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Supreme Court of Texas.
Texas Comptroller of Public Accounts, Petitioner,
v.
Attorney General of Texas and the Dallas Morning News, Ltd,
Respondents.
No. 08-0172.

September 10, 2009.

Appearances:
John M. Hohengarten, Office of the Attorney General, Austin, TX,
for petitioner.
Paul C. Watler, Jackson Walker LLP, Dallas, TX, for respondent
Dallas Morning News.
Brenda K. Loudermilk, Office of the Attorney General, Austin, TX,
for respondent Attorney General.

Before:

Chief Justice Wallace B. Jefferson; Harriet O'Neill, Dale
Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R.
Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0172 Texas Comptroller of Public Accounts v. Attorney General of Texas and the Dallas Morning News.

MARSHALL: May it please the Court, Mr. Hohengarten will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JOHN M. HOHENGARTEN ON BEHALF OF THE PETITIONER

ATTORNEY JOHN M. HOHENGARTEN: May it please the Court, this Court should hold the common law privacy interests extend to date of birth information under the Tess and Billings v. Atkinson and Valenzuela v. Aquino.

JUSTICE DAVID M. MEDINA: Mr. Hohengarten, does this Court have jurisdiction to even hear this matter.

ATTORNEY JOHN M. HOHENGARTEN: Absolutely, Your Honor, there is a jurisdiction in this case. This raises a very important question for the jurisprudence of the state under the Public Information Act. The question is whether or not date of birth information for at least 145,000 public employees will be publicized in public information for anyone who wishes to obtain that information. So we submit it very much is a matter of jurisprudential importance and involves the construction of a statute in the PIA.

JUSTICE HARRIET O'NEILL: Is the question really so narrow. It's

not so much birth date information as it is the whole packet of information that includes birthdates that would allow identity theft. It wouldn't be birthdates per se that would be protected under a privacy interest, but the combination with the other information that allows identity theft.

ATTORNEY JOHN M. HOHENGARTEN: That's correct, Justice O'Neill. What we are submitting is that date of birth information in conjunction with other information that is already available to a requestor does trigger this privacy interest for three primary reasons. A reasonable person would be highly offended by the publication, the publicizing of this information because of the additional risks of identity theft. That's number one. Because this information can allow persons to obtain other sensitive information as the Arizona Supreme Court noted in the Scottsdale School District case, that is Social Security number, investment and insurance portfolios, perhaps even medical history and the third reason is that under the PIA, we have a situation that is akin to publicizing this information. This case is not just about the news having this information. This case is about whether or not dates of birth will be available to any requestor under the PIA no matter how suspicious that requestor's activities. As this Court knows, the government body is not entitled to ask the requestor no matter how legitimate the suspicions, for what that purpose that requestor is using that information and the link between dates of birth in connection with other information that a requestor would have about a given individual. The link between that and the additional risk of identity theft has been clearly drawn by the Court, the New York Court of Appeals in the Daley v. Metropolitan Life case. The implication is also clear there in the case I mentioned a moment ago, the Scottsdale Independent School District case v. KPNX Broadcasting Company. In that case, the Court noted all the additional confidential information that could be obtained.

JUSTICE HARRIET O'NEILL: Were those courts interpreting the common law or were they interpreting legislative enactments that protected that information.

ATTORNEY JOHN M. HOHENGARTEN: In the case of Daley and in the case of KPNX, we are dealing with the Open Records Acts in other states and.

JUSTICE HARRIET O'NEILL: And legislative exceptions.

ATTORNEY JOHN M. HOHENGARTEN: And legislative exceptions and as this Court knows, in nearly all the cases that we cited that discuss the need to protect date of birth information, the courts are employing a balancing test that does not exist and we concede this, under the Texas PIA.

JUSTICE HARRIET O'NEILL: But I guess my point is should we read some significance into the fact that the legislature weighed these policy interests and did not decide to create an exception. This is a uniquely legislative function as opposed to judicial.

ATTORNEY JOHN M. HOHENGARTEN: I would respectfully disagree, Your Honor. The PIA expressly states that the judiciary can be a part of this process by identifying common law privacy interests. That point was made very clear by this very Court in the Industrial Foundation of the South case and it is not a requirement that the legislature specifically identify an exemption in the Act. The only question for this Court we would respectfully submit is does the common law protect this information. If it doesn't, we lose. If it does, we should prevail.

JUSTICE DALE WAINWRIGHT: And your burden in that question is particularly high isn't it? Speaking of the legislative policy, the PIA

says in its introductory paragraph that under the fundamental philosophy of the American Constitution Reform of representative government that adheres to the principle the government is the servant and not the master of the people and I'm paraphrasing, that each person is entitled to complete information about the affairs of government, a laudable goal. So you've got a particularly steep burden to satisfy to exempt public information from disclosure.

ATTORNEY JOHN M. HOHENGARTEN: We do have a steep burden, Justice Wainwright, and in particular because this Court would have to make new law. This Court would have to recognize for the first time the common law privacy interests reached date of birth information in light of changes in technology and the increasing problem of identity theft in our society. So we acknowledge that we've got a tough road to hoe in this case, but we think the policy interests are so compelling and they fit so well under that test that this Court has articulated in *Valenzuela v. Aquino* that the comptroller should, in fact, prevail in this case.

JUSTICE DALE WAINWRIGHT: You do cite in your brief the analogous exemption 6 in the Freedom of Information Act and you've just talked about there in your brief the cases of *Aleva* (ph), you mentioned here the *Scottsdale*, the Arizona Supreme Court case that have applied by analogy, the exemption in the Freedom of Information Act to state Open Records Act exemptions. 552.102 in the Texas PIA has similar language to that exemption 6 and so you seem to be arguing in your brief about that balancing test under 552.102 or at least that we should look to those opinions that I've mentioned for that balancing test to try to find an exemption for date of birth information. Is that a fair kind of summary of your position on the balancing tests?

ATTORNEY JOHN M. HOHENGARTEN: I would correct it this way, Justice Wainwright. I would say that we are going solely under 552.101 and the ability of this Court to hold information as protected under confidential information that is held confidential by judicial decision and so the issue is does the Texas common law reach this information. We are not advocating a balancing test. Under that other statute, we don't believe a balancing test is applicable under this particular state regulatory system.

JUSTICE DALE WAINWRIGHT: I looked back at the summary judgments filed in the trial court, page 56 of the Dallas Morning News briefs references both 552.101 and .102. Your brief on pages 6 and 7 references the balancing tests that would be applicable to 552.102. Yet you're limiting your argument to 552.101?

ATTORNEY JOHN M. HOHENGARTEN: Yes we are. We had other arguments.

JUSTICE DALE WAINWRIGHT: 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.

ATTORNEY JOHN M. HOHENGARTEN: We are not making that argument. We are under 102.

JUSTICE DALE WAINWRIGHT: Why not?

ATTORNEY JOHN M. HOHENGARTEN: Because we believe that our very strongest argument respectfully we disagree with the Justice on this point is the common law under *Valenzuela v. Aquino* and the *Billings v. Atkinson* case. We believe that given technological changes in the society, a reasonable person would be highly offended by this disclosure under the common law. So we may have a disagreement with the Justice on our strongest argument here, but we absolutely believe that test that has been stated by the Supreme Court at least twice is our very strongest argument for protecting this information.

JUSTICE DALE WAINWRIGHT: Under 552.101, the tests that you're asserting there, I have not seen any case that you have been able to cite that has taken that same position.

ATTORNEY JOHN M. HOHENGARTEN: There is no case in Texas.

JUSTICE DALE WAINWRIGHT: However, under 552.102, there's two US Supreme Court opinions regarding exemption 6 of the Freedom of Information Act that referenced date of birth, the privacy concerns there. Arizona Supreme Court has taken that approach. The Kansas Supreme Court has at least to some degree taken the same approach. So there's some case law supporting the 102 argument. You don't think that's a very strong argument.

ATTORNEY JOHN M. HOHENGARTEN: Well, our concern is that most of the other states in their Open Records Act, as well as FOIA, have a balancing test that is simply not found in the Texas PIA and that is our concern. We have cited those cases from other jurisdictions as further support for our position that a reasonable person, this theoretical reasonable man or woman would be highly offended by the disclosure of this information and one of our arguments for the Court to arrive at that policy is that there are legislative and judicial trends in all the other jurisdictions be it by statute or by judicial decision that have protected this information and so our invoking those cases really go to whether a reasonable person would expect this information to be private and we are not submitting to this Court that those cases, *Olivia*, *KPNX*, the *Daily Bee Metropolitan* case, that those are controlling cases in this case. Obviously they're from other jurisdictions and they don't control what this Texas Court does, but perhaps more importantly as I emphasized just a moment ago, most of those statutes in other states are different in that they carry forward FOIA's balancing tests so that courts can look at the privacy interests and then weigh whether or not that privacy interest prevails over a legitimate public interest in having this information.

CHIEF JUSTICE WALLACE B. JEFFERSON: How do you come to the conclusion that the release of date of birth information would lead to identity theft?

ATTORNEY JOHN M. HOHENGARTEN: We don't conclude that it would lead to identity theft, Justice Jefferson. What we are saying is that it would clearly increase the risk for any given individual and we base our assertion on the connection that has been made by other judicial decisions, that is the connection between this information and identity theft. We base it on the Federal Trade Commission report that shows identity theft is rampant in this country, that billions of dollars are lost every year through identity theft, that persons typically spend dozens of hours trying to untangle the mess that is created when they are victims of identity theft. We have cited the bill analysis by the legislature when they enacted the dumpster diving legislation that protects persons from private businesses carelessly misusing.

JUSTICE DAVID M. MEDINA: Can you prevail just on the sole position that this is not a legitimate public concern?

ATTORNEY JOHN M. HOHENGARTEN: Unfortunately, we don't get to make that argument. We wish that we could make the argument that we get to ask this Court to balance the privacy interests against legitimate public concern, but we just don't see that argument under the applicable case law in part because, go head, Justice.

JUSTICE DAVID M. MEDINA: [inaudible] understand the opinion below about the arguments that you made legitimate public concern and the embarrassment of the public information that could be released.

ATTORNEY JOHN M. HOHENGARTEN: That is absolutely correct. In the

Court of Appeals below, we also argued that this information would constitute publicizing of embarrassing facts and in that privacy interests under the common law, there is a weighing of how embarrassing the information is as against a legitimate public need to know. We are no longer making that argument. We don't think it really fits because no one is arguing that a date of birth is an embarrassing piece of information. So we think the stronger at least for most people, but we think the stronger common law interest is clearly the intentional intrusion into the private affairs and concerns of another that would be highly offensive to a reasonable person. We think that's the strongest privacy interest under common law given the facts in this case.

JUSTICE HARRIET O'NEILL: Under the Identity Theft Enforcement and Protection Act, there are two classes of information. There's personal information and sensitive personal information and birthdates are not made sensitive personal information under the Act. Do you attribute any significance to that distinction in the legislation?

ATTORNEY JOHN M. HOHENGARTEN: We do not attribute any significance to that distinction because, again, and respectfully, we believe the sole question before this Court is whether or not Texas common law would protect this information.

JUSTICE HARRIET O'NEILL: But if businesses are required to protect it, why should governments be required to protect it.

ATTORNEY JOHN M. HOHENGARTEN: Well, in fact, under that dumpster diving act, the businesses are required to shred or engage in erasure of personal identifiers, including date of birth information and the Attorney General's office actually has enforcement powers that it can bring against businesses that mishandle information, personal identifiers, including date of birth information.

JUSTICE DAVID M. MEDINA: Would a state employee have standing to intervene to prevent the information from being released?

ATTORNEY JOHN M. HOHENGARTEN: In this case, I don't believe that a state employee could intervene because the information is held by the comptroller's office. It is part of the comptroller's payroll database. The comptroller's the one that possesses this information. Employees are required to disclose it.

JUSTICE DAVID M. MEDINA: When you disclose it and become a state employee, you give up your right to privacy in that regard?

ATTORNEY JOHN M. HOHENGARTEN: Well, we're saying absolutely not. I mean, that's the concern. It's not only public employees, but persons trying to obtain occupational license, obtain other services from the government that may be required to disclose their date of birth to a government agency in return for employment or occupational licenses or benefits and this Court even noted in *Industrial Foundation v.*, excuse me, the *Industrial Foundations of the South* case that because that disclosure of information is often required to obtain the service or employment or the license, it really can't, as a practical matter, be deemed a consensual or free disclosure. Employees have to give it up if they want the job, but because that information is then in the comptroller's payroll database, I think the employees themselves would have a difficult time intervening in this particular lawsuit.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, counsel. The Court is ready to hear argument from the respondents and the cross petitioners.

MARSHALL: May it please the Court, Mr. Watler will present argument for cross petitioners for the Dallas Morning News and Ms. Loudermilk will present argument for respondent, the Attorney General

of Texas. Mr. Watler will open with the first 13 minutes.

ORAL ARGUMENT OF PAUL C. WATLER ON BEHALF OF THE RESPONDENT

ATTORNEY PAUL C. WATLER: May it please the Court, good morning. The Court of Appeals judgment in favor of the news and the Attorney General should be affirmed. The Court of Appeals was correct in holding that dates of birth of state employees contained in the comptroller's payroll database is not excepted from disclosure under the Public Information Act.

JUSTICE HARRIET O'NEILL: Would your position be different if this were Social Security numbers?

ATTORNEY PAUL C. WATLER: It would be because the Act specifically has an exception for Social Security numbers. The legislature several years ago chose to protect Social Security numbers.

JUSTICE HARRIET O'NEILL: But if the legislature did not have that exception, would your position be the same?

ATTORNEY PAUL C. WATLER: I think it would have to be determined under this common law analysis that we're engaged in here.

JUSTICE HARRIET O'NEILL: I agree and.

ATTORNEY PAUL C. WATLER: Under the Industrial Foundation analysis.

JUSTICE HARRIET O'NEILL: And what your common law interpretation be?

ATTORNEY PAUL C. WATLER: Well I think that there is a very good chance that unlike dates of birth, that it could be found to be intimate information that would be protected.

JUSTICE HARRIET O'NEILL: Why?

ATTORNEY PAUL C. WATLER: Because it is a unique identifier that does bring forth some of these concerns.

JUSTICE HARRIET O'NEILL: So if it could be proven that date of birth was a unique identifier under identity theft sort of protocol, then your argument would go away.

ATTORNEY PAUL C. WATLER: No, the question whether it's a unique identifier alone is not the analysis. There's several parts to whether or not something is an actionable public disclosure of private facts. The first element is whether it's highly intimate or embarrassing.

JUSTICE HARRIET O'NEILL: Well, or intrusive.

ATTORNEY PAUL C. WATLER: Well, that's a separate branch. There's four branches of the invasion of privacy tort, three of which are recognized in Texas. Intrusion upon seclusion is a completely separate branch and I think it's important and one thing I'd like to talk about as time permits is the difference between the intrusion upon seclusion theory which is the sole theory the comptroller is advancing now.

JUSTICE HARRIET O'NEILL: But my point is, it seems to me that your same argument, if there were no exceptions for Social Security and if date of birth were established to allow identity theft.

ATTORNEY PAUL C. WATLER: Yes.

JUSTICE HARRIET O'NEILL: Then I don't see the distinction between Social Security numbers and dates of birth under a common law analysis.

ATTORNEY PAUL C. WATLER: Well the question would be is the information highly intimate or embarrassing. I don't think Social Security number in and of itself would deem to be embarrassing. There might be some question of Social Security numbers of whether it's highly intimate, but even if it was, then you go to the next step of the analysis. Would the disclosure of it be reasonably offensive to a reasonable person, highly offensive to a reasonable person? Candidly, I

think Social Security numbers, as opposed to dates of birth, may tend to be more in that category.

JUSTICE HARRIET O'NEILL: Why? That's what I don't understand.

ATTORNEY PAUL C. WATLER: Because of the fact that it is the means by which Social Security benefits are obtained and other things of that sort. The study.

JUSTICE HARRIET O'NEILL: Because it could allow identity theft?

ATTORNEY PAUL C. WATLER: I think there is that possibility. The study that the comptroller relies on to a great extent, the FTC study that they point to, does talk about Social Security numbers being problematic in the identity theft arena. There is no reference whatsoever to dates of birth.

JUSTICE HARRIET O'NEILL: So your point of contention then is whether dates of birth will allow identity theft.

ATTORNEY PAUL C. WATLER: In this record, there is absolutely no evidence that the availability of dates of birth under the Texas Public Information Act or by any other means contributes to identity theft.

JUSTICE HARRIET O'NEILL: Yours is an evidentiary point then.

ATTORNEY PAUL C. WATLER: In large part, it is. I mean this record is totally absent. I think the great wisdom of the common law and the fact that this Court back in the Industrial Foundation case incorporated the common law is it does have room to breathe and to expand and to address circumstances, but in this case there is just no evidence.

JUSTICE HARRIET O'NEILL: So as an evidentiary matter then, if there were proof that dates of birth along with the package of information that's requested would allow identity theft in the same manner as revealing the Social Security number would, your position would be difference.

ATTORNEY PAUL C. WATLER: Well no because there would still be the need to establish all the elements of public disclosure or private fact. It's not just whether or not it somehow has a concern linked to identity theft. It's whether or not it's highly intimate or embarrassing information, whether the disclosure of it would be highly offensive to a reasonable person and still whether there's a lack of public interest. Those are the three elements of the public disclosure tort.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you agree with the comptroller that if the Dallas Morning News is entitled to this information, the world is right?

ATTORNEY PAUL C. WATLER: That is the law. That is the law. Available to a media requestor is equally available to any other requestor.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you have no concern or it doesn't deter you from argument if, in fact, there are minors of information out there, identity, you know, people who are using it for marketing purposes, but also to steal bank accounts and that sort of thing. You're not concerned that might have the effect if we were to affirm.

ATTORNEY PAUL C. WATLER: I think the better approach is to legislate against the evils that we're concerned about and the legislature has done that. This former business commerce code section 35.48 is now codified in chapter 48, but that is an example of the legislature specifically trying to address the evil of identity theft and I think it's better to punish, the approach should be to punish the misuse of information rather than prohibiting any use of information that can have lots of social utility in other [inaudible].

JUSTICE DALE WAINWRIGHT: Let me see if I can understand the maybe the reasons for the request. The Dallas Morning News sought from all 145,000 employees of the state of Texas their full name, job description, agency where they worked, race, sex, work address, date of initial employment, pay rate, salary and date of birth.

ATTORNEY PAUL C. WATLER: That is correct.

JUSTICE DALE WAINWRIGHT: The comptroller responded we'll give you all of that except date of birth and we will substitute age for date of birth and the news said that's not good enough. We want date of birth as well.

ATTORNEY PAUL C. WATLER: That's correct. The reason.

JUSTICE DALE WAINWRIGHT: What's useful about that information with date of birth that is not useful about that information with only age provided.

ATTORNEY PAUL C. WATLER: I will be glad to tell you and this is something that is both in the record and I know was before the legislature the last couple times and I think it is significant that this whole issue has been before the legislature the last two sessions and the legislature has chosen not to enact statutes that would specifically exempt.

JUSTICE DALE WAINWRIGHT: Surely you're not saying that we should take legislative intent from a failure to enact a statute?

ATTORNEY PAUL C. WATLER: No, but I think this is an area that is uniquely legislative. We are deciding case or you are deciding case under the Texas Public Information Act, which is a creature of the legislature and it's been well interpreted over many years and there's been acquiescence in the interpretations of this Court by the legislature, but to your point.

JUSTICE DALE WAINWRIGHT: Is the date of birth so important that age wouldn't satisfy the same purpose?

ATTORNEY PAUL C. WATLER: The morning news and other news organizations use that information to cross reference against criminal records and databases. If you have date of birth, you can find out if John Doe, who is employed by the Texas Library Commission is a sex offender or not or better yet, whether someone who is the administrator of a Texas Youth Commission facility is a sex offender working in our cases, working in our youth facilities. That's exactly the type of reporting that the morning news did do to disclose that there were over 250 convicted felons, many of whom were sex offenders, working in the Texas Youth Commission. You can't do it with just year of birth or age because the information doesn't correlate and there's evidence in this record is also that there's approximately 2,000 state employees with the same first and last name, John Smith and so forth. In order to be able to distinguish between the John Smith that works for the Texas Youth Commission versus the John Smith that works for State Preservations Board, you need the date of birth information.

JUSTICE DALE WAINWRIGHT: So with all the other information requested and provided, you can't do what you're saying your client wants to do without the date of birth?

ATTORNEY PAUL C. WATLER: Right because that other information is not in the criminal history record information. When someone's convicted of a sex offense, it doesn't necessarily, it's not going to have the agency, it may have the agency they work for, but certainly not going to have the other identifying information such that it's searchable across databases.

JUSTICE HARRIET O'NEILL: Isn't there a narrower way to search for that. Can't you access the criminal database of sex offenders and then

request public information on those particular employees.

ATTORNEY PAUL C. WATLER: There's no evidence of that in the record. I mean the comptroller didn't bring that forward as something that could be done.

JUSTICE HARRIET O'NEILL: That's a practical matter.

ATTORNEY PAUL C. WATLER: I don't really know, I guess is the only way that I can answer that question.

JUSTICE HARRIET O'NEILL: You can get the criminal database and you can say state employees that are in this criminal database, we want information.

ATTORNEY PAUL C. WATLER: What I do know, Justice O'Neill, is I've talked to many journalists both among my clients and other news organizations that are involved in this issue now that it's been in the courts and before the legislature the last several years, there's been testimony particularly at the legislature on many occasions that the only feasible way for them to do what I was describing to Justice Wainwright is to have date of birth information. There's been no testimony that I've seen. No one has told me that they can do it by getting sex offender registries and then correlating it against an employment database.

JUSTICE HARRIET O'NEILL: We're talking around each other. You have to admit if that's the purpose of the inquiry, that targeted purpose, the request is pretty broad.

ATTORNEY PAUL C. WATLER: Yes, yes. But the reason I bring this up is because one of the elements of the common law cause of action for invasion of privacy for public disclosure of private facts, the final element is whether or not there is a legitimate public interest and this illustrates there is several legitimate public interests. It's not the only one. I think this is a prime example and I think it's a powerful example, which is why we bring it up. But it's not the only example. The record also shows, for instance.

JUSTICE HARRIET O'NEILL: Well I hear you, but it seems to me that the legitimate public interest should be more narrowly stated. In other words, we don't want sex offenders in our correctional facilities and so therefore you look at that population, but to request every single employee it seems like a broad net to cast.

ATTORNEY PAUL C. WATLER: Actually the well-settled law of common law privacy is that the particular information that's alleged to be private or claimed that there's privacy protection for need only have a logical nexus to matters of public interest. So if we have the issue of sex offenders working in the Texas Youth Commission, which undoubtedly is an issue of public interest, if there's a logical nexus between that issue and the availability of dates of birth of public employees, then that element is satisfied so the law is a very broad test. I understand what you're saying.

JUSTICE HARRIET O'NEILL: But you're going beyond the public interests in your request. The public interest you just identified you could ask for everybody who works at the Texas Youth Commission.

ATTORNEY PAUL C. WATLER: Well and we also asked for everybody who works at the State of Texas by asking for the state employees payroll database. I mean that is the entire database and it's because obviously from time to time the morning news has no idea who's going to be making news next week or next month and it's useful for them to be able to as case by case basis if situations arrive to be able to do records database checking to find out these things.

JUSTICE PHIL JOHNSON: Counsel, let me ask one question on your evidentiary. You said there's no evidence of what the reasonable person

would consider private, do we need evidence?

ATTORNEY PAUL C. WATLER: Well the comptroller makes this argument about legislative facts that you can take a notice of legislative facts. It's unclear to me what facts exactly, excuse me, that the comptroller wishes the Court to take judicial notice of, but.

JUSTICE PHIL JOHNSON: The question is pretty narrow. Is it your position that we have to have evidence of what a reasonable person would consider private or is that something that the Court should know.

ATTORNEY PAUL C. WATLER: I think in this instance, it was the burden of the comptroller to bring forth evidence that the disclosure of the date of birth of a public employee would be reasonably offensive or be highly offensive to a reasonable person. They failed to meet that burden of proof. They didn't bring that forth that evidence. I don't think it could be supplied any other way.

JUSTICE PAUL W. GREEN: That's what really troubles me about this case. You make the claim that because of an evidentiary failure there's potentially 145,000 state employees out there who are exposed. It may be true that there is a connection that could be made between a name and a birth date that would create a danger of identity theft and yet those people are out there. Who's protecting them to a request, as you say, it could be anybody in the world. We're being broadcast around the world this morning. I could ask you what your birth date is and you probably would not want that, but yet these people are exposed to that so who's protecting them?

ATTORNEY PAUL C. WATLER: Well there's a procedure interestingly under the Texas Public Information Act at which a governmental body, such as a comptroller, can give actual notice to individuals whose privacy interests are affected to allow them to come in and participate and raise objections or raise.

JUSTICE PAUL W. GREEN: 145,000 people?

ATTORNEY PAUL C. WATLER: The Act provides for that. The comptroller chose not to do that. The Act also allows a governmental body to have standing to assert the privacy interests of the individuals involved. You can do it one of two ways. The comptroller chose to take the standing, assert the privacy interests of the individuals herself and having taken on that burden. She's bound to the same rules as any other litigant that you have to make certain proof in court and if the failure of that proof may defeat your claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright.

JUSTICE DALE WAINWRIGHT: Counsel, Texas may be different, but the Arizona Supreme Court in the Scottsdale decision says in the opinion that with the name and the date of birth, you can get a criminal arrest record, Social Security number, civil litigation record, credit history, financial accounts, complete medical information, potentially pretty dangerous disclosure.

ATTORNEY PAUL C. WATLER: I think, several things to keep in mind. The Scottsdale case is more than 10 years old. I don't think that's the case today. There's certainly no contemporary or recent information showing that a date of birth could yield medical information with ease by going out on the internet, which is what is suggested by the comptroller. There's certainly no evidence of that that that has happened or that would be the result. We've had a lot of progress of protecting such things as medical records through HIPAA and so forth. So I really question the viability of that particular language. The language certainly does appear in that Scottsdale case and the last thing I would say about the Scottsdale case is it applies just a different standard than we had here under our Public Information Act.

It does not apply the common law of invasion of privacy.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Watler. The Court will hear from the Attorney General.

ATTORNEY BRENDA LOUDERMILK: May it please the Court, I'd like to try to address some of the questions that have been asked of Mr. Watler in the short time that I have and then a couple other points I'd like to make. Justice Wainwright mentioned the FOIA test and the possibility of using that under Section 552.102. I know that the comptroller's brief said that there was a balancing test under 552.102, but there is not. The 3rd Court of Appeals in the Hubert v. Hart Hank case rejected that concept and referred back to this Court's Texas Industrial Foundation and said that the balancing will occur by applying the Industrial Foundation case.

JUSTICE HARRIET O'NEILL: It's my understanding they're not making that claim here.

ATTORNEY BRENDA LOUDERMILK: I believe you're right. The FOIA test, even if the Court wanted to consider that, it has expanded way beyond what the FOIA was when this legislature in Texas used the FOIA as an example to enact what was then called the Texas Open Records Act and it expanded the balanced that they used is a balancing to determine whether or not the information that's being requested has anything to do with the actual operations of a specific agency and if that test were applied today in Texas, there's many information that is now presently open under our system of common law privacy that would be shut down. For instance, less serious misconduct by low-level employees is closed down under the FOIA test. It's not. This Court in the basic 552.001 purpose in the PIA is that the public has a right to know how the officers and government is working in Texas and it's been a fundamental principle.

JUSTICE HARRIET O'NEILL: I don't think anyone disagrees with that. I think we all agree with open government and let the sun shine in. I think there is a big disagreement as to potential damage to employees and surely the Attorney General's office is concerned about that.

ATTORNEY BRENDA LOUDERMILK: It is and we pondered long and hard in drafting the ruling that we did and my comment there is the PIA was not enacted to present or protect against unwelcome conduct or illegal conduct and this Court in the Industrial Foundation was faced with an accusation that the requestor there wanted to use the information from the workers compensation files to blacklist employees from future emphatically because they filed workers comp complaints and the Court was not without sympathy for that, but it explained in the system that the legislature had enacted in the PIA that it was not to prohibit illegal conduct or conduct or even to look into what the use of information is to be.

JUSTICE DALE WAINWRIGHT: So then what happens if very personal private information is disclosed and it's legitimately pursuant to an Attorney General opinion and then the entity that obtained the information negligently mishandles it and someone is injured through identity theft or some other tortious conduct. Is the entity that obtained the information responsible or accountable? What happens in that instance?

ATTORNEY BRENDA LOUDERMILK: Section 552.204 says that a public information officer is not responsible for the use of information after it has been disclosed.

JUSTICE DALE WAINWRIGHT: Not the public entity. I'm talking about the private entity that obtained the information. Do they have

accountability for mishandling if that were to occur, private information that is obtained from the comptroller?

ATTORNEY BRENDA LOUDERMILK: I would say, I'm not an expert on tort law, but I would expect the remedy would be over in tort law or if it's information, the Identity Theft Enforcement Act is designed to prohibit illegal conduct such as you taking a personally identifiable information like a date of birth and using it to get someone's identity to get something of value.

JUSTICE DAVID M. MEDINA: Doesn't releasing that information just make the illegal conduct much easier for individuals who aren't as truly interested in the public information that would be released and why should this be a vehicle to allow that?

ATTORNEY BRENDA LOUDERMILK: Truthfully, Your Honor, I don't know whether it does or not. There really is no firm evidence. This case was not tried with really expanding on what evidence there is in Texas about that and one of the reasons it's not. Again, the PIA is not there to prohibit illegal conduct.

JUSTICE DAVID M. MEDINA: Should this Court even be concerned about that?

ATTORNEY BRENDA LOUDERMILK: Of course, you're concerned. The legislature has been concerned about it.

JUSTICE DAVID M. MEDINA: But is it something that we should take under consideration or is that more of a public policy issue better dealt with legislature?

ATTORNEY BRENDA LOUDERMILK: Your Honor, I think it's a public policy issue that is more appropriately discussed and considered in the legislature and part of that reason is because the legislature has been very active in this area. Starting with 2005 when it had to deal with the Identity Theft Enforcement Act and it chose not to make date of births or any other personal identifying information confidential and with the change in the Voter Registration Act, which there was a specific amendment to prohibit the release of date of births that you find on your Voter Registration Act. They actively declined to do that. In the last two sessions of the legislature.

JUSTICE HARRIET O'NEILL: Not reading anything into legislative inaction, it would seem that, I mean I understand your position that the PIA does not exist to prevent identity theft, but I would present it doesn't exist either to facilitate it. We all get emails from it seems like I get an inordinate number of emails from an agent in Nigeria wanting me to open a bank account to help get money out. Now if this request were by the internet through some entity that was known to mine data, your position would be it's still, you have to give it them right?

ATTORNEY BRENDA LOUDERMILK: The Act is silent about the use or the nonuse or the good use.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the Act says you're not to inquire about the use correct?

ATTORNEY BRENDA LOUDERMILK: That's correct, Your Honor, and this Court in at least two cases, AT&T Consultants in 1995 and the Seminole Industrial Foundation case.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if the day after tomorrow we affirm the Court of Appeals' opinion and immediately 145,000 employees have their identity stolen, you would say that is not of concern under the statute to you and it shouldn't be to the Court. We just wait a couple years until legislature comes back and hopefully remedies the situation for future employees because the ones who were impacted, they would have no recourse.

ATTORNEY BRENDA LOUDERMILK: I think that's the determination the way the Act is presently written and the legislature has chosen it to be that way, Your Honor.

JUSTICE DALE WAINWRIGHT: And you also said there might be a remedy in tort law?

ATTORNEY BRENDA LOUDERMILK: Absolutely.

JUSTICE DALE WAINWRIGHT: Or you were speculating?

ATTORNEY BRENDA LOUDERMILK: And there is a remedy under the Identity Theft Enforcement Act. Thank you, Your Honor.

JUSTICE HARRIET O'NEILL: Not against the government though, only against business.

ATTORNEY BRENDA LOUDERMILK: That's correct.

JUSTICE DALE WAINWRIGHT: The US Supreme Court in Department of State v. Washington Post in 1982. You may think that that case is dated too if the 1998 case is dated accordingly to your co-counsel, then maybe this one is too. Interpreting exemption 6 from the Freedom of Information Act, which has similar language to 552.102, which may not be raised here, the US Supreme Court noted that an individual's date of birth is private information. Do you think if we were looking at 552.102 that it would be an easier argument that date of birth is private information not to be disclosed and under 552.101?

ATTORNEY BRENDA LOUDERMILK: The only case really to construe that exception is the Hubert case.

JUSTICE DALE WAINWRIGHT: Is that exemption 6 under FOIA or PIA?

ATTORNEY BRENDA LOUDERMILK: No, 102. And the 3rd Court said it's the same test as under Industrial. The FOIA.

JUSTICE DALE WAINWRIGHT: The 3rd Court is not binding on this Court.

ATTORNEY BRENDA LOUDERMILK: Absolutely. The FOIA test has a much broader definition of what is private information. It's basically anything that someone thinks is private and then if it has nothing to do with the actual workings of an agency, then there's no public interest. So that's one of the reasons why that test has never been adopted in Texas.

JUSTICE DALE WAINWRIGHT: So you think it would come out differently because the PIA is stronger in disclosure than FOIA.

ATTORNEY BRENDA LOUDERMILK: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF JOHN M. HOHENGARTEN ON BEHALF OF PETITIONER

ATTORNEY JOHN M. HOHENGARTEN: With respect to the issue of tort law, this case however the Court decides it, may well affect tort law in Texas because as this Court noted in the Industrial Foundation's case, if information is deemed to be public information, then the use and publicizing the further use and publicizing of that information may raise First and Fourteenth Amendment concerns that would protect any misuse or further publication of that information and I based this assertion on this Court's very discussion of Cox Broadcasting Company v. Cohn in its Industrial Foundation case. So if this Court decides that the information is private, potentially that may affect tort law one way, but if this Court says no, this is public information, it can be publicized, then the misuse of that information in tort law would probably be protected because it's public information and that public information and the disclosure of that public information may well

implicate First and Fourteenth Amendment concerns as this Court noted in *Industrial Foundations*. The second point that is important to emphasize is that we are, in fact, going under legislative facts in this case. We don't think it is reasonable to expect that the comptroller is going to be able to put on evidence that a reasonable man or woman would be highly offended by the disclosure of that information.

JUSTICE PHIL JOHNSON: Well that's the reason I asked the question a while ago. When we try cases with juries, we presume that the juries are reasonable people and know certain things and so is it necessary that there be proof of what a reasonable person is if the jurors know and we trust the jurors to be that way, I'm wondering is it your position that the Court should know that or should it have to be proved up. I guess you get an expert to say a reasonable person would think this way. That seems to be the other side's position.

ATTORNEY JOHN M. HOHENGARTEN: Well in fact in tort law there may be situations where the question of whether the information would be highly offensive to a reasonable information and that may be a fact issue that is submitted to the jury, but that doesn't foreclose this Court under the PIA from noting legislative facts based on the FTC report, based on legislative history by the Texas legislature when it enacted the dumpster diving legislation. It doesn't prohibit this Court from noting that other courts, including the Arizona Supreme Court and the New York Court of Appeals have drawn in their opinions a clear connection between the risk of identity theft and the disclosure of date of birth information and that brings me to the other point. The Court of Appeals simply erred when it concluded that we had failed to meet our burden because we had not put on evidence that disclosure of this information will lead to identity theft. We are not required under the *Billings* test to prove conclusively that this disaster will befall 145,000 public employees and those are just the state employees. School districts are also included within the definition of governmental bodies and we're not even talking about them explicitly in this particular lawsuit, although the Court's decision was implications for those employees as well. Now, with respect to Justice Medina's question, I think as far as a public employee intervening to assert that confidentiality interest, a public employee would have tough road to hoe because the information is at least theoretically freely given to the potential employer, but because there is an asserted confidentiality interest, I think a public employee would have at the very least a colorable argument that he or she can intervene in protection of this information and lastly, I would like to emphasize that *Billings*, which dealt with wiretapping, was decided 30 years ago. We've seen serious substantial technological changes in this society that weave the facts scenario in *Billings* somewhat dated, but the common law principles that this Court embraced are very much applicable to date of birth information. The very genius of the common law is that it can grow and evolve as prudential application permits and in this case, the common law should be recognized as protecting that date of birth information. Unless the Court has any further questions for me, I'll return my remaining time to the Justices.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you very much, counselors. The cause is submitted and the Court will take a brief recess.

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