT'L ACAD. SCI. 10975 (2009)). Other scholarly and media reports and court cases cited by the Court repeat the findings of the Acquisti and Gross study, or make general statements that compilation of data can be more helpful to identity thieves than data spread out through multiple sources, or that simply assert that birth dates may lead to more private data. Neither the Court nor the Comptroller cite any study positively demonstrating that release of birth date information with a person's name, without a social security number, makes it significantly more likely that the person will be the victim of identity theft. And neither cites any study evidencing an identity theft that began through birth date information being disclosed in a public database.

Credible studies indicate that dates of birth are not the *sin qua non* of identity theft. The most common form of identity theft arises from credit card theft or check fraud, and the least common

form arises from stolen social security numbers or other personal information. Herb Weisbaum, *Identity Theft Problem: The Facts Behind the Fear*, MSNBC (Oct. 21, 2010, 7:42 AM) http://www.msnbc.msn.com/id/39763386/ns/business-consumer_news/ (last visited Dec. 1, 2010) (recognizing a recent report that the "most common form of identity theft is . . . 'old-fashioned credit card theft or check fraud,'" with nearly all respondents to the survey recognizing that their identity theft was due to stolen or misused credit or debit cards, and that a hijacking of an identity using a "Social Security number and other basic information" is the "least common form of identity fraud"). A recent study published by the United States Federal Trade Commission reports that a thief's use of a social security number with a new name and *false* date of birth currently accounts for 80–85 percent of all identity fraud. Lanny Britnell, Identity Theft America, *The Changing Face of Identity Theft*, at 1, *available at* http://www.ftc.gov/os/comments/creditreportfreezes/534030-00033.pdf; *see also* SYNOVATE, FEDERAL TRADE COMMISSION—2006 IDENTITY THEFT SURVEY REPORT 30 (Nov. 2007), *available at* http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf (recognizing that 56 percent of victims did not know how their information was stolen, and of the 43 percent of victims who did, many knew the thief personally, had their identities stolen through a purchase or other transaction, from a wallet, from a company that had the information, from hacking, "phishing," the mail, or some other way). The Attorney General's office indicated its strong desire to eliminate identity theft, but candidly acknowledged at argument that there is "no firm evidence" that disclosure of birth dates facilitates identity theft and confirmed that the PIA is not intended to prohibit illegal use of data.

The information here is public information, and the connection between the information being disclosed and the actual harm sought to be prevented is too tenuous to support the judicial restrictions on disclosure of the public's information proffered by the Court when that same public information has been shown to have positive benefits.

Finally, the privacy interest at stake here is lower than the Court makes it out to be because much if not most of the information at issue has been distributed by the state for years—in some instances for a fee. Texas sells personal information under the Motor Vehicle Records Disclosure Act, including names, addresses, dates of birth and driver's license numbers, to businesses, insurance companies, private investigatory agencies and other third parties, for a number of specified purposes. *See* TEX. TRANSP. CODE §§ 730.007, .011 (permitting agencies to disclose the personal information and to charge "reasonable fees for such disclosure"); Ryan McNeill, *ID Theft vs. Public Record* at A1 (reporting that "private companies spent nearly $50 million during the last fiscal year" buying Texas drivers' data). To the extent that Texas government employees have driver's licenses, it is likely that their dates of birth have either already been released by a Texas governmental agency or sold to private entities, or both. Even though the Transportation Code section has been in place for nearly 13 years, there is no evidence submitted indicating that information disclosed through that mechanism has been a hotbed of identity theft. The State has sold similar information on Texans with driver's licenses for years, suggesting that arguments that the same information about a subset of Texans will greatly increase the possibility of identity theft ring hollow. This Act regulates the use of motor vehicle information and allows disclosure of birth dates of all Texas drivers, whether public or private employees, to many private parties capable of disguising their true identities. And

an authorized recipient of this personal information is authorized to resell or redisclose that information for permitted purposes. TEX. TRANSP. CODE § 730.013(b).[7] It is ironic that the Court cuts off free access by the public under the PIA to the same public information that is being sold under the Transportation Code.

B. The News Has Established a "Sufficient Reason" for the Disclosure.

When personal privacy interests are at stake, the second part of the *Rose* balancing test is whether the requestor has established a "sufficient reason for the disclosure." *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The requesting party must establish "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance the interest. Otherwise, the invasion of privacy is unwarranted." *Id.*

The Court holds that the News loses under the balancing test because it "has produced no evidence supporting government wrongdoing [and therefore] the public interest in disclosure is negligible." ___ S.W.3d ___ (citation omitted). I disagree; the public interest in the information is demonstrated. The News argues that it wishes to use the date of birth information to determine whether particular governmental employees who work in or near children are convicted felons or sex offenders. The News asserts a two-fold need for birth dates: first, to determine whether governmental entities are employing sex offenders or felons in jobs that may put children or the public at large at risk, and second, to confirm the identity of a particular governmental employee who

[7] Prior to 2001, the Transportation Code permitted agencies to distribute birth date information "for bulk distribution for surveys, marketing, or solicitations" provided that persons had the opportunity to opt-out and prohibit the uses. TEX. TRANSP. CODE § 730.007, *repealed* by Acts 2001, 77th Leg., R.S., ch. 1032.

may have a criminal record. The News advises that some 2,000 employees of the State of Texas have the same first and last name. It is reasonable and desirable that the media check the identities of these employees before publishing unflattering facts about them. The News further advises that, through its research, it was able to disclose in an article that over 250 employees of the Texas Youth Commission were convicted felons. *See* McNeill, *ID Theft vs. Public Record*, at A1. These are legitimate and productive uses of dates of birth.

No one doubts that citizens of this state have a right to know the names of those who work for them in government. Neither party, nor the Court, disputes that the News has the right to such names, and the names are easily available, in electronic form, on various governmental websites and other databases. *See, e.g.*, Capitol Complex Telephone System (CCTS) Directory, http://www.dir.state.tx.us/ccts/directory/index.html (last visited Dec. 1, 2010) (listing the names, titles, and telephone numbers of employees working in or near the Capitol). On the other hand, no one argues that state employees give up all of their privacy rights simply by working as an unelected public servant. But the disclosure of the birth dates in this case may actually help preserve government workers' privacy, by ensuring that any organization—media, political, watchdog, financial, governmental, or otherwise—does not falsely accuse those governmental employees of being persons they are not. This is different from the data that the government collects about non-governmental employees. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Free Press*, 489 U.S. 749, 773 (1989) (concerning a FOIA request for criminal records of an individual investigated by the FBI). The information at issue may actually prevent mistaken identities and will help keep the government accountable for those they hire.

But fundamentally, under the summary judgment procedures, the Court errs by requiring evidence in the record that the News had no reason to provide in the first place. At the trial court in her summary judgment motion, the Comptroller argued that section 552.101 excepted birth dates from disclosure under *Industrial Foundation* and the Texas common law. Although the Comptroller mentioned that other courts had applied a balancing test, she did not request that one be applied to the facts here. Likewise, at the court of appeals, the Comptroller once again argued that section 552.101 excepts public employees' birth dates from disclosure under common law and constitutional concepts. *Rose*, and the balancing test now adopted by the Court, was not cited as a basis for the Comptroller's position before the court of appeals issued its opinion. The Comptroller cited section 552.102 only in her reply brief at the court of appeal to support the position that sections 552.101 and 552.102 "protect the same privacy interests." There was no need for the News to submit any evidence for the trial court summary judgment proceedings showing a "significant" public interest that the information is "likely to advance." ___ S.W.3d ___ (citing *Favish*, 541 U.S. at 172). We cannot expect a party to present evidence for a standard unknown, unargued, and unapplied below—another reason we enforce our waiver rules. *E.g.*, *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) (noting that a party should not "surprise his opponent on appeal by stating his complaint for the first time"). At a minimum, this Court should remand the case to the trial court for the parties to develop the record and argue the balancing test under the new standard. TEX. R. APP. P. 60.2(f), 60.3 (providing that this Court may remand for further proceedings in light of changes in the law or in the interest of justice); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) ("We have broad discretion to remand for a new trial in the interest of justice where it appears a party

may have proceeded under the wrong legal theory. Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled." (citations omitted)). Here, the successful party at trial relied on a standard that the Court has now abandoned. Certainly the News should have an opportunity to make its case under the new formula.

For these reasons, I would not decide this case under section 552.102 and the Court's balancing test. As discussed below, under the issue asserted by the Comptroller, birth dates are not confidential under section 552.101.

IV. Disclosure of Birth Date Information

The Comptroller argues that public employees' dates of birth are "confidential" under section 552.101 of the PIA. It is useful to understand the PIA's structure.

A. The Legislature's Comprehensive Statutory Scheme for Government Transparency

The stated policy of the PIA is to promote open government. "[I]t is the policy of this 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." TEX. GOV'T CODE § 552.001(a). "Public information" includes information that is "collected, assembled, or maintained . . . in connection with the transaction of official business" by a governmental body. *Id.* § 552.002(a). In general, the PIA is to be liberally construed in favor of granting requests for information. *Id.* § 552.001(b). Relative to other freedom of information laws, such as FOIA, the Texas PIA more strongly favors transparency and open government. *See*, *e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) ("Unlike the FOIA, our

Act contains a strong statement of public policy favoring public access to governmental information and a statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information.").

While the PIA provides an ardent statutory edict for openness in state affairs, the Legislature has protected specified information from disclosure in Subchapter C of the PIA. TEX. GOV'T CODE §§ 552.101–.151. A governmental agency is not required to disclose information excepted under Subchapter C of the PIA, but it may disclose such information if it chooses, "unless the disclosure is expressly prohibited by law or the information is confidential under law." *Id*. § 552.007. Some examples of information that the PIA excepts from disclosure include information that would give advantage to a competitor or bidder, information in a student record at an educational institution funded wholly or partly by state revenue, and the social security number of a living person. *Id*. §§ 552.104, .114(a), .147(a).

In addition to these exceptions, the Legislature created a special category of information in the PIA— "confidential" information. Information that is considered "confidential" is a subset of the information excepted from disclosure. *See id*. § 552.101. But, unlike information that is merely excepted from disclosure, the PIA *prohibits* the disclosure of confidential information and makes its disclosure a crime punishable by: "(1) a fine of not more than $1,000; (2) confinement in the county jail for not more than six months; or (3) both the fine and confinement." *Id.* § 552.352. The Legislature specifically identifies in the PIA some information that is considered confidential.[8]

[8] Examples include the home address, home telephone number, or social security number of peace officers, county jailers, and current or former employees of the Texas Department of Criminal Justice, among others; any identifying information of a crime victim or claimant, including address and social security number; credit card, debit

Outside of the PIA, no fewer than 100 Texas statutes classify information as confidential for purposes of the PIA.[9] Other statutes specifically limit the scope of "confidential" information. For example, while section 552.147 generally excepts social security numbers of living persons from disclosure, it also explicitly states that it "does not make the social security number of a living person confidential under another provision of this chapter or other law." TEX. GOV'T CODE § 552.147. Other statutes, however, do make social security numbers contained in specified records "confidential" and subject to criminal penalties, such as on voter registration applications and in law enforcement personnel records. *See* TEX. ELEC. CODE § 13.004(c); TEX. GOV'T CODE § 552.1175.

The text of the PIA indicates that the Legislature intended the word "confidential" to have a specific meaning in the PIA, separating highly sensitive information that is *prohibited* from disclosure (such as the home address of a peace officer) from sensitive information that is merely *excepted* from disclosure (such as information in a student record). The PIA thus creates three distinct categories of public information—information required to be disclosed, information excepted from mandatory (but not voluntary) disclosure, and confidential information that is

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card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body; and the social security number of applicants for a marriage license. TEX. GOV'T CODE § 552.1175, .132, .136, .141.

[9] An electronic search of Texas statutes returned 101 results in which certain information was "confidential" and "not subject to disclosure" under the PIA. Examples include certain records of teacher certification examinations (TEX. EDUC. CODE § 21.048(c-1)), student loan borrower records (TEX. EDUC. CODE § 57.11(d)), child welfare service reports, (TEX. FAM. CODE § 264.613(a)), DNA records stored in the Department of Public Safety DNA database (TEX. GOV'T CODE § 411.153(a)), the responses to exit interviews provided by departing government workers (TEX. GOV'T CODE § 651.007(g)), certain nursing home records (TEX. HEALTH & SAFETY CODE § 242.134(a)), certain carrier contracts in the workers' compensation system, (TEX. INS. CODE § 1305.154(a)), social security numbers provided by applicants for professional licenses (TEX. OCC. CODE § 59.001), pending proposals for comprehensive development agreements in transportation projects (TEX. TRANSP. CODE § 370.307(a)), and certain information relating to mineral, oil, and gas leases (TEX. NAT. RES. CODE §§ 52.190(d), 53.081(d)).

prohibited from disclosure and subject to criminal penalties.[10] It is within this statutory framework that I consider whether birth dates of public employees are considered to be part of this third category of "confidential information."

As a policy matter, it is admittedly undesirable to release information about public employees that could lead to identity theft. States typically have overwhelmingly addressed this issue by legislation. The Attorney General noted that a number of other states have excepted birth date information in personnel files from open records request disclosures in statutes.[11]

The Texas Legislature has balanced the competing interests of open government and individual privacy in deciding which types of public information are excepted from disclosure in the

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[10] The PIA may not criminalize all distribution of information designated "confidential" in some manner in the statute. The penal provision of the PIA makes distribution of information "considered confidential under the terms of this chapter" a misdemeanor punishable by fine, confinement in county jail, or both. TEX. GOV'T CODE § 552.352(a). Information "considered to be confidential by law" is "excepted" from the disclosure requirements of section 552.021. *Id.* § 552.101. We have not addressed whether the "confidential" information referred to in section 552.021 is treated the same as the "confidential" information in section 552.352(a).

[11] Tex. Att'y Gen. OR2006-01938 (citing State Practices for Classification of Date of Birth in Public Records (on file with Open Records Division of the Office of the Attorney General)):

> According to the survey, states with an "unwarranted invasion of personal privacy" exemption in their open records law protect date of birth information. *See* HAW. REV. STAT. § 92F-13(1); 5 ILL. COMP. STAT. 140/7(1)(b); KAN. STAT. ANN. § 45-221(30); KY. REV. STAT. § 61.878(1)(a); MASS. GEN. LAWS ANN. ch. 66, § 10; MICH. COMP. LAWS ANN. § 15.243; N.H. REV. STAT. ANN. § 91-A:5; N.J. STAT. ANN. § 47:1A-10; N.Y. PUB. OFF. § 89(2)(b)(iv); UTAH CODE ANN. § 63-2-302(2)(d). One state grants date of birth protection under a similar standard, "unreasonable invasion of personal privacy." *See* S.C. CODE ANN. § 30-4-40(a)(2). Several states protect date of birth information under an exception for employee "personnel" records. *See* ARIZ. ADMIN. CODE R2-5-105; DEL. CODE ANN. tit. 29 § 10002; KAN. STAT. ANN. § 45-221(4); IOWA CODE § 22.7; MD. CODE ANN., STATE GOV'T § 10-616(h)(2)(I); MISS. CODE ANN. § 25-1-100; N.D. CENT. CODE § 44-04-18.1; OR. REV. STAT. § 192.502(3); R.I. GEN. LAWS § 38-2-2; VA. CODE ANN. § 2.2-3705.1(1); WYO. STAT. ANN. § 16-4-203. The state of Georgia protects employee date of birth information under a statute that specifically makes confidential date of birth information "if technically feasible at a reasonable cost." *See* GA. CODE ANN. § 50-18-72(a)11.3(A). Several states protect date of birth information by unofficial policy. Finally, the state of Washington protects date of birth information under a state plan to curtail identity theft.

PIA. This Court previously acknowledged that this is the Legislature's role. "Although we recognize that there is often much potential for abuse of information in government records, the task of balancing the public's right of access to government records against potential abuses of the right has been made by the Legislature; the court's task is to enforce the public's right of access given by the Act." *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 675 (Tex. 1976). The Legislature excepted information for privacy reasons if it has been "considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. We are constrained therefore not to apply a different, or more expansive meaning of "confidential" for purposes of section 552.101 because it might be good policy to prevent the disclosure of certain information. Our task is to enforce the public's right to access given by the PIA and adhere to the language of section 552.101 and the statutory scheme set up by the PIA, "not to second-guess the policy choices" that inform these statutes. *See McIntyre v. Ramirez*, 109 S.W.3d 747, 748 (Tex. 2003).

Nowhere in the PIA has the Legislature specifically excepted general birth date information, birth date information combined with other identifying information, or information the disclosure of which is feared may lead to identity theft. The Legislature has enacted specific statutes to protect against identity theft. *See* TEX. BUS. & COM. CODE §§ 72.004, 521.001–523.053. My inquiry, then, is whether birth date information is "confidential" pursuant to section 552.101.

B. Exception to Mandatory Disclosure of Public Information Under Section 552.101 of the PIA

Section 552.101 of the PIA states that public information is excepted from the broad disclosure "requirements of Section 552.021 if it is information considered to be confidential . . . by judicial decision." Relying on the opinion in *Industrial Foundation*, the Comptroller argues that the release of birth date information would violate the tort of intrusion upon seclusion. Therefore, she argues, such information has been considered to be confidential by the judicial decision in *Billings v. Atkinson* and is excepted from disclosure by section 552.101.

This Court's only interpretation of section 552.101 was the subject of a fractured opinion (a three justice plurality, two separate concurrences, and a four justice dissent) in *Industrial Foundation of the South v. Texas Industrial Accident Board.*, 540 S.W.2d 668, 675 (Tex. 1976). Despite the various views of the *Industrial Foundation* Court, there was unanimity on the proposition that the PIA does not give courts the discretion to secret certain information from the public by creating new categories of confidential information not protected by the terms of the PIA. In *Industrial Foundation*, the petitioners argued that the Legislature intended section 552.101 "to delegate to the courts a duty to determine what information should be excepted from disclosure as confidential by balancing in each case the interest in privacy against the interest in disclosure, thus creating a common-law privacy doctrine which would except the information involved 'by judicial decision.'" *Indus. Found.*, 540 S.W.2d at 681. The Court rejected that argument:

> We do not believe that a court is free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure. This policy determination was made by the Legislature when it enacted the statute. "All

> information collected, assembled, or maintained by governmental bodies" is subject to disclosure unless specifically excepted. We decline to adopt an interpretation which would allow the court in its discretion to deny disclosure even though there is no specific exception provided.

Id. at 681–82; *see also id*. at 691–92 (Reavley, J., dissenting, joined by Steakley, Pope, and Denton, JJ.) ("I agree with everything in the opinion of the majority except what is written to support the holding that information on the nature of the injury. . . may be 'deemed confidential' . . . . It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary."). In other words, courts do not have the discretion to classify information as confidential on an *ad hoc* basis; confidentiality of public information is to be determined by the terms of the Act. To sanction the creation by courts of new types of protected information not identified in the PIA would open the way for judicial amendment of the PIA. Accordingly, I would interpret section 552.101 to deem confidential information that was held by judicial decision to be confidential at or before the time of the provision.

This approach would leave policy-making to the Legislature. It would also provide certainty in the definition of confidential information so that governmental entities and public officials may act accordingly. If courts decided which public information is considered to be confidential on an *ad hoc* basis, according to what individual jurists believe to be good policy, a court could decide to make birth date information confidential under the PIA in order to further the policy goal of preventing identity theft. An immediate consequence of this might be the attachment of criminal penalties for the disclosure, apparently even if unintended, of birth date information. *See* note 10. Government officials may be forced to redact all birth date information disclosed to the public or

face criminal penalties, even in records that are decades old and currently made available to the public in, for example, all the state courthouses in the two hundred fifty-four counties around the state.[12] By limiting these determinations to information that has already been considered confidential, such as information the disclosure of which would violate the public disclosure tort, legislators can enact policy in a careful, deliberate manner, often preventing the substantial practical problems that may accompany judicial overstepping.

A majority of the court in *Industrial Foundation* looked to the Court's decision in *Billings v. Atkinson*, which recognized the tort of public disclosure of private facts, in order to determine whether the information at issue had been considered to be "confidential." "We recognized in *Billings* . . . that an individual has the right to be free from 'the publicizing of one's private affairs with which the public has no legitimate concern . . . .'" *Indus. Found.*, 540 S.W.2d at 682. The Court interpreted "confidential" according to its common dictionary definition—"'known only to a limited few: not publicly disseminated: PRIVATE, SECRET.'" *Id*. at 683. The majority reasoned that the characteristics of the dictionary definition of confidential are "precisely the characteristics which information protected by this branch of the tort invasion of privacy must have. And, we believe that it is this type of information which the Legislature intended to exempt from mandatory disclosure . . . ." *Id*. *Billings* explained that certain information is protected by the tort of public

[12] An example of the scope of unintended consequences and potential harm of such a seemingly simple act of making birth date information confidential was shown recently when an attorney general opinion opined that social security numbers are confidential. Tex. Att'y Gen. Op. No. GA-0519 (2007). District and county court clerks around the state uniformly petitioned for relief because their provision of access to the social security numbers in the public records of the numerous courts they serve potentially subjected them to criminal penalties. The Attorney General's office abated its opinion and the Legislature swiftly and unanimously passed a statute expressly providing that Social Security numbers are not confidential. *See* TEX. GOV'T CODE 552.147(a).

disclosure. The majority opinion in *Industrial Foundation* held that the Legislature intended to protect this same information from disclosure under the PIA by excepting it as confidential (or private) by the judicial decision in *Billings*. Thus, "if a governmental unit's action in making its records available to the general public would be an invasion of an individual's freedom from the publicizing of his private affairs, then the information in those records should be deemed confidential by judicial decision." *Id.*

Reasonable minds may differ today as to the meaning of the phrase "information considered to be confidential . . . by judicial decision."[13] But the Legislature has not amended this section of the PIA in the thirty-seven years since that decision, and *Industrial Foundation* is still our sole authority on the meaning of section 552.101. TEX. GOV'T CODE § 552.101; *see* Acts June 14, 1973, 63rd Leg., R.S., ch. 424, § 3, 1973 Tex. Gen. Laws 1112, 1113. Respecting the Legislature's prerogative and the precedential value of the opinion in *Industrial Foundation*, I would not extend it to create unintended exceptions under the PIA.

C. The Comptroller's Argument for Analysis under the Intrusion upon Seclusion Tort

The Comptroller asks this Court to expand *Industrial Foundation* by holding that if the disclosure of information would lead to a violation of the privacy tort of intrusion upon seclusion,

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[13] *See*, *e.g.*, *Indus. Found.,* 540 S.W.2d at 688 (Daniel, J., concurring) ("It is my opinion that . . . the Legislature did not intend [the Open Records Act] to be as broad as it was written."); *id.* (Johnson, J., concurring) ("Since a majority of this court has concluded that Rule 9.040 of the Industrial Accident Board is invalid . . . this writer joins Justice Doughty's opinion insofar as it requires that certain information in the Board's records be withheld to protect the common law right of privacy of compensation claimants."); *id.* at 691–92 (Reavley, J., dissenting) ("I doubt that we are entitled to read this intent into the Legislature's use of 'confidential.' . . . It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary. I would construe our question of legislative intent in favor of disclosure and then await legislative change if the result is objectionable. This area of confidentiality can best be mapped by statute.").

such information should be considered to be confidential under section 552.101. The Comptroller acknowledges that no judicial decision has ever held that information is confidential because disclosure of such would violate the tort of intrusion upon seclusion, and no Texas court has ever held that the intrusion upon seclusion tort can be violated by a disclosure of information. *Cf. Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Cornhill Ins. PLC v. Valsamis*, *Inc.*, 106 F.3d 80, 85 (5th Cir. 1997) (applying Texas law); *Clayton v. Wisener*, 190 S.W.3d 685, 696–97 (Tex. App.—Tyler 2005, no writ); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App.—Corpus Christi 1991, no writ).

The elements of the torts of public disclosure of private facts (as applied in *Industrial Foundation*) and intrusion upon seclusion contain important differences. The public disclosure tort has two elements: "information [is] deemed confidential by law 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." *Indus. Found.*, 540 S.W.2d at 685. On the other hand, the intrusion tort's elements are: "(1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person." *Valenzuela*, 853 S.W.2d at 513.

The Comptroller attempts to expand section 552.101 to include as confidential by judicial decision information that would be protected by the intrusion upon seclusion tort. For this argument to succeed, the Court would have to redefine the intrusion tort to include the disclosure of birth date information that *may* lead to an intrusion (i.e. by an identity thief). This connection is difficult to make. For instance, if a burglar enters your house, reads through your private files and papers, and

steals your credit cards and identification, is the publisher of the phone book from which the burglar obtained your address liable for the intrusion? The answer is, of course, no. The tort of intrusion upon seclusion can only be committed by "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns." *Id*. The tort is not committed by one who unintentionally facilitates the possible intrusion. Moreover, no Texas court has ever found a violation of the intrusion tort absent a physical intrusion or surveillance upon the seclusion of another, and the Comptroller does not cite any judicial decision that has ever made such a determination. *Cf. Clayton*, 190 S.W.3d at 696–97; *Wilhite,* 812 S.W.2d at 6; *Valsamis,* 106 F.3d at 85.

Industrial Foundation is very clear that the question is whether the disclosure itself, not the requestor's use of the information, would violate an individual's right to privacy. "[I]f a *governmental unit's action* in making its records available to the general public would be an invasion of an individual's freedom from the publicizing of his or her private affairs, then the information in those records should be deemed confidential by judicial decision under . . . the Act." *Indus. Found*, 540 S.W.2d at 683 (emphasis added). Justice Reavley, in dissent, also agreed that the Legislature is "concerned with confidentiality entirely apart from the manner of use of the information." *Id*. at 692 (Reavley, J., dissenting). The analysis should focus on whether the government's disclosure would violate the individual's privacy. For PIA tenets to apply based on the use rather than nature of the information would require government entities to obtain the reasons why the information is requested. This would contradict the clear prohibition in the PIA against government inquiries into the purpose for the requested information. TEX. GOV'T CODE § 552.222; *A & T Consultants, Inc.*

v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995) (holding that courts may neither consider purpose of the request nor inquire into how the requestor intends to use the information).

The Comptroller's argument for extending *Industrial Foundation* to include an alternative analysis of section 552.101 using the intrusion upon seclusion tort is not supported by the provisions of the PIA.

D. Application of the Industrial Foundation *Test*

The *Industrial Foundation* test holds that information "is excepted from mandatory disclosure . . . as information deemed confidential by law 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." *Indus. Found.*, 540 S.W.2d at 685. I first analyze whether birth date information is highly intimate or embarrassing information, the publication of which would be highly objectionable to a reasonable person.

The Court in *Industrial Foundation* analyzed information contained in workers' compensation files to determine whether it satisfied this element of the tort. The Court reasoned that some information would satisfy the "highly intimate" standard, including:

> a claim for injuries arising from a sexual assault of a female clerk following an armed robbery; a claim on behalf of illegitimate children for benefits following their father's death; a teacher's claim for expenses of a pregnancy resulting from the failure of a contraceptive device; claims for psychiatric treatment of mental disorders following work related injuries; claims for injuries to sexual organs, and for injuries stemming from an attempted suicide; and claims of disability caused by physical or mental abuse by co-employees or supervisors.

Id. at 683. This is the deeply personal, highly intimate type of information the tort is meant to protect from publicity.

The Second Restatement of Torts also gives examples of information that rises to the level of highly intimate or embarrassing. "Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). Contrasting this private information, the Restatement notes, "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the *date of his birth*, the fact of his marriage, [or] his military record . . . ." *Id.* (emphasis added). The U.S. Court of Appeals for the Fifth Circuit, interpreting Texas law, came to the same conclusion:

> However, none of these items of information — middle initial, age, street address, job title — can be characterized under Texas law as "private" and "highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities." Texas invasion of privacy law in this respect has been guided by Prosser, *Law of Torts* § 117 (4th ed. 1971) and Restatement (Second) of Torts § 652D. Prosser, *supra*, states "'[t]he plaintiff cannot complain when . . . publicity is given to matters such as the *date of his birth*.'" *Id*. § 117 at 858 . . . . The Restatement (Second) of Torts . . . is to the same effect . . . "[t]here is no liability for giving publicity to facts about the plaintiff's life . . . such as the *date of his birth* . . . ."

Johnson v. Sawyer, 47 F.3d 716, 732–33 (5th Cir. 1995) (citing *Indus. Found.*, 540 S.W.2d at 682–84) (further citations omitted) (emphasis added). If disclosure of birth dates is held to violate the public disclosure of private facts tort, the consequence to tort law would be to potentially allow recovery for damages whenever someone publicizes information as "highly intimate" as a birth date. The public disclosure tort was not meant to protect such information from publicity. *See Johnson*, 47 F.3d at 732; RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

The Comptroller argues that the combination of birth date information and other identifying information, such as a name, rises to the level of "highly intimate" justifying exclusion from disclosure. She argues that because birth date information, in conjunction with this other information, can be *used* to access sensitive information, such as a social security number, birth date information itself is sensitive information. The argument casts too broad a net and misses the essence of the inquiry. How otherwise public information is used after disclosure does not guide the analysis of whether it is confidential and excepted from disclosure under section 552.101. *See Indus. Found.* 540 S.W.2d at 692 (Reavley, J., dissenting) ("I read the Legislature to be concerned with confidentiality entirely apart from the manner of use of the information."). If that analysis were determinative, much of the defined public information would be withheld because of a possibility or likelihood of it being used itself or in conjunction with other public information for inappropriate or illegal purposes. For example, that a person's business address, race, and gender could be *used* by a stalker to identify and commit an assault at the person's workplace, does not convert the work address into confidential information. In addition, the public disclosure tort focuses on the character of the information itself. Is it "highly intimate" such that its mere publication would be objectionable to a reasonable person? *See Indus. Found.* 540 S.W.2d at 683. How the information is used once it is made public, while of obvious concern to policy-makers who balance the risks in writing statutes, does not drive the analysis in interpreting section 552.101. Accordingly, public employees' birth dates do not constitute highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.

This information is also of legitimate public concern. The News contends that birth date information ensures accuracy in identifying subjects of newspaper articles, and the information has also been used to determine that criminal offenders have been employed by some public school systems. The Comptroller has offered no response to this contention. In any event, birth date information does not satisfy the first requirement of the public disclosure analysis, that the information contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. I would conclude that the disclosure of birth date information does not violate the public disclosure tort, and birth date information is not confidential under section 552.101 of the PIA.

E. The Balancing Test

The Court applies a balancing test following the U.S. Supreme Court's decision in *Rose v. Department of the Air Force*, 425 U.S. 352 (1976), to hold that birth date information is confidential under our PIA. In that case, the Supreme Court interpreted Exemption 6 of FOIA, which excepts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 370 (quoting 5 U.S.C. § 552(b)(6)). The Court held that the language "clearly unwarranted invasion of personal privacy" in the statute was a Congressional mandate for courts to balance "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Id.* at 372.

As noted above, the pivotal language in FOIA Exemption 6 is not contained in section 552.101 of the Texas PIA. The Court should not create a balancing test for the section 552.101

analysis when the language from which the test arises ("clearly unwarranted invasion of personal privacy") is not contained in the relevant provision. *See Indus. Found.*, 540 S.W.2d at 681–82 ("Absent [a provision with the "clearly unwarranted" language], we do not believe that a court is free to balance the public's interest in disclosure against the harm resulting [from] disclosure."). Therefore, the Court's balancing test is inappropriate here, and we should leave for another day whether a balancing test is appropriate for any determination under section 552.102, or, as the Austin Court of Appeals held in *Hubert v. Harte-Hanks Texas Newspapers, Inc.* twenty-seven years ago, that the test is the same under both sections. 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

IV. Fee Shifting

The News also challenges the trial court's refusal to award attorney's fees under the PIA and the Uniform Declaratory Judgment Act as an abuse of discretion, based upon language in two sections of the PIA that were in effect at the time of this suit but have subsequently been amended. TEX GOV'T CODE §§ 552.323(b), .324.[14] The Court did not address the issue at length because the

[14] Each of these sections has since been amended, clarifying the attorney's fees issue. The Legislature moved the cause of action from Texas Government Code section 552.353(b)(3) to 552.324. The amended section 552.324 now reads:

> (a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:
>
> (1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and
>
> (2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.
>
> (b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor . If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3) .

Comptroller prevailed. ___ S.W.3d ___. In my view, the News should prevail, but I would hold that the trial court was correct in exercising its discretion in deciding whether to assess attorney's fees against the Comptroller. Because the Comptroller had a legitimate concern over privacy issues relating to the disclosure of birth date information under the PIA, she had a reasonable basis in law to refuse disclosure of the information and the litigation was brought in good faith. Accordingly, I concur in the judgment of the Court on the attorney's fees issue.

V. Conclusion

The Legislature's comprehensive statutory scheme that guarantees public access to government information through the PIA, with selected exceptions, does not make birth dates confidential under section 552.101. Because the Court reaches a different result based on an issue the Comptroller waived, I respectfully dissent. I concur in the judgment on the attorney's fees issue.

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Dale Wainwright
Justice

Opinion Delivered: December 3, 2010

TEX. GOV'T CODE § 552.324. Section 552.353(b)(3) now reads:

> (b) It is an affirmative defense to prosecution under Subsection (a) that the officer for public information reasonably believed that public access to the requested information was not required and that:
>
> > (3) not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, the officer or the governmental body for whom the defendant is the officer for public information filed a petition for a declaratory judgment against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, as provided by Section 552.324, and the cause is pending.

Id. § 552.353(b)(3). And section 552.323(b) now explicitly allows the trial court to shift fees in an action under section 552.324:

> (b) In an action brought under Section 552.324, the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. . . .

Id. § 552.323(b). This new statutory scheme should prevent the confusion found here from occurring in future cases.