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

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, concurring in the judgment.

The media requested vouchers that detail expenditure of public funds for the governor's security detail when he travels. Because it concerns how the government spends taxpayer monies, the information in vouchers is not just "public information" under the Public Information Act (PIA), it is "core" public information, with a greater emphasis on disclosure than other public information. *See* TEX. GOV'T CODE § 552.022(a). The Texas Department of Public Safety argues that the information should not be disclosed, even though it is core public information, because of the risk to the safety of elected officials. There is no express exception to disclosure for this core public information. This tension resulted in this Court concluding that it may 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*. *See* 540 S.W.2d 668, 682 (Tex. 1976) (plurality op.) ("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 692 (Reavley, J., dissenting) ("It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary."). The Court concludes that it is "not bound by the Legislature's policy decisions" in deciding common law exceptions to the statute, leaving no apparent boundaries on new common law exceptions to the legislated disclosure requirements in the PIA that courts may now create. ___ S.W.3d ___.

Further complicating the case, the trial court made an express finding that "[p]ublic disclosure of the information in the vouchers requested by [the media representatives] 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 Court acknowledges a lack of expertise in such matters and credits the law enforcement testimony that disclosure of the vouchers would create a threat of injury. While I agree with the Court's strong desire to keep public officials safe, once the Legislature weighed in, the question of keeping public information from the people is not one for the courts. The Court should not judicially create an exception to disclosure that contradicts the Legislature's expressed intent in the PIA. I cannot join the Court's opinion, but because I believe that DPS argued, and the trial court accepted, an exception not allowed by law, I would remand in the interests of justice for the trial court to consider other exceptions grounded in "other law."

I. Background

The Public Information Act contains a comprehensive scheme arming the public with statutory mandates for the government to disclose information "collected, assembled, or maintained under a law or ordinance" or in connection with business by or for a governmental body, and it is to be liberally construed to grant requests for information. TEX. GOV'T CODE §§ 552.001(b), .002(a). All such information is subject to disclosure unless it is either later excepted from the definition of "public information" or it falls under an exception to disclosure. *See id.* §§ 552.101–.151; *cf., e.g.*, TEX. ELEC. CODE § 13.004(c) (defining certain voter registration information as confidential and not "constitut[ing] public information" for purposes of the PIA). "Public information" may be excepted from disclosure under Subchapter C, or may be prohibited from disclosure if the information is deemed "confidential." TEX. GOV'T CODE §§ 552.007, .101, .352.

There is, however, another level of "public information." Members of this Court and the Attorney General's Office have, in the past, called it "super public" information; today the Court calls it "core public information." *See* ___ S.W.3d ___; *In re City of Georgetown*, 53 S.W.3d 328, 341 (Tex. 2001) (Abbott, J., dissenting); Tex. Att'y Gen. OR2004-7388. This is the type of public information at the core of government functions, generally relating to laws actually enacted, decisions of the judiciary, votes of the Legislature, and how the government spends the people's money. *See* TEX. GOV'T CODE §§ 552.022, .0221, .0225. As such, core public information is not subject to the routine exclusions in Subchapter C, but may be withheld from the public only if the information is "expressly confidential under other law." *Id.* § 552.022(a). This rule was important

enough that the Legislature specifically commanded courts to comply with it. Section 552.022(b) mandates that "[a] court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law." *Id.* § 552.022(b).

Reporters representing the *Austin American-Statesman*, *San Antonio Express-News*, and the *Houston Chronicle* sent requests to DPS officials. One reporter requested "travel vouchers for Gov. Rick Perry's security detail for all trips out of state during two time periods. The first time period is January through December 2001. The second time period is January through June 2007." Another requested "access to or copies of travel vouchers for Gov. Rick Perry's security detail." The parties acknowledge that these requests include "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *See id.* § 552.022(a)(3). As such, the information requested is core public information. *Id.* § 552.022.

II. Disclosure of Core Public Information as "Expressly Confidential Under Other Law"

Compared to the dozens of exceptions for disclosure of "regular" public information, there is only one exception to the PIA's mandated disclosure of core public information—if it is "expressly confidential under other law." *Id.* The text of section 552.022's narrow exclusion contains three facial requirements: the information must be "confidential," such designation that the information is confidential must be "express," and the source of the confidential designation must be "other law." This requirement was put in place by a 1999 amendment. *See* Act of May 25,

1999, 76th Leg., R.S., ch. 1319, § 5, 1999 Tex. Gen. Laws 4501. Prior to the amendment, section 552.022 of the Government Code merely recognized the types of information enumerated in section 552.022 were "public information." It recognized that vouchers were public information "if the information is not otherwise made confidential by law." *Id.* But the amendment added language to the introductory clause, requiring that all types of core public information enumerated in section 552.022 are public information "and not excepted from required disclosure under this chapter unless they are expressly confidential under other law." *Id.*[1] This 1999 amendment was heralded as a "true success" in providing a "citizen . . . full and complete information regarding official acts of those who represent them and the affairs of government." Rick L. Duncan, *No More Secrets: How Recent Legislative Changes Will Allow the Public Greater Access to Information*, 1 TEX. TECH. J. TEX. ADMIN. L. 115, 133 (2000). We should give effect to all the words in a statute, and to changes in the words of legislative acts. *See Indep. Life Ins. Co. of Am. v. Work.*, 77 S.W.2d 1036, 1039 (Tex. 1934). As discussed below, the Court's opinion does not, as it ignores the "express," "confidential," and "other law" requirements of the statute.

A. Other Law

"Other law" means law other than the Public Information Act. *City of Georgetown*, 53 S.W.3d at 332–33. I disagree with the Court's assertion that "other law" exceptions to disclosure of core public information can mean " judicial decisions." ___ S.W.3d ___. The Court cites as

[1] Recently, the Texas Legislature amended section 552.022's "expressly confidential under other law" provision, and also added specific exceptions in the PIA for certain confidential information. *See generally* Act of May 20, 2011, 82nd Leg., R.S. (to be codified at TEX. GOV'T CODE chs. 51, 552). After the effective date, core public information may be withheld from disclosure if it is "made confidential under this chapter or other law." *Id.* § 2 (to be codified at TEX. GOV'T CODE § 552.022). This amendment does not apply to the case at bar, because the statute's effective date is September 1, 2011. *Id.* § 41.

authority for its holding the case of *In re City of Georgetown*, a case in which the Court examined whether rules in the Texas Rules of Civil Procedure regarding attorney-client privilege constituted "other law" under section 552.022. *Id.* (citing *City of Georgetown*, 52 S.W.3d at 332). In *City of Georgetown*, the Court held that because our enacted rules of court "have the same force and effect as statutes," and the rules were derived from previously enacted statutes, such rules constitute "other law" under section 552.022. 53 S.W.3d at 332 (quotation omitted). The Court today misreads *City of Georgetown*, asserting that it serves as the basis for creating common law exceptions to the PIA. The Court cites no other Texas authority for this holding.

Other provisions in the PIA also indicate that judicial decisions should not be "other law" for the purpose of the section. *See Molinet v. Kimbrell*, ___ S.W.3d ___ (Tex. 2011) (noting that we examine the "entire act" to glean the meaning of a statute's text (citations and quotations omitted)). In section 552.101 of the PIA, the Legislature excepted from disclosure information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. This provision applies to "public information" defined and disclosable pursuant to section 552.021, and not to the core public information delineated in section 552.022. If we were to interpret "other law" in section 552.022 to include law made pursuant to a judicial decision, we would effectively apply section 552.101's "judicial decision" exception to disclosure to core public information. This is contrary to the Legislature's explicit statement that core public information is "*not excepted from required disclosure under this chapter*," including section 552.101. *Id.* § 552.022 (emphasis added). The most logical reading, then, is that "other law"

must mean other statutory law where the Legislature has declared certain information confidential,[2] or rules of court drafted by this Court that are commensurate with statutes. *See City of Georgetown*, 53 S.W.3d at 333.

The Court argues that the "other law" in this case is the "individual['s] right to be free from physical harm," as manifested in the tort of battery. ___ S.W.3d ___. The Court posits that because physical safety is "the primary concern of every government," and the PIA protects private information, then it must surely protect physical safety as well. *Id.* at ___ (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). The reasoning is a sound policy argument in drafting legislation. Elected officials should not be subjected to harm by dangerous persons whose task may be made easier through public information requests. But the policy decision of how to satisfy that objective is not ours. The Legislature has made nondisclosure of the core public information at issue dependent on it being specifically designated confidential by rules or statutes outside of the PIA.

Further, this Court has never held that other torts would protect the disclosure of core public information under section 552.022. In *Industrial Foundation of the South v. Texas Industrial Accident Board*, we decided the scope of information protected by "judicial decision" under the predecessor to Government Code section 552.101. 540 S.W.2d at 683. This is not an interpretation of "other law" under section 552.022, and, as discussed above, the two provisions are not coterminous.

---

[2] This is essentially the limited exception under the federal Freedom of Information Act. *See* 5 U.S.C. § 552(b)(3) (excluding from FOIA's reach "matters that are specifically exempted from disclosure by statute . . . if that statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and specifically references § 552(b), if passed after 2009").

In *Industrial Foundation*, all members of the Court agreed that the scope of the "judicial decision" exception did not give the Court a blank check to create common law exceptions to the PIA. *Id*. at 681–82 (plurality op.). "It was not the intention of the Legislature to turn over the administration of the Open Records Act to the judiciary." *Id*. at 692 (Reavley, J., dissenting, joined by Steakley, Pope, and Denton, JJ.); *see also Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex.*, ___ S.W.3d ___ (Tex. 2010) (Wainwright, J., dissenting) ("[C]ourts 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."). As I discussed in *Texas Comptroller*, the Legislature limited our ability to create judicial exceptions to the PIA. *Id.* at ___. Thus, the Legislature's definition of the "judicial exception" includes only the privacy torts recognized at the time of *Industrial Foundation*. *See* 540 S.W.2d at 678–81. There was one such tort at that time—public disclosure of private facts. I would thus limit the scope of the "judicial decision" exception to that tort. My fundamental concern is the Court's willingness to create common law exceptions to the comprehensive disclosure scheme of the PIA, weakening the PIA in three consecutive opinions interpreting the Act—*City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (extending response periods by governmental entities to requests for public information when the request was unclear), *Texas Comptroller*, ___S.W.3d at ___ (holding dates of birth "confidential" under "judicial decision" and excepting them from disclosure under the PIA), and this case, *DPS v. Cox*.

Immediately after the dispute over the disclosure of travel vouchers arose, the Legislature considered making such voucher information confidential.[3] But it did *not* declare vouchers from security details "confidential," nor did it except these vouchers from the definition of "public information" under 552.022(a). Instead, the Legislature passed what is currently codified as section 552.151 of the Government Code.[4] That section provides:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

TEX. GOV'T CODE § 552.151 (to be recodified at TEX. GOV'T CODE § 552.152). The amendment applies only to information to be disclosed pursuant to section 552.021, *i.e.*, regular "public information." It is an exception in Subchapter C, which specifically does not apply to core public

---

[3] Parallel bills in the Texas House and Senate during the current legislative session attempted to specifically make "a voucher submitted or to be submitted under [Chapter 660 of the Government Code] confidential and may not be disclosed under the PIA" if the voucher was for expenses incurred in protecting an elected official or the official's family. H.B. 3131, 82nd Leg. R.S., § 1 (introduced March 10, 2011); S.B. 1923, 82nd Leg., R.S., § 1 (introduced April 29, 2011). Neither bill came to a vote before each bill's respective chamber during the regular session. During the special session in June 2011, Senate Bill 1 was amended to make vouchers or other reimbursement forms confidential for a period of eighteen months following the date of travel "if the reimbursement or travel expense incurred by a peace officer while assigned to provide protection for an elected official of this state or a member of the elected official's family." S.B. 1, 82nd Leg., 1st C.S., § 79A.01 (introduced May 31, 2011). Following the eighteen-month period, the vouchers "become subject to disclosure under Chapter 552 and are not excepted from public disclosure or confidential under that chapter or other law," with seven exceptions, including the personal safety exception. *Id.* During the eighteen-month period, agencies are required to submit expense summaries providing specified, detailed information. *Id.* The Legislature has provided that this Court will have "original and exclusive mandamus jurisdiction" over the construction, applicability, or constitutionality of the amendment, and the amendment applies only to vouchers created on or after September 1, 2011. *Id.*; *see also id.* § 80. The Governor has not yet taken action on the bill.

Because the vouchers at issue in this case are not covered by the new section, its interpretation is not before this Court.

[4] The original enacting legislation added the exception as section 552.151. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742, 743 (codified at TEX. GOV'T CODE § 552.151). This session, the Legislature redesignated the section as section 552.152, effective September 1, 2011. *See* Act of May 5, 2011, 82nd Leg., R.S., S.B. 1303, § 27.001(20). For the sake of clarity, this opinion will refer to the provision as presently in force, section 552.151.

information, like information in the vouchers at issue in this case. The Court argues that the Legislature's "swift passage" of section 552.151 of the Government Code "confirms the primacy" of the government's interest in protection against physical harm. ___ S.W.3d___. But the Legislature's intent is best manifested in what actually becomes law. *Molinet*, ___ S.W.3d at ___ ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent . . . ."). The promulgation of section 552.151 demonstrates the opposite. Section 552.151 is not an exception to the mandated disclosure of core public information. The Court's opinion grafts the Legislature's test found in section 552.151 onto situations in which the Legislature unambiguously did not intend. The Court would rewrite section 552.151 to hold that such information is "excepted from the requirements of sections 552.021 or 552.022" and moves the section out of the PIA such that it can be considered "other law." ___ S.W.3d ____ (emphasis added). The Court should not by common law override a specific statutory mandate.

B. Confidential

Even if "other law" may include judicial decisions and the common law, section 552.022 requires that the "other law" declare the information "confidential." "Confidential" may have a fluid meaning, such as "protected," "secured," or "safeguarded." *Cf. City of Georgetown*, 53 S.W.3d at 334 ("A law does not have to use the word 'confidential' to expressly impose confidentiality."). The Legislature has enacted a plethora of laws that deem certain information "confidential" for myriad purposes. *See Tex. Comptroller*, ___ S.W.3d ___ (Wainwright, J., dissenting) (noting that "no fewer than 100 Texas statutes classify information as confidential for purposes of the PIA"); *City of Georgetown*, 53 S.W.3d at 339–40 (Abbott, J., dissenting) (providing four examples of information

"expressly made confidential" in the Transportation Code, Education Code, and Family Code). Likewise, there are a number of tort actions, both statutory and common law, that recognize that certain types of information are private or confidential.[5] But in every instance, the *information itself* is the issue, and the statute, decision, rule, or crime exists to protect the information itself or a person who will be directly harmed by the information's release.

Once again, the Court creates a judicial exception to disclosure of information in the PIA based on a possible use of the information rather than the nature of the information itself. In *Texas Comptroller*, the Court, for the first time, considered derivative harm arising from the release of information—whether disclosure of birth dates of public employees, along with other information, could be used for identity theft. The Court held that such potential tortious use of the public information constituted grounds to withhold the information because it would constitute a "clearly unwarranted invasion of personal privacy." *Tex. Comptroller*, ___ S.W.3d at ___. But the courts are not "free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure." *Indus. Found.*, 540 S.W.2d at 681–82 (plurality op.). "This policy determination was made by the Legislature when it enacted the statute." *Id.* at 82. The Legislature granted the people's right to the information after considering its potential uses and harms. The Court, apparently believing the Legislature did not sufficiently execute its task, finds a new common

[5] Examples include trade secrets, privilege, public disclosure of private facts, and gag orders during trial. *See In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (defining trade secrets); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39, 40, 41 (similarly defining trade secrets and remedies available for protection of trade secrets); TEX. R. CIV. P. 193.3 (setting standards for asserting privileges in discovery); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 222–23 (Tex. 2004) (per curiam) (providing for mandamus relief for erroneous rulings on privileged documents); *Indus. Found. of the S. v. Tex. Ind. Accident Bd.*, 540 S.W.2d 668, 682–83 (Tex. 1976) (plurality op.) (discussing the tort of public disclosure of private facts); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (discussing a court's authority to issue gag orders).

law exception to disclosure based on its own views of harm in the potential use of, on this occasion, core public information.

In *Texas Comptroller*, as here, the Court did not restrict itself to considering whether the actual release of the information (state employees' birth dates) was harmful, but rather whether, in the wrong hands and in combination with other information, such as Social Security numbers, state employees might be at higher risk for identity theft. *Tex. Comptroller*, ___ S.W.3d ___. The harm was derivative, and the analysis allowed for post-hoc, judicially created exceptions to disclosure. For the same reasons as in *Texas Comptroller*, I believe the Court's analysis and application of derivative harm to create an exception to disclosure is inappropriate, particularly so because of the core public nature of the information at issue, and because the Court's rule could permit unfettered judicial discretion in declaring any information not subject to disclosure. Its discovery of this common law right may even inadvertently have the effect of creating some common law cause of action for "wrongful disclosure of information," and may have the potential to randomly and unnecessarily subject various government agencies and officers to criminal liability for simply disclosing what the Legislature determined, and the Court admits, is core public information. *See* TEX. GOV'T CODE § 552.352 (defining the misdemeanor crime of distribution of information "considered confidential under the terms of this chapter").

C. Expressly

Even if our common law torts are "other law," and even if, somehow, the threat of the tort of battery declares some unknown information "confidential," the final requirement of section 552.022 is that the "other law" must "expressly" make the information "confidential." The Court

does not address how it believes that the information at issue here is "expressly" confidential. Merriam-Webster's dictionary defines "express" as "directly, firmly, and explicitly stated." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/express (last visited June 21, 2011). The tort of battery is when a person "(a) . . . acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (1965); *see also Bailey v. C.S.*, 12 S.W.3d 159, 162 (Tex. App.—Dallas 2000, no pet.) ("A person commits a battery if he intentionally or knowingly causes physical contact with another when he knows or should reasonably believe the other person will regard the contact as offensive or provocative."). Nowhere in the tort's elements, or in any of our cases, is it "directly, firmly, and explicitly stated" that battery protects information from disclosure. The tort concerns harmful or offensive intentional contact. The Court ignores this critical requirement of the statute limiting a court's ability to protect information from disclosure.

Simply put, common law battery is not "other law" under which the information at issue here is "expressly confidential." The Court oversteps legislated limits recognized in *Industrial Foundation* to interpret exceptions to disclosure under the PIA. For this reason, I do not join in the Court's opinion.

III. Remand Is Appropriate

Although I cannot join the Court's opinion, I join its judgment that remand is appropriate. I believe DPS's and the trial court's improper reliance on the "special circumstances" exception, and

the possibility of harm to public officials, warrants a remand in the interests of justice. I also believe that DPS should have the opportunity to argue that a specific exception to disclosure made by the Homeland Security Act should apply.

The Court relies on and builds upon the Attorney General's "special circumstances" test, which the Attorney General has applied numerous times in various letter rulings, in support of its holding today. However, this test, and its rulings, do not apply to the information at issue here nor to the legal theory upon which the Court relies in withholding the information.

The genesis of the test is a one-page letter ruling from 1974, that was later expanded in 1977. It was not a freestanding test to withhold information, but rather was used in determining whether information could be withheld as a "clearly unwarranted invasion of personal privacy," a separate, statutory exception to disclosure of non-core public information in the Act. Tex. Att'y Gen. ORD-54 (1974); Tex. Att'y. Gen. ORD-169 (1977); *see also* TEX. GOV'T CODE § 552.102 (providing an exception for regular "public" information for information in a personnel file, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). In other words, the attorney general examined "special circumstances," such as an employee's specific history of being threatened, harassed, or stalked, to see if information in a state employee's personnel file should not be disclosed under what is now section 552.102 of the PIA. Rather than protecting more information from disclosure, the "special circumstances" test, as initially articulated by the attorney general, actually required *more* information to be disclosed, because only if the "special circumstances" existed could an employee's personnel information (including his or her home

address, phone number, and other personal information) be withheld. Tex. Att'y Gen. ORD-54 (1974); Tex. Att'y Gen. ORD-169 (1977).

In later attorney general opinions, though, the "special circumstances" test was not discussed in conjunction with section 552.102's "clearly unwarranted invasion of personal privacy" in employees' personnel files, but rather as a privacy exception or "other judicial decision" under section 552.101. *See, e.g.*, Tex. Att'y Gen. OR2004-10845. No party extensively discussed the evolution of this test in the attorney general's office from 1977 until today. However, it appears that the attorney general's basis for applying the "special circumstances" test to information not subject to disclosure was based on the application of the tort of public disclosure of private facts (discussed in *Industrial Foundation* and analyzed under the employment file exception, predecessor to section 552.102) as another "judicial decision" excluding information pursuant to section 552.101.

It also appears that the Attorney General has determined that section 552.101 is "other law" for the purpose of deciding whether core public information can be withheld. I agree that the tort of public disclosure of private facts may be a "judicial decision," as it was extant at the time the PIA was promulgated, that could be the basis of an exclusion from disclosure under section 552.101 and may also be "other law" by which core public information is "expressly confidential" under section 552.022. However, section 552.101, in and of itself, cannot be "other law" to withhold core public information. To enact such a rule would thwart the Legislature's expressed intent that core public information is not subject to the Subchapter C exceptions, including section 552.101. This is further evidenced by the fact that the Legislature's new "special circumstances" exception, which appears to be similar to the Attorney General's so-called common law privacy "special circumstances"

exception, is in Subchapter C, thus currently applying to "public information" but not core public information that must be disclosed pursuant to section 552.022. Therefore, the Attorney General's "special circumstances" exception should not apply to the information here.

The Attorney General's "special circumstances" test cannot apply in this situation. However, because the use of the test as an independent basis for withholding information was reasonably well established in a number of attorney general letter rulings for a number of years, because DPS and the trial court erroneously relied upon the test, and because of the serious personal safety concerns at issue in this case, I would remand in the interest of justice to allow DPS to argue any and all exceptions that are based on "other law," such as one based on Government Code section 418.176, the exception from the Homeland Security Act. *See* TEX. R. APP. P. 60.3; *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007) (remanding "to allow the parties to present evidence responsive to [the Court's] new guidelines").

On remand, the trial court should consider whether specific information in the vouchers raises serious security concerns and should be redacted. For example, in the sample submitted *in camera* to the Court, one cannot only identify at which specific hotels the Governor's security detail stayed and, inferentially, whether they stayed in the same hotel as the Governor, but also when the members of the detail arrived and departed from the foreign country. Other information in the vouchers, such as total amounts spent for lodging or costs of meals, may not present the same security concerns. The trial court should carefully consider the varying levels of concern for the different types of information in the vouchers.

IV. Conclusion

There is legitimate concern about fashioning a rule that could allow those who want to do harm to government officials to gain information to help them do so through the government's own records. The rule the Court announces today—that it can fashion common law exceptions to disclosure of core public information—is based on a genuine concern to protect our public officials from physical harm and acts of terrorism, but it thwarts the Legislature's clear statement that it, not the courts, grants exceptions to the public's access to public information. There are many statutes and rules that make information "expressly confidential," but the judge-made tort of battery is not one, and we should guard against any court creating reasons to keep government information from its citizens. That policy-laden task, as emphasized in *Industrial Foundation*, belongs to the Legislature. Because the Court's rule opens the door to new judicially created exceptions to disclosure of core public information and weakens what was one of the strongest, most robust freedom of information statutes in the nation,[6] I respectfully cannot join the Court's opinion. But because I believe remand in the interest of justice is appropriate, I join the Court's judgment.

_____

Dale Wainwright
Justice

OPINION DELIVERED: July 1, 2011

[6] *See City of Dallas*, 304 S.W.3d at 395 n.5 (Wainwright, J., dissenting) (citing 151 Cong. Rec. S1525-26 (Feb. 16, 2005) (statement of Senator John Cornyn)).