

No. 09-0530

In the Supreme Court of Texas

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
Third Court of Appeals at Austin, Texas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Plaintiffs' response confirms the need for the Court's resolution of the important issues presented in this case. In their response, Plaintiffs argue that governmental entities may not withhold public information that would threaten a person's physical safety because the Legislature and the Court have never expressly endorsed such withholding. But for over 30 years, the Attorney General's legal framework for securing information from release that would threaten a person's physical safety has enjoyed legislative acquiescence. Not until the court of appeals's decision below has the practice ever been questioned. And the court below acknowledged the importance of protecting physical safety, but determined that it had no authority to apply a common-law exception that this Court has not yet recognized.

The Court has already exercised its common-law authority to prevent the disclosure of public information that would cause injury to a person through the release of embarrassing private facts. The Court should likewise prevent the disclosure of public information that would threaten *physical* injury to a person, consistent with over three decades of undisturbed Attorney General legal opinions.

The need for physical-safety protection is compelling. If the court of appeals's decision stands, governmental bodies in Texas would be required to release public information about both public employees and private citizens even if disclosure would expose them to a substantial threat of physical harm.

Plaintiffs also incorrectly assert that the confidentiality of the vouchers under the Texas Homeland Security Act (THSA) cannot be considered because the issue was waived. Although application of a mandatory statute is not subject to waiver, DPS nevertheless preserved the argument in this case because it has consistently argued that the vouchers are excluded from required disclosure under the PIA by "other law," which includes statutes like the THSA. Plaintiffs' alternative argument, that the THSA does not render the vouchers confidential, cannot be squared with the statute's plain text or the record. The vouchers easily fit within the scope of the THSA because they were collected pursuant to the DPS officers' protection of the Governor and others from attack, and are related to the security detail's staffing requirements and tactical plan. The Court should confirm that the travel vouchers are excepted from the PIA's disclosure requirements because they are confidential under the THSA.

ARGUMENT

I. THE COURT CAN AND SHOULD ADOPT COMMON-LAW PROTECTION FOR PHYSICAL SAFETY.

The “primary concern of every government” is ensuring the physical safety of its citizens. *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see also, e.g., Operation Rescue-Nat’l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 569 (Tex. 1998) (holding that protecting patient safety is a compelling reason to restrict demonstrations); *State v. Corpus Christi People’s Baptist Church, Inc.*, 683 S.W.2d 692, 696 (Tex. 1984) (concluding that ensuring children’s safety is a compelling reason to require a church to be licensed for day care); WILLIAM BLACKSTONE, 1 COMMENTARIES *120-26 (explaining that “the principal aim of society is to protect individuals” in enjoyment of their absolute rights, among which is the right of “personal security,” which consists of a person’s “enjoyment of his life, his limbs, his body, his health, and his reputation.”). Plaintiffs do not dispute the compelling importance of protecting a person’s physical safety, but they oppose any action by the Court to ensure such protection. Their opposition to a common-law protection from physical-safety threats is misguided, as explained below.

A. The PIA’s Incorporation of Common-Law Exceptions Is Not Limited to Those That Flow From the Invasion-of-Privacy Tort.

Both the text of the PIA and the precedents of this Court recognize the authority of Texas courts to adopt and enforce common-law exceptions to disclosure of public information. The PIA makes clear that public information may be excepted from disclosure

“if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOV’T CODE § 552.101 (emphasis added). Likewise, so-called “core” public information under § 552.022 (information to which the PIA’s statutory exceptions generally do not apply) may be withheld so long as “other law”—such as common law—authorizes the withholding. *Id.* § 552.022(a), (b). For its part, the Court has consistently confirmed its authority to permit withholding of public information based on law outside the PIA, beginning with its adoption of a common-law exception to disclosure just three years after the PIA’s enactment. *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 (Tex. 1976); *see also In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001).

Plaintiffs argue that the PIA’s incorporation of common-law exceptions includes “*only* the established tort of invasion of privacy.” Resp. at 14. But neither the text of the PIA nor the Court’s decisions provide any support for that position. Indeed, Plaintiffs’ only citation to support their argument is an out-of-context quote from *Industrial Foundation*, which concerned whether discrimination should be a factor in the common-law privacy exception. 540 S.W.2d at 686. That passage reflected the Court’s contemplation of the parameters of the common-law privacy exception, not a general statement about the spectrum of permissible common-law exceptions. *Id.*

The plain language of the PIA forecloses Plaintiffs argument by the use of broad, general language excusing from disclosure public information that is rendered confidential

by “judicial decision” and “other law.” TEX. GOV’T CODE §§ 552.022, .101. The PIA does not even mention the invasion-of-privacy tort, much less limit common-law exceptions to those that flow from it. Plaintiffs’ attempt to limit the PIA’s incorporation of common-law exceptions strictly to the tort of invasion of privacy is baseless, and the Court should not give the PIA such a restrictive interpretation. *See Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991) (explaining that courts may not “add words that are not implicitly contained in the language of the statute.”).

B. Adopting Common-Law Physical-Safety Protection Would Not Conflict with the Court’s Precedent.

In opposing common-law protection for disclosures that would threaten physical safety, Plaintiffs erroneously claim that extending such protection would “require a radical reconception of the tort of common-law privacy.” Resp. at 17. That argument fails for two reasons.

First, the premise of Plaintiffs’ argument—that adoption of a common-law exception would alter the tort upon which it is based—is faulty. When the Court adopted the common-law privacy exception in *Industrial Foundation*, it was based on—but not identical to—the invasion-of-privacy tort. 540 S.W.2d at 682-83. For example, the privacy exception does not require publication, an essential element of the invasion-of-privacy tort. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). But that omission—crucial to the efficacy of the exception—does not alter the tort. The same is true for physical safety. Recognizing an

exception to disclosure based on an established common-law interest would not alter tort law; it would bolster the legal values that the tort was conceived to protect.¹

Second, common-law physical-safety protection need not derive from the invasion-of-privacy tort at all. As explained, the PIA does not limit common-law exceptions to only those drawn from the invasion-of-privacy tort. *See supra* I.A.² The basis for physical-safety protection can be found in established common-law principles, particularly the tort of battery, which secures a person’s interest in freedom from harmful physical contact. *See Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (explaining that the tort of battery protects the “interest in freedom from intentional and unpermitted contacts”) (quoting PROSSER, LAW OF TORTS 32 (3d ed. 1964)); *see also* FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 3.2 (3d ed. 2006) (noting that the tort of battery concerns “the interest in the physical integrity of the body, that it be free from harmful contacts”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 9, p. 41 (5th ed. 1984) (explaining that the tort of battery protects, among other things, a person’s interest in avoiding “physical harm”); Restatement (Second) of Torts, § 15 cmt. a (1965) (noting that

1. Plaintiffs also erroneously assert that physical-safety protection would require the kind of balancing of interests rejected in *Industrial Foundation*. In that case, the Court rejected an *ad hoc*, case-by-case judicial balancing of privacy concerns against the public’s interest in disclosure of information held by governmental bodies. 540 S.W.2d at 681-82. The PIA does not permit such judicial interference, and DPS does not advocate that in this case. To the contrary, a common-law physical-safety exception, like the established common-law privacy exception, would simply require the application of a legal standard to the facts of the particular case.

2. Though the Attorney General derived its policy from the Court’s common-law privacy exception, it had no other alternative to address the critical need for physical-safety protection. The Court is not so constrained.

a battery violates a person’s “freedom from the intentional infliction of offensive bodily contacts”).³ With a deeply-rooted common-law basis, incorporation of a physical-safety exception would be fully consistent with the Court’s decision in *Industrial Foundation*.

C. The New PIA Exception Confirmed the Legislature’s Concern for Physical Safety, and Signaled Its Approval of the Attorney General’s Longstanding Legal Framework.

Following the court of appeals’s decision below, the Legislature quickly responded with a new statutory exception in the PIA to ensure the protection of physical safety. TEX. GOV’T CODE § 552.151. The Legislature’s enactment confirmed the importance of preventing disclosures that would threaten a person’s physical safety. And in creating the new exception, the Legislature not only signaled its approval of the Attorney General’s longstanding legal framework, it did so without disturbing the Attorney General’s approach with respect to core public information under § 552.022.

Plaintiffs readily admit that “the Legislature’s new law essentially codifies the Attorney General’s ‘exceptional circumstances’ privacy test,” Resp. at 25, but nevertheless, they argue that the Legislature’s failure to enact a broader statutory exception indicated its disapproval of the Attorney General’s framework as applied to public information under

3. Plaintiffs’ related assertion that the tort of battery does not provide any basis for making the vouchers confidential, Resp. at 18, misses the point. If the disclosure of public information would threaten a person’s physical safety—an interest long-protected in the common law by the tort of battery—there is a compelling interest in maintaining the confidentiality of that information, because the protection of physical safety is every government’s primary concern. *Salerno*, 481 U.S. at 755. Moreover, Plaintiffs’ argument that the exception would improperly focus on what the information would be used for, Resp. at 19, confuses the tort with the exception, which should consider only whether release would subject a person to a substantial threat of physical harm regardless of the intended use by the requestor, as does the recently-enacted statutory physical-safety exception in the PIA. See TEX. GOV’T CODE § 551.151.

§552.022. Resp. at 10-11. It is well established, however, that courts “cannot draw inferences of the legislature’s intent from the failure of the bills to pass” because “[a]ny such inference would involve little more than conjecture.” *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983); *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (explaining that the Court attaches “no controlling significance to the Legislature’s failure to enact” one bill over another) (internal quotation marks omitted). Thus, a failed, alternative statutory exception reveals nothing about the Legislature’s intent for the enacted legislation or its view of the Attorney General’s framework.

Plaintiffs also incorrectly assert that adoption of common-law protection would render the new legislation superfluous. Resp. at 11. Section 552.151 applies only to public information related to a governmental employee, so common-law physical-safety protection would not overlap with the statutory exception for those individuals such as private citizens and out-of-state law-enforcement personnel. Plaintiffs’ argument also overlooks the *Georgetown* decision, in which the Court applied the common-law-based attorney-client and work-product privileges to public information under § 552.022 of the PIA—even though the Legislature had already incorporated those privileges into the PIA as statutory exceptions. 53 S.W.3d at 328, 331, 337. The Court’s holding in *Georgetown* confirms that the Legislature’s enactment of a PIA exception does not prejudice the Court’s authority to endorse a similar common-law exception for public information beyond the reach of the statutory exception. *See id.*

D. The Trial Court’s Factual Findings Have No Bearing on the Need for a Common-Law Physical-Safety Exception.

Plaintiffs argue that the trial court’s application of the facts to the standard articulated by the Attorney General’s Office renders the need for a common-law physical-safety exception moot. That assertion is both incorrect and misses the larger point: the need for physical-safety protection extends well beyond the facts of this case. *See* Pet’r Br. at 18-20. Regardless, the trial court’s findings of fact below concerned only the standard articulated by the Attorney General. CR.40-42. Not until the Court resolves the appropriate legal standard for securing physical safety under the common law can the trial court properly address the facts in this case.

E. The Court Should Resolve the Intolerable Uncertainty Created by the Court of Appeals’s Decision.

Plaintiffs claim that this case is not an appropriate vehicle for addressing the needed common-law physical-safety protection because the Legislature “essentially codifie[d] the Attorney General’s” legal standard, Resp. at 25-27. But that shortsighted argument ignores the broad, dangerous implications of the court of appeals’s decision for individuals not covered by the new PIA exception, such as private citizens and law-enforcement personnel from outside the state. *See* Pet’r Br. 18-20. And contrary to Plaintiffs’ assertion, Resp. at 26, the new PIA exception does not fully resolve the dangers noted in examples from prior Attorney General rulings. *See* Pet’r Br. at 18-19 (noting examples in which the Attorney General’s Office applied it’s “special circumstances” framework that would be prohibited by the court of appeals’s decision). Specifically, one example concerned information in a

completed report that must be disclosed under § 552.022(a)(1). Tex. Att’y Gen. OR2008-01570 (2008) (security alert). Other examples addressed private citizens who are not covered by the new PIA exception and whose information was included in a completed report that is subject to required disclosure under § 552.022(a)(1). *See* Tex. Att’y Gen. OR2007-1390 (2007) (crime victim and witness); Tex. Att’y Gen. OR2007-06993 (2007) (crime witness and informant); Tex. Att’y Gen. OR2004-10845 (2004) (crime victim). Only one of the listed examples might be covered by the new PIA exception. *See* Tex. Att’y Gen. OR2008-03289 (2008) (personal information of city employees).

More importantly, the rulings noted in the brief on the merits comprise only a small fraction of the cases in which the Attorney General’s Office has applied its physical-safety framework to prevent harmful disclosure. Given the flood of public information requests, *see* Pet’r Br. at 5 and n.2, new scenarios arise every day that require a physical-safety exception to avoid disclosure that would jeopardize a person’s safety. If the court of appeals’s decision stands, the Attorney General will have no means for preventing many of these harmful disclosures.

Plaintiffs were also wrong about the Attorney General’s prior rulings in similar voucher cases. Resp. at 27. Pursuant to its duty to interpret and administer the PIA, *e.g.*, TEX. GOV’T CODE §§ 552.011, .301-.306, the Attorney General’s Office has long permitted withholding of public information if release would threaten a person’s physical safety. *See* Tex. Att’y Gen. ORD-169 at 6 (1977). That enduring policy of protection is not compromised by a pair of non-precedential, informal letter rulings that required release of

similar travel vouchers. Resp. at 27 (referencing Tex. Att’y Gen. OR2002-0605 (2002), and Tex. Att’y Gen. OR2004-4723 (2004)). As explained in the merits brief, Pet’r Br. at 15, neither ruling addressed physical safety because that issue was apparently not raised in the request, but rather determined only that the vouchers were not excused from release by the PIA’s statutory law-enforcement exception, § 552.108. Tex. Att’y Gen. OR2002-0605 at 1-2 (2002); Tex. Att’y Gen. OR2004-4723 at 1-2 (2004). DPS’s decision to not raise physical-safety concerns in response to prior requests reflects the reality that every request is different, whether in time or information sought. It says nothing about the legitimacy of raising physical-safety concerns in response to later, different requests, and DPS should not be penalized for selectively raising concerns when they arise. The two prior letter rulings are limited to their facts, and in no way diminish the real need for common-law physical-safety protection.

II. THE VOUCHERS ARE CONFIDENTIAL UNDER THE THSA.

A. Application of the THSA Was Not Waived.

In an effort to defeat application of the THSA in this case, Plaintiffs claim that DPS’s argument on this point is waived because it did not specifically mention the statute below as a basis for withholding. However, as a mandatory statute, application of the THSA is not subject to waiver. *See* TEX. GOV’T CODE § 418.176(a) (declaring that specific information “*is confidential*”) (emphasis added). As this Court explained in an analogous context, “waiver cannot be invoked to nullify a mandatory statutory restriction, especially when such restriction is enacted for the benefit of the general public as opposed to those benefits that

inure to a private individual.” *Mo. Pac. R.R. Co. v. Am. Statesman*, 552 S.W.2d 99, 106 (Tex. 1977) (rejecting an argument that a party could waive application of a mandatory statute by agreement). What’s more, the PIA forbids—and criminalizes—disclosure of information rendered confidential by other statutes. TEX. GOV'T CODE § 552.352. If application of the THSA was deemed waived, the Legislature’s intent to preserve the relevant information’s confidentiality would be undone, both in the THSA and the PIA.

The “general rules requiring preservation in the trial court are just that, general rules,” *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999), and as such, they should not be applied in this case to thwart the plain intent of the Legislature, which is to preserve the confidentiality of information subject to the THSA. After all, when “a procedural rule conflicts with a statute, the statute controls,” except in rare circumstances not present here. *Collins v. Ison-Newsome*, 73 S.W.3d 178, 184 (Tex. 2001); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex. 1971) (noting that “when a rule of the court conflicts with a legislative enactment, the rule must yield”); *Mo., K. & T. R. Co. v. Beasley*, 155 S.W. 183, 187 (Tex. 1913) (explaining that “the Supreme Court cannot by rule set aside a statute”). Thus, the mandatory nature of the THSA prevents a waiver of its application in this case.

The PIA provides further confirmation that mandatory laws rendering information confidential are not subject to waiver. Under the PIA, if a governmental body seeks to withhold information from disclosure but fails to properly seek an attorney general decision, the information is “presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” TEX. GOV'T CODE §

552.302. A statute that mandates the confidentiality of the requested information is one such “compelling reason” for excluding disclosure despite the governmental body’s failure to comply with the PIA. Tex. Att’y Gen. ORD-150 at 2 (1977) (explaining that a compelling reason for withholding includes when information is deemed confidential by another law); Tex. Att’y Gen. ORD-26 at 2 (1974) (same); Tex. Att’y Gen. OR2010-07961 (2010) (same).

The PIA thus balances the public’s interest in open government with the genuine need for confidentiality by creating a powerful incentive for timely seeking an attorney general decision while at the same time ensuring that information that should remain confidential is not released. There is no reason to think the Legislature intended a different outcome in the context of a lawsuit. Indeed, the same negative consequences that the PIA is structured to avoid would result if a mandatory exception could be waived in subsequent litigation.

Even if the THSA argument could be waived, it was not. Plaintiffs do not dispute that DPS has always alleged that the vouchers are expressly confidential under “other law.” *See, e.g.,* Tex. Att’y Gen. OR2007-11405 (2007) (noting DPS’s request to withhold the vouchers pursuant to the PIA’s exception for other law); CR.29 (arguing that disclosure is not required because the vouchers are “confidential under other law”). And there is no question that the THSA qualifies as “other law” under § 552.022. Although DPS did not specifically argue until this stage that the travel vouchers are also confidential under the THSA, that argument is merely an additional reason that the vouchers are excepted from disclosure under § 552.022; it is not a new issue. Specifying grounds for exclusion under § 552.022’s “other law” provision does not exclude all others.

Plaintiffs' argument that the trial court's fact findings preclude DPS from raising its argument regarding the THSA on appeal is also incorrect. *See Resp.* at 22-23. Plaintiffs cite Texas Rule of Civil Procedure 299 for support, but that rule concerns issues *supporting* the judgment and affirmative defenses. TEX. R. CIV. P. 299. DPS's THSA argument obviously does not support the trial court's judgment, because it seeks reversal. Nor is the THSA argument an affirmative defense. An affirmative defense "seeks to establish an independent reason why the plaintiff should not recover." *Gorman v. Life Ins. Co.*, 811 S.W.2d 542, 546 (Tex. 1991). It is a defense "of avoidance, rather than a defense in denial." *Id.* Application of the THSA would excuse the disclosure requirement under the PIA that Plaintiffs urged in their pleadings; it would not provide an independent basis for withholding the vouchers. As such, it is not an affirmative defense, and the trial court's fact findings do not preclude the argument's consideration on appeal.

B. The THSA Applies to the Vouchers.

There can be little doubt that the THSA applies to the vouchers, and Plaintiffs' argument to the contrary lacks merit. *See Resp.* at 23-25. Among other things, the THSA mandates confidentiality of information that is "collected, assembled, or maintained" by a governmental body for the purpose of "preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity" and relates to either the staffing requirements of law enforcement (among others) or to an agency's tactical plan. TEX. GOV'T CODE § 418.176(a). The vouchers in this case easily fit the statutory standard.

To begin with, the vouchers were collected for the purpose of providing protection to the Governor and others from, among other things, terrorist attack. The fact that the vouchers' narrow purpose was for reimbursement does not diminish their larger role in investigating, preventing, and responding to terrorist attacks. And because the vouchers reveal such information as when, where, how, and how many officers traveled with the Governor and others, they undoubtedly "relate" to both the security detail's tactical plan and staffing requirements. Because the THSA mandates their confidentiality, and the statute's application was not waived, the vouchers may not be released.

PRAYER

The Court should grant the petition for review, reverse the judgment of the court of appeals, and render judgment that the vouchers are excepted from disclosure. Alternatively, the Court should reverse and remand for a new trial to apply a common-law exception for physical-safety threats.

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