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

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

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

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

Invoking the Texas Public Information Act (PIA), the Dallas Morning News sought a copy of the Comptroller's payroll database for state employees. *See* TEX. GOV'T CODE ch. 552. The Comptroller responded with the full name, age, race, sex, salary, agency, job description, work address, date of initial employment, pay rate, and work hours for each employee. But the Comptroller withheld dates of birth as protected under Government Code section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[1] *Id*. § 552.101. She then sought the Attorney General's opinion on whether those dates must be disclosed. *Id*. § 552.301. In a comprehensive response, the Attorney General's letter ruling referenced not only section 552.101, but also section 552.102's personnel file exemption, which protects the privacy rights of government employees.

> In addition to [section 552.101], the Act also provides specific protection for the privacy rights of government employees. *See* Gov't Code § 552.102(a). Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* . . . The limitation of a "clearly unwarranted invasion of personal privacy" requires a balance between the protection of an individual's right of privacy and the preservation of the public's right to

> government information. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 n.8 (Tex.App.-Austin 1983, writ ref'd n.r.e.) (establishing test for privacy under exception; citing *Dept. of the Air Force v. Rose*, 425 U.S. 352, 378 n.16).

Tex. Att'y Gen. OR2006-01938, at 2.[2]

In the same opinion, the Attorney General discussed the growing problem of identity theft and described how birth dates, particularly when utilized with other data, facilitate that crime. He noted that "a majority of the fifty states protect date of birth information in government employee personnel files." *Id*. at 3. Ultimately, however, the Attorney General concluded that there was no proof "that harmful financial consequences will result from the release of the date of birth information in response to this request." *Id. at* 4. He left open the possibility that "based on a presentation of new facts and additional arguments, . . . it is possible that Texas could join the growing number of states that protect from disclosure broad-based requests for date of birth information." *Id*.

The trial court and the court of appeals sided with the Attorney General. 244 S.W.3d 629. The Comptroller has petitioned this Court, and we must now decide if the PIA requires redaction of birth dates. In the course of answering that question, we must also decide whether, to protect 144,000 state employees whose privacy interests would otherwise be compromised,[3] we may consider an argument that the Comptroller presented expressly in the trial court and the court of appeals, but only tangentially here. For reasons expressed by the Attorney General in an earlier phase of this litigation, we conclude that the Comptroller properly withheld birth dates. We hold that, under the unique circumstances presented here, the questions the Comptroller has presented fairly include an argument that the privacy interest of the state's employees must be protected under the personnel-file exception. We reverse in part and affirm in part the court of appeals' judgment.

I. Procedural history

After the Attorney General issued his letter, the Comptroller, represented by the Attorney General, sued the Attorney General and sought a declaration that birth dates were excepted from disclosure. The Comptroller asserted that the Attorney General failed to apply the appropriate standards for employee privacy rights under both sections 552.101 and 552.102. The News intervened and moved for summary judgment, as did the Comptroller. The trial court granted the News' motion (although it denied the News' request for attorney's fees) and denied the Comptroller's. The court of appeals affirmed. 244 S.W.3d 629.

In the trial court and the court of appeals, the Comptroller argued that section 552.102's personnel file exemption applied. Citing *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex.App.-Austin 1983, writ ref'd n.r.e.), however, the Comptroller contended that the test was the same under either section 552.101 or 552.102. The Attorney General agreed. The court of appeals, although noting the Comptroller's arguments under both sections 552.101 and 552.102, appears to have considered only section 552.101. 244 S.W.3d 629, 633, 635. We granted the petitions for review. 52 Tex. Sup. Ct. J. 377 (Feb. 27, 2009).[4]

II. The third party privacy interests persuade us to consider the section 552.102 exception that the Comptroller abridged from her argument in this Court.

Although his opinion letter cited a balancing test for determining whether birth date information falls within section 552.102's personnel file exception, neither the Attorney General nor the Comptroller (represented by the Attorney General) now contends that a balancing test is appropriate. Instead, before and since that letter, and based solely on the court of appeals' decision in *Hubert*, the Attorney General says that the test for information excepted from disclosure under section 552.102 is identical to that under section 552.101. *See, e.g.*, Tex. Att'y Gen. OR2010-01791, at 3 ("In *Hubert*, the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation*, for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under sections 552.101 and 552.102(a) together.") (citations omitted); Tex. Att'y Gen. OR2005-11671, at 4 (same); Tex. Att'y Gen. OR2005-00721, at 3 (same); ATTORNEY GENERAL OF TEXAS, PUBLIC INFORMATION 2010 HANDBOOK 81 (noting that "[t]he court in *Hubert v. Harte-Hanks Texas Newspapers, Inc.* ruled that the test to be applied under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for applying the doctrine of common law privacy as incorporated by section 552.101" and "[c]onsequently, in claiming that information is excepted from public disclosure under section 552.102, a governmental body should not rely upon decisions interpreting this provision that predate the *Hubert* decision").

In this Court, the Comptroller no longer presses the section 552.102 argument, although her petition for review cites state and federal cases holding that disclosure of dates of birth would be a "clear invasion of personal privacy"—similar to the section 552.102 standard ("clearly unwarranted invasion of personal

privacy"). The petition also notes that "[a] majority of the fifty states now exempt[s] date of birth from disclosure when an open records request is made for the personnel files of government employees"; that "[s]everal states protect the information under an 'unwarranted invasion of personal privacy' exemption"; and that "[o]ther states protect date of birth as part of an exception for employee personnel records." The Comptroller cites an analogous case under the Freedom of Information Act's (FOIA) Exemption 6 (the federal personnel policy exemption), as well as a Delaware attorney general opinion determining that public release of the dates of birth of all state employees would constitute an invasion of personal privacy under that state's personnel file exception. *See* Del. Op. Att'y. Gen. No. 94-I019 (1994). We find it difficult to ignore these citations, even in light of the Comptroller's statement at argument that she was no longer pursuing a section 552.102 exemption.

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); *see also Pub. Utils. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (observing that, "in our adversary system, a court has not only the power but the duty to insure that judicial proceedings remain truly adversary in nature"). This comports with the steps taken by the Legislature to protect third party privacy interests in PIA matters. For example, although a governmental body waives any exception to disclosure it fails to raise before the attorney general, that rule is inapplicable when the exception "involv[es] the property or privacy interests of another person." TEX. GOV'T CODE § 552.326. And before disclosure, a governmental body must "make a good faith attempt to notify" a person whose "proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131."[5] *Id*. § 552.305.

Cases interpreting the federal Act support a similar construction. The Supreme Court has made it clear that FOIA Exemption 6 protects the privacy interest belonging to the individual. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363 (5th Cir. 2001) ("The Supreme Court has explained that the privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information."). In *August v. Federal Bureau of Investigation*, 328 F.3d 697, 702 (D.C.

Cir. 2003), the court remanded for consideration of additional exemptions from disclosure because, although the government generally waives any FOIA exemption it fails to raise in initial proceedings, "the Government's failure . . . resulted from human error, because wholesale disclosure would pose a significant risk to the safety and privacy of third parties, and because the Government has taken steps to ensure that it does not make the same mistake again, we see this case as inappropriate for the rigid 'press it at the threshold, or lose it for all times' approach." That court pointed out that third parties, who "bear no responsibility for the Government's litigation strategy," should not "pay for the Government's [failure to raise the applicable exemptions]." *August*, 328 F.3d at 701; *see also Joseph W. Diemert, Jr. & Assocs. Co. v. FAA*, 218 F.App'x 479, 482 (6th Cir. 2007) ("[S]ome courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest may validly waive it."). In another case, the court observed that, although an agency generally waives any exemption it fails to raise at the initial proceedings, "in certain FOIA cases where the judgment will impinge on rights of third parties that are expressly protected by FOIA, such as privacy or safety, district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant" post-judgment relief. *Piper v. DOJ*, 374 F.Supp.2d 73, 78 (D.D.C. 2005). Thus, "the importance of protecting third parties' interests makes judicial intervention proper," even though the Comptroller no longer presses the argument. *Id*. at 81.

III. Determining whether the information sought is a "clearly unwarranted invasion of personal privacy" requires us to balance the individual's right to privacy against the public's right to government information.

The Texas Legislature modeled the PIA after the FOIA. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 355 (Tex. 2000) (plurality op.). Both statutes favor disclosure,[6] but each contains exceptions.[7] Section 552.102(a) exempts information from a "personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." TEX. GOV'T CODE § 552.102(a). This language tracks its federal counterpart, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The United States Supreme Court, in *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), interpreted the personnel file exemption to "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act." The Supreme Court later explained that, under this balancing test "[i]nformation such as place of birth, date of birth, date of

marriage, employment history, and comparable data is not normally regarded as highly personal, and yet . . . such information, if contained in a 'personnel' or 'medical' file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982) (noting that "'limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual*'" (quoting H. R. Rep. No. 1497, 89th Cong., 2nd Sess., at 11 (1966))).

Although we have held that a balancing test is not required under section 552.101 (excepting from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision"), we have not rejected its application to section 552.102. *See Indus. Found. of South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 681 (Tex. 1976). In *Industrial Foundation*, decided shortly after the U.S. Supreme Court issued *Rose*, we held only that *Rose*'s balancing test was inapplicable to section 552.101 because the PIA "contain[ed] no exception comparable to" FOIA's exception for "files '*similar' to* medical or personnel files." *Id*. (emphasis added).

In *Hubert v. Harte-Hanks Texas Newspapers, Inc*., 652 S.W.2d at 550, the only decision to consider whether a balancing test applied under section 552.102, a divided court of appeals held that it did not:

> Nothing in the language [of the PIA] indicates that . . . the federal balancing test or the *Industrial Foundation* test should be employed in determining cases involving 'information from personnel files.' Nevertheless, this Court has determined, finally, that the *Industrial Foundation* test for information deemed confidential by law under [section 552.101] . . . should apply also to [section 552.102].

The dissenting justice disagreed, arguing that "[t]he plain meaning of the term 'clearly unwarranted' implies in the strongest possible terms that the decision to disclose the information depends upon a balancing test." *Id.* at 559 n.4 (Powers, J., dissenting). He interpreted *Industrial Foundation* to endorse the use of a balancing test for claims under section 552.102:

> With respect to the [PIA], however, the Supreme Court of Texas observed that the same construction, if applied to [section 552.101] of the Texas statute, would render superfluous [section 552.102] of that statute in matters of personnel-file privacy. The Court thus implied in the strongest terms that the balancing test to which it referred would be applicable under [section 552.102], but not applicable outside that subsection.

Id. at 557-58 (Powers, J., dissenting).

We agree with Justice Powers. Because the PIA is modeled on the FOIA, federal precedent is

persuasive, particularly where the statutory provisions mirror one another. *See In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316-17 (Tex. 2009) (conceding that state discovery rules are not identical to federal rules, but "are not inconsistent," and "therefore we look to the federal rules for guidance"); *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417, 425 (Tex. 2007) (looking to cases interpreting federal rules where Texas rules incorporated the identical language); *Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2006); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 664 (Tex. 2004). In drafting the FOIA, the U.S. Senate explained that "'[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Rose*, 425 U.S. at 372 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., at 9 (1965)). When the Texas Legislature used the same "clearly unwarranted invasion of personal privacy" language, it is fair to presume it intended the same meaning as that articulated by its federal predecessor. *Cf. Farmers Group*, 222 S.W.3d at 425 (noting that Texas statute incorporating language from Federal Rule of Civil Procedure indicated that statute was intended to have similar application).

The Attorney General recognized the applicability of this balancing test in his initial response to the Comptroller's open letter request, noting that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' requires a balance between the protection of an individual's right of privacy and the preservation of the public's right to government information." Tex. Att'y Gen. OR2006-01938, at 2 (citing *Rose*, 425 U.S. at 378 n.16). We agree: *Rose*'s balancing test is the appropriate standard under section 552.102. Accordingly, we next weigh the third party privacy interest against the public's right to government information.

IV. Both the Attorney General and the Comptroller have identified significant privacy interests at stake, and the public interest in employee birth dates in this case is minimal.

The privacy interests protected by the PIA exemption involve the right of individuals "to determine for themselves when, how, and to what extent information about them is communicated to others." ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967), *quoted in Reporters Comm.*, 489 U.S. at 764 n.16. The News responds that it has no interest in disclosing birth dates to the world, but rather would use the information to investigate inappropriate hires or other misadventures the state may commit. We do not doubt that the News would put the information to beneficial use. But if the requested information is

disclosed to the News, it must be disclosed to any applicant, including those who would employ it for illegitimate purposes. "[O]nce there is disclosure, the information belongs to the general public." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

Nor is it relevant that birth dates may be readily available from other sources. "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). The Supreme Court has held that government employees have a privacy interest in nondisclosure of their home addresses, even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists." *Id*. (holding that such addresses were exempt from disclosure under FOIA Exemption 6).

Instead, we must examine whether state employees have a privacy interest in their birth dates. The Attorney General, in his initial response to the Comptroller, highlighted many of the issues implicated by the News' request:

> Identity theft, without question, is becoming one of the fastest growing criminal and consumer offenses in the twenty-first century. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d 530, 535 (N.Y. Sup. 2004) (denying defendant's motion for summary judgment in negligence action against insurer who disclosed consumers' names, social security numbers, and date of birth information). The Federal Trade Commission estimated 27.3 million reported cases of identity theft, causing billions of dollars in damages, in the five years preceding early 2003. *Id.* (citing Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 (February, 2004)). A date of birth obtained in combination with other data about an individual can be used in at least two harmful ways: to obtain sensitive information about an individual and to commit identity theft. *See Daly v. Metropolitan Life Ins. Co.*, 782 N.Y.S.2d at 535-36; *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 539 (Ariz. 1998).

Tex. Att'y Gen. OR2006-01938, at 3.

> Nor can we ignore the reality of technology. As one court has noted:
>
> "There is a difference between electronic compilation in searchable form and records that can only be found by a diligent search through scattered files. The former presents a far greater threat to privacy" (Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN LJ 151, 155-56 [1998]). Moreover, on-line data brokers often collect information taken from public records and allow access in a searchable form, which potentially leads to abuse by identity thieves.

Goyer v. N.Y. State Dep't of Envtl. Conservation, 813 N.Y.S.2d 628, 639 (N.Y. Sup. Ct. 2005) (holding that personal information (including dates of birth) in hunting licenses were exempt from disclosure under state's

"unwarranted invasion of personal privacy" standard). The Attorney General has observed that preventing identity theft "begins by reducing the number of places where your personal information can be found," *Preventing Identity Theft*, FIGHTING IDENTITY THEFT, www.texasfightsidtheft.gov/preventing.shtml, and he concedes that "[c]ertain public information websites allow individuals to locate [highly sensitive personal] information in any state, including Texas, using only a name and date of birth," Tex. Att'y Gen. OR2006-01938, at 3. One commentator has noted that "information deemed useful to be publicly available under the old transactions technology" is now "too available in a world of wired consumers." Alessandro Acquisti & Ralph Gross, *Predicting Social Security Numbers From Public Data*, 106 PROC. NAT'L ACAD. SCI. 10975, 10980 (2009), *available at* www.pnas.org/content/106/27/10975.full.pdf *(citation omitted); cf. Reporters Comm.*, 489 U.S. at 764 ("[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."). For this reason, almost every major consumer protection entity, whether governmental or non-governmental (including the Federal Trade Commission, the President's Task Force on Identity Theft, and the Texas Attorney General's website), advises citizens against publicizing their dates of birth or using their dates of birth as pin numbers and passwords.[8]

Moreover, there is little question that one "can take personal information that's not sensitive, like birth date, and combine it with other publicly available data to come up with something very sensitive and confidential."[9] Hadley Legget, *Social Security Numbers Deduced From Public Data*, WIRED SCI. (July 6, 2009, 5:05 PM) http://www.wired.com/wiredscience/2009/07/predictingssn/. As the Arizona Supreme Court has observed:

> With both a name and birth date, one can obtain information about an individual's criminal record, arrest record . . . driving record, state of origin, political party affiliation, social security number, current and past addresses, civil litigation record, liens, property owned, credit history, financial accounts, and, quite possibly, information concerning an individual's complete medical and military histories, and insurance and investment portfolio.

Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co., 955 P.2d 534, 539 (Ariz. 1998); *see also Data Tree, LLC v. Meek*, 109 P.3d 1226, 1238 (Kan. 2005) ("An individual's social security number, date of birth, and mother's maiden name are often used as identifiers for financial accounts or for obtaining access to electronic commerce."); *Hearst Corp. v. State*, 882 N.Y.S.2d 862, 875 (N.Y. Sup. Ct. 2009) (concluding that

"a reasonable person would find the disclosure of their precise birth dates, taken together with their full name and other details of their State employment, to be offensive and objectionable"). In fact, "[a] key element from the privacy standpoint is the inclusion of residents' date of birth." Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 9, at *19 (2006).

Additionally, the Legislature has provided that state employees' social security numbers, home addresses, and personal family information are excepted from disclosure. TEX. GOV'T CODE § 552.117(a); *see also id.* § 552.147(a) (excepting from disclosure the social security numbers of all "living person[s]"). As the Attorney General has noted, "it is universally agreed that SSNs are at the heart of identity theft and fraud, and in today's Internet world where information—including public government information—can be instantly and anonymously obtained by anyone with access to the worldwide web, the danger is even greater." Op. Tex. Att'y Gen. No. GA-519, at 6 (2007). These protections would be meaningless, however, if birth dates were disclosed, because those dates, when combined with name and place of birth, can reveal social security numbers. *See* Bob Moos, *How Secure is Your Social Security Data?*, DALLAS MORNING NEWS, Aug. 9, 2009, at 1D. "[I]t is by now well established that the disclosure of an individual's full birth date, taken together with his or her full name and the details of employment, can be used to facilitate identity theft, thereby resulting [in] both economic and personal hardship to individuals." *Hearst Corp.*, 882 N.Y.S.2d at 875; *see also Scottsdale*, 955 P.2d at 536 (noting that "birth dates are in fact private" and "may be used to gather great amounts of private information about individuals").

These concerns have led courts to conclude that birth dates implicate substantial privacy interests. *See, e.g.*, *Oliva v. United States*, 756 F.Supp. 105, 107 (E.D.N.Y. 1991) (holding that, under FOIA Exemption 6, "dates of birth[] are a private matter, particularly when coupled with . . . other information" and disclosure "would constitute a clearly unwarranted invasion of personal privacy"); *cf. Schiller v. INS*, 205 F.Supp.2d 648, 663 (W.D. Tex. 2002) (holding that, under FOIA Exemption 7(c) "the privacy interest of these individuals in their names and identifying information, i.e. birth date, outweighs the public interest in disclosure"); *Creel v. U.S. Dep't of State*, 1993 U.S. Dist. LEXIS 21187, at *19-*20 (E.D. Tex. 1997) (noting that, under FOIA Exemption 7(c), private citizen had a "significant personal privacy interest in her home address, birth date, social security number, and telephone number").

We conclude that the state employees have a "nontrivial privacy interest" in their dates of birth. *Dep't of Defense*, 510 U.S. at 501. And while we may not inquire into the requesting party's intended use of the information,[10] we must nevertheless examine "the only relevant public interest in the . . . balancing analysis—the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"[11]

Like the FOIA, the PIA is based on the notion that citizens are entitled "to complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE § 552.001(a); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (observing "the basic policy that disclosure, not secrecy, is [FOIA's] dominant objective"). Thus, personal information about employees that does not shed light on their official actions would not further the purpose of the statute. *Cf*. Op. Tex. Att'y. Gen. GA-519, at 5 (noting that "[r]edacting SSNs from responsive records requested under the PIA will not detract from the PIA's purpose of making publicly available information about the affairs of government and the official acts of public officials and employees because the release of SSNs does not serve the purpose of openness in government in any foreseeably significant way"). In *Reporters Committee*, the U.S. Supreme Court clarified FOIA's statutory purpose as a means for citizens to know "what their government is up to":

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Committee, 489 U.S. at 773.

Employee birth dates shed little light on government actions. The News points out that the public has an interest in monitoring the government, and birth dates could be used to determine whether governmental entities like school districts and hospitals have hired convicted felons or sex offenders. But when a protected privacy interest is at stake, the requestor must identify a sufficient reason for the disclosure; mere allegations of the possibility of wrongdoing are not enough. *See Favish*, 541 U.S. at 172 (noting that, when protected privacy interests are at stake, the requestor must "establish a sufficient reason for the disclosure").[12] A requestor must show that the public interest sought to be advanced is significant—an interest more specific than having the information for its own sake—and that the information sought is likely to advance that

interest. *Id.* at 172; *cf. Indus. Found.*, 540 S.W.2d at 685 (requiring requestor to show that private information is of "legitimate public concern" before disclosure may be required under PIA section 552.101). This is distinct from identifying "the particular interest of the requestor, and the purpose for which he seeks the information," considerations that are irrelevant to our analysis, except to the extent "the requestor's interest in the information is the same as that of the public at large." *Indus. Found.*, 540 S.W.2d at 685.

But "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) (rejecting, under FOIA Exemption 6, asserted public interest in ascertaining veracity of government reports, as requestors had not produced "a scintilla of evidence . . . that tend[ed] to impugn the integrity of the reports"); *Consumers' Checkbook v. U.S. Dep't of Health and Human Servs.*, 554 F.3d 1046, 1054 n.5 (D.C. Cir. 2009) (holding that a "'mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests'" protected by FOIA Exemption 6) (quoting *McCutchen v. U.S. Dep't of Health and Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994))). The Supreme Court has criticized the idea that bare allegations would suffice to require disclosure. *Favish*, 541 U.S. at 174 (holding that "the requester must establish more than a bare suspicion" and "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"). Because the News has produced no evidence supporting government wrongdoing, the public interest in disclosure here is negligible.[13] *See Dep't of Defense*, 510 U.S. at 498 (noting that providing employees' home address would reveal little or nothing about employing agencies or their activities).

Moreover, the Comptroller has relinquished the full name, age, race, sex, salary, agency, job description, work address, date of initial employment, pay rate, and work hours of every agency employee. The Comptroller also showed that, using only the information produced, each employee was distinguishable without resort to date of birth. *See Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005) ("The availability of information through other sources lessens the public interest in its release through FOIA.").

We hold that the state employees' privacy interest substantially outweighs the negligible public interest in disclosure here. Consistent with the federal courts and those in other states, we conclude that

disclosing employee birth dates constitutes a clearly unwarranted invasion of personal privacy, making them exempt from disclosure under section 552.102.

V. Attorney's fees

The trial court denied the News' request for attorney's fees, and the court of appeals affirmed. 244 S.W.3d at 641-42. The News petitioned this Court for review, arguing that attorney's fees were proper under Government Code section 552.323(b) and the Declaratory Judgment Act. *See* TEX. GOV'T CODE § 552.323(b); TEX. CIV. PRAC. & REM. CODE § 37.009.

A. Government Code § 552.323(b)

Section 552.323(b) authorizes a court to award reasonable attorney's fees incurred by a party "who substantially prevails." TEX. GOV'T CODE § 552.323(b). Before a trial court may award fees, the statute also requires that a number of other conditions be met: that the action be brought under section 552.324; that the trial court consider whether the public information officer who withheld that information had a reasonable basis in law for doing so; and that the trial court examine whether the litigation was brought in bad faith. *See id.* The parties dispute whether these requirements were satisfied here. We need not reach those issues, however, because the Comptroller has prevailed.

B. Declaratory Judgment Act

Under the Declaratory Judgment Act, a trial court may award reasonable and necessary attorney's fees "as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The News contends that it is entitled to fees because it is a prevailing party and because the Comptroller has no legal basis to support her position. Because, as outlined above, we disagree, we conclude that the trial court did not abuse its discretion in refusing to award the News attorney's fees, and we affirm the judgment denying the News' request for attorney's fees. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

VI. Conclusion

Identity theft cost Americans almost $50 billion in 2007 alone. RACHEL KIM, JAVELIN STRATEGY & RESEARCH, 2007 IDENTITY FRAUD SURVEY REPORT 1 (2007), *available at* http://graphics8.nytimes.com/images/blogs/freakonomics/pdf/Javelin%20Report%202007.pdf. In 2004, Texas ranked fourth among states for the number of identity-theft complaints reported to the Federal Trade Commission. OFFICE OF CONSUMER CREDIT, LEGISLATIVE REPORT REVIEWING IDENTITY THEFT AND SENATE BILL 473 (2004), *available at*

http://www.occc.state.tx.us/pages/publications/Identity_Theft.pdf. The State of Texas employs over a quarter of a million people, 144,000 of whom represent the true parties involved in this controversy. When the privacy rights of a substantial class of innocent third parties are affected by one of our decisions, we have a duty to pay them heed. And because the state employees' privacy interest substantially outweighs the minimal public interest in the information, we hold that disclosure of state employee birth dates would constitute a clearly unwarranted invasion of personal privacy, and such dates are excepted from disclosure under section 552.102(a). *See* TEX. GOV'T CODE § 552.102. We reverse in part and affirm in part the court of appeals' judgment and render judgment declaring that the public employee birth dates at issue in OR2006-01938 are excepted from disclosure under section 552.102. *See* TEX. R. APP. P. 60.2(a), (c).

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Wallace B. Jefferson
Chief Justice

Opinion Delivered: December 3, 2010

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1 The Comptroller also asserted that the information was protected under section 552.108, which excepts from disclosure certain law enforcement, correction, and prosecutorial information. TEX. GOV'T CODE § 552.108. That exception is not at issue here.

2 Like all Open Records Letter Rulings, this one was signed by an assistant attorney general in the Open Records Division. *See* OPEN RECORDS LETTER RULINGS, ATTORNEY GENERAL OF TEXAS, https://www.oag.state.tx.us/open/index_orl.php.

3 According to the U.S. Census Bureau, as of March 2008, there were 257,830 full-time and 78,625 part-time employees of the State of Texas. 2008 ANNUAL SURVEY OF STATE AND LOCAL GOVERNMENT EMPLOYMENT AND PAYROLL, U.S. CENSUS BUREAU, *available at* http://www2.census.gov/govs/apes/08sttx.txt.

(all Internet materials as visited December 1, 2010 and copy available in Clerk of Court's file). According to the Comptroller, around 144,000 employees working for state agencies in Texas would be affected by the Public Information Act request.

4 The Texas Association of School Boards Legal Assistance Fund submitted an amicus curiae brief in support of the Comptroller; the Freedom of Information Foundation of Texas and the Reporters Committee for Freedom of the Press submitted an amici curiae brief in support of the Attorney General and the News.

5 Although the Comptroller asserted that dates of birth were exempt from disclosure under section 552.101, there is no indication that written notice was provided to the state employees whose data would be disclosed. The News states that no notice was given, and the Comptroller does not argue to the contrary.

6 *See* TEX. GOV'T CODE § 552.001(b); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting that "disclosure, not secrecy,

is the dominant objective of [FOIA]").

[7] *See, e.g.*, 5 U.S.C. § 552(b)(6); TEX. GOV'T CODE § 552.102.

[8] *See, e.g.*, *Fighting Back Against Identity Theft*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/deter-detect-defend.html; Graeeme R. Newman & Megan M. McNally, *Identity Theft Literature Review*, NATIONAL INST. J. 210459 (Jan. 27-28, 2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/210459.pdf; PRESIDENT'S TASK FORCE ON IDENTITY THEFT, COMBATING IDENTITY THEFT: A STRATEGIC PLAN (2007), *available at* http://www.idtheft.gov/reports/StrategicPlan.pdf; *Preventing Identity Theft*, ATTORNEY GENERAL OF TEXAS, *available at* https://www.oag.state.tx.us/consumer/identity_theft.shtml; *Seven Main Points of Identification*, GET ID SMART, *available at* lthttp://www.getidsmart.com/; *Working to Resolve Identity Theft*, IDENTITY THEFT RESOURCE CENTER, *available at* http://www.idtheftcenter.org/artman2/publish/c_tips/index.shtml.

[9] This apparently stems from the Social Security Administration's methods for assigning numbers, which is usually done shortly after a person's birth, and based in part on geography. Hadley Legget, *Social Security Numbers Deduced From Public Data*, WIRED SCI. (July 6, 2009, 5:05 PM) http://www.wired.com/wiredscience/2009/07/predictingssn/.

[10] *See* TEX. GOV'T CODE 552.222; *A&T Consultants v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995) (noting that FOIA also "bars the government from examining the motives or interests of the party requesting the release of public information"); *see also Reporters Comm.*, 489 U.S. at 771 (holding that "the identity of the requesting party has no bearing on the merits of his or her FOIA request"); *U.S. Dep't of Air Force, Scott Air Force Base v. Fed. Labor Relations Auth.*, 838 F.2d 229, 232-234 (7th Cir. 1988) (noting that requestor's use was irrelevant, as "[t]he special needs of one, or the lesser needs of another, do not matter," because "[t]he first person to get the information may give it away; so if one person gets it, 'any person' may. 'The Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein.'" (quoting *Sears*, 421 U.S. at 149)).

[11] *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773).

[12] Although *Favish* was decided under FOIA Exemption 7(c), the relevant public interest is the same under Exemption 6. *See Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. at 496 n.6 (noting that the identification of the relevant public interest is the same under Exemptions 6 and 7(c); the exceptions "differ in the magnitude of the public interest required to override the respective privacy interests"); *see also Checkbook v. U.S. Dep't of Health and Human Servs.*, 554 F.3d 1046, 1055 n.4 (D.C. Cir. 2009).

[13] Of course, should the News obtain such evidence, it would be free to make another PIA request for the relevant birth dates.