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Supreme Court of Texas.
Texas Department of Public Safety
v.
Cox Texas Newspapers, L.P., and Hearst Newspapers, L.L.C.
No. 09-0530.

September 15, 2010.

Appearances:

David S. Morales, Office of the Attorney General, Austin, TX, for the petitioner.William Christian, Graves, Dougherty, Hearon & Moody, P.C., Austin, TX, for the respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, Paul W. Green, Phil Johnson, Eva Guzman, and Debra Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated please. The Court is ready argument in 09-0530 Texas Department of Public Safety v. Cox Texas Newspapers. Justice Medina and Justice Willett are not sitting in that cause.

MARSHALL: May it please the Court. Mr. Morales will present argument for the petitioners. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID S. MORALES ON BEHALF OF THE PETITIONER

ATTORNEY DAVID S. MORALES: May it please the Court. This Court should hold that two exemptions to the Public Information Act, one statutory, one common law extend to the information at issue in this case. The first, the Texas Homeland Security Act, expressly states that information such as that found in the governor's protective details travel vouchers are confidential.

JUSTICE EVA M. GUZMAN: There's some question about whether you preserve that argument. Would you address that after you point out your second basis?

ATTORNEY DAVID S. MORALES: Sure. The second basis is the common law physical safety exception, which protects those persons under a substantial threat of physical harm. Now to the issue of waiver, which the respondents have raised, there are three reasons why this issue has not waived. The first, the statute itself, the Homeland Security Act, states that specific information is confidential as a matter of law so it's a mandatory statute. The statute itself says that information that's collected, assembled, maintained for or by a governmental entity for the purpose of preventing, detecting or investigating and act of terrorism or related criminal activity and relates to staffing requirements or tactical plans of that law enforcement agency are confidential as a matter of law so it's mandatory so this Court has repeatedly said that waiver cannot be invoked to nullify a mandatory statutory restriction and we pointed the Court to Mopax Railroad v. Austin American Statesman from this Court in 1977. That's the first basis for it not being waived. The second is that the PIA itself, the Information Act itself, criminalizes the disclosure of confidential information under other statutes. 552.352 expressly makes that a misdemeanor and so DPS in this particular case has no discretion as to whether or not to disclose this information and the third basis, of course, is that the department has always argued to the Attorney General, to the trial court, as well as to the Court of Appeals that the protective detail travel vouchers are confidential under other law, under 522.022.

JUSTICE EVA M. GUZMAN: Having been on a trial court and a court of appeals I was just wondering how, I guess the trial court is supposed to sit there and think about every other law they could possibly apply?

ATTORNEY DAVID S. MORALES: I will concede here before this Court that it would have been preferable to have raised that in the trial court, but that was not done. It was an oversight, but the fact that it's mandatory means that it cannot be waived and so it is squarely before this Court. It is applicable to the vouchers at issue in this case and it creates a statutory exemption to disclosure under the act.

JUSTICE NATHAN L. HECHT: What are we to do with fact finding that these documents just don't fit under these categories?

ATTORNEY DAVID S. MORALES: Well, the fact finding in a trial court did not, it was the Homeland Security Act issue and so ...

JUSTICE NATHAN L. HECHT: So would we remand it or?

ATTORNEY DAVID S. MORALES: It would be remanded for that purpose or this Court could, on the record here, say that it's squarely applicable and render, but certainly you can remand it to have that issue considered.

JUSTICE NATHAN L. HECHT: And with respect to the common law category, what about that? What are we going to do with the fact finding?

ATTORNEY DAVID S. MORALES: The fact finding that was done was both on the common law privacy issue that the attorney that was raised in the trial court and that was under the Attorney General's special circumstances test, as well as the Fourteenth Amendment claim. The Court of Appeals reached the factual finding of the constitutional claim, the Fourteenth Amendment claim, but they did not reach the fact-finding on the common law claim and so for that particular claim, under the standard that we have articulated and we're asking the Court to recognize today for the physical safety exception, that would likewise be remanded back down to the Court of Appeals or the trial court to decide it under the proper standard.

JUSTICE DALE WAINWRIGHT: The trial court had a hearing, took live testimony from witnesses I understand and before reaching its conclusions of fact, one of them, number 15, says public disclosure of the information at issue in the vouchers would not put any person in imminent threat of physical danger or create a substantial risk of serious bodily harm from a reasonably perceived likely threat. You're saying we should remand it and say Judge, think about it again?

ATTORNEY DAVID S. MORALES: No, not at all. The Court did not have the benefit of this Court's recognizing the common law exception of physical safety. That wasn't before it. What they had in front of it was ...

JUSTICE DALE WAINWRIGHT: What facts, what new facts are going to be brought to the judge? The standards from the common law seem pretty similar. What new facts do you propose that the judge would consider in taking another look at this fact finding ...

ATTORNEY DAVID S. MORALES: I don't believe there would be any new facts. I think what the Court would have to decide is whether or not the disclosure of this information would constitute a substantial threat of physical safety being breeched, in this case to the governor and to the first family and any that are protected. Now, but as far as the facts, no, I don't think the trial court or this Court needs any new facts. The unrebutted testimony of the trial court was expert testimony from the protective detail for the Lieutenant Armistead and he expressly stated this constitutes a substantial threat to the governor's family and others that are being protected.

JUSTICE WALLACE B. JEFFERSON: Was DPS violated criminal law when it released these vouchers in prior years in 2004 and '05 and '07 or whenever?

ATTORNEY DAVID S. MORALES: The first release was, there were three; 2002, 2004 and 2005 I believe. The Homeland Security Act came into effect in 2003 so 2002 is right. As far as 2004 and 2005, the department was relying on the Attorney General's rulings in those particular cases. The department at that time raised only the 108 exception, which is the law enforcement exception. The Attorney General, following this Court's ruling in City of Georgetown said that exceptions within subsection C of the act do not apply to 022 information or super public information.

JUSTICE DEBRA H. LEHRMANN: If we read the Homeland Security Act as broadly as you suggest, isn't that just going to pretty much swallow up the public information act as far as DPS is concerned?

ATTORNEY DAVID S. MORALES: No, I don't believe so.

JUSTICE DEBRA H. LEHRMANN: Explain how it wouldn't.

ATTORNEY DAVID S. MORALES: Well first of all, as the Court is aware the process that, it's always going to be subject to a mandamus proceeding. The department in this particular case or any other law enforcement agency will make the determination and their professional judgment as law enforcement of whether or not it meets that test. If they do believe it does then they will withhold and ask the Attorney General for an opinion. The Attorney General will then decide whether or not it does. There's that measure, that check if you will there and as the Court is aware, it was almost a year ago that the case of the date of birth records with CPA with the comptroller's office was argued here before this Court and the Attorney General did not agree with the comptroller's office on that particular case so it very well could be that the attorney general does not agree with the department, but then beyond that, certainly there's a mandamus proceeding that would decide whether or not that particular statute exemption is applicable.

JUSTICE WALLACE B. JEFFERSON: How does the release of prior vouchers pose a future threat to a public official like the governor?

ATTORNEY DAVID S. MORALES: As the testimony of the trial court revealed, when you take these vouchers and the information that's contained in them, you can discern how many protective detail are with the governor and his family at any particular time. If they go to a certain location they may take five. If they go to another location they may take two.

JUSTICE WALLACE B. JEFFERSON: How do you distinguish that argument from the Attorney General's opinion in 2010 with respect to a district attorney who sought to prevent calendar entries and communications

because it would interfere with law enforcement. There the Attorney General said, you know looking at past information doesn't demonstrate how a release of current information would interfere with law enforcement and I see a pretty close parallel between the two cases.

ATTORNEY DAVID S. MORALES: [Inaudible] I'm not familiar with that particular ruling, but I can say that ...

JUSTICE WALLACE B. JEFFERSON: Let me give you, I'll give you the number for the record and you can respond later. It's Texas Attorney General Opinion OR2 010-10168.

ATTORNEY DAVID S. MORALES: But I can speak to this specific case and if that had to do with the district attorney, certainly this has to do with the Department of Public Safety, the protective detail, which is a very unique situation where this details entire job, their entire reason for being is to protect the governor 24 hours a day, seven days a week.

JUSTICE PHIL JOHNSON: What is the purpose of maintaining the vouchers? You know the purpose of the detail to protect the governor. What's the purpose of maintaining the vouchers?

ATTORNEY DAVID S. MORALES: Of maintaining them as confidential?

JUSTICE PHIL JOHNSON: No, just maintaining them. Because the act you're talking about there, it says the purpose of, for the purpose. These documents are, if it's collected, assembled or maintained for the purpose of preventing, detecting, it seems to me like maybe the purpose of maintaining those vouchers is simply a record-keeping function as opposed to something that might be for the purpose of preventing something in the future. I'm having trouble with the purpose language.

ATTORNEY DAVID S. MORALES: I think there is a very narrow, limited purpose just like there is for any voucher of, at any state employee to get reimbursed for expenses. That's very narrow, but the broader ...

JUSTICE PHIL JOHNSON: That's why it's generated.

ATTORNEY DAVID S. MORALES: Generally. I mean ...

JUSTICE PHIL JOHNSON: That's why you [inaudible] start with. So how does that fit in for the purpose of being to defeat these acts of terrorism or [inaudible]?

ATTORNEY DAVID S. MORALES: Because these vouchers would not exist, these particular vouchers at issue and all the ones for the protective detail would not exist but for the protective detail detecting and trying to thwart terrorism or other related criminal acts.

JUSTICE PHIL JOHNSON: And that's the purpose for which those vouchers are created?

ATTORNEY DAVID S. MORALES: That's why they were created, yes. They were created to, as part of the entire tactical situation where the protective detail needs to travel with the governor wherever he goes and then by the very fact that they are traveling they need to submit these vouchers. It's part and parcel of the entire operation, but yes it does serve a very narrow function, but for example--

JUSTICE PHIL JOHNSON: And it seems like, you know the legislature passed this statute, 52151, that's not argued as being effective here, but in that it talks about information in the custody of a governmental body that relates to, it seems like a very directly addressed, the problem we're talking about here with language fairly significantly different from what's in 418176.

ATTORNEY DAVID S. MORALES: Sure and if I could speak to the new statute, 151, which the legislature passed the last time around, that statute does articulate very well what the Attorney General for the last 30 years from John Hale all the way to Greg Abbott have been applying as far as special circumstances to protect the physical safety of persons that would be affected by the disclosure of particular public information. That statute, of course as was briefed at nauseam is not applicable to these particular vouchers because the vouchers are contained and are subject to O22.

JUSTICE WALLACE B. JEFFERSON: There are a number of categories that are not explicitly statutory that you would have us at least review, things like privacy, physical safety. Would you include something like identify theft in that? I mean there's another case pending here as you mentioned where an argument is made that the release of information, although it's not required to be exempted statutorily, but the release of information would have the affect of compromising the identities of hundreds of thousands of people.

ATTORNEY DAVID S. MORALES: I believe the comptroller in that case argued that that fits within the Industrial Foundation of the south framework under privacy and so yes, we would agree that the Court can and has looked in the past at common law to protect those interests that have already existed in common law so in that particular case in Industrial Foundation of course it was privacy, the same with the date of birth records. In this case, physical safety under the long-standing common law of battery would not seemingly be as applicable as privacy. Privacy would seem to be a closer fit. [Inaudible]

JUSTICE NATHAN L. HECHT: I just want to be clear about what we talked about earlier. You don't think that there is a necessity for further evidentiary hearing. You just think that the evidence that has already been offered and admitted needs to be reviewed under whatever standard we come up with?

ATTORNEY DAVID S. MORALES: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: So we could do that, as well as the lower courts.

ATTORNEY DAVID S. MORALES: Absolutely.

JUSTICE DALE WAINWRIGHT: A question about Industrial Foundation. As you know that was our opinion in 1976, which applied the Billings decision, our opinion from 1973 about a privacy right that the Public Information Act in Texas was passed in 1973 and it seemed to, at least in part, adopt Billings when it said that protections recognized by the judiciary can also exempt public information from disclosure. The Industrial Foundation opinion, there was no majority opinion. It was very splintered, three plurality, two separate concurrences and a four-justice dissent, but all nine agree on this proposition that the Court is not free to balance the public's interest in disclosure against the harm resulting to an individual by reason of disclosure. This policy determination was made by the legislature when it enacted the statute. We declined to adopt, I'm quoting now, an interpretation, which would allow the Court in its discretion to deny disclosure even though there is no specific exception provided. Are you saying that we should, although you cite Industrial Foundation to support much of your argument that the Court can recognize common law exceptions that are not in the statute, Industrial Foundation itself and all nine agreed on this proposition, says that we should not create common law exceptions that are not in the statute. How do you reconcile that seeming contradiction in your argument?

ATTORNEY DAVID S. MORALES: I would say that the Court wouldn't be creating a common law exception. It would be recognizing something that has always existed. I think that certainly back before there was a Public Information Act in 1973--

JUSTICE DALE WAINWRIGHT: But this Court has never recognized the exception you're arguing for today.

ATTORNEY DAVID S. MORALES: Yes, the Court--

JUSTICE DALE WAINWRIGHT: The Attorney General has for, as you pointed out, for a long time.

ATTORNEY DAVID S. MORALES: Yes. No, the Court has not and that is what we are asking the Court to do today is to recognize--

JUSTICE DALE WAINWRIGHT: To recognize a new exception?

ATTORNEY DAVID S. MORALES: Yes to the Public Information Act, but it's an exception that we would argue has always been there in the common law when there was just a common law right to inspect public records. There's always been that. Nixon, not Nixon, yes Nixon v. Warner Communications back in 1976 held that there's always been common law that says the public has a right to inspect the goings on of government including courts, but that's tempered and it always had been tempered by the ability of the custodian to exercise judgment as the custodian to prevent harm. Now that's always been the subject of mandamus and then the PIA came along and so that common law has always been there and we're just asking the Court to recognize that common law right that's always been there.

JUSTICE DALE WAINWRIGHT: And I realize your time has expired, but the federal opinions on the Freedom of Information Act apply a different statute with some different language than the Texas Public Information Act and I haven't looked at Nixon recently, but let me ask a final question, which is how far does your argument take us? Once the principal line drawing that stops this Court from continuing to recognize common law exceptions? We recognized one. Actually, I would phrase it as the legislature recognized one in Billings. Where do you draw the line saying the Court can stop recognizing new, unexpressed exceptions to disclosure that are not in the PIA? If we recognize one where does it stop?

ATTORNEY DAVID S. MORALES: I think that's a fair question and I would answer it this way. Last session the legislature did speak to the physical safety exception in 151. They expressly said that if a person, if releasing the information would subject the person to a substantial threat of physical harm so they have addressed that. That takes us a little bit of the way for some very limited state employees.

JUSTICE DALE WAINWRIGHT: Although the legislature could have made that statute retroactive and did not so it doesn't apply to this case, does it?

ATTORNEY DAVID S. MORALES: They could have, but even if they had and placed it in the same place, it wouldn't apply to these O22 vouchers and so it really was the placement of it more than whether, that was, and whether that was intentional or not I can't speculate as to why the legislature put this in any particular place, but what I can express to the Court is that common law right has always been there. The legislature is free to come back and expand that if they want, but just like in the City of Georgetown even though there were rules and PIA exceptions concerning attorney/client and work product privileges this Court went ahead and recognized that those derived from common law before and so the Court an do so again in this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you Mr. Morales. The Court is now ready to hear argument from the respondent.

MARSHALL: May it please the Court, Mr. Christian will present the argument for the respondents.

ORAL ARGUMENT OF WILLIAM CHRISTIAN ON BEHALF OF THE RESPONDENT

ATTORNEY WILLIAM CHRISTIAN: May it please the Court. I'm William Christian. I'm here on behalf of the respondents, Cox Texas Newspapers and Hearst Newspapers L.L.C. The information detailing the way in which the government spends tax dollars is fundamentally public information and the travel vouchers at issue

are an important tool of the news media, my clients, and reporting on and keeping the public apprised of the conduct of public officials.

JUSTICE NATHAN L. HECHT: If it were proven that information requested would jeopardize the safety of public employees, you think there's still no exception?

ATTORNEY WILLIAM CHRISTIAN: There currently is no exception if it were proven, which I think is the big caveat here.

JUSTICE NATHAN L. HECHT: But if it were?

ATTORNEY WILLIAM CHRISTIAN: Then that would be a situation where this Court perhaps should determine whether the common law, whether it's privacy or some other right or torte should be expanded or covers that particular situation.

JUSTICE NATHAN L. HECHT: Well, I guess I understood your brief to say it shouldn't be expanded no matter what.

ATTORNEY WILLIAM CHRISTIAN: It shouldn't be expanded in this case because the facts don't support it, because the Legislature has already acted in reaction to the Court of Appeals position and has not exercised its discretion to make these vouchers confidential.

JUSTICE NATHAN L. HECHT: So but you're acknowledging that personal safety is at least as important an interest as privacy and if it were really at stake there should be another law exception for it.

ATTORNEY WILLIAM CHRISTIAN: Absolutely. Personal safety is a very important exception and it's not our intention to put any public official or public employee in danger and if there were truly a situation, factual situation presented to this Court where releasing a piece of paper was going to put the governor or someone else in an imminent threat of physical harm then I think that's an appropriate situation for this Court to perhaps examine what the common law basis for withholding that information would be.

JUSTICE DEBRA H. LEHRMANN: Is that a middle ground that would be acceptable to you and could you expand on that as far as other Situations where it would be acceptable?

ATTORNEY WILLIAM CHRISTIAN: Well, I think my position is it's not necessary to get into that in this case because of the facts and the fact findings in this case and the problem is once you start down that road where do you stop? Where do you draw the line? How do you set the standard in a way that is going to capture this hypothetical situation in the future?

CHIEF JUSTICE WALLACE B. JEFFERSON: Well also, I mean none of us judges from the trial court to the Court of Appeals, that I'm aware of, to this Court are law enforcement officers. I mean is there, with the expertise that they have in determining when and to what extent there is a threat to a public official from the release of information, shouldn't there be some kind of deference that the Court pays to their expert judgments on these matters or not?

ATTORNEY WILLIAM CHRISTIAN: I don't have a problem with deference to experts Your Honor, but I do have a problem with just going with the say-so of what a governmental agency says about whether something is a threat or not a threat. I think whatever, if you choose to write all this, it sets some sort of standard that the courts have to play a role in testing the assertions of the governmental body and after a full trial, a full and fair trial where they get to put on their witnesses, they get to choose the representative sample of the documents that they submit to the judge in camera and the judge makes that call that they haven't met that burden, then they have to release those records. They can't be simply because the government body says it's a problem or a threat

therefore the--

CHIEF JUSTICE WALLACE B. JEFFERSON: There was a famous exchange in the U.S. Supreme Court and it seems to me it was in the Pentagon Papers case where questions similar to what Justice Hecht posed to you earlier was presented to council and it is, you know Counsel if we were to release this information or hold it disclose and you knew that people were then going to be exposed to physical danger, would you still be making the argument and I think the answer was no in that case that there are going to be exceptions so what we're trying to do here is if that is your answer, figure out what those exceptions would be and to a certain extent you have to predict what would happen were some information released and I mean there is something of a professional guess or judgment. So when do we find that line is crossed and when not? What's the principal?

ATTORNEY WILLIAM CHRISTIAN: Well I think it is, perhaps I would suggest a question that is best left for another day in a case that presents a factual situation that does rise to the level of that physical safety threat. Again, the fact of findings here based on the evidence that the trial judge found don't give the Court that basis and if you are--

JUSTICE NATHAN L. HECHT: But the problem with that is at least to me the Court of Appeals explanation, which is well maybe some threat in the past, but no threat going forward. Now I mean when would there ever be a threat going forward? I mean it's, the follow-up question is how do we know when we see evidence that it amounts to an imminent physical threat?

ATTORNEY WILLIAM CHRISTIAN: Yeah. It's a difficult line to draw to be sure if that's the road that you're going to go down in crafting some sort of--

JUSTICE NATHAN L. HECHT: Well you already said we should. I thought.

ATTORNEY WILLIAM CHRISTIAN: Well, I'm saying that I don't say that you shouldn't in the proper case, but that this case doesn't present the facts upon which you should craft that rule.

JUSTICE NATHAN L. HECHT: Alright, but in a case in which, I mean how would we know when that case got here we didn't know what we were looking for?

ATTORNEY WILLIAM CHRISTIAN: Well, I think it would be a case where the government body hasn't released the very documents in the past over the years and there have been no problem at all, but the evidence--

CHIEF JUSTICE WALLACE B. JEFFERSON: What if the vouchers say very particularly that when the governor travels out of state there are two people that follow in a car or stay at the hotel with the governor, there is one person outside and this is repeated over and over again so that anyone who--

ATTORNEY WILLIAM CHRISTIAN: Next time he's going to stay in room 4043 or something like that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Or just the number of personnel, the number of security officers that are in place. That would be valuable information to someone who might want to do harm.

ATTORNEY WILLIAM CHRISTIAN: Well, what I would suggest is resisting a standard that is sitting there and thinking up some way in which some unidentified person could possibly cause harm based on the information that is there. I think that's a standard where it becomes a standardless standard and it does threaten to swallow the act because any piece of information if you sit down and think there long enough you can probably come up with some way that some person could make use of that information if they were bent on causing harm to another person. But I think if it is something that is clearly identifiable to the person in question and the governmental body can explain perhaps who they fear might use this information and exactly how they might use this information other than "I don't really know how they might use it, but it might prove useful" then that might

be a situation that rises to that level where the Court would want to address that.

JUSTICE PAUL W. GREEN: So they would have come in and explain the threat level that's existing in order to protect the documents each time? Because I can look back and say well in 2002 or even 2004 or 2005 maybe there weren't threats that existed that exist now and so are you saying that well because you disclosed those in the past and it sort of undercuts your decision now, is the agency then required to come in and say well things are different now and here's why?

ATTORNEY WILLIAM CHRISTIAN: If things are different now and they can explain why then maybe perhaps so. They didn't do it in this case.

JUSTICE PAUL W. GREEN: But maybe they shouldn't have to do that either, explaining what the specific threat is now to make it different than the year before.

ATTORNEY WILLIAM CHRISTIAN: Well I think they would have to if they're going to explain how releasing these vouchers are going to cause some imminent or a substantial threat to public safety.

JUSTICE PAUL W. GREEN: But doesn't that go to what Justice Hecht was talking about or Chief Justice Jefferson in the sense that you've got a law enforcement question here that none of us are equipped to decide?

ATTORNEY WILLIAM CHRISTIAN: I don't think it is necessarily, I think the Courts are perfectly equipped to decide what, you know whether the evidence meets a certain legal standard and for instance the new statute, a substantial threat to the public, to the safety of a public official or a public employee. The courts are going to have to, the Attorney General and the courts are going to have to apply that standard in certain factual situations and it's going to be based on evidence and yes expert testimony if the expert qualifies and explains, you know is consistent with the rules of evidence how his or her opinion is based up, is supported by the facts that they're relying on. That can be something the Court can defer to, but there has always got to be a role for the Court to test the government's assertion that any particular document is going to pose this threat of public safety. To do otherwise would undermine the Act's purpose and interest in ensuring government accountability and access to governmental information as expressly stated in the public policy of the act.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is this same question we're presented in federal court and involved the Executive Branch of the United States, do you have an opinion on what the courts have held, how the case would turn out under the federal act?

ATTORNEY WILLIAM CHRISTIAN: Well, the Federal Act of course is different. I searched for some analogous case involving say the Secret Service travel vouchers of the President and I haven't found any such case. The FOIA doesn't contain this 552.022 statute that we're dealing with here that explicitly makes vouchers releasable under the Public Information Act unless expressly confidential under the law, under other law. The only recent analogous case that I can point you to Chief Justice is the photos detailing detainee abuse in Iraq. The Court of Appeals held that those photos had to be released over the government's assertions that doing so would cause harm to our military in the field, that there was no exception to justify withholding those and that the ACLU, I believe, was entitled to those photographs.

JUSTICE NATHAN L. HECHT: But the argument there was a consequential harm, right, that by making the photos public you would infuriate the opposition and more people would be shot.

ATTORNEY WILLIAM CHRISTIAN: I think it was along those lines.

JUSTICE NATHAN L. HECHT: But it wasn't that they're going to find out the name of one of the guards, track him home and do him in on the way.

ATTORNEY WILLIAM CHRISTIAN: That's true. And what happened there was the Congress intervened in between the Court of Appeals and the Supreme Court and passed a specific law that made those specific documents confidential. Of course there was a big debate in the presidential election and President Obama, I believe, switched his opinion on that and that's how that happened. Here again, we have a statute passed by the legislature in reaction to our Court of Appeals opinion.

JUSTICE NATHAN L. HECHT: Do you think it correctly states the common law exception 151?

ATTORNEY WILLIAM CHRISTIAN: I think that it, I think it certainly encompasses what the Attorney General's opinion was and we don't have a problem with that particular standard in this case again, because the trial court applied that standard and found that these vouchers are wanting.

JUSTICE NATHAN L. HECHT: So if there were going to be a common law, other law exception 151 is not any different from what it would be?

ATTORNEY WILLIAM CHRISTIAN: Probably so. I think something along the lines of the imminent threat that the Attorney General came up with or the statutory provision that the Legislature passed.

JUSTICE PHIL JOHNSON: And even if that statute did apply you still prevail?

ATTORNEY WILLIAM CHRISTIAN: Right and it doesn't apply and I think that is another reason why this Court should be hesitant to jump in and announce a new common law rule because the Legislature has for the vast majority of information that governmental bodies hold, passed a standard that the DPS is asking you to pass. What we're dealing with here, well probably now there are no Public Information Act requests that predate the enactment of this law, so the retroactivity issue is gone. We're dealing with a specific statute that lists 18 categories of public information, most of which are dealing with the way in which the government spends public funds; vouchers, accounts, contracts, things like that and for whatever reason the legislature chose not to extend the protection that it passed for public safety to information in that category. So the question is why, in this case where the facts don't present it, does this court need to go and make a new common law rule or a new common law standard when the legislature didn't do so and the facts don't support it? I also want to address Industrial Foundation because I think that is, there is really no greater disagreement in the analysis in the briefs then what that case means. And I think Justice Wainwright's recitation of the quote was exactly our position that the Court 30 years ago said that the judiciary should not go creating common law exceptions to disclosure, but there is no basis for the judiciary to withhold information when there's no specific exception in the Act or some firmly grounded tort such as the Invasion of Privacy Tort that was addressed there. I don't think you can go and create a common law exception in this case without overruling the statutory interpretation that this Court took in Industrial Foundation. Again, you're certainly within your power to do that, but all the reasons for stari decisis and cases interpreting statutes are here. The Legislature has never, in the years since Industrial Foundation, passed any kind of statute that gives the judiciary the discretion to adopt common law exceptions or the ability to balance in a particular case whether the interest and security or some other good reason might outweigh the interest in disclosure.

JUSTICE NATHAN L. HECHT: But you, again, now let me be sure I understand, if 151 had not been passed and there were no such thing as Section 418.176 you still think there should be a common law exception if personal safety is truly at stake, in periled?

ATTORNEY WILLIAM CHRISTIAN: I guess my--

JUSTICE NATHAN L. HECHT: Unquestionably in periled?

ATTORNEY WILLIAM CHRISTIAN: --unquestionably in peril. I certainly think that is something that the Court or any court would want it to prevent from happening because I certainly, it's not our client's position that

we want to see anybody hurt.

JUSTICE NATHAN L. HECHT: Physically.

ATTORNEY WILLIAM CHRISTIAN: Physically. If there were, but I think that hypothetical factual situation is not present in this case and unless and until it does I don't think the Court needs to go messing with the Industrial Foundation case, addressing why it needs to get involved when the legislature made a certain decision to pass the statute that didn't cover these records and the facts of this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: You acknowledge that if you're entitled to it or if your client is entitled to it, anyone can get that information, correct? I mean your motives may be completely and are let's state that, completely pure, your government, the fourth branch and you're looking at government accountability and that sort of thing, but you can see that if you're entitled to them then organizations or people who have less pristine motives would also be entitled to that information.

ATTORNEY WILLIAM CHRISTIAN: Under the Act I think that is true that there is no basis for discriminating against a requestor, but I think that's another important consideration to take into account when setting. What I think if you're going to set some kind of common law standard that it is a clear standard and one that doesn't just simply defer to the governmental body because if you're treating every public information request by imagining the worst possible things that could happen or treating every requestor like a criminal then that is going to, again undermine the public policies of openness that are expressed in the Public Information Act that everyone is entitled to the information about government unless expressly made confidential under other law. Those kind of values that are expressed in the Act would be completely undermined by some type of approach that would simply assume the worst about any requestor even if that is, as you say is not even present in this particular case. I want to briefly touch on the waiver provision of the second argument, the statutory argument that they brought up first in their argument. They mentioned this Mo. Pac. v. American Statesman case. That's not even an error preservation case. I believe it's a contributory negligence case, which said that when a railroad bridge, by statute it has to be built a certain height, some engineer can't waive that requirement by telling someone it's okay to build it a little bit lower. It had nothing to do with failing to raise an argument in the trial court and then raising it only at the Texas Supreme Court level. The only other case that they cite is a juvenile delinquency case where this Court recognized a narrow exception because of the quasi criminal nature of those proceedings, for fundamental error that wasn't preserved in the cases below, but since then it has restricted that doctrine to those juvenile delinquency proceedings and the parental termination case, it said fundamental error doesn't apply. The only situation where this Court has entertained an argument that was not raised in the trial court or the court of appeals is something affecting the Court's subject matter jurisdiction and of course, this particular argument doesn't. The fact, the criminal argument is also not an excuse for failing to preserve error. There's no criminal law exception to error preservation. No one would be prosecuted for turning over records in compliance with a judgment of the trial court or this court. That is not a basis for excusing waiver and the other law basis that they argued were very specific and the judge is not obligated to search through all the statutes to find whatever some other law that they chose or failed to raise to the trial court below. As I said at the beginning, travel vouchers like these are important tools for the public to hold the public services accountable for the way in which the government spends its tax dollars. The legislature recognized this by placing vouchers within the O22 statute. DPS had a full and fair trial to establish the reasons that they believe that they shouldn't be withheld. The district court applied the legal standards it asked, the DPS asks the district court to apply and DPS failed to meet its burden. As a matter of fact, releasing these vouchers poses no substantial threat of physical harm. Under these circumstances we think you should leave for another day any changes to the common law or any changes to the interpretation of the Public Information Act. It should instead hold my client's statutory right of access to this information and affirm the judgment below.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor.

REBUTTAL ARGUMENT OF DAVID S. MORALES ON BEHALF OF PETITIONER

ATTORNEY DAVID S. MORALES: Counsel for respondent said that, why should this Court hold these documents to be not subject to the PIA when the department itself has released them in the past? All of the releases, well let's put it this way, the department has always objected to the release of the vouchers for the governor's protective detail. They have never voluntarily just given them over. It has always been subject to the Attorney General's ruling on whatever exception they presented. In the cases at issue that respondent is talking about, the department raised the 108 exception that the Attorney General said did not apply to O22 information. There was one or two other times that this happened again, but those were, the department relied on prior determinations on the exact same vouchers that the Attorney General had said you need to turn over. So the department has always protected these. There has never been a time that the department has not. The only time they've been turned around, it's been pursuant to the Attorney General's rulings.

JUSTICE DALE WAINWRIGHT: Are you, Counsel, seeking to hold that these vouchers should be excepted from disclosure or should be deemed confidential?

ATTORNEY DAVID S. MORALES: I think they are one in the same. I think they are confidential under the common law and then therefore under 101 they are accepted from disclosure.

JUSTICE DALE WAINWRIGHT: Well, under the PIA there's several categories of information. If they're excepted from disclosure the public entity can still voluntarily turn them over if they want to. If they're confidential under the PIA there's no discretion to turn them over and in fact, turning them over is a criminal offense so are you asking for an exception or that they be deemed confidential?

ATTORNEY DAVID S. MORALES: And I'll answer it this way and I will do my best to answer it. I think the City of Georgetown case muddled the waters a little bit in that there are mandatory exceptions that the Attorney General rules on and there are discretionary exceptions and the City of Georgetown doesn't distinguish between those, but the Attorney General does in its rulings going back. Now so what we're asking for this Court is to say, yes under common law these are confidential. And so as well as under the Homeland Security Act and so therefore, the criminal issues arise as far as not having discretion to turn them over and so are they waivable? We would argue that they're not and so we are asking that they're confidential as a matter of law and then so they are public information, but they're confidential as a matter of law. Therefore, they should not be produced.

JUSTICE DEBRA H. LEHRMANN: Are you saying more generally that if DPS decides that these should, that that decision should control basically?

ATTORNEY DAVID S. MORALES: No. I think that's the starting point.

JUSTICE DEBRA H. LEHRMANN: Okay.

ATTORNEY DAVID S. MORALES: I think that the law enforcement agency makes that professional judgment. Once they do that, they present it to the Attorney General in saying we want to withhold these and the Attorney General will decide whether or not they have met their burden to establishing whether or not there is a substantial threat of physical harm. If they have not, then it needs to be turned over. If they do then it gets to go on and if the requestor wants to take it up on mandamus they very well can do that. I have limited time, but I wanted to just let the Court know the department does not take lightly bringing this issue, these issues up to this Court and asking this Court to recognize a common law exception to the Public Information Act. In this case, as the record reflects, the department did turn over all of the numbers as far as how much money was spent for all of these things, they turned them over in aggregate and they turned them over in categories of what was spent on lodging, what was spent on meals, what was spent on all this. It's not that the department does not want the public to have access to what their tax dollars are spent on. They absolutely have the right to that and so that was turned over, but because of the need to protect the tactical information the operations of the protective detail, what kind of vehicles they use, whether they're armored, whether they're not armored, how many folks are

you taking, how far in advance does a protective detail go out when they're going to a particular location?

JUSTICE NATHAN L. HECHT: The Attorney General's opinion seems fairly deferential to those [inaudible]. Should the Court's be the same? You say you represent, you represent, you represent and based on that it's confidential.

ATTORNEY DAVID S. MORALES: I do think that a certain amount of deference to law enforcement in these particular areas is required. Again, although I represent the department I am not a law enforcement officer and I don't know and I rely on their professional judgment to decide whether that is right. Now I will say that the Attorney General is entitled to deference by this Court because it's the Legislature themselves that decided that the Attorney General will interpret the Act, as well as ensure its uniform applicability so the legislature has decided that the Attorney General will have that role and so there is a certain deference that needs to be applied there as well. Thirty-four years ago this Court decided that there was a common law and recognized a common law exception to the PIA that protects intimate, private facts and the Court was well within its discretion to do that. What we're talking about here is the physical safety, not only of the first family and foreign dignitaries that the protective detail protects, but also that whole category of people that have come under the physical safety exception that the Attorney General has been ruling on for the past 30 years.

JUSTICE DALE WAINWRIGHT: Or even if this Court travels, our security details.

ATTORNEY DAVID S. MORALES: Or mine, yes that's exactly right so if the Court can recognize that there's a common law interest that needs to protect someone's private, intimate facts then certainly to protect the physical safety of people that would be affected by a substantial threat of physical harm by the release of information should be protected as well.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you Mr. Morales. That concludes this argument. The cause is submitted. All arguments for this morning have concluded. The Marshall will now adjourn the Court.

MARSHALL: All rise.

2010 WL 3713705 (Tex.)

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