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SUPREME COURT OF TEXAS
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No. 23-0244

In the Supreme Court of Texas

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioner,

v.

SIERRA CLUB AND KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondents.

On Petition for Review from the Third Court of Appeals at Austin, Texas

RESPONDENT ATTORNEY GENERAL'S BRIEF ON THE MERITS

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ATTORNEYS FOR RESPONDENT ATTORNEY GENERAL OF TEXAS

November 18, 2024

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2. Did the court of appeals err in finding that the deadline to request an Attorney General decision did not reset after TCEQ sought to exclude information from Sierra Club's request?

3. Did the court of appeals err when it found that the deliberative process privilege did not present a compelling reason for TCEQ to withhold the requested information?

I. STATEMENT OF FACTS

The Attorney General (AG) adopts Petitioner's factual background regarding the procedural history of this case but adds the following. *See* Pet. Brief on Merits at 19-20.

A. Statutory Background

1. The Public Information Act favors disclosure of public information.

The Public Information Act (PIA) requires the disclosure of all recorded governmental information, as defined in Section 552.002, unless an exception applies. Tex. Gov't Code § 552.001. The PIA balances the public's interest in disclosure and confidentiality of information. *Paxton v. Dallas*, 509 S.W.3d 247, 249-50 (Tex. 2017). The PIA codifies multiple exceptions to disclosure and creates a framework for responding to requests. Tex. Gov't Code 552. However, the scale is always tipped in favor of disclosure. Tex. Gov't Code § 552.001.

2. The legislature added the definition of a business day to the PIA in response to the 2022 court of appeals' decision that is before this Court.

The PIA requires a governmental body to ask for a letter ruling from the AG within ten business days of receiving the request. Tex. Gov't

Code § 552.301(b). After the Third Court of Appeals ruled below that a business day includes every day other than a legal holiday and weekend (App. A), the legislature amended the PIA in 2023 to define a business day as a day other than a 1) weekend; 2) federal or state holiday; or 3) a day where the governmental body is closed or operating with minimum staffing, which the governmental body has designated as one of its limited non-business days. Tex. Gov't Code § 552.0031. The ten-business-day deadline may reset if the governmental body asks for a clarification or narrowing of an unclear or overbroad request for information. *City of Dallas v. Abbott*, 304 S.W.3d 380, 381 (Tex. 2010); *See* Tex. Gov't Code § 552.222(b). If a governmental body does not request an AG ruling within ten business days of receiving a request, the information will be presumed to be public, unless a compelling reason prevents disclosure. Tex. Gov't Code § 552.302.

B. Factual Background

On July 1, 2019, TCEQ received Sierra Club's public information request for documents relating to TCEQ's proposed or final Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment." App. B at C.R. 18-19. Sierra Club specifically

delineated five different categories of information that it sought to be disclosed. *Id*. Sierra Club also provided TCEQ with helpful information to find the information at issue by listing entities with whom TCEQ may have discussed such information, and by providing a list of search queries. *Id*. at 19.

On July 2, 2019, TCEQ asked Sierra Club if it sought confidential as well as non-confidential information. C.R. 42. Sierra Club responded, "[y]es, we would like to receive all responsive information that TCEQ may believe is confidential, but that must be released under the TX Public Information Act." *Id*.

TCEQ was closed on July 4th and July 5th. *Id*. at 32. On July 17, 2019, TCEQ requested an AG opinion to determine if the PIA excepted some of the information at issue from disclosure. *Id*. at 36-39. In its original request, TCEQ did not inform the AG that TCEQ had been closed on July 5th in honor of Independence Day. *Id*. The AG found that TCEQ missed the ten-day deadline and did not present a compelling reason to withhold the information despite its transgression. *Id*. at 14-17. Accordingly, the AG ordered TCEQ to disclose the information at issue.

Id. at 15-16. TCEQ filed this lawsuit against the AG to challenge the letter ruling, and the events leading up to this appeal followed.

II. SUMMARY OF ARGUMENT

The Court should reverse the court of appeals decision only regarding its holding that TCEQ did not timely request an AG opinion within the ten business days mandated by the PIA. The court of appeals misinterpreted the meaning of "business day" in the PIA. The court of appeals interpreted "business day" to be every day other than weekends and national and state holidays, in contravention of the AG's long-standing interpretation. In response, the 88th legislature spoke and enacted a law reversing the court of appeals' interpretation of "business day" under the PIA. The legislature amended the PIA to explicitly define business day to exclude days designated by a governmental body as non-business days. Tex. Gov't Code § 552.0031. Therefore, this Court should likewise side with the express intent of the legislature in its interpretation of business day.

The Court should affirm the court of appeals' holding that TCEQ's question to Sierra Club did not reset its deadline to request an AG decision. Under Section 552.222(b), a governmental body may clarify a

request or seek to narrow a request. However, the ten-day deadline to request an AG decision only restarts if the governmental body seeks to clarify or narrow "an unclear or overbroad information request." *City of Dallas,* 304 S.W.3d at 381.

Sierra Club's request for information was not unclear because Sierra Club provided a highly detailed request, even providing TCEQ with relevant search terms. App. B at C.R. 18-19. This exacting detail distinguishes Sierra Club's request for information from the request made in *City of Dallas*. Sierra Club's request for information was not overbroad either—it was merely detailed. *Id*. at 18-20. Because Sierra Club's request was not unclear or overbroad, Section 552.222(b) and *City of Dallas* do not reset the clock on TCEQ's deadline to request an AG opinion. Therefore, the court of appeals did not err in finding that TCEQ's question to Sierra Club did not reset its ten-day deadline.

The Court should affirm the court of appeals' holding that TCEQ did not present a compelling reason to withhold the information at issue. TCEQ relies upon *Paxton v. Dallas* to argue that the deliberative process privilege presents a compelling reason to withhold the information at issue. But *Paxton v. Dallas* is distinguishable because it concerns the

attorney-client privilege rather than the deliberative process privilege. The attorney-client privilege occupies a category of its own as the "most sacred" of legal privileges. App. D at *Paxton v. Dallas*, 509 S.W.3d at 259. Therefore, the court of appeals did not err when it found that the deliberative process privilege did not present a compelling reason for TCEQ to withhold the information at issue.

III. ARGUMENT AND AUTHORITIES

A. The court of appeals erred in its interpretation of "business days" to exclude TCEQ's agency holiday.

The court of appeals focused exclusively on the common and ordinary meaning of "business day," and overlooked the agency and legislative history of the term of art. App. A at 8-10. As a result, the court of appeals' interpretation was much stricter than the legislature intended. Based on the common meaning of "business day" the court of appeals concluded that a business day includes every day other than a weekend, national holiday, or state holiday. *Id*. at 10. Therefore, under the court of appeals' interpretation, every weekday, which is not a national or state holiday, is considered a business day even if the

governmental body closes its offices or operates with minimal staff on that day. *Id.*

Prior to the 88th legislative session (2023), the PIA did not explicitly define business day. *See* Tex. Gov't Code § 552.0031. Yet, the PIA still required a governmental body to request an AG opinion within ten business days of receiving the request. Tex. Gov't Code § 552.301(b). The AG has maintained a longstanding interpretation of "business day" as a day when a governmental body is open for business. *See* Tex. Att'y Gen. OR2004-7902, OR2006-06146, OR2008-03636, OR2008-17124, OR2009-04916.

The legislative history of the PIA further supports the AG's longstanding interpretation of business day. Prior to 1997, the PIA required governmental bodies to ask for an AG opinion within ten *calendar* days of receiving the request. *See* Act of May 25, 1995, 74th Leg., R.S., ch. 1035, § 18, 1995 Tex. Gen. Laws 5127, 5139 (amended 1997) (current version at Tex. Gov't Code § 552.301(b)). The 75th Texas Legislature (1997) amended the PIA to require governmental bodies to request an AG opinion within ten *business* days. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1231, § 5, 1997 Tex. Gen. Laws 4697, 4701 (amended

1999) (current version at Tex. Gov't Code § 552.301(b)). By amending the PIA language to require a governmental body to request an AG opinion within ten business days, rather than calendar days, the legislature removed from the ten-day request period Saturdays, Sundays, and any other day in which the entity was closed.

This suggests that the legislature understood that requesting an AG opinion within ten calendar days was burdensome when the governmental body was closed for business during some of those days. Other sections of the PIA still require a governmental body to act within a certain number of calendar days. Tex. Gov't Code §§ 552.303, .324, .353. This underscores that the legislature understood the different impacts of requiring compliance within a number of business days versus calendar days. By amending the time to request an AG opinion to ten business days, the legislature alleviated the burden of the PIA's previous response deadline based on calendar days.

After the issuance of the court of appeals' opinion in this case, the 88th legislature, in 2023, explicitly defined "business day" in the PIA. Tex. Gov't Code § 552.0031. The legislature rejected the court of appeals' determination that a business day only included a day other than a

weekend or legal holiday. Instead, the legislature recognized that a business day included a day other than a weekend, legal holiday, or a governmental body's designated non-business day. *Id*. Under the PIA's current definition of business day, a governmental body may designate up to ten non-business days per calendar year where the governmental body's administrative offices are closed or when the governmental body is operating with minimal staffing. Tex. Gov't Code § 552.0031(f). The AG does not take a position on whether or not Section 552.0031 applies retroactively. However, the amendment reinforces that the legislature intended to exclude days where an agency is closed from the definition of business day. This is apparent because the AG maintained a longstanding interpretation of the PIA's definition of business day, which the legislature is presumed to know, and which the legislature reinstated after the court of appeals contradicted that interpretation. *See Berry v. State Farm Mut. Auto. Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App.—Austin, 2000, no pet.).

Now that the legislature has spoken, it is clear the court of appeals misunderstood the legislature's intent and misinterpreted the meaning of "business day". Because "business day" includes an agency holiday

when the agency is closed, such as TCEQ's closure for July 5th in honor of Independence Day, TCEQ timely requested an AG opinion. TCEQ received the request on Monday July 1, 2019, and requested an AG opinion on July 17, 2019. App. B at C.R. 18-19; C.R. 36-39. Excluding non-business days from the deadline calculation, including weekends, July 4th and 5th, TCEQ timely requested an AG opinion. The Court should reverse the court of appeals' decision on this point, consistent with legislative intent.

B. The court of appeals did not err when it found that TCEQ's request to narrow Sierra Club's request did not reset the deadline to request an AG decision.

TCEQ's question to the Sierra Club, asking if it was requesting confidential information, did not fall within the limits of Section 552.222(b). "If what information is requested is unclear to the governmental body," Section 552.222(b) allows the governmental body to "ask the requestor to clarify the request." Tex. Gov't Code § 552.222(b). Because the Sierra Club's request was not unclear, this part of Section 552.222(b) does not apply. Additionally, "if a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed[.]" *Id*. This part

of Section 552.222(b) allows the governmental body to make inquiries of the requestor, which is otherwise prohibited, but it does not reset the clock on a request.

TCEQ relies upon *City of Dallas* to advance the argument that its question to Sierra Club should have re-started the ten-day deadline. However, *City of Dallas* is inapplicable in this case. *City of Dallas* held that the "timeliness of a request for an attorney general opinion is measured from the date a party seeking public information responds to a governmental body's good-faith request for clarification or narrowing of an *unclear or overbroad information request*." App. C at *City of Dallas*, 304 S.W.3d at 381 (emphasis added). The requestor in *City of Dallas* originally requested "[a]ny and all information pertaining to the City of Dallas 'Assessment Center Process' for uniform positions of the Dallas Fire and Police Departments." *Id.* The City of Dallas sought clarification of this request by asking if the requestor sought "information regarding specific assessment centers" and inquiring about the relevant time-period. *Id.* at 382. In holding that the ten-day period to request an AG opinion is measured from the clarification date, the Court relied upon the fact that the City of Dallas could not have reasonably determined what

documents the requestor wanted from the requestor's original request. *Id*. at 385-86.

In its email to the Sierra Club, TCEQ asked if the Sierra Club sought confidential information related to its PIA request for information related to the TCEQ proposed Development Support Document, Ethylene Oxide Carcinogenic Dose-Response Assessment (June 28, 2019). C.R. 42. This is a yes or no question regarding a specific document. This contrasts greatly with the clarification request in *City of Dallas*.

The difference between the value of the requestor's response to the governmental body's question underscores the difference between the requests made by the City of Dallas and TCEQ. In *City of Dallas*, the requestor clarified that his request referred to the "positions of the Dallas Fire Rescue Fire Lieutenant and Captain for the year 2000[,]" and he specifically sought information about 1) how the Assessment Process was administered; 2) job analysis for the stated positions; 3) contracts to conduct the Assessment Center; and 4) information on percentage mirroring between Fire Prevention and Fire Operations. App. C at *City of Dallas,* 304 S.W.3d at 382. This response gave the City of Dallas actionable feedback. Based on the requestor's feedback, the City of Dallas

could narrow its search to specific job positions, for a specific time, regarding specified categories instead of locating *all* of the information related to *all* positions at the Dallas Fire and Police Departments since the inception of those departments, as required by the first request.

In response to TCEQ's request, Sierra Club answered, "[y]es, we would like to receive all responsive information that TCEQ may believe is confidential, but that must be released under the TX Public Information Act." C.R. 42. This response left TCEQ in the same place at which it started. And, even if Sierra Club had said 'no' to TCEQ's request, TCEQ would still have had to locate *all* of the responsive information to determine if any of the documents contained confidential information. Because the Sierra Club had requested information related to a single document, and TCEQ only asked Sierra Club for a 'clarification' that would not have altered its behavior, the court of appeals reasonably found that "it was clear to [TCEQ] what information the Sierra Club was requesting." App. A. at 12.

If the clarity of the request is not at issue, then the *City of Dallas* allows for a narrowing of an overbroad request to restart the ten-day deadline. App. C at *City of Dallas*, 304 S.W.3d at 381. But the Sierra

Club's request to TCEQ was not overbroad—it was merely detailed. The Sierra Club requested information related to five different topics, which the Sierra Club explained in detail. App. B at C.R. 18-19. The Sierra Club further explained what type of information it sought by providing a lengthy list of entities with whom TCEQ may have discussed the relevant information. *Id*. at C.R. 19. Furthermore, Sierra Club provided specific relevant search terms for TCEQ to find the relevant information. *Id*. The PIA makes all information recorded by a governmental body publicly available upon request unless an exception applies. Tex. Gov't Code § 552.001; *See* Tex. Gov't Code §§ 552.002, .021, .022. The Sierra Club's request was not overbroad just because it was long.

Accordingly, the court of appeals' opinion does not conflict with *City of Dallas*. TCEQ has alleged that it did not know what documents were responsive to Sierra Club's PIA request, but the court of appeals found otherwise. App. A. at 12. Because the court of appeals found that TCEQ understood what information Sierra Club requested, the court of appeals found that TCEQ's email to Sierra Club did not seek to clarify or narrow an unclear or overbroad request. Because this is a reasonable conclusion, the Court should find that the court of appeals did not err when it found

that TCEQ's request to Sierra Club did not reset the ten-business day deadline.

Because the court of appeals' decision did not change the standard applicable to resetting the ten-day deadline, it does not impose an undue burden upon governmental bodies. The standard remains that the ten-day deadline will reset if a governmental body requests a clarification or narrowing of an unclear or overbroad request. The court of appeals applied this standard in its decision below and found that TCEQ did not meet its requirements. Every governmental body is on the same footing because they are required to submit a request for an AG opinion within ten business days of being notified of what the requestor requests. Further, TCEQ does not allege that the standard ten business day requirement in the PIA poses an undue burden upon governmental bodies, so the same standard applied by the court of appeals would not impose an undue burden either.

The AG takes no position as to whether TCEQ's failure to warn Sierra Club about the consequences of failing to respond to a request for clarification prevented the resetting of the statutory clock to request an AG opinion.

C. The court of appeals did not err when it found that the deliberative process privilege did not present a compelling reason for TCEQ to withhold the requested information.

The deliberative process privilege does not constitute a compelling reason to avoid disclosure of the information at issue pursuant to Section 552.302. Codified in Section 552.111 of the PIA, the deliberative process privilege prevents disclosure of agency pre-decisional communications that directly lead to creation of an agency's policy. Tex. Gov't Code § 552.111; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361, 364 (Tex. 2000).

TCEQ relies upon *Paxton v. Dallas* to argue that the deliberative process privilege applies, but *Paxton v. Dallas* is distinguishable because it solely addresses the attorney-client privilege. In *Paxton v. Dallas*, the Texas Supreme Court found that a governmental body has a compelling reason to withhold information under Section 552.302 only if the information is of such a pressing nature "that it outweighs the interest of favoring public access." App. D at *Paxton v. Dallas*, 509 S.W.3d at 259. The Court concluded that the attorney-client privilege fit this definition. *Id*. at 266-67.

In its discussion of the attorney-client privilege, the Court distinguished the attorney-client privilege from other privileges. The Court noted that "the attorney-client privilege holds a special place among privileges: it is the 'oldest and most venerated of the common law privileges of confidential communications.' As the 'most sacred of all legally recognized privileges,' 'its preservation is essential to the just and orderly operation of our legal system.'" *Id.* at 259

The deliberative process privilege does not occupy the same esteemed echelon as the attorney-client privilege. Even after the death of a client, the attorney-client privilege remains. Tex. R. Evid. 503(c)(3); *Morrison v. State,* 575 S.W.3d 1, 26 (Tex. App.—Texarkana 2019, no pet.). However, the deliberative process privilege may be overcome by a sufficient showing of need.[1] *Fed. Trade Comm'n v. Warner Commc'ns Inc.,* 742 F.2d 1156, 1161 (9th Cir. 1984); *Harding v. Cty. of Dallas, Tex.*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *12 (N.D. Tex. 2016). Therefore, the court of appeals did not err in finding that the deliberative

[1] As the PIA is based on the FOIA, it is appropriate to use federal case law as a guide. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000).

process privilege did not present a compelling reason for TCEQ to withhold the information at issue.

IV. Conclusion & Prayer

The AG respectfully requests the Court to reverse the court of appeals' decision in part and affirm in part. The Court should reverse the court of appeals decision only regarding its holding that TCEQ did not timely request an AG opinion within the ten business days mandated by the PIA. The Court should affirm the court of appeals' holding that TCEQ's question to Sierra Club did not reset its deadline to request an AG decision. The Court should also affirm the court of appeals' holding that TCEQ did not present a compelling reason to withhold the information at issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2) and relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this document is 3,525, excluding those portions of the Respondent's Brief exempted by Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, a true and correct copy of the above and foregoing document was sent to the following attorneys via electronic service and/or electronic mail:

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INDEX OF APPENDICES

Appendix A

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00256-CV

Texas Commission on Environmental Quality, Appellant

v.

Sierra Club and Ken Paxton, Attorney General of Texas, Appellees

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-006941, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

MEMORANDUM OPINION

The Texas Commission on Environmental Quality (the Commission) sued Ken Paxton, Attorney General of the State of Texas, seeking declaratory relief from compliance with an attorney general decision ordering the Commission to disclose certain information requested by the Sierra Club. *See* Tex. Gov't Code § 552.324 (authorizing suit against attorney general by governmental body that seeks to withhold information attorney general has ordered disclosed pursuant to Public Information Act). The Sierra Club intervened, seeking a writ of mandamus to compel the disclosure of the responsive documents. *See id.* § 552.321 (waiving sovereign immunity for requestor seeking mandamus to compel disclosure). The Sierra Club and the Commission filed competing motions for summary judgment. The district court denied the Commission's motion, granted the Sierra Club's, and ordered the Commission to produce the requested documents to the Sierra Club. The Commission then perfected this appeal. We will affirm the district court's summary judgment.

BACKGROUND

On July 1, 2019, the Commission received a request pursuant to the Public Information Act (PIA) for documents and records relating to the Commission's proposed or final Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment" and documents and records relating to the Commission's action to create a unit risk factor, unit risk estimate, or cancer-risk value or metric for ethylene oxide. The Commission released some information, asserted that some of the information was not subject to the PIA, and withheld some information on the ground that it was excepted from disclosure under PIA section 552.111, which provides that "[a]n interagency or intraagency memorandum or letter that would not be available to a party in litigation with the agency is excepted from the requirements of Section 552.021 [that public information must be made available to the public]." *Id.* § 552.111. The Commission asserted that it withheld information it maintained was protected by the deliberative process privilege. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000) (recognizing that "Texas courts and the Attorney General have consistently recognized that [the exception from disclosure provided by section 552.111] encompasses the common law deliberative process privilege, which protects certain agency communications from discovery" and that the privilege protects predecisional and deliberative communications related to agency's policymaking).

In conjunction with its decision to withhold certain records, the Commission sought a decision from the Attorney General's Open Records Division (ORD) that the records it withheld fell within the agency memorandum exception in Government Code section 552.111

because they were protected by the deliberative process privilege.[1] *See* Tex. Gov't Code § 552.301(a) (governmental body that receives written request for information it wishes to withhold under section 552.111 must ask for decision from attorney general about whether information is within that exception), (b) (governmental body must ask for attorney general's decision and state exceptions that apply not later than 10th business day after date of receiving the request). The Commission placed its letter requesting the Attorney General's decision into the Commission's interagency outgoing mailbox on July 17, 2019. The ORD's letter decision determined that the Commission's username and password for a website were not information made public under the PIA and that it was not required to release it. With regard to the Commission's request for a decision on whether it could withhold information based on section 552.111, the ORD stated that because the Commission did not timely request an attorney general decision "the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure." *See id.* § 552.302 (if governmental body does not request attorney general decision within ten business days of receiving written request for information, requested information is presumed to be subject to required public disclosure and must be released unless there is compelling reason to withhold it); *Paxton v. City of Dallas*, 509 S.W.3d 247, 252 (Tex. 2017) ("In harmony with the policy underlying the PIA's prompt-production requirement, the governmental body asserting an exception must request an attorney general decision 'within a reasonable time but not later than the 10th business day after the date of receiving the written request.' If a request for decision is untimely, 'the information requested

[1] The Commission also asserted that it could withhold an email communication containing the Commission's username and password for the American Conference of Governmental Industrial Hygienists on the ground that it is not public information subject to the PIA. The ORD determined that this communication could be withheld and it is not at issue in this appeal.

in writing is presumed to be subject to required public disclosure and must be released *unless there is a compelling reason to withhold the information.*'") (citations omitted). The ORD further determined that the Commission failed to establish a compelling reason to withhold the information and, consequently, the Commission could not withhold the requested information pursuant to Government Code section 552.111. *See* Tex. Att'y Gen. OR2019-26474.

The Commission then filed suit against the Attorney General seeking to withhold the records from the Sierra Club. *See* Tex. Gov't Code § 552.324 (governmental body may file suit against attorney general seeking declaratory relief from attorney general opinion issued under section 552.301). The Attorney General answered and requested that the district court render judgment declaring that the information must be disclosed to the requestor. The Sierra Club intervened and sought a writ of mandamus to compel the Commission to disclose the requested information. *See id.* § 552.321 (requestor may file suit for writ of mandamus compelling governmental body to make information available for public inspection if governmental body refuses to supply information that attorney general has determined is not excepted from disclosure). The Commission and the Sierra Club each filed motions for summary judgment. The district court granted the Sierra Club's motion and denied the Commission's. The Commission perfected this appeal.

APPLICABLE LAW

The Public Information Act

The purpose of the PIA is to provide public access "at all times to complete information about the affairs of the government and the official acts of public officials and employees." *Id.* § 552.001. "The Act mandates a liberal construction to implement this policy and one favoring a request for information." *City of Garland*, 22 S.W.3d at 356. On receiving a

request for information, a governmental body's public information officer must promptly produce public information for inspection, duplication, or both. Tex. Gov't Code § 552.221(a). Certain information is specifically excepted from required disclosure. *Id.* §§ 552.101-.154.

If a governmental body believes the requested information is excepted from disclosure, and if there has been no previous determination on the subject, the PIA requires the governmental body to state the exceptions it believes apply and request an opinion from the attorney general not later than the tenth business day after receiving the request. *See id.* § 552.301; *City of Garland*, 22 S.W.3d at 356. If the governmental body does not timely request an attorney general's opinion, the information is presumed public and must be released unless there is a compelling reason to withhold it. *See* Tex. Gov't Code § 552.302; *City of Dallas v. Abbott*, 304 S.W.3d 380, 381 (Tex. 2010). If the attorney general rules that the PIA does not exempt the information from disclosure or that a governmental body that has failed to timely request an opinion has not demonstrated a compelling reason to withhold the information, the public information officer must make it available to the requesting party or seek a judicial determination that the information does not have to be disclosed. *See* Tex. Gov't Code §§ 552.302, .324; *City of Garland*, 22 S.W.3d at 356. The governmental body has the burden of proving in a judicial proceeding that an exception to disclosure applies. *City of San Antonio v. Abbott*, 432 S.W.3d 429, 431 (Tex. App.—Austin 2014, pet. denied).

Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When the trial court does not specify the grounds for granting the motion, we must uphold the judgment if any of the grounds asserted in the motion and preserved for appellate review are meritorious. *Provident Life & Accident Ins. v. Knott*,

128 S.W.3d 211, 216 (Tex. 2003). When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Garland*, 22 S.W.3d at 356; *Abbott v. Dallas Area Rapid Transit*, 410 S.W.3d 876, 879 (Tex. App.—Austin 2013, no pet.). When both parties move for summary judgment on the same issue and the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented and, if we determine that the trial court erred, render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005) (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000)).

This appeal requires that we construe the PIA. In general, matters of statutory construction are questions of law that we review de novo. *See Railroad Comm'n of Tex. v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context or the plain meaning leads to absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). "Construction of a statute must be consistent with its underlying purpose." *Northwestern Nat'l Cnty. Mut. Ins. v. Rodriguez*, 18 S.W.3d 718, 721 (Tex. App.—San Antonio 2000, pet. denied).

DISCUSSION

Was the Commission's Request for an Attorney General Decision Timely?

In its first issue, the Commission asserts that its request for an attorney general decision was timely—i.e., that the request was made within ten business days of the Commission's receipt of the Sierra Club's request. *See* Tex. Gov't Code § 552.301(b). The

Commission received the Sierra Club's request on Monday July 1, 2019. It placed its request for an attorney general decision in interagency mail on Wednesday July 17, 2019. The parties agree that Thursday, July 4; Saturday, July 6; Sunday, July 7; Saturday, July 13; and Sunday, July 14 are not counted for purposes of determining what date constitutes the tenth business day from July 1. The Sierra Club argues that the tenth business day after Monday, July 1, 2019, was Tuesday, July 16, 2019, and that the Commission's July 17 request was therefore untimely. The Commission counters that, in addition to the weekend dates and the July 4 holiday, Friday, July 5 should not be counted because the Commission "was closed" on that day "in observance of the Independence Day holiday," and therefore July 5 was not a "business day" for purposes of calculating the deadline for requesting an attorney general opinion. As evidence that it was "closed" on July 5, 2019, the Commission submitted the affidavit of one of its legal assistants in which she attested that "the agency was closed July 4-5, 2019, in observance of the Independence Day holiday." Thus, according to the Commission, the tenth business day after July 1, 2019, was July 17, 2019, the day it placed its request in interagency mail. *See id.* § 552.308(b) (request to attorney general is timely if agency provides evidence sufficient to establish that request was deposited in interagency mail within specified time period). To resolve this dispute, we must determine the meaning of the term "business day" in the PIA—specifically whether it includes dates that an agency has unilaterally declared itself to be "closed."

Throughout the PIA, the statute mandates that virtually all deadlines are calculated using "business days." *See, e.g.*, *id.* §§ 552.221(d) (directing agency that cannot produce public information for inspection within ten business days after date information is requested to certify fact in writing and set date information will be available), .225(a) (providing

that requestor must complete examination of information not later than tenth business day after date information is made available), .2615(b) (providing that requestor must respond to itemized cost of copying requested public information within ten business days after date statement sent to requestor), .301(b) (request for attorney general opinion must be made within ten business days of receiving request for public information). The term "business day" is not defined in the statute. "When a statute uses a word that it does not define, our task is to determine and apply the word's common, ordinary meaning." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). In determining the common, ordinary meaning of a term, we may look to a "wide variety of sources, including dictionary definitions, treatises and commentaries, our own prior constructions of the word in other contexts, the use and definition of the word in other statutes and ordinances, and the use of the words in our rules of evidence and procedure." *Id.* The common meaning of "business day" is "a day that most institutions are open for business." *Black's Law Dictionary* 454 (9th ed. 2009). The term "business day" is defined in the Texas Government Code, and in other statutes, as a day other than a Saturday, Sunday, or legal holiday. *See* Tex. Gov't Code § 2116.001 ("'Business day' means day other than a Saturday, Sunday, or banking holiday for bank chartered under the laws of this state."); Tex. Est. Code § 452.004 (defining "business day" as "a day other than a Saturday, Sunday, or holiday recognized by this state"); Tex. Fam. Code § 86.0011 (defining "business day" as "a day other than a Saturday, Sunday, or state or national holiday"); Tex. Health & Safety Code § 775.0221 (defining "business day" as "a day other than a Saturday, Sunday, or state or national holiday"); Tex. Ins. Code § 542.051 (defining "business day" as "a day other than a Saturday, Sunday, or holiday recognized by this state"); Tex. Loc. Gov't Code § 143.034 (when computing five-business-day period for seeking review of fire or police department promotional exam results "a Saturday,

Sunday, or legal holiday is not considered a business day"); Tex. Prop. Code § 62.026 (defining "business day" as "a day other than a Saturday, Sunday, or holiday recognized by this state"). Similarly, for purposes of computing time periods, the Texas Rules of Civil Procedure exclude Saturdays, Sundays, and legal holidays when the last day of the time period falls on one of those days and also excludes Saturdays, Sundays, and legal holidays from computation of any time period of five days or less. *See* Tex. R. Civ. P. 4. And for the purpose of computing time periods, the Texas Rules of Appellate Procedure also exclude Saturdays, Sundays, and legal holidays when the last day of the time period falls on one of those days. *See* Tex. R. App. P. 4.1. None of these statutes or rules contemplates that a time period may be extended by not counting a day on which the person or entity required to meet the deadline has decided that it will be "closed."

The Legislature has defined both the national holidays and state holidays that the state recognizes. *See* Tex. Gov't Code § 662.003. The national holidays are: (1) the first day of January, "New Year's Day"; (2) the third Monday in January, "Martin Luther King, Jr. Day"; (3) the third Monday in February, "Presidents' Day"; (4) the last Monday in May, "Memorial Day"; (5) the fourth day of July, "Independence Day"; (6) the first Monday in September, "Labor Day"; (7) the 11th day of November, "Veterans Day"; (8) the fourth Thursday in November, "Thanksgiving Day"; and (9) the 25th day of December, "Christmas Day." *Id.* § 662.003(a). The state holidays are (1) the 19th day of January, "Confederate Heroes Day"; (2) the second day of March, "Texas Independence Day"; (3) the 21st day of April, "San Jacinto Day"; (4) the 19th day of June, "Emancipation Day in Texas"; (5) the 27th day of August, "Lyndon Baines Johnson Day"; (6) the Friday after Thanksgiving Day; (7) the 24th day of December; and (8) the 26th day of December. *Id.* § 662.003(b). The Legislature has also

designated the days on which Rosh Hashanah, Yom Kippur, or Good Friday fall as "optional holidays." *Id.* § 662.003(c). July 5th, the day after Independence Day, is not included in the list of holidays or optional holidays recognized by the State. Moreover, the Government Code provides that a state agency "shall have enough employees on duty during a state holiday to conduct the public business of the agency or institution." *See id.* § 662.004. Thus, even when a state agency observes a state holiday, it must be staffed sufficiently to conduct its public business. It must also be the case, then, that when an agency such as the Commission chooses to "close" its office on a day that is neither a national nor state holiday, such as July 5th, it must still have enough employees on duty to conduct its public business, which includes complying with the deadlines set forth in the PIA for handling requests for public information. *See Paxton*, 509 S.W.3d at 251 ("The prompt production of public information furthers the 'fundamental philosophy' that 'government is the servant and not the master of the people.'"); *see also* Tex. Gov't Code § 552.221 (governmental body must "promptly" produce public information after receiving request for disclosure, meaning "as soon as possible under the circumstances, that is, within a reasonable time, without delay"). We see no support in the common meaning of the term "business day," in the manner in which it has been defined in various statutes and court rules, or in the policy of the PIA, for concluding that the term "business day" excludes not only Saturdays, Sundays, and legal holidays, but also days that a state agency decides to "close" its office in extended observance of a national holiday. Therefore, July 5, 2019, constitutes a "business day" for purposes of computing the deadline for the Commission to have requested an attorney general decision about whether the information the Sierra Club requested was within the asserted exception to disclosure under the PIA.

The Commission also asserts that the ten-business-day period should commence on July 2, rather than July 1, because it maintains that it asked the Sierra Club to clarify its request pursuant to Government Code section 552.222(b). *See* Tex. Gov't Code § 552.222(b). That provision of the PIA provides, "If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request." When a governmental body acting in good faith requests clarification, the ten-day period to request an attorney general's opinion is measured from the date the request is clarified. *See City of Dallas*, 304 S.W.3d at 381, 384. The Commission argues that the following July 2, 2019 email from the Commission to a Sierra Club representative constitutes a request for clarification under section 552.222(b):

> We are in receipt of your public information request to the Texas Commission on Environmental Quality, PIR No. 48291 for information related to the TCEQ, proposed Development Support Document, Ethylene Oxide Carcinogenic Dose-Response Assessment (June 28, 2019).
>
> Please clarify whether your request is seeking confidential information. If you request confidential information, we will need to seek an Attorney General opinion for the requested confidential material or information. It may take up to 60 days for the Attorney General to reach a determination on our request.
>
> Please let me know how you would like to proceed.

On the same day, the Sierra Club representative responded: "Yes, we would like to receive all responsive information that TCEQ may believe is confidential, but that must be released under the TX Public Information Act." The issue, then, is whether the Commission's email constitutes a section 552.222(b) good faith request to clarify "what information" the Sierra Club was requesting because it was unclear to the Commission "what information" was included in the request.

For two reasons, we conclude that this email does not constitute a section 552.222(b) request for clarification. First, the email does not ask the Sierra Club to clarify the subject matter of the information it has requested but, rather, asks the Sierra Club if it is requesting information related to the subject matter of the request that the Commission considers to be confidential. The email begins by stating that the Commission has received the Sierra Club's request for "information related to the TCEQ proposed Development Support Document, Ethylene Oxide Carcinogenic Dose-Response Assessment (June 28, 2019)." This indicates that it was clear to the Commission what information the Sierra Club was requesting but simply wanted to determine whether the Sierra Club sought to obtain both confidential and non-confidential *categories* of responsive documents. Second, the email does not include the statutorily mandated statement regarding the consequences of failing to timely respond to a written request for clarification. *See* Tex. Gov't Code §§ 552.222(e) ("A written request for clarification or discussion under Subsection (b) [] *must include* a statement as to the consequences of the failure by the requestor to timely respond to the request for clarification, discussion, or additional information." (emphasis added)); .222(d) ("If by the 61st day after the date a governmental body sends a written request for clarification or discussion under Subsection (b) [] the governmental body, officer for public information, or agent, as applicable, does not receive a written response from the requestor, the underlying request for public information is considered to have been withdrawn by the requestor."). The failure of the Commission to include the statutorily mandated warning confirms that the Commission's email was not intended to be a section 552.222(b) request for clarification that would have any effect on the computation of the ten-business day deadline for requesting an attorney general decision. We overrule the Commission's first issue.

Did the Commission Establish a Compelling Reason to Withhold Information?

In its second issue, the Commission argues that, even if we conclude that its request for an attorney general decision was untimely, the information that it contends is covered by the deliberative process privilege may still be withheld because that privilege establishes a compelling reason for withholding the information under section 552.302. *See id.* § 552.302 (untimely request for attorney general decision gives rise to presumption that information must be disclosed absent a "compelling reason to withhold the information"). The issue before us, then, is whether the interests protected by the deliberative process privilege are sufficiently compelling to rebut the public-disclosure presumption that arises on expiration of the PIA's ten-business day deadline. *See Paxton*, 509 S.W.3d at 256 ("In some instances, important policies and interests that animate a statutory exception are compelling *in their own right*.").

The PIA does not define the reasons that may be "compelling" enough to withhold requested information following an untimely request for an attorney general decision. The Texas Supreme Court, however, has provided extensive guidance on the issue in its opinion in *Paxton v. City of Dallas*. *See id.* at 256-60 (analyzing whether attorney-client privilege is compelling reason to withhold requested information). The court explained:

> The meaning of the term "compelling" is of vital importance to our analysis because it represents a qualitative limitation on the justifications that permit withholding information from public disclosure. Neither *a* reason nor even a *good* reason would be sufficient to rebut the public-disclosure presumption. The reason must be "compelling."
>
> Our examination of dictionaries, treatises, and judicial constructions of similar language reveals the term "compelling" connotes urgency, forcefulness, and significantly demanding concerns. "Compelling" means "[u]rgently requiring attention" and "[d]rivingly forceful"' "not able to be resisted; overwhelming" and "not able to be refuted; inspiring conviction"; and "calling for examination, scrutiny, consideration, or thought."

Id. at 258. The court then analyzed whether the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption and concluded that they are. The court explained that the "attorney-client privilege holds a special place among privileges" and is the "oldest and most venerated" and "the most sacred of all recognized privileges." *Id.* at 259. The court reasoned that the attorney-client privilege was a compelling reason to withhold documents presumed to be public because the privilege is "essential to the just and orderly operation of our legal system" and "has been a cornerstone of our legal system for nearly 500 years." *Id.* at 261.

Informed by the Texas Supreme Court's analysis in *Paxton*, we consider whether the deliberative process privilege also protects an interest sufficiently compelling to rebut the public-disclosure presumption. Section 552.111 exempts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Tex. Gov't Code § 552.111. "Texas courts and the Attorney General have consistently recognized that this exception encompasses the common law deliberative process privilege, which protects certain agency communications from discovery." *City of Garland*, 22 S.W.3d at 361 (citations omitted). In contrast to the attorney-client privilege, the deliberative process privilege was not recognized in Texas until the year 2000. *See id.* at 360 ("Whether the deliberative process privilege exists in Texas and, if it does, the privilege's scope, are issues of first impression for this Court."). In recognizing the privilege, the court cautioned that its scope must be limited to resist the "'inevitable temptation' on the part of governmental litigants to interpret the exception as expansively as necessary to apply it to the particular records it seeks to withhold," which would result in allowing "the exception to swallow the [PIA]" and undermine the "strong statement of public policy favoring public access to governmental information and

[the] statutory mandate to construe the [PIA] to implement that policy and to construe it in favor of granting a request for information." *Id.* at 362-64.

The deliberative process privilege exemption in the PIA is modeled after an exemption in the Freedom of Information Act that protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "The purpose of the privilege is to protect the agency decision-making process from the inhibiting effect that disclosure of predecisional advisory opinions and recommendations might have on the 'frank discussion of legal or policy matters' in writing." *Skelton v. United States Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982) (discussing statutorily created deliberative process privilege in Freedom of Information Act). The privilege, however, is qualified; it is not absolute. *Federal Trade Comm'n v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). "The deliberative process privilege is qualified and can be overcome 'by a sufficient showing of need.'" *Harding v. City of Dallas*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *12 (N.D. Tex. Dec. 23, 2016). Courts consider multiple factors when determining whether the deliberative process privilege is overcome, including the relevance of the evidence, the availability of other evidence, the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions, the interest of the party seeking the information in accurate judicial fact finding, and the presence of issues concerning alleged governmental misconduct. *See Doe v. City of San Antonio*, No. SA-14-CV-102-XR, 2014 WL 6390890, at *2 (W.D. Tex. 2014) (citing *Smartwood v. County of San Diego*, No. 12CV1665-W BGS, 2013 WL 6670545 (S.D. Cal. Dec. 18, 2013) (holding privilege did not protect child welfare service agency's internal investigation from discovery in a section 1983 lawsuit after balancing relevant factors)). The deliberative process

privilege exception to disclosure is "'not an absolute shield' and is to be construed in the light of the act's mandate that information regarding the affairs of government and the official acts of those who serve the public be freely available to all." *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citing *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.—Austin 1992, no writ)). Significantly, unlike the attorney-client privilege, our jurisprudence has not developed procedural safeguards against circumstances in which a party inadvertently waives the privilege by missing a deadline. *Cf.* Tex. R. Civ. P. 193.3(d); *In re Certain Underwriters at Lloyd's London*, 294 S.W.3d 891, 904 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam) (under Rule 193.3(d), party who fails to diligently screen documents before producing them does not waive claim of attorney-client privilege and rule was intended to restrict waiver in variety of situations that might arise from inadvertent disclosure of privileged documents).

For these reasons, we decline to hold that the deliberative process privilege is on equal footing with the attorney-client privilege such that its application constitutes a compelling reason to withhold information. Unlike the attorney-client privilege, the deliberative process privilege does not "reflect a foundational tenet in law," is not an "old and venerated" privilege, and is not unqualified. We conclude that the deliberative process privilege does not meet the Legislature's requirement that a justification for withholding information presumed public be "compelling." *See Paxton*, 509 S.W.3d at 258 ("The meaning of the term 'compelling' is of vital importance to our analysis because it represents a qualitative limitation on the justifications that permit withholding information from public disclosure."). We overrule the Commission's second issue.

May the Commission Withhold Documents It Claims Are Not Responsive to the PIA Request?

In its third issue, the Commission asserts that the trial court erred by rejecting the Commission's argument, raised for the first time in its third amended motion for summary judgment, that certain documents it seeks to withhold are not responsive to the Sierra Club's PIA request. In its summary-judgment motion, the Commission identified six documents that it claimed were not responsive to the PIA request. The Commission stated that it had produced these documents "in an abundance of caution, as there was not adequate time to review all 6,414 pages of potentially responsive information provided by various TCEQ staff before the request for a ruling to the Attorney General was submitted." Thus, the Commission sought a ruling from the district court that "certain portions of the information at issue are not responsive to the Sierra Club's [PIA] request, and therefore, should not be released." We conclude that the district court did not err in denying the Commission's summary-judgment motion seeking to withhold documents on the ground that they are nonresponsive to a PIA request. The PIA provides that "the only suit a governmental body may file seeking to withhold information from a requestor is a suit that . . . seeks declaratory relief from compliance with a decision by the attorney general *issued under Subchapter G.*" Tex. Gov't Code § 552.324 (emphasis added).[2] Section 522.301 states that a governmental body may ask the attorney general for a decision about whether the information is within one of the exceptions under Subchapter C. *Id.* § 522.301. Subchapter C lists the various exceptions to the general rule that information collected, assembled, or maintained by or for a governmental body is public information and is available by request. *Id.* § 552.002(a); *see Boeing Co. v. Paxton*, 466 S.W.3d 831, 832 (Tex. 2015). Thus, a governmental agency may not seek declaratory relief in district court unless the relief it seeks is

[2] The statute notes that "Subchapter G" refers to Texas Government Code sections 522.301-.309.

from an attorney general decision regarding application of one of the Subchapter C exceptions. There is no exception under Subchapter C for information that is claimed to be nonresponsive to a PIA request; therefore, the Commission could not assert nonresponsiveness of information as a basis for withholding it in the underlying suit. *See Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex. App.—Austin 2002, no pet.).[3] The district court properly denied the Commission's request to withhold information on that basis. We overrule the Commission's third appellate issue.[4]

CONCLUSION

Having overruled the Commission's three issues on appeal, we affirm the trial court's order denying the Commission's motion for summary judgment. We also affirm the trial court's order granting the Sierra Club's motion for summary judgment, ordering the Commission to produce to the Sierra Club the documents submitted in camera and marked with Bates Numbers 0001 through 6414, and awarding the Sierra Club attorneys' fees and costs.

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[3] Consistent with the suit's being limited to review of the attorney general's decision regarding the application of a Subchapter C exception is Texas Government Code section 552.326, which provides that "the only exceptions to required disclosure within Subchapter C that a governmental body may raise in a suit filed under this chapter are exceptions that the governmental body properly raised before the attorney general in connection with its request for a decision regarding the matter under Subchapter G." *See* Tex. Gov't Code § 552.326.

[4] On appeal the Commission asserts that because the Sierra Club should not have prevailed on its motion for summary judgment, the district court's award of attorneys' fees and costs should be reversed. Because we conclude that the district court did not err in granting the Sierra Club's motion for summary judgment, we also affirm the award of attorneys' fees and costs.

Chari L. Kelly, Justice

Before Chief Justice Byrne, Justices Kelly and Smith

Affirmed

Filed: November 22, 2022

Appendix B

EARTHJUSTICE

July 1, 2019

Public Information Officer, MC 197
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
openrecs@tceq.texas.gov
https://www2.tceq.texas.gov/pircs/index.cfm

Dear Public Information Officer,

Pursuant to Texas's Public Information Act, on behalf of Sierra Club, I request the following documents and/or records from any relevant offices, staff files, or otherwise in the possession of the Texas Commission on Environmental Quality (TCEQ), including but not limited to those of Toby Baker, Executive Director; Division Director Michael Honeycutt, Angela Curry, Joseph T. Haney, Jr., TCEQ; Allison Jenkins, M.P.H.; Jessica L. Myers, PhD, and any other staff or contractors employed by the TCEQ Toxicology Division (TD); Deputy Director Tonya Baer, Mike Wilson, TCEQ Air Permits Division, and any other staff or contractors employed by the TCEQ Office of Air, as well as any other staff or contractors of the TCEQ, involving, containing information on, or otherwise relating to communications since November 9, 2016, regarding or relating to:

(1) The Texas Commission on Environmental Quality (TCEQ) proposed or final Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment" (June 28, 2019), its plan for and/or draft of such document, and/or any other material discussing or including the modeling approach, the toxicity information, or any other proposed, draft, or final action to create a unit risk factor (or URF, unit risk estimate, or any cancer-risk value or metric) for Ethylene Oxide;[1]
(2) The full and underlying record of information on which TCEQ is relying and/or that TCEQ has considered or is considering in potential support of the Ethylene Oxide Development Support Document;
(3) The comments that TCEQ filed with EPA stating that: "the TCEQ is in the process of deriving a URF for ethylene oxide. . . ." and describing a "draft" of this document;[2]
(4) TCEQ's draft or final "request for toxicity information on Ethylene Oxide" to EPA and/or the public (Aug. 16, 2017);

[1] TCEQ, proposed Development Support Document, Ethylene Oxide Carcinogenic Dose-Response Assessment (June 28, 2019), https://www.tceq.texas.gov/assets/public/implementation/tox/dsd/proposed/jun19/eo.pdf.
[2] TCEQ comment (Apr. 26, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0417-0142; TCEQ comment (May 30, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0688-0089.

EXHIBIT B

(5) U.S. EPA's Integrated Risk Information (IRIS) draft or final Evaluation, toxicological review, and cancer risk value or Unit Risk Estimate for Ethylene Oxide (2016).[3]

Please provide copies of any and all such records, including any involving, including, or relating to communications between TCEQ and any of the following people and organizations outside of TCEQ, including but not limited to any person employed by, contracting, or otherwise affiliated with: the U.S. Environmental Protection Agency (any current or former staff or contractors), and/or with the American Chemistry Council, the American Petroleum Institute, the American Fuel & Petrochemical Manufacturers' Association, the Chamber of Commerce, UARG, the Alliance for Risk Assessment, TERA, Exponent, Ramboll, Summit Toxicology, Toxicology Excellence for Risk Assessment, BASF, Bayer MaterialScience, Chevron Phillips, Denka, Dow/DuPont, Eastman, Equistar, ExxonMobil, Formosa, Georgia-Pacific, Honeywell, Huntsman, Kururay, Lubrizol, Lyondell, Momentive, Monsanto, Occidental Chemical, Rohm & Haas, Rubicon, Sasol, Solvay, Syngenta, Total Petrochemicals, Union Carbide, Valero, Westlake Polymers, Hunton & Williams, Beveridge & Diamond, Sidley Austin, Keller Heckman, Covington Burling, Kimberly White, Michael Dourson.

Relevant search terms include, but are not limited to, "ethylene oxide cancer risk value," "2016 IRIS assessment," "2016 IRIS value," "USEPA (2016)," "USEPA unit risk factor," "URF for ethylene oxide," "EtO," "eto," "ethylene oxide," "inhalation unit risk estimate," "ethylene oxide URE," "75-21-8," "two-piece linear spline model," "supra-linear model," "sublinearity," "TCEQ's assessment," "ethylene oxide URF," "7.1E-3 per ppb," "1 in 100,000 excess cancer risk," "URF of 2.5E-6," "1.4E-6," "Valdez-Flores," "Kirman," "Kirman and Hays," "USEPA 2016," "Cox proportional hazards model.

For the purposes of this request, the terms "record" and "records" mean all materials in whatever form (handwritten, typed, electronic or otherwise produced, reproduced, or stored) in TCEQ's possession since November 9, 2016, including, but not limited to, letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, notes of telephone conversations, telefaxes, e-mails, text messages, internet chat logs, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final, embargoed, or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the TCEQ or any of its staff or contractors, including responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any governmental purpose.

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[3] EPA, IRIS, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, EPA/635/R-16/350Fa (Dec. 2016), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1025tr.pdf.

Sierra Club respectfully requests a waiver or reduction of costs because Sierra Club is a nonprofit organization that intends to review and use these records solely for the evaluation of the records in the public interest, and not for the commercial or financial benefit of any person. We are willing to pay up to $200 for the cost of these records without further consultation. If the cost is going to be more than $200, please let us know as soon as possible before further processing this request.

In addition, if at all possible, we would strongly prefer to receive these records in electronic format either by CD-ROM, or by email to: Robyn Winz, rwinz@earthjustice.org and Emma Cheuse, echeuse@earthjustice.org. To the extent any of the requested documents are located on a publicly accessible website, please provide the relevant internet hyperlinks in lieu of producing those specific records.

Finally, we request all documents to be released as soon as possible on a rolling basis. If any documents cannot be released within ten business days of this request, please provide a list of responsive documents that TCEQ is evaluating for release and provide a date-certain when TCEQ will provide the documents.

Thank you for your assistance, and please contact us if you have any questions about the scope of this request or the particular documents requested.

Sincerely,

Emma Cheuse
Robyn Winz
Earthjustice
echeuse@earthjustice.org
rwinz@earthjustice.org
(202) 667-4500 ext. 5220 or ext. 5256

On behalf of Requester Sierra Club and the Lone Star Chapter
Neil Carman

Appendix C

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Tyler v. Paxton, Tex.App.-Austin, January 28, 2015

304 S.W.3d 380
Supreme Court of Texas.

CITY OF DALLAS, Petitioner,
v.
Greg ABBOTT, Attorney General of Texas, Respondent.

No. 07–0931.
|
Argued Oct. 15, 2008.
|
Decided Feb. 19, 2010.

Synopsis

Background: City sought declaratory judgment that certain documents requested under the Public Information Act were protected from disclosure by the attorney-client privilege. The 261st District Court, Travis County, Stephen Yelenosky, J., ordered that the documents be disclosed. City appealed. The Amarillo Court of Appeals, 279 S.W.3d 806, affirmed. City petitioned for review.

The Supreme Court, O'Neill, J., held that when a governmental entity requests clarification of an unclear request for public information, the ten-day period to request an attorney general opinion as to applicability of exception to disclosure requirement is measured from the date the request is clarified.

Judgment of Court of Appeals reversed and judgment rendered.

Dale Wainwright, J., dissented and filed opinion in which Johnson, J., joined.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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Opinion

Justice O'NEILL delivered the opinion of the Court in which Chief Justice JEFFERSON, Justice HECHT, Justice MEDINA, Justice GREEN, and Justice GUZMAN joined.

The Public Information Act mandates disclosure of public information upon request to a governmental body, but excepts certain categories of information from the disclosure requirement. *See* TEX. GOV'T CODE §§ 552.021, 552.221, 552.101–.136. A governmental body wishing to claim an exception must make a timely request for an attorney general's opinion as to the exception's applicability. *Id.* § 552.301(a). If a request is not timely made, the information is presumed subject to disclosure unless there is a compelling reason to withhold it. *Id.* § 552.302. In this case, we must decide whether the governmental body's request was timely, and, if not, whether the public policy reasons supporting the confidentiality of attorney-client communications are sufficiently compelling to overcome the public-information presumption that applies when a governmental body fails to make a timely request. We hold that the timeliness of a request for an attorney general opinion is measured from the date a party seeking public information responds to a governmental body's good-faith request for clarification or narrowing of an unclear or overbroad information request. Accordingly, we reverse the court of appeals' judgment and render judgment

that the information in the City's exhibits F and G is excepted from disclosure under the Act.

I. Background

On May 16, 2002, the City of Dallas received a Public Information Act request from James F. Hill, II, for

1. Any and all information pertaining to the City of Dallas "Assessment Center Process" for uniform positions of the Dallas Fire and Police Departments."

2. The definition of KG/BRG?

3. Any and all memos, directives, documents and communications of meetings of (scheduled or un-scheduled) boards, councils, department heads/staff, and City Managers pertaining ***382** to the establishment of the Assessment Center Process.

On May 22, the City responded, seeking to clarify whether Hill sought "information regarding specific assessment centers and if so for what period of time." *See id.* § 552.222(b) (allowing a governmental body to seek clarification of an unclear request). Six days later, Hill replied, clarifying his request as follows:

> The time frame and positions I am relating the request for are: the positions of Dallas Fire Rescue Fire Lieutenant and Captain for the year 2000.
>
> Additionally:
>
> * Any written documents on "how Assessment Process was to be administered" for the above positions and time frame.
>
> * Job Analysis for the positions of Fire Lieutenant and Fire Captain and date of each analysis.
>
> * Any contracts between Booth and the City of Dallas/Civil Service to conduct the Assessment Center for the Dallas Fire department positions Fire Lieutenant and Fire Captain.
>
> * An explanation on the "mirroring" of percentages between Fire Prevention and Fire Operations testing for the same time period.

In preparing to fulfill the clarified request, the City encountered several documents, identified as exhibits F and G, which it considered protected from disclosure by the attorney-client privilege. TEX.R. EVID. 503(b)(1); TEX. GOV'T CODE § 552.107(1). On June 10, 2002, the City requested an attorney general opinion regarding application of the privilege to the withheld documents. TEX. GOV'T CODE § 552.301(a). The Attorney General concluded that the City's request was untimely. *See id.* § 552.301(b) (requiring a governmental body to request an attorney general decision "not later than the 10th business day after receiving the written request" when seeking to withhold information). According to the Attorney General, the ten-day clock began to run on May 16 when the City received Hill's first request, and the City's May 22 response seeking clarification merely tolled the ten-day clock until Hill's second letter was received on May 28. *See* Tex. Att'y Gen. ORD–663 (1999). With the clock tolled until May 29, the City had until June 6 to request an attorney general decision, according to the Attorney General's calculations.[1] Because the City did not submit its request until four days later, on June 10, the Attorney General determined the City's request was untimely. As a result, the Attorney General explained, a legal presumption arose that exhibits F and G were public, and the City could only overcome that presumption by demonstrating a compelling reason to withhold the documents. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex.App.-Austin 1990, no writ). Considering the attorney-client privilege a discretionary exception subject to waiver, the Attorney General concluded that a compelling reason to overcome the public-information presumption had not been presented.

The City brought this suit seeking a declaratory judgment that exhibits F and G are protected from public disclosure by the attorney-client privilege.[2] *See* TEX. ***383** GOV'T CODE §§ 552.324, 552.325; *In re City of Georgetown,* 53 S.W.3d 328, 330 (Tex.2001). At trial, the City argued that its request for an attorney general decision was timely because the ten-day response period under section 552.301(d) did not begin to run until Hill clarified his request. Alternatively, the City contended the public policy reasons that support the attorney-client privilege are sufficiently compelling to overcome the public-information presumption. After a bench trial, the trial court—initially assuming the privileged nature of the documents and later confirming, *in camera,* the privilege under Texas Rule of Evidence 503(b)(1)—rejected both arguments and ordered that the documents be disclosed. The court of appeals affirmed. 279 S.W.3d 806, 808. We granted the City's petition for review to consider the Act's application under the circumstances presented. 51 Tex. S. Ct. J. 1076 (Tex. June 27, 2008).[3]

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II. Discussion

We first consider the timeliness of the City's request for an attorney general opinion. A governmental entity that believes information requested under the Public Information Act is excepted from disclosure must ask for an attorney general's opinion no later than the tenth business day after it receives the request. TEX. GOV'T CODE § 552.301(b). But, "[i]f what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request." *Id.* § 552.222(b). Further, "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed...." *Id.* We must decide what effect a request for clarification or narrowing has on the ten-day deadline. Section 552.222(b) is silent on this issue.

The City contends the ten-day period should be measured from the date the party seeking public information clarifies or narrows the request. It maintains that Hill's original letter was so broad that it did not put the City on notice that he was requesting the information in exhibits F and G. The City notes that section 552.301(b) requires a governmental body seeking a ruling that information is excepted from disclosure to "state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." According to the City, a governmental body cannot reasonably comply with that obligation if the request is unclear or overbroad.

Relying on a 1999 open records decision, Open Records Decision No. 663, the Attorney General contends the ten-day deadline for the City to request a ruling under section 552.301(b) was merely tolled during the period the City was waiting for a response from Hill, and did not reset once the City received Hill's clarification. According to the Attorney General, such a construction is necessary to ensure that governmental bodies comply with their ***384** duty to respond promptly to requests for public information. *See* TEX. GOV'T CODE § 552.221(a). If the ten-day period were reset rather than tolled by a clarification request, the Attorney General argues, governmental bodies could extend the deadline to respond to a public information request indefinitely by repeatedly requesting clarification. The Attorney General maintains that a conclusion that a clarification request restarts the statutory deadline would be contrary to the Act's directive that its provisions are to be "construed in favor of granting a request for information." *Id.* § 552.001(b).

Our task in construing a statute is to give effect to the Legislature's intent in enacting it. *Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 493 (Tex.2001). Ordinarily, we are confined to the statute's plain language. *Id.* (citing *Morrison v. Chan,* 699 S.W.2d 205, 208 (Tex.1985)). However, when a provision is silent as to its consequences as it is here, we look to the statute as a whole and strive to give it a meaning that is in harmony with other provisions. *Id.* (citing *Barr v. Bernhard,* 562 S.W.2d 844, 849 (Tex.1978)). We presume that the Legislature intended all provisions of a statute to be effective, and that it intended a just and reasonable result. *Id.* (citing TEX. GOV'T CODE § 311.021(2), (3)). While the Attorney General's interpretation of the Act may be persuasive, it is not controlling. *Holmes v. Morales,* 924 S.W.2d 920, 924 (Tex.1996). In this instance, we conclude that the Attorney General's interpretation of section 552.222(b) is inconsistent with other provisions of the Act. Reading section 552.222(b) in harmony with those provisions, we hold that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general opinion is measured from the date the request is clarified or narrowed.

A. Other Provisions of the Act

The Legislature has clearly expressed an intent that governmental entities respond promptly to requests for public information. TEX. GOV'T CODE § 552.221(a). But, as the Attorney General has acknowledged, while the Act prohibits

> "unreasonable delays in providing public information, [it also] recogniz[es] that the functions of the governmental body must be allowed to continue. The interests of one person requesting information under the Open Records Act [now Public Information Act] must be balanced with the interests of all the members of

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> the public who rely on the functions of the governmental body in question."

Tex. Att'y Gen. ORD–664, 3 (2000) (quoting Tex. Att'y Gen. ORD–467, 6 (1987)). And while the Act's fundamental purpose is to mandate the maximum disclosure of public information, it was also designed "to simultaneously protect the personal privacy of individuals." House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1718, 74th Leg., R.S. (1995); *see, e.g.,* TEX. GOV'T CODE §§ 552.102, .109, .114, .115, .117. According to the House Research Organization, as of 2007, some Texas agencies received as many as 2,000 Public Information Act requests a year, House Research Org. Bill Analysis, Tex. H.B. 1497, House Committee Report, 80th Leg., R.S. (2007), and officials responding to those requests bear an onerous responsibility: if they disclose information that is confidential under the Act, they face criminal liability. TEX. GOV'T CODE § 552.352(a).[4] Moreover, public entities ***385** requesting an attorney general opinion must specify the exceptions that apply within the same ten-day period in which an opinion must be requested. *Id.* § 552.301(b). As the Attorney General has observed, the requirements to request an opinion and specify the applicable exceptions "presuppose[ ] that the governmental body has identified the responsive information." Tex. Att'y Gen. ORD–664, at 4 fn.2. In light of those considerations, it is reasonable to assume that the Legislature intended that public entities would have a reasonably clear idea of the information requested before the ten-day deadline begins to run.

Other provisions of the Act also weigh in favor of measuring the statutory deadline from the date an unclear or overbroad request has been clarified or narrowed. The Act permits governmental entities to impose charges for the cost of copying records, and, in certain circumstances, preparing them for inspection. TEX. GOV'T CODE §§ 552.261, .271. The governmental body must provide the person requesting information with a detailed statement itemizing all the estimated anticipated costs of complying with the request. *Id.* § 552.2615(a). If the person requesting the information does not respond to the estimate within ten business days by accepting the estimate, modifying their request, or filing a complaint with the Attorney General alleging that the governmental entity is overcharging, the request is considered withdrawn. *Id.* § 552.2615(b). A public information officer may require a deposit or payment of a bond if the estimated costs of preparing copies will exceed $100 (for bodies with more than fifteen employees) or $50 (for entities with fewer than sixteen employees). *Id.* § 552.263(a). If a deposit or bond is required, then, for purposes of section 552.301, the request is not considered received until the entity receives the deposit or bond. *Id.* 552.263(e). This provision belies the Attorney General's contention that section 552.301's ten-day deadline is "absolute," and signals the Legislature's recognition of the potential burden responding to public information requests may place on governmental bodies. *See* Senate Research Ctr., Bill Analysis, Tex. S.B. 623, 79th Leg., R.S., 2005 ("The time and resources used in the preparation of a brief to the attorney general are not reimbursed to the governmental entity, which creates a problem when a requestor is authorized to force a governmental entity to prepare briefs for the attorney general, before payments have been made.")

None of these provisions specifically addresses the effect of a clarification request.[5] But they suggest that the Legislature envisioned an orderly process in which both the government and the requesting party will proceed with a reasonable idea of the burdens and costs each is likely to incur in connection with a request for public information. If a request is unclear or overbroad, the government's ability to identify applicable statutory exceptions to disclosure, or to prepare an accurate estimate of anticipated costs, is severely hampered; if the statutory ten-day period is merely tolled while the government awaits clarification, the government is left with little time to assess applicable exceptions or prepare any estimate ***386** of costs, a result that could leave both parties with less accurate information. While the Act requires governmental entities to respond promptly to public information requests, " 'promptly' means as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* § 552.221(a). If the circumstances are that a request is so unclear or overbroad that a governmental entity, acting in good faith, cannot understand what is requested, then it is consistent with the Act's structure to measure the time period in which an attorney general opinion must be requested from the date the request is clarified.

The regulatory background against which section 552.222(b) was enacted reinforces our construction of the statute. More than a decade before the Legislature enacted the clarification statute, the Attorney General had issued Open Records Decision 333, a decision that has never been withdrawn or overruled.[6] In that decision, the City of Houston received a request from the Houston Chronicle for "access to blotters maintained by all divisions of the Houston Police Department." Tex. Att'y Gen. ORD–333, 1 (1982). The

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newspaper relied on a decision holding that police blotters were public information, *Houston Chronicle Publishing Co. v. City of Houston,* 531 S.W.2d 177 (Tex.Civ.App.-Houston [14th Dist.] 1975), *writ ref'd n.r.e.,* 536 S.W.2d 559 (Tex.1976). *Id.* The City disagreed because, broadly read, the Chronicle's request included the identities of police informants. *Id.* The Chronicle and the City then engaged in a series of verbal and written exchanges in which the City sought to clarify the precise information the newspaper sought. *Id.* As a consequence of these efforts, more than ten days elapsed between the Chronicle's original request and the date the City requested an attorney general open records decision. *Id.* at 2. Because the original request was "extremely broad, and referred only to 'blotters'," the Attorney General concluded that a letter from the Chronicle precisely identifying the information it sought was the operative date to trigger the ten-day period, even though the Act contained no provision allowing a governmental entity to attempt to clarify or narrow a request. *Id.* at 2–3. Presumptively, the Legislature was aware of this opinion when it enacted section 552.222(b) in 1995. *See Tex. Dept. of Prot. & Reg. Servs. v. Mega Child Care, Inc.,* 145 S.W.3d 170, 176 (Tex.2004). ***387** While the opinion was not based on any explicit clarification provision, it did provide the Legislature with the view of the officer in charge of enforcing the Act that measuring a governmental body's response time from the date an unclear or overbroad information request is clarified would be consistent with the Act's overarching purposes. It is not unreasonable to assume that the Legislature anticipated that section 552.222(b) would have the same effect on the ten-day deadline.

Construing the statute so that clarification of an unclear or overbroad information request resets the statutory ten-day deadline would not be contrary to the Legislature's mandate that the Act be construed in favor of granting a request. TEX. GOV'T CODE § 552.001(b). To the contrary, as we have observed, allowing a governmental entity ten days from the time an unclear or overbroad request is clarified only helps ensure that the response will be meaningful, providing the requestor with the information he or she actually wants. As the Attorney General has recognized, if a request is vague or overbroad, a governmental body cannot "accurately identify and locate the requested items." Office of the Attorney General of Texas, PUBLIC INFORMATION 2008 HANDBOOK, ix. And, in sections 552.263 and 552.2615 of the Act, the Legislature itself has attempted to balance the policy of broad disclosure against the burden that may be placed upon scarce government resources in attempting to respond to extremely broad information requests.

We agree with the Attorney General that a governmental entity should not be allowed to use requests for clarification in bad faith merely to delay production of public information. But in this case, it is undisputed that the City acted in good faith in asking Hill to clarify or narrow his broad request for public information. Once he did, the City promptly responded. There is nothing to indicate that the City was attempting to drag out the process by its request for clarification. Under these circumstances, the ten-day period for requesting an attorney general opinion ran from the date of Hill's response, and the City's request for an attorney general opinion was timely. Because we conclude that the ten-day period in this case ran from the date of Hill's clarification, we do not reach the City's argument that Hill's response asked for "additional items" that were not included in his original request, or its alternative argument that the attorney-client privilege is itself sufficiently compelling to overcome the public-information presumption that inheres when an attorney general's opinion is not timely requested.

III. Conclusion

We reverse the court of appeals' judgment and render judgment that the information contained in exhibits F and G is excepted from disclosure under the Act.

Justice WAINWRIGHT filed a dissenting opinion, in which Justice JOHNSON joined.

Justice WILLETT did not participate in the decision.

Justice WAINWRIGHT, joined by Justice JOHNSON, dissenting.

The introductory section of the Public Information Act (PIA) announces the policy of the State of Texas on the peoples' right of access to public information.

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not

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> the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly ***388** provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.

TEX. GOV'T CODE § 552.001. This laudable objective of the PIA, to ensure transparency in public affairs, does not require that all public information be routinely disclosed. Sensibly, some data defined as public information may be withheld under the statute's terms, but the PIA requires that exclusions from disclosure be timely raised with the Office of the Attorney General. *Id.* § § 552.101, .301. A public entity has ten business days to request the Attorney General's opinion if it desires to withhold public information. *Id.* § 552.301. If the governmental body fails to meet this statutory deadline, the standard for withholding the public information from disclosure rises from merely "confidential" to the governmental entity having to establish a "compelling reason" for nondisclosure. *Id.* § 552.302.

There is no dispute that the information at issue in this case is public information, and it may have been excepted from disclosure. However, the City of Dallas did not request a written opinion from the Attorney General on its desire to withhold the public information until seventeen business days after it received the request for disclosure. The Court holds that eight of the days need not be counted because the clock does not begin on the deadline to request an attorney general opinion until after the public's request for information is clarified, even though the PIA states that the ten-day period begins when the request is "received." The Court concludes that the City's request to the Attorney General was timely and the City need not turn over the public information requested because the lower standard for withholding the public information was met. Because the Court's approach hinders the Legislature's goal of providing the people with prompt access to public information, *see id.* § 552.221(a), and creates an easy manner to delay such access, contrary to the PIA's purpose and language, I respectfully dissent.

I. Background

On May 16, 2002, the City of Dallas received a request from James F. Hill, II for "[a]ny and all information pertaining to the City of Dallas 'Assessment Center Process' for uniform positions of the Dallas Fire and Police Departments." [1] On May 22, 2002, the City sent a letter to clarify the request, asking: "Are you seeking information regarding specific assessment centers and if so for what period of time?" [2] Hill responded on May 28, 2002, specifying that he requested information for the year 2000 for the positions of Dallas Fire Rescue Fire Lieutenant and Captain. On June 10, 2002, the City requested from the Office of the Attorney General a decision on whether some of the information sought, specifically a memorandum designated Exhibit F and two memoranda designated Exhibit G, could be withheld under the privilege for attorney-client communications. The Office of the Attorney General concluded that the City's request was untimely and that the City had ***389** not presented a compelling reason to withhold the information. Tex. Att'y Gen. LA–4450 (2002)Tex. Att'y Gen. LA–4450 (2002). The Attorney General therefore directed the City to disclose the information. Claiming the information was protected from disclosure by the attorney-client privilege, the City sought declaratory judgment in district court in Travis County to withhold the documents from disclosure. The trial court issued findings of fact and conclusions of law in its final judgment ordering disclosure. The court of appeals also concluded that the City's request was untimely, held that it had not established a compelling reason to withhold the information, and affirmed the trial court's order of disclosure. The Court's opinion reaches the contrary result.

II. The Public Information Act Provides for Prompt Disclosure of Public Information.

The PIA codifies and strengthens the policy of the State of Texas that the people are entitled to "complete information" about the affairs of government. TEX. GOV'T CODE §§ 552.001, .021. From this initial premise, the statute then allows selected exceptions to the right to complete information.

When a member of the public requests public information, the governmental entity "shall promptly produce public information." *Id.* § 552.221(a). " '[P]romptly' means as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* If the entity believes that any of the requested information is protected from disclosure by the exceptions in Subchapter C of the PIA, it must request, within ten business days, an opinion from the Attorney General on whether the information may

indeed be withheld. *Id.* § 552.301(a), (b). The provisions of Subchapter C set forth the exceptions from disclosure for public information. *See id.* §§ 552.101–.151. These are the standards the Office of the Attorney General considers when it receives compliant requests by governmental bodies to withhold public information under section 552.021.

When the governmental body fails to request an attorney general decision on withholding certain public information within the PIA deadline, the statute establishes a presumption that the information must be publicly disclosed. *Id.* § 552.302. The information then may only be withheld if the governmental body establishes a "compelling reason" to do so. *Id.* The Attorney General opined that the City of Dallas did not timely file its request for a decision on the asserted attorney-client privilege, an issue I now consider.

III. The City's Request for a Decision from the Attorney General Was Untimely.

On May 16, 2002, Dallas received Hill's request for all information pertaining to the City of Dallas Assessment Center Process for uniform positions of the Dallas Fire and Police Departments. Four business days later, the City requested from Hill a clarification of his broad request. The City received Hill's clarification four business days after its request. The City waited another nine business days thereafter, until June 10, to request an attorney general opinion. Thus, the City did not request a decision from the Attorney General until seventeen business days (twenty-five calendar days) after it received Hill's original request. If the four business-day period during which the City sought clarification is excluded, the City's request to the Attorney General was not sent until thirteen business days after receiving Hill's original May 16 request.

Section 552.301(b) expressly starts the clock ticking for the ten business-day ***390** deadline on the date the City "receives" the written request. TEX. GOV'T CODE § 552.301(b). Section 552.222(b) allows a governmental body to seek clarification upon receipt of an unclear or overbroad request for information, but it does not address how a clarification affects the ten-day deadline. *Id.* § 552.222(b); *see also* Tex. Att'y Gen. ORD–663, 3 (1999) ("[W]hile the PIA expressly permits a governmental body to seek clarification and narrowing of a request, it is silent as to the effect of such inquiry on the PIA's deadline for requesting a decision."). The City claims its request was timely because, upon receipt of Hill's clarification, it was treated as a new request, and the ten-day period reset. The Attorney General asserts, and the court of appeals reasoned, that the City's request was untimely because the time period was only tolled for the four business days between the City's request for Hill's written clarification and its receipt of that clarification.

The custom and practice in the Office of the Attorney General over the years have provided a consistent and rational manner for handling clarification requests. The Office of the Attorney General issues thousands of PIA rulings per year. In 2007 alone it issued 17,000 rulings. Between 2001 and 2007, the Attorney General issued approximately 4,515 rulings regarding claims of attorney-client privilege. Brief of Respondent–Attorney General at 29, 31, *City of Dallas v. Greg Abbott, Attorney General of Tex.,* No. 07–0931 (Tex. May 9, 2009). Attorney general opinions, which this Court has recognized as persuasive, provide that a governmental entity's good faith attempt to clarify or narrow a request tolls the time period for the information requested; conversely a request for new information that is included in a clarification starts the period anew only for that new information. *See* *Holmes v. Morales,* 924 S.W.2d 920, 924 (Tex.1996) (explaining that attorney general opinions are "persuasive, but not controlling" authority); *Doe v. Tarrant County Dist. Attorney's Office,* 269 S.W.3d 147, 152 (Tex.App.-Fort Worth 2008, no pet.) (giving special "due consideration" to attorney general decisions involving public information because the Legislature requires the Attorney General to issue written opinions advising governmental entities); Tex. Att'y Gen. ORD–663; Tex. Att'y Gen. LA–12245 (2009) (finding that a clarification was not a new request resetting the time period); Tex. Att'y Gen. LA–9346 (2007)Tex. Att'y Gen. LA–9346 (2007) (finding a request untimely notwithstanding the agency's request for clarification from the requestor); Tex. Att'y Gen. LA–2258Tex. Att'y Gen. LA–2258, 1–2 (2003) (finding that the tolling from clarification made request timely). If the request is simply too broad and the governmental entity seeks to narrow it, the governmental body does not get a new ten-day period for the information included in the original request. For that information, the clock is tolled the period between the time the governmental body requests clarification and the time the governmental body receives the clarification response. *Id.*

The Attorney General has recognized that governmental bodies that genuinely need clarification of a request should not be threatened with loss of their statutory time to seek an attorney general opinion on an exception from disclosure.

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Tex. Att'y Gen. ORD–663 at 5. It stands to reason that clarification and narrowing, sought in good faith, should be encouraged. *See id.* For the last decade, the opportunity for reasonable clarification has been incorporated in the Attorney General's application of tolling principles to requests for clarification by governmental entities. *See id.* The public entity thereby gains more time to gather the alleged privileged information during the clarification ***391** period but must request the attorney general decision within ten business days plus the period during which the clock is tolled for a good faith clarification request. *See id.*

Hill's clarification limited the request to the year 2000 and to the positions of Dallas Fire Rescue Fire Lieutenant and Captain. It also requests a list of information: "[a]ny written documents on 'how Assessment Process was to be administered' for the above positions and time frame"; "[j]ob analysis[ ] for the positions of Fire Lieutenant and Fire Captain and date of each analysis"; "[a]ny contract between Booth and the City of Dallas/Civil Service to conduct the Assessment Center for the Dallas Fire department positions Fire Lieutenant and Fire Captain"; and "[a]n explanation on the 'mirroring' of percentages between Fire Prevention and Fire Operations testing for the same period." This information would be subsumed by his original request for information pertaining to the City of Dallas 'Assessment Center Process' for uniform positions of the Dallas Fire and Police Departments. Indeed, the City does not contend that the three documents it seeks to withhold, in Exhibits F and G, were not included in the original request from Hill.[3] Accordingly, the ten business-day period should be tolled for the intervening time between the government's clarification request and Hill's response. Thus, excluding the four business days during which the time period was tolled, the City's request for a decision from the Office of the Attorney General was not sent until the thirteenth business day after Hill's May 16 request. The City's request was not timely.

Asserted exceptions to disclosure of public information had been handled in this manner for years when the City received Hill's request. *See* Tex. Att'y Gen. ORD–663 (1999). The City was charged with knowledge of the law yet failed to follow it. *See* TEX GOV'T CODE § 552.012 (mandating training of public information officers); *Osterberg v. Peca,* 12 S.W.3d 31, 38 (Tex.2000) (holding that ignorance of the law is not an excuse for violation of a statute).

Tolling the ten-day period during the clarification process for information in the original request furthers the PIA's objective of promptly providing, "without delay," the public with information from its servants—governmental entities. *See* TEX. GOV'T CODE § 552.221(a). Resetting the time period in this circumstance delays disclosure of public information. It imposes no additional incentive to timely produce information sought within the original request that is also sought in the clarification. *See* *Indus. Found. of the S. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 687 (Tex.1976) (holding that "the Act does not allow either the custodian of records or a court to consider the cost or method of supplying requested information in determining whether such information should be disclosed"). Moreover, tolling the time period for this information that was included in the original request is the established method for handling clarifications under ***392** the PIA. *See* Tex. Att'y Gen. ORD–663 at 1. The Court's approach resets the clock for all information in the original request each time a clarification is sought, and it is not justified where that clarification only narrows the scope of the original request for the benefit of the governmental entity. *See* Tex. Att'y Gen. LA–12245 (discussing multiple clarification requests). Surely, where new information is sought in a clarification, the entity should receive ten business days to seek an attorney general opinion. But it is inconsistent with the language and purpose of the PIA to extend the statutory deadline ten business days beyond the time already allotted for public information requested initially. The Court's holding ignores the date of receipt of the original request and, contrary to the statutory mandate, inserts an unnecessary delay into the process. This allows both inadvertent delay of disclosures about government affairs and easy manipulation of the deadline through clarification requests.

The Office of the Attorney General distinguishes between new requests framed as clarifications (for which a new ten business-day period applies), clarifications of public information within the scope of initial requests (for which tolling applies), and new information sought as part of legitimate clarifications of original information requested (for which the ten business-day period resets for the new information and tolling applies to information within the scope of the original request). *See* Tex. Att'y Gen. LA–4352Tex. Att'y Gen. LA–4352, 1 (2005). The Court not only reverses a decades-old policy of tolling for unclear requests but creates a new category of "vague or overbroad" requests for public information. The Attorney General's approaches addressed the various circumstances while insisting on compliance with the Legislature's mandate to address open records requests "without delay." The Court's holding could insert delays and increase costs to all parties involved

by shifting the emphasis in PIA disclosure disputes from defining "compelling reason" for nondisclosure (in the case of untimely requests) to squabbles over whether non-lawyer members of the public precisely worded their requests to governmental entities for admittedly public information. It is problematic to insert into the Legislature's PIA scheme of disclosure a bane that exists in civil litigation: incessant disputes over the wording of discovery requests.

IV. The Higher, Compelling Reason Standard Governs the City's Untimely Request to Withhold Public Information.

Because the City's request for an attorney general opinion on withholding Exhibits F and G was untimely, I address whether the asserted reason for disclosure satisfied the PIA's elevated compelling reason standard.

The only exceptions to required disclosure of public information under Subchapter C that the City may raise in this suit are exceptions it raised with the Attorney General in its request for decision contained in its letter of June 10, 2002. *See* TEX GOV'T CODE § 552.326. The only exception the City raised in the June 10 letter was section 552.107(1) of Subchapter C concerning "information that ... an attorney of a political subdivision is prohibited from disclosing because of a duty to the client...." *Id.* § 552.107(1). Whether Exhibits F and G are subject to public disclosure depends on the interpretation of the exception for attorney-client privileged information in Subchapter C of the PIA. *See id.* To simply assert the exception, however, the City must have requested a decision from the Attorney General on the privilege within ten business days from the date of receipt of the request. *Id.* § 552.301. If the City's request was dilatory, ***393** Exhibits F and G would be presumed subject to public disclosure and "must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302.

The City argues that it satisfies the compelling reason standard by merely asserting the attorney-client privilege as an exception to disclosure. If so, the City could except public information from disclosure merely by asserting the same justification it was late in raising with the Office of the Attorney General. But such an interpretation contradicts the express language of the statute and violates its purpose.

The very use of the word "compelling" in this context indicates the intent to impose a tougher standard for violation of the deadline. Precepts of statutory construction dictate that because the Legislature did not define the word "compelling" in the PIA, we interpret the word according to its plain and common meaning. *See* *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex.2003). The common meaning of "compelling" is "demanding attention" or "respect." COMPACT OXFORD ENGLISH DICTIONARY 300 (2nd ed. 1991). To be compelling, a justification must be more than simply legitimate or good, it should be persuasive to the point of demanding respect or acquiescence.

The City argues that the attorney-client privilege is always a "compelling reason" to prevent disclosure because it is the oldest of the privileges for confidential communications known to the common law and is vital to encourage clients to confide in their attorneys. *See* *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex.1995). The City's interpretation of the section 552.301 compelling reason standard would require nothing more to keep public information secret than a late assertion of a legitimate justification, notwithstanding the statutory mandates. There are several other reasons this conclusion is incorrect.

A. The Legislature's Adoption of the Compelling Reason Standard in the PIA Codified the Attorney General's Application of the Standard.

In considering the 1999 proposed amendment to the PIA that would include the compelling reason standard, the Legislature was not acting in a vacuum. The Office of the Attorney General originated the compelling reason standard long before the Legislature amended the statute to incorporate it.

Every Attorney General in the thirty-five years since the PIA was enacted has applied and enforced the heightened compelling reason standard. *See* Tex. Att'y Gen. ORD–26 (1974)Tex. Att'y Gen. ORD–26 (1974) (Attorney General John Hill); Tex. Att'y Gen. ORD–319 (1982) (Attorney General Mark White); Tex. Att'y Gen. ORD–552 (1990) (Attorney General Jim Mattox); Tex. Att'y Gen. ORD–630 (1994) (Attorney General Dan Morales); Tex. Att'y Gen. LA–3474 (2001)Tex. Att'y Gen. LA–3474 (2001) (Attorney General John Cornyn); Tex. Att'y Gen. LA–6858 (2002)Tex. Att'y Gen. LA–6858 (2002) (Attorney General Greg Abbott). In 1974, the Attorney General reasoned that a late request for decision meant that the resulting presumption

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that information must be disclosed could only be overcome by a "compelling demonstration that the information requested should not be released to the public." Tex. Att'y Gen. ORD–26Tex. Att'y Gen. ORD–26; *see also* Tex. Att'y Gen. ORD–552. That office affirmed the application of this standard in several instances. *See* Tex. Att'y Gen. ORD–319; Tex. Att'y Gen. ORD–150 (1977); Tex. Att'y Gen. ORD–34 (1974)Tex. Att'y Gen. ORD–34 (1974). In 1994, an attorney general opinion addressed the very issue before this Court. "The mere fact that the information is within the attorney-client privilege and ***394** thus would be excepted from disclosure under section 552.107(a) of the Open Records Act [now PIA] if the governmental body had made a timely request for an open records decision does not alone constitute a compelling reason to withhold the information from public disclosure." Tex. Att'y Gen. ORD–630 at 7. The office confirmed that ruling in 2001. *See* Tex. Att'y Gen. LA–5561 (2001)Tex. Att'y Gen. LA–5561 (2001). In 1999, before the PIA was amended that year, the Attorney General again explained that the compelling reason standard applied to public information for which the request for decision was late. Tex. Att'y Gen. LA–725 (1999)Tex. Att'y Gen. LA–725 (1999) (Attorney General John Cornyn). And these attorney general opinions consistently apply a higher standard to allow this type of exception to withholding information.

In addition, several courts of appeals have adopted the Attorney General's standard for deciding PIA disputes arising out of a late request for an attorney general opinion. *Doe,* 269 S.W.3d at 154 (stating that "statutory and case law support the AG's general rule" and adopting that standard); *Jackson v. Tex. Dep't of Pub. Safety,* 243 S.W.3d 754, 758 (Tex.App.–Corpus Christi 2007, pet. denied) (adopting the Attorney General's compelling reason standard); *Hancock v. State Bd. of Ins.,* 797 S.W.2d 379, 381 (Tex.App.-Austin 1990, no pet.) (citing attorney general opinions, recognizing the compelling reason standard, and holding that the agency must do more than present a "mere showing of the applicability of one of the statutory exceptions" to overcome the presumption of openness). *But see City of Garland v. Dallas Morning News,* 969 S.W.2d 548, 554–55 (Tex.App.-Dallas 1998) (refusing to adopt the "compelling demonstration test" because the court did not find "*Hancock* and the attorney general opinions" adopting that test persuasive), *aff'd on other grounds,* 22 S.W.3d 351, 364 (Tex.2000) (plurality opinion) (declining to address the applicability of the compelling reason standard because the information at issue was subject to disclosure regardless of that analysis). As the Attorney General and these courts of appeals have consistently held, to uphold a late request to except public information from disclosure based on the attorney-client privilege requires more than reasserting the same privilege. *See* Tex. Att'y Gen. ORD–676 (2002); Tex. Att'y Gen. LA–5561Tex. Att'y Gen. LA–5561; Tex. Att'y Gen. ORD–630.

It is thus not surprising that the Legislature continued this established and predictable policy. At a Senate hearing on amending the PIA in 1999 to explicitly incorporate the compelling reason standard, the author of the bill, Senator Corona, explained that the amendment "will require the governmental body to forfeit any discretionary exceptions and would require the release of the information," consistent with the Attorney General's previous decisions. The author then introduced the chief of the open records division of the Office of the Attorney General, who explained:

> [T]he attorney general's office has interpreted that this—and basically this codifies a long standing interpretation of the attorney general's office, that I think stretches all the way back from 1977 in Open Records Decision 150—and the attorney general has determined that, uh, compelling reasons would be if if [sic] the information were made confidential by another source of law outside the Open Records Act ... as well as if release of the information would adversely affect the privacy or property interest of third parties. [4]

***395** Hearing on S.B. 277 Before the Senate Committee on State Affairs, 76th Leg., R.S. (Partial Transcript at 2, March 11, 1999); Act of September 1, 1999, 76th Leg., R.S. ch. 1319, § 21, 1999 Tex. Gen. Laws 4509; *see also Phillips v. Beaber,* 995 S.W.2d 655, 658 (Tex.1999) (stating that courts presume the Legislature acts with knowledge of the accepted legal meanings of terms); *McBride v. Clayton,* 140 Tex. 71, 166 S.W.2d 125, 128 (1942) (explaining that "statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it").

Since the Legislature's 1999 addition of the compelling reason standard to the PIA, the Attorney General has affirmed its interpretation, and the Legislature has not responded negatively to it. Tex. Att'y Gen. ORD–676. The Court has explained that it is persuasive that the Legislature had amended the PIA several times without responding negatively to attorney general interpretations. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 366 (Tex.2000).

B. The Compelling Reason Standard Provides Incentives for Expeditious Action as Contemplated by the PIA.

The overall scheme of the statute indicates the Legislature's goal of preventing open government requests from languishing in the bureaucratic process due to dilatory requests for decisions and slow responses. *See, e.g.,* § 552.301(b) (requiring governmental entities to request decisions on exceptions from disclosure of public information within ten business days); § 552.306 (requiring the Attorney General to render a decision "not later than the 45th business day after the date the Attorney General received the request"). [5] To accomplish this goal of the PIA, a "compelling reason" must be a higher and more demanding standard to create a persuasive incentive for governmental entities to comply with the PIA's expeditious time frames. The Court's holding undercuts the incentive to be prompt by allowing an easy manner to delay the decision to produce public information. Under the City's position, a city that prioritizes open government and works diligently to meet the deadline for a request for decision on an attorney-client privilege issue is treated no differently than a city that is not diligent in attempting to respond to a PIA request and simply asks for a "good faith" clarification of a word or phrase in a request.

To demonstrate a compelling reason to withhold information, the Attorney General's longstanding interpretations require that the governmental entity assert the attorney-client privilege along with another special circumstance that increases the consequences of disclosure, such as that the interests of third parties would be harmed or that the governmental entity is prohibited from disclosing the information by other law. [6] *See* Tex. Att'y Gen. LA–***396** 5561 ***396** Tex. Att'y Gen. LA–5561; Tex. Att'y Gen. ORD–630; Tex. Att'y Gen. ORD–26Tex. Att'y Gen. ORD–26. I agree that the two bases for demonstrating compliance with the compelling reason standard are reasonable. However, application of the standard should also consider circumstances in which the disclosure of such privileged information would likely inflict substantial harm to the public or the entity. In this case, without more, the City's privilege fails the compelling reason standard. However, in other circumstances, disclosure of privileged attorney-client communications could cause substantial harm to the public entity and add substantial cost or even harm the public that the PIA seeks to keep informed.

C. The City's Position Would Delete the "Compelling Reason" Standard From the Statute in These Situations.

The City argues that attorney-client privilege is always a compelling reason to prevent disclosure. *In re City of Georgetown,* 53 S.W.3d 328, 332–33 (Tex.2001) (quoting *Leggat,* 904 S.W.2d at 647). That holding essentially means that a governmental entity could either intentionally or unintentionally make a late request to the Attorney General seeking an exception from disclosure and still not have any higher burden to except information from disclosure. I disagree that the importance of the privilege means that a statute or rule cannot provide for waiver of the privilege or elevate the standard to rely on it. *See, e.g.,* TEX.R. CIV. P. 193.3(d) (stating that a party who inadvertently discloses information waives the attorney-client privilege if it does not assert the privilege within ten days of disclosure); TEX.R.APP. P. 33.1(a); *see also In re Christus Spohn Hosp. Kleberg,* 222 S.W.3d 434, 439–41 (Tex.2007); *In re Living Ctrs. of Tex., Inc.,* 175 S.W.3d 253, 259–60 (Tex.2005). The City waived the straightforward application of the attorney-client privilege by not requesting a decision within ten business days and should not be able to overcome that waiver by reasserting the same privilege. [7]

It is important to remember that the City retains control over the nondisclosure of otherwise privileged information if it simply abides by the PIA's deadlines. This in no way diminishes the importance of the attorney-client privilege; instead, I believe that the City must follow the procedures specifically mandated by the PIA in order to assert it without having to establish a compelling reason. The procedure in section 552.301 is not a trap for the unwary that could catch a conscientious governmental official off guard. [8] An action as simple as placing a letter to the Attorney General with a short request for a decision in the United States mail, first

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class, within ten business days after receiving the public information request, satisfies ***397** the statute. *See* TEX. GOV'T CODE § 552.308. The likely reason the entity would not comply with this requirement is simply because it does not have a system in place to handle these requests quickly and efficiently, which is the harm the Legislature attempted to remedy in the statute by training all public officials in the requirements of the PIA and explicitly requiring prompt responses to the people for public information.

V. Conclusion

The Legislature requires disclosure of public information and prompt resolution of exemptions from disclosure. Because the City failed to comply with the requirements to withhold public information from disclosure, I respectfully dissent and would hold that the PIA requires the City to disclose the public information.

All Citations

304 S.W.3d 380, 53 Tex. Sup. Ct. J. 349

Footnotes

1 It appears that the Attorney General excluded the dates of the City's clarification request and Hill's response, as well as two intervening weekends and Memorial Day (May 27) in calculating that response deadline.

2 The City also sought a writ of mandamus ordering the Attorney General to declare the documents excepted from public disclosure. Absent express statutory authority providing otherwise, "[o]nly the supreme court has the authority to issue a writ of mandamus ... against [the Attorney General]". *See* *A & T Consultants, Inc. v. Sharp,* 904 S.W.2d 668, 672 (Tex.1995) (citing TEX. GOV'T CODE § 22.002(c)). Because the City requested only declaratory relief in its prayer, we will address our attention only to that issue.

3 We have received *amicus curiae* briefs supporting the City from the Texas Association of Counties and, jointly, the Texas Association of School Boards Legal Assistance Fund, Texas Municipal League, and the Texas City Attorneys Association. The Freedom of Information Foundation of Texas, the Texas Association of Broadcasters, and the Texas Daily Newspaper Association filed a joint brief in support of the Attorney General, as did Senator John Cornyn.

4 Officials who wrongfully withhold public information may also face criminal sanctions, but only if they act with criminal negligence. Tex. Gov't Code § 552.353(a).

5 The latter provision would not apply to Hill's request as it did not become effective until 2005. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 315, §§ 2, 3 2005 Tex. Gen. Laws 938. Nevertheless, the Legislature's willingness to extend the statutory deadline until a deposit or bond is paid is suggestive.

6 The Attorney General does not contend that the City's request for clarification was pretextual, and the City maintains that it was unaware Hill was seeking the information in exhibits F and G until it received that clarification. Open Records Decision No. 663, on which the Attorney General relied in this case, reads Open Records Decision No. 333 to apply when the responding entity "did not understand the nature of the information requested as information which could be protected from disclosure until the day [it] received the clarification." Tex. Att'y Gen. ORD–663, at 3. Although the original request in Open Records Decision No. 333 was couched in broad terms, Open Records Decision No. 663 concluded that the clarified request became the operative request because it "included excepted information not sought in the original request." *Id.* at 3. It then articulated the tolling rule that the Attorney General advocates in this case. *Id.* at 4. Ultimately, however,

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in Open Records Decision No. 663, the Attorney General ruled that a request for information containing certain search terms did not initiate the ten-day period in which to seek an attorney general's opinion about documents containing those terms that were in the possession of the agency's outside counsel, even though those documents were clearly public information. *Id.* at 6. The Attorney General did "not believe that the first request, which did not specify information held by [the agency's] outside counsel, served to notify [the agency] that the requestor was seeking information held not only by [the agency], but also by its counsel." *Id.*

1 The PIA precludes the governmental entity from inquiring about the reason for the request, so the parties do not provide the reason. *See* TEX GOV'T CODE § 552.222.

2 Police and fire departments use assessment centers to evaluate potential candidates for promotion. *See* Paul Lepore, *Firefighter's Five–Step Guide to a Promotion,* FIRE LINK, http://www.firelink.com/bene fits/articles/1825—firefighters-five-step-guideto-a-promotion (last visited Feb. 16, 2010). It typically includes a tactical scenario and other exercises, an oral interview and presentation, and an employee counseling session. *Id.*

3 In its brief on the merits, the City notes that the court of appeals framed this issue as "whether the information [Exhibits F and G] sought to be excluded from public disclosure was included in the first request." The appellate court concluded that it was. The City contends that the court should have considered the different question of what information Hill "really wanted" or "sought" because he "did not actually want all information pertaining to the assessment center process." The City argues that Hill's initial request did not specify that he wanted Exhibits F and G, but it does not deny that Exhibits F and G were included within the scope of Hill's first request. The Attorney General points out that Exhibits F and G must have been included in Hill's original request because the clarification narrowed the scope of documents sought.

4 Actually, the standard was created by the attorney general's office in 1974 in Open Records Decision No. 26, which explained there must be a "compelling demonstration that the information requested should not be released to the public," decided by the Honorable John L. Hill.

5 In an amicus brief from Senator John Cornyn, former Texas Attorney General, supporting the current Attorney General's position, he explains that the Texas Public Information Act is widely regarded as the strongest and most successful open government law in the country particularly because of its deadlines and enforcement mechanisms and that the Federal Act is largely based on the Texas PIA, citing 151 Cong. Rec. S 1525–26 (Feb. 16, 2005).

6 The fact that the attorney-client privilege exists in other law does not mean that the City could not waive it. *See* Tex. Att'y Gen. ORD–630. The attorney-client privilege benefits the City, as the client, and therefore can be waived by the City. *Id.* However, if the City were claiming a non-discretionary exception, such that the City were actually prohibited from disclosing it at the risk of penalty, that exception would be a compelling reason and satisfy the statute.

7 The Attorney General has held in multiple decisions that a governmental entity waived privileges. *See, e.g.,* Tex. Att'y Gen. ORD–663 (holding that a governmental body waived the attorney client privilege, the work product privilege, and the litigation exception by missing the deadlines in 552.301); Tex. Att'y Gen. LA–5561Tex. Att'y Gen. LA–5561 (same); Tex. Att'y Gen. ORD–400 (1983) (holding that a governmental body waived the work product privilege by showing the information to the members of the public); Tex. Att'y Gen. ORD–325 (1982) (holding that a governmental body waived exceptions to disclosure by not raising them).

8 In fact, all public officials have been required since 2006 to complete a training regarding the government's responsibilities under the PIA. *See* TEX. GOV'T CODE § 552.012.

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Appendix D

KeyCite Yellow Flag - Negative Treatment
Distinguished by Texas Tech University Health Sciences Center - El Paso v. Niehay, Tex.App.-El Paso, January 31, 2022

509 S.W.3d 247
Supreme Court of Texas.

Ken PAXTON, Attorney General of Texas, Petitioner,
v.
CITY OF DALLAS, Respondent

No. 15–0073
|
Argued September 14, 2016
|
OPINION DELIVERED: February 3, 2017

Synopsis

Background: City separately challenged two Attorney General rulings, which required disclosure of attorney-client communications based on city's failure to timely seek an Attorney General decision regarding disclosure of requested information under the Public Information Act (PIA). The 419th Judicial District Court, Travis County, Stephen Yelenosky, J., found the information exempt from disclosure, and after Attorney General appealed, the Austin Court of Appeals, 453 S.W.3d 580, affirmed. The 126th Judicial District Court, Travis County, Gisela D. Triana, J., found the information was subject to disclosure, and after city appealed, the Corpus Christi-Edinburg Court of Appeals, 2015 WL 601974, reversed. Attorney General appealed, and the appeals were consolidated.

Holdings: As issues of first impression, the Supreme Court, Guzman, J., held that:

a governmental body does not forfeit the attorney-client privilege by failing to timely request an Attorney General decision, and

the privilege is sufficiently compelling to rebut the presumption of public disclosure after an untimely request.

Decisions of the Courts of Appeals affirmed.

Boyd, J., filed dissenting opinion in which Johnson, J., joined.

Procedural Posture(s): On Appeal.

***249** ON PETITION FOR REVIEW FROM THE COURTS OF APPEALS FOR THE THIRD AND THIRTEENTH DISTRICTS OF TEXAS, Melissa Young Goodwin, J.

Attorneys and Law Firms

Bill Davis, Charles Roy, David A. Talbot Jr., James Edward Davis, Kimberly L. Fuchs, Rosalind L. Hunt, W. Kenneth Paxton Jr., for Ken Paxton.

Barbara E. Rosenberg, Christopher J. Caso, James B. Pinson, Warren M. Ernst, for City of Dallas.

Opinion

Justice Guzman delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Willett, Justice Lehrmann, Justice Devine, and Justice Brown joined.

Recognizing that government is founded on the authority of the people and "instituted for their benefit,"[1] the Texas Public Information Act (PIA) favors an open and transparent government to ensure the people "retain control over the instruments they have created."[2] But the PIA simultaneously recognizes that public interests are best advanced by shielding some information ***250** from public disclosure.[3] The Legislature, in its considered judgment, has excepted from disclosure more than sixty categories of information, including information protected by the attorney-client privilege.[4] The issue in this case is whether the governmental body must disclose its attorney-client-privileged communications even though the parties agree the information is categorically excepted from public disclosure under the Act. The controversy exists because (1) the governmental body missed a ten-business-day statutory deadline to request a Texas Attorney General decision affirming a categorical exception to disclosure applies,[5] and (2) an untimely request for an attorney general decision gives rise to a presumption that the information must be disclosed absent a "compelling reason to withhold the information."[6] The crux of our inquiry concerns the meaning of "compelling reason."

The PIA does not define, delineate, or restrict the reasons that may be "compelling" enough to withhold requested information following an untimely request for a decision. As a statutory-construction issue of first impression, we

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must therefore determine whether the interests protected and advanced by the attorney-client privilege are imperative enough to overcome the public's interest in having governmental bodies promptly request a determination from the attorney general's office when they seek to protect confidential information from public-information requests. In other words, we must ascertain whether the PIA mandates public dissemination of otherwise confidential attorney-client communications solely because a governmental body missed a statutory deadline.

We hold that, absent waiver, the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption that arises on expiration of the PIA's ten-day deadline. The attorney-client privilege reflects a foundational tenet in the law: ensuring the free flow of information between attorney and client ultimately serves the broader societal interest of effective administration of justice.[7] The Legislature's choice to exempt information protected by the attorney-client privilege embodies the fundamental understanding that, in the public sector, maintaining candid attorney-client communication directly and significantly serves the public interest by facilitating access to legal advice vital to formulation and implementation of governmental policy. Full and frank legal discourse also protects the government's interest in litigation, business transactions, and other matters affecting the public.[8] Depriving the privilege of its force thus compromises the public's interest at both discrete and systemic levels.[9]

Because failing to meet the PIA's deadline to assert a statutory exception to disclosure does not, in and of itself, constitute waiver of the attorney-client privilege, requested information does not automatically lose its confidential status and is not subject to compelled disclosure under the PIA solely on that basis. We therefore affirm the lower-court judgments holding the ***251** attorney-client confidences at issue need not be disclosed to the public-information requestors.

I. The Texas Public Information Act's Requirements

The PIA embodies the State's policy that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."[10]

Under the PIA, the public has a right of access to "public information,"[11] a broadly defined term.[12] A governmental body must "promptly" produce public information after receiving a request for disclosure, meaning "as soon as possible under the circumstances, that is, within a reasonable time, without delay."[13] The prompt production of public information furthers the "fundamental philosophy" that "government is the servant and not the master of the people."[14]

The right to access is not absolute, however; the Legislature incorporated into the PIA more than sixty exceptions to the public-disclosure requirement.[15] Statutory exceptions range from very broad to more specific categories of information, including "information considered to be confidential by law, either constitutional, statutory, or by judicial decision,"[16] attorney-client information,[17] certain rare books and original manuscripts,[18] various categories of records containing personal information of public employees or private citizens,[19] and sensitive crime-scene images.[20] "[The PIA's] exceptions embrace the understanding that the public's right to know is tempered by the individual and other interests at stake in disclosing that information."[21]

Consistent with the PIA's fundamental precept that "[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know,"[22] a governmental body cannot unilaterally determine that requested information is exempt from disclosure. Rather, a governmental body must request a decision from the Texas Attorney General confirming the claimed exception applies to the requested information, unless the Attorney General has previously made a determination that the information falls within a claimed exception.[23]

***252** In harmony with the policy underlying the PIA's prompt-production requirement, the governmental body asserting an exception to disclosure must request an attorney general decision "within a reasonable time but not later than the 10th business day after the date of receiving the written request."[24] If a request for decision is untimely, "the information requested in writing is presumed to be subject to required public disclosure and must be released *unless there is a compelling reason to withhold the information.*"[25]

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To secure compliance with the statute, the PIA provides civil-enforcement mechanisms when a governmental body "refuses to request an attorney general's decision" or "refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure."[26] In such cases, either the requestor or the Attorney General can institute mandamus proceedings to compel access to the information.[27] The PIA further authorizes certain local or state officials to seek declaratory or injunctive relief based on a complaint by "a person who claims to be the victim of a [PIA] violation," but only after the governmental body is afforded notice and fails to timely cure the alleged violation.[28] Subject to limited exceptions, the trial court shall award costs of litigation and reasonable attorney fees to a plaintiff who substantially prevails in a civil-enforcement suit against the governmental body.[29]

The PIA also provides criminal penalties for (1) destruction, removal, or alteration of public information, (2) distribution or misuse of "information considered confidential under the [PIA's] terms," and (3) criminally negligent failure to provide access to or copies of public information.[30]

In comparison, "[t]he only suit a governmental body may file seeking to withhold information from a requestor is a suit ... seek[ing] declaratory relief from compliance with [an attorney general] decision."[31] Attorney fees and costs may be awarded to a party who substantially prevails in a suit instituted by a governmental body.[32]

II. The Dispute

In this consolidated appeal, the City of Dallas seeks relief from two attorney general decisions concluding the City must disclose confidential attorney-client communications pursuant to public-information requests the City received regarding the McCommas Bluff Landfill (the Landfill case) and a convention-center hotel (the Hotel case). The parties agree the requested information constitutes "public information" under the PIA, but because the information is undisputedly subject to the attorney-client privilege, the City contends the information is excepted from disclosure under PIA sections 552.101 (the confidential-by-law exception) and 552.107 (the attorney-client exception).

Section 552.107 applies to "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the ***253** Texas Disciplinary Rules of Professional Conduct."[33] Section 552.101 applies to "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[34] According to the City, section 552.101 encompasses the attorney-client privilege because the privilege derives from the common law and is also memorialized in judicially promulgated rules.

The parties agree the PIA excepts attorney-client communications from public disclosure, although they disagree about whether protection is afforded under the confidential-by-law exception or the attorney-client exception. The dispute is not about whether the PIA excepts the requested information from public disclosure—the parties agree it does. Nor does the City contend that it may unilaterally make that determination. Rather, the dispute arises because the City failed to *timely* request an attorney general decision affirming that the information falls within one of the asserted exceptions, as required by section 552.301 of the PIA.

The City requested an attorney general decision twenty-six business days after receiving the written request in the Landfill case and forty-nine business days after receiving the request in the Hotel case. The City's proffered reason for the delay was inadvertence.[35] Because the requests for an open-records ruling were untimely, the City concedes the requested information is presumed to be subject to disclosure unless "a compelling reason to withhold the information" exists.[36] Thus, the determinative issue is whether the City met its burden to rebut the public-disclosure presumption in section 552.302 that was triggered when the City failed to timely seek an attorney general decision.

***254** The City asserts a number of statutory exceptions to disclosure and adamantly argues that important policies underlying the attorney-client privilege present a compelling reason to withhold disclosure of confidential attorney-client communications. The City also claims a compelling reason to withhold the requested landfill information because disclosure would prejudice its bargaining position in a long-term transaction with millions of dollars at stake.

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Though attorney-client communications are not intended to be freely accessible to the public under the PIA or available to third parties in proceedings outside the PIA, the Attorney General determined the City must release the requested information.[37] The Attorney General's letter rulings were based on agency precedent limiting the "compelling reason" standard to (1) information falling under an exception the Attorney General considers to impose "mandatory" confidentiality, meaning the governmental body is *prohibited* by law from disclosing the information and could not voluntarily disclose the information without being criminally sanctioned under the PIA,[38] and (2) information that could jeopardize third parties if disclosed.[39] The latter circumstance is not implicated by the public-information requests at issue, and the Attorney General asserts the former does not apply because the attorney-client privilege can be waived voluntarily, making confidentiality "discretionary," not "mandatory." Taking a constrained view of the statutory language, the Attorney General has determined that the mere *ability* to waive the attorney-client privilege automatically and categorically precludes the privilege from constituting a compelling reason to withhold confidential attorney-client ***255** communications, even if the privilege has not *actually* been waived. Accordingly, the Attorney General ruled that neither the confidential nature of attorney-client communications nor the City's particularized allegation of prejudice to its business interests constitutes a compelling reason to withhold the requested information.

The City challenged the letter rulings in separate trial-court proceedings and achieved conflicting results. In the Hotel case, the trial court held the City did not have a compelling reason to withhold the requested information. But in the Landfill case, the trial court found the information is excepted from required public disclosure, explaining the attorney-client privilege is an inherently "compelling reason to withhold information" because it is vital to our adversarial system of justice and no authority supports compelling disclosure of information protected by the attorney-client privilege based solely on a missed deadline.[40] The City and the Attorney General appealed the respective adverse rulings.

In the Landfill case, a divided Third Court of Appeals affirmed the trial court's judgment in the City's favor, holding attorney-client communications are excepted from disclosure under the confidential-by-law exception and, considering the privilege's purposes and the protections afforded under the law, a compelling reason to withhold the information necessarily exists and rebuts the public-disclosure presumption in section 552.302.[41]

The Hotel case was transferred to the Thirteenth Court of Appeals pursuant to a docket-equalization order. Applying the appellate decision in the Landfill case as precedent,[42] the court reached the same conclusion, reversing the trial court's judgment and rendering judgment for the City.[43]

On appeal to this Court, we consolidated the Attorney General's appeals for argument and disposition.[44]

III. Discussion

The parties agree that, had the City timely requested an attorney general decision, the PIA does not require public disclosure of attorney-client confidences in either the Landfill or the Hotel case. Nor is there any dispute that the City's untimely requests activated a presumption that the requested information must be disclosed absent a "compelling reason to withhold the information." Thus, the dispositive issue is whether a "compelling reason" exists to rebut the public-disclosure presumption.

The resolution of that issue does not turn on whether the attorney-client privilege falls within one statutory exception or another, or whether confidentiality is at the governmental body's discretion rather ***256** than compulsory, as asserted by the Attorney General. Such extra-textual distinctions are not decisive because the statute prescribes "a compelling reason to withhold the information" as the determinative and only standard.[45]

In resolving the dispute at hand, we affirm that even under the compelling-reason standard, information cannot be withheld unless a statutory exception applies, because public information remains public unless it is expressly excepted from disclosure.[46] But merely establishing an exception cannot always be sufficient to rebut the public-disclosure presumption, because if the statute were so construed, the compelling-reason requirement would be rendered a nullity.

We reject, however, the notion that statutory exceptions are categorically distinct from compelling reasons and that something more is always required to rebut the presumption that arises from a governmental body's failure to timely request an attorney general decision. In some

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instances, important policies and interests that animate a statutory exception are compelling *in their own right.* We hold the attorney-client privilege, which is protected by one or more statutory exceptions to public disclosure, [47] protects and advances interests that provide independently compelling reasons to withhold privileged information unless confidentiality has been waived.

A. "Compelling Reason"

The controlling issue in this case involves the proper construction and application of the "compelling reason" standard in section 552.302 of the PIA, which is implicated when a governmental body seeks to withhold information from public disclosure but fails to make a timely request for an attorney general decision. [48] Statutory construction presents a question of law that we determine de novo under well-established principles. [49]

As always, our mandate is to ascertain and give effect to the Legislature's intent as expressed in the statutory language. [50] Further, by statutory directive, we must liberally construe the PIA to promote the policy of open government. [51]

The PIA does not define the phrase "compelling reason" or its constituent terms; accordingly, those words bear their common, ordinary meaning unless a different or more precise definition is apparent from the statutory context or the plain meaning yields an absurd result. [52] Though neither of those qualifying exceptions applies, ***257** the Attorney General relies on agency-deference and legislative-ratification doctrines to support a restrictive construction of the compelling-reason standard.

Long before the "compelling reason" safeguard was added to section 552.302, the Attorney General authorized governmental bodies to withhold information from public disclosure despite an untimely request for an open-records decision, if a "compelling reason" or a "compelling demonstration" rebutted the statutory presumption of openness. [53] But the Attorney General recognized only two circumstances that could satisfy that standard: "[1] the asserted exception is 'mandatory,' *i.e.*, the information is confidential by law and the governmental body therefore is *prohibited* from releasing it, or [2] if the release of the information implicates third party interests." [54]

Citing legislative history and relying on agency precedent, the Attorney General asserts the Legislature intended a similarly constrained construction of section 552.302's compelling-reason standard. [55] As so construed, the Attorney General contends the City cannot rebut the public-disclosure presumption because neither condition exists.

We decline the Attorney General's invitation to import restrictions that alter the plain language of the statute at issue here. We have long held a statute's unambiguous language controls the outcome. When a statute is clear and unambiguous, like section 552.302, we do not resort to extrinsic interpretive aids, such as legislative history, "because the statute's plain language 'is the surest guide to the Legislature's intent.' " [56] Moreover, although we may consider an agency's construction of a statute, "*deferring* to an agency's construction is appropriate only when the statutory language is ambiguous." [57] In like manner, legislative ratification applies only to ambiguous statutes. [58] We reject the limitations the Attorney General champions because they are not textually supportable. Instead, we must ***258** apply the plain meaning of the phrase "compelling reason to withhold the information," which is not as circumscribed as the Attorney General advocates.

The meaning of the term "compelling" is of vital importance to our analysis because it represents a qualitative limitation on the justifications that permit withholding information from public disclosure. Neither *a* reason nor even a *good* reason would be sufficient to rebut the public-disclosure presumption. The reason must be "compelling."

Our examination of dictionaries, treatises, and judicial constructions of similar language [59] reveals the term "compelling" connotes urgency, forcefulness, and significantly demanding concerns. "Compelling" means "[u]rgently requiring attention" and "[d]rivingly forceful"; [60] "not able to be resisted; overwhelming" and "not able to be refuted; inspiring conviction"; [61] and "calling for examination, scrutiny, consideration, or thought." [62] A need is "compelling" if it is "so great that irreparable harm or injustice would result if it is not met"; [63] a reason may be "compelling" if time is of the essence; [64] a governmental interest "is compelling when the balance weighs in its favor"; [65] and the public interest in maintaining confidentiality of information may be "compelling" if the

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interest advanced by the promise of confidentiality would be "eviscerated" by compelled disclosure. [66]

Though not authoritative, we may, as this Court has often done, look to federal cases for guidance on the meaning of terms not otherwise defined. [67] Federal courts have employed a "compelling reason" standard to determine whether information should be withheld from the public in an analogous context involving sealing judicial records. [68] Much like the policies ***259** underlying the PIA, a court's discretion to seal records is "bounded by a 'long-established legal tradition' of the 'presumptive right of the public to inspect and copy judicial documents and files.' " [69] To determine whether "compelling reasons" exist to shield information in court records from public exposure, federal courts employ a balancing test, weighing the interest the public has in access to judicial records against the interest of a party seeking to make judicial records confidential. [70]

We similarly conclude that section 552.302's compelling-reason standard requires an assessment of the relative importance of a reason for withholding information in relation to the presumption of openness. [71] In that regard, a reason to withhold information will be "compelling" only when it is of such a pressing nature (e.g., urgent, forceful, or demanding) that it outweighs the interests favoring public access to the information and overcomes section 552.302's presumption that disclosure is required. [72]

B. The Attorney–Client Privilege Protects Significant Interests

Privileges "represent society's desire to protect certain relationships." [73] The attorney-client privilege holds a special place among privileges: it is "the oldest and most venerated of the common law privileges of confidential communications." [74] As "the most sacred of all legally recognized privileges," "its preservation is essential to the just and orderly operation of our legal system." [75]

The privilege rests on "the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional ***260** mission is to be carried out." [76] "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." [77] The privilege's purpose could not be more evident: "to encourage clients to make full disclosure to their attorneys" [78] and, in return, to allow clients to obtain full, fair, and candid counsel. [79] By promoting "full and frank communications between attorneys and their clients," the privilege "promote[s] broader public interests in the observance of law and administration of justice." [80]

In the governmental context, the attorney-client privilege applies with "special force." [81] "[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest." [82]

The notion that "sound legal advice or advocacy serves public ends" is not rationally debatable. [83] After all, the government conducts its business on behalf of the public (residents, voters, taxpayers, and ratepayers), [84] and a fully informed servant is a more capable servant. The attorney-client privilege "encourag[es] government officials formulating policies in the public's interest to consult with counsel in conducting that public business." [85] The privilege also protects the public fisc when the government is participating in litigation, negotiating billion-dollar contracts, and performing regulatory acts under complex regulatory schemes.

Fundamentally, the promise of confidentiality fosters "a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business." [86] And though the dissent dismisses the importance of the privilege in the governmental context as mere hyperbole, [87] affording weight to the policies and interests that drive the privilege's application cannot be disregarded so handily. At a bare minimum, sound judgment tells us that the people are best served when government officials, "who are expected to uphold and execute the law and who may face criminal ***261** prosecution for failing to do so," operate in an atmosphere that encourages them "to seek out and receive fully informed legal advice." [88]

The attorney-client privilege exists—and has been a cornerstone of our legal system for nearly 500 years [89]—because the interests protected and secured by the promise of confidentiality are not merely significant; they are

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quintessentially imperative. Safeguarding the privilege is important—indeed, compelling—because the consequences of disclosure are far from inconsequential. Once information has been disclosed, loss of confidentiality is irreversible.[90] The bell cannot be unrung, and neither dissemination nor use can be effectively restrained.[91] Unsurprisingly, the ramifications are not limited to particularized matters, but are also wrought on a systemic level.[92] The PIA recognizes this by categorically excepting privileged information from the public-access requirement. More to the point, however, significant interests independent of the PIA's exceptions favor withholding confidential and privileged attorney-client communications from compelled disclosure.

Though the precise issue presented in this case is one of first impression under the PIA, analogous authority from this Court confirms that the attorney-client privilege is inherently compelling. For example, in *In re George*, we examined the attorney-client privilege in a dispute involving the client's access to attorney work product.[93] After the client's attorneys had been disqualified from representing her based on their prior representation of an opposing party, the client sought possession and control of the attorneys' work product. We held that maintaining confidentiality of the opponent's attorney-client communications—which had been the basis for the disqualification order—provided a "compelling reason" to deprive the client of her significant property right to the work product generated by her former counsel.[94]

In *Ford Motor Co. v. Leggat*, we considered whether to apply Michigan's more expansive protections of the attorney-client privilege in lieu of Texas's narrower attorney-client privilege in a conflict-of-laws analysis.[95] We held that "[t]he purpose of the attorney-client privilege and the reliance placed by the client on the confidential nature of the communications *create[d] special reasons*" to apply the broader attorney-client privilege.[96]

In a different context involving similar tensions between public access and the need for confidentiality, federal courts ***262** have affirmed that the need to preserve the attorney-client privilege is compelling. Applying a compelling-reason standard to determine whether to seal judicial records, federal courts generally accept the attorney-client privilege as a "compelling reason" justifying a motion to seal[97] even when balanced against the public's substantial right to access the information: "When privileged materials must be filed in a case, and the privilege has not been waived, courts generally find compelling reasons to overcome the strong presumption in favor of public access exist sufficient to warrant sealing those materials."[98]

As the PIA and the common law both bear witness, the attorney-client privilege protects a relationship that is integral to the administration of justice as well as a government that functions for the benefit of the people.

C. Waiver

Despite advancing and protecting important interests, the attorney-client privilege could not be a "compelling reason to withhold the [requested] information" if confidentiality has been waived. Thus, before balancing the interests protected by the privilege against those served by the PIA, we must consider whether noncompliance with section 552.301's ten-day deadline waives the attorney-client privilege. We hold that a governmental body does not forfeit the attorney-client privilege by failing to timely request an attorney general decision under section 552.301.

"Generally, 'waiver' consists of the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."[99] Merely missing ***263** a statutory deadline does not mirror any of the conduct our rules and case law recognize as waiving a privilege. Nor does the PIA's language support the conclusion that the privilege may be waived by inaction or delay. We elaborate on both points as follows.

Rule 511 of the Texas Rules of Evidence governs waiver of evidentiary privileges by voluntary disclosure. Subsection (a) of Rule 511 sets forth the general rule that evidentiary privileges are waived if the privilege holder voluntarily discloses the privileged matter, consents to disclosure, or places the matter at issue.[100] The circumstances Rule 511(a) recognizes as waiving a privilege are materially dissimilar to those presented in this case. Subsection (b) of the rule applies only to the attorney-client privilege and imposes limitations on the general waiver rule to preserve the privilege despite actual disclosure.[101] Under subsection (b), the attorney-client privilege is afforded additional protection against waiver.

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The attorney-client privilege may also be waived by inadvertent disclosure during litigation, if the disclosure is accompanied by conduct inconsistent with claiming the privilege of confidentiality. "[T]he essential function of the privilege is to protect a confidence that, once revealed *by any means*, leaves the privilege with no legitimate function to perform." [102] Notwithstanding actual disclosure, however, Texas Rule of Civil Procedure 193.3(d) preserves a claim of privilege if the privilege holder (1) did not intend to waive the privilege and (2) takes prompt action to claim the privilege after "actually discover[ing]" the disclosure was made. [103] Rule 193.3(d) "was designed to ensure that important privileges are not waived by mere inadvertence or mistake." [104] But when inadvertence is coupled with failure to take prompt remedial action after discovering actual disclosure of privileged information, the privilege is waived because inaction under such circumstances is inconsistent with claiming the privilege.

Citing Rule 193.3(d) by analogy, the Attorney General suggests sections 552.301 and 552.302 should be construed as effecting a waiver by inaction or omission. But the scenario described in Rule 193.3(d)—actual disclosure followed by delayed action results in waiver—is the converse of the question presented here: does delay waive the privilege and compel disclosure?

Rule 193.3(d) contemplates waiver of confidentiality in the context of an inadvertent, *but actual*, disclosure. [105] In this case, there has been no disclosure, and the issue ***264** is whether the PIA compels disclosure *despite* the absence of actual disclosure and *without regard to* the City's efforts to maintain confidentiality under section 552.302. Rule 193.3(d) is substantively inapposite.

In addition to actual disclosure, the attorney-client privilege may be waived by "offensive use" of the privilege. Offensive use occurs when a party seeking affirmative relief "attempts to protect outcome-determinative information from any discovery." [106] Though we have recognized the vitality of the offensive-use doctrine, we have explained that "an offensive use waiver of a privilege should not lightly be found" because privileges "represent society's desire to protect certain relationships." [107] An untimely request for an attorney general decision under section 552.301 does not implicate concerns equivalent to those undergirding the offensive-use doctrine.

Finally, and most decisively, section 552.302's language cannot reasonably be construed as effecting a waiver of confidentiality. Some PIA sections explicitly refer to waiver, [108] but section 552.302 does not. Rather than waiving interests that are protected by a statutory exception to disclosure, section 552.302's express language creates a *presumption* that disclosure is required. [109] Because the presumption is rebuttable, we conclude that missing the statutory deadline in section 552.301 does not waive the attorney-client privilege.

D. Balancing Competing Interests

Our inquiry does not end with establishing that the interests secured by the attorney-client privilege are inherently compelling and that mere delay in seeking an attorney general decision does not waive the privilege. Those determinations impact only one side of the balancing equation. We must also consider whether the significant interests the attorney-client privilege advances outweigh competing interests favoring disclosure and the statutory presumption that disclosure is required.

We begin our analysis by observing that, under the PIA, (1) the public is not entitled to information the Legislature has chosen to except from required public disclosure, [110] and (2) section 552.302's "compelling reason" safeguard applies only to information the PIA already excepts from disclosure. [111] Accordingly, a requestor's general right of access to public information is not a competing interest to be weighed under the compelling-reason balancing test. [112]

Instead, the failure to timely request an attorney general decision under section 552.301 of the PIA implicates the public's interest in the "prompt" production of public ***265** information. [113] The PIA's deadlines help ensure governmental bodies do not impede the public's access to public information. Compliance with statutory deadlines furthers important interests in avoiding delay and preventing gamesmanship and obstructionism.

These interests are undoubtedly significant, but the PIA expressly contemplates they may be overcome by countervailing interests of utmost importance. [114] We conclude the interests protected by the attorney-client

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privilege surpass that high threshold. When weighed against the need for expediency, the interests protected by the attorney-client privilege—and the irremediable consequences of disclosure—are demonstrably more compelling.

Under the PIA, the public has no right of access to privileged information in the first instance and only a rebuttable presumption of access in the second. [115] We must also consider that the attorney-client privilege is afforded to the government *for the public's benefit*; accordingly, the public's interest is not one-sided in this context. Because the privilege benefits both the governmental body and the people it represents, the public's interest in maintaining confidentiality must be factored into the analysis. Among other shared benefits, the privilege shields confidential information from third parties whose litigation or business interests are adverse to the public's interest, promotes a culture that incentivizes governmental bodies to seek legal advice, and allows the free flow of information between attorney and client without fear of compelled public disclosure. [116]

***266** Protecting privileged attorney-client communications is also more urgent than promptness because the PIA provides disincentives to gamesmanship that might otherwise reward dilatory conduct, intentional or otherwise. Under the PIA, there is no benefit to bypassing the Attorney General altogether, and delay bears its own consequences.

For one thing, the interests protected by some statutory exceptions will not independently satisfy the compelling-reason standard; thus, failing to timely assert an applicable exception could result in mandatory disclosure that might otherwise have been avoided. Because section 552.302 provides only a limited safeguard, missing the deadline in section 552.301 is a risky endeavor.

Refusing to request or comply with an attorney general decision carries the additional risk of a civil-enforcement action that—win or lose—would surely be costly. But if lost, obtaining and relying on an attorney general decision under section 552.301 precludes an award of attorney fees and litigation costs to the prevailing plaintiff. The PIA's fee-shifting provisions thus provide both a carrot and a stick.

Finally, a governmental body's only way to avoid disclosing public information to a requestor is a suit that "seeks declaratory relief from compliance with [an attorney general] decision issued under Subchapter G [sections 552.301 to 552.309]." [117] This provision also helps secure the Attorney General's oversight as contemplated by the Legislature.

To require public disclosure of confidential attorney-client communications as an automatic—and irremediable—sanction for missing a statutory deadline is not necessary to achieve the PIA's objective of an open government and would be a jurisprudential course fraught with peril. Compelled forfeiture of the privilege under such circumstances necessarily undermines its underpinnings and threatens the foundation of a justice system that thrives on full and candid legal representation. Most importantly, however, such an outcome is not supported by a plain reading of the statutory text.

The PIA's exception for attorney-client communications affirms the importance of honest and candid conversations between governmental bodies and their legal counsel. Eviscerating the privilege by compelling disclosure in pursuit of "promptness" may have a wide-reaching and chilling effect on communications between governmental bodies and their counsel. [118] When a privilege as sacrosanct as the attorney-client privilege is irretrievably lost under the unexceptional facts presented here, "governmental entities might well choose to forego fruitful self-analysis and decide not to seek needed legal advice." [119]

Robotic perfection by a governmental body's public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a City's legal affairs without the occasional error would require divinity. The safeguard the Legislature enacted in section 552.302 exists to prevent such a scenario.

E. Section 552.302 Does Not Require Disclosure

When balanced against the PIA's promptness requirements, the interests ***267** safeguarded by the attorney-client privilege present compelling reasons to withhold information protected by the privilege. The harm from compelled dissemination of confidential attorney-client communications is irremediable, and the consequences are visited on both the governmental body and the taxpayers it represents. Mandating disclosure would further undermine the attorney-client privilege's fundamental purpose by impairing frank discourse between a governmental body and its counsel. [120]

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In contrast, allowing a governmental body to withhold attorney-client communications after an untimely request for an attorney general decision bears less onerous consequences that may be ameliorated by several statutory incentives and disincentives. [121] Stated summarily, even when a compelling reason exists to withhold disclosure, the PIA incentivizes governmental bodies to request an attorney general decision (1) to ensure the attorney-client privilege covers all the information the governmental body desires to withhold, (2) to assert additional exceptions for withholding information for which no "compelling reason to withhold information" exists, (3) to avoid a costly civil-enforcement action, and (4) to avoid assessment of litigation costs and reasonable attorney fees if the plaintiff substantially prevails in such an action. [122]

Although we must construe the PIA liberally in favor of granting requests for information, [123] we hold that the significant interests supporting withholding confidential and privileged attorney-client communications outweigh the competing interests supporting disclosure. We therefore conclude a "compelling reason" to withhold confidential attorney-client communications ***268** exists and, absent waiver, rebuts the presumption that the information protected by the privilege is "subject to required public disclosure." [124]

F. Response to the Dissent

Though quibbling here and there about the actual importance of the attorney-client privilege in the public sector, the dissent's analysis fundamentally depends on the fiat that exceptions and compelling reasons are mutually exclusive under the statute. [125] But no authority—statutory or otherwise—supports the conclusion that compelling interests motivating a statutory exception are categorically disqualified from constituting a "compelling reason" to withhold information from public disclosure. The dissent's proclamation pays lip service to our fundamental obligation to construe statutes as written, but is textually unsupportable and, frankly, preposterous.

First, the Legislature has placed no restrictions on the compelling-reason standard. Indeed, as the dissent readily acknowledges, the "actual language" in section 552.302 applies to "*any* 'compelling reason.' " [126] Second, the statute betrays no Legislative intent to ignore policies embodied in and interests protected by statutory exceptions in determining whether a "compelling reason to withhold the information" exists. Not a single word in the PIA supports a construction of section 552.302 as rendering irrelevant, for example, the policy of preventing bioterrorism that underlies section 552.151 or the interest in avoiding a "substantial threat of physical harm" to an employee or officer as advanced by section 552.152. [127] In this case, our responsibility to determine whether a compelling reason exists requires that we consider the interests protected by the attorney-client privilege—interests the dissent ignores entirely—and not disregard them out of hand merely because they were important enough for the Legislature to protect in the first instance. [128]

This is not, as the dissent says, "a distinction without a difference" [129] because ***269** not all of the policies and interests animating a statutory exception will necessarily be compelling in their own right—in whole or part. [130] We cannot, however, ignore those that are. The statutory support for this construction of the statute is, quite simply, the compelling-reason standard articulated in section 552.302. [131]

The dissent's theory to the contrary turns on an interpretation of section 552.302 that requires privilege *plus* other compelling circumstances. Aside from engrafting restrictions that do not exist in the statutory language, the dissent offers few parameters as to what would qualify. We are left only with the dissent's view that a compelling reason (1) will usually address the governmental body's "reasons for its failure to timely and properly assert the privilege," [132] and (2) "might exist if the governmental body establishes that substantial harm would result if the information is released." [133]

In summarily concluding that the interests protected by the attorney-client privilege are not significant enough to rebut the public-disclosure presumption, the dissent gives short shrift to the compelling interests underlying the attorney-client privilege, cites no authority supporting compelled disclosure of attorney-client privileged information due to tardiness or inaction, and overlooks the public interest in maintaining confidentiality of attorney-client communications. As a substitute for these inquiries, the dissent's analysis elevates promptness to near conclusive importance. The PIA does not, however, require a compelling reason for "untimeliness" or "lack of diligence"; it requires a "compelling reason to withhold the information" from public disclosure. The significant interests advanced and protected by the attorney-client privilege meet that standard.

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The dissent's analytical gaps are not overcome by the host of boilerplate open-records decisions the dissent offers to "prove[ ]" that routinely depriving the attorney-client privilege of force over the last twenty-two years has not prevented governmental bodies from seeking legal advice or chilled full and frank legal communications. [134] No matter how many open-records decisions have applied the Attorney General's unduly restrictive interpretation of section 552.302 —the underlying rationale of which the dissent correctly repudiates [135] —proof that a rule has been applied is no proof of the rule's impact. The reality is we do not know how twenty-two years of routinely adverse legal rulings have shaped internal discourse; ***270** whether ethical and legal violations have occurred that may have been prevented under a proper construction of the PIA; or how the public fisc has been affected. We do know, however, that the attorney-client privilege exists because the systemic harm from denying it is real even if it is not quantifiable. [136] We also know that the privilege's purpose is well established and enduring, and that it applies with "special force" to the government because it advances the public's best interests. [137]

Ipse dixit, however, is not proof of anything—one way or the other—and is no substitute for 500 years of precedent. [138] If it were, the same open-records decisions the dissent relies on would "prove[ ]" and debunk the dissent's own "parade of horribles" by demonstrating that even under the Attorney General's restrictive construction of the statutory standard, governmental bodies continued to engage the PIA's oversight process after missing the statutory deadline. [139]

As a final rejoinder, we address the dissent's refrain that we are substituting our judgment, our preferences, and our rules for the Legislature's. When we endeavor to ascertain the meaning of an undefined statutory term that is integral to a statutory inquiry, we are not overstepping the bounds of our authority merely because our colleagues disagree with our analysis or conclusions. "[T]o admit that disagreements do and will always exist over hard and fine questions of law doesn't mean those disagreements are the products of personal will or politics rather than the products of diligent and honest efforts by all involved to make sense of the legal materials at hand." [140] But if that criticism were fairly lodged in any direction, it would be toward those who, in the guise of interpreting a statute, invent a standard that imposes limitations that are more restrictive than the plain language allows while simultaneously denouncing a party's construction of the statute on the very same basis. [141] By substituting inflammatory rhetoric for analysis, the dissent confirms the adage that, when neither the law nor the facts are in your favor, pound the table.

IV. Conclusion

The PIA promotes and advances the public's interest in governmental transparency and openness, but not at the expense of the public's equally significant interest in ensuring public officials pursue and obtain legal advice and representation in affairs of governance. The significance of the interests protected by the attorney-client privilege and the need to protect attorney-client confidences from compelled public disclosure were not lost on the Legislature in enacting the PIA. The PIA addresses the competing values of transparency and the need for confidentiality by excepting confidential attorney-client communications from mandatory public disclosure. In ***271** doing so, the PIA recognizes the importance of the attorney-client privilege and affirms that the public interest is best served when those sworn to protect it are guided by fully informed legal advice in conducting public affairs.

Though the PIA must be construed liberally in favor of granting a request for public information, the "compelling reason" inquiry requires us to weigh the public's interest in expeditious assertion of a statutory exception against the invaluable right to have attorney-client communications protected from compelled public disclosure. Meeting statutory deadlines is certainly important, but as the PIA plainly articulates, is not determinative. Weighing against the need for prompt action is the irremediable consequence of compelling disclosure; once privileged information is disclosed, confidentiality is lost for all times and all purposes. When the interests are balanced, the compelling nature of the attorney-client privilege is manifest. Because there is a compelling reason to withhold information covered by the attorney-client privilege, we affirm the lower-court judgments holding the City of Dallas need not disclose that information to the requestors.

Justice Boyd filed a dissenting opinion, in which Justice Johnson joined.

Justice Boyd, joined by Justice Johnson, dissenting.

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When this Court gets to make the rules, it goes to great lengths to protect attorney-client communications. As the Court explains today, under the common law and our evidentiary and procedural rules (that is, the rules this Court gets to make), most attorney-client communications are protected from compelled disclosure unless the client waives the privilege by intentionally relinquishing it or engaging in conduct inconsistent with the right to claim it. *Ante* at 262–63 (citing *In re Nationwide Ins. Co.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); TEX. R. EVID. 503, 511; TEX. R. CIV. P. 193.3(d)).

But we don't get to make the rules here. When the public seeks access to public information that the government possesses on the public's behalf, the Texas Public Information Act controls. TEX. GOV'T CODE §§ 552.001–.353. The government has no inherent, constitutional, or common-law right to withhold any public information from the public's view. The Texas Constitution guarantees that all "political power is inherent in the people," and the government is "founded on their authority, and instituted for their benefit." TEX. CONST. art. I, § 2. Based on the "fundamental philosophy" of this "constitutional form of representative government," the people of Texas have declared through their duly elected lawmakers that "it is the policy of this state" that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE § 552.001(a). Although the people have delegated significant authority to their government, they have not given "their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.* Instead, the people "insist on remaining informed so that they may retain control over the instruments they have created." *Id.*

The Texas Public Information Act recognizes that the government may need to keep certain attorney-client communications confidential, just as it recognizes the government may need to keep certain trade secrets, student records, information about bioterrorist threats, and other types of information confidential. In each case, the Act protects the need for confidentiality ***272** by providing an exception to the Act's public-disclosure requirement. But the Act's protection is limited, and it treats attorney-client communications exactly the same as all other excepted information.

Relying on Court-created common-law and litigation rules, the Court decides today to treat the attorney-client privilege as unique and special even though the Act does not. The Act treats the privilege as the basis for an exception to the Act's disclosure requirement, but the Court holds that it is also—categorically and always—a "compelling reason" to withhold government communications from the public even when the government fails to timely and properly claim the Act's exception. Under the Court's holding, establishing the exception will always constitute a compelling reason, so the Act's compelling-reason requirement is meaningless when applied to attorney-client communications. This holding obliterates the sole method by which the Act compels the government to timely and properly assert the attorney-client privilege.

Nothing in the Act supports the Court's decision to grant the privilege such special treatment. Nor do the Court's hyperbolic assertions that holding otherwise might cause the government to stop relying on legal advice. [1] At least twenty-two years of reality have conclusively proven the contrary. Adhering to the Act's requirements instead of the Court's policy preferences and preposterous predictions, I conclude that the attorney-client privilege cannot independently constitute a compelling reason to permit the government to withhold public information when the government fails to assert the privilege as and when the Act requires. Instead, like every other basis for one of the Act's exceptions, the privilege triggers an exception to the Act's disclosure requirement. If the government fails to timely and properly assert that exception, the Act requires that the facts and circumstances of the particular case establish a compelling reason that effectively demands that the information be withheld from the public despite the government's failure to timely comply with the Act. Because the City of Dallas has provided no such compelling reason in these particular cases, I would reverse.

I.

Compelling Reason

The Texas Public Information Act's foundational provision requires the government to make public information [2] "available ***273** to the public at a minimum during the normal business hours of the governmental body" [3] that possesses the information. TEX. GOV'T CODE § 552.021. When the government receives a request for public

information, it must provide the information to the requestor "promptly," which means "as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* § 552.221(a). The government may withhold requested information only as expressly provided by the Act. *See id.* § 552.006. The Act pointedly requires that we construe its provisions "liberally ... in favor of granting a request for information." *Id.* § 552.001(b).[4] Like any other statute, we must enforce the Act "as written" and "refrain from rewriting [its] text." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (citing *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920)).

The Act provides numerous exceptions to its disclosure requirement. *See* TEX. GOV'T CODE §§ 552.101–.156. But the government cannot unilaterally withhold information it believes falls within one of the exceptions. Instead, it must ask the Attorney General to decide whether an exception applies. *Id.* § 552.301(a). Specifically, the government must ask for the Attorney General's decision, identify the exceptions on which it relies, and provide notice to the requestor within "a reasonable time" but not more than ten business days after receiving the public-information request. *Id.* § 552.301(b), (d). Then, within a "reasonable time" but not more than fifteen business days after receiving the request, the government must submit written comments to the Attorney General explaining why the asserted exceptions apply and must send a copy of those comments to the requestor. *Id.* § 552.301(e), (e–1).[5] The Attorney General must "promptly render a decision ... determining whether the requested information is within one of the exceptions." *Id.* § 552.306(a). The government must either comply with the Attorney General's decision or file suit to challenge it. *See id.* § 552.324(a).

The Act expressly refers to section 552.301's ten- and fifteen-day time limits as "deadlines." *Id.* § 552.2615(g). A deadline is "a date or time before which something must be done and after which the opportunity passes or a penalty follows." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 580 (2002). Section 552.302 describes the consequences of the government's failure to meet section 552.301's deadlines:

> If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Sections 552.301(d) and (e–1), the information requested in writing *is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.*

***274** TEX. GOV'T CODE § 552.302 (emphasis added).

In these two consolidated cases, the City of Dallas received requests for information that included its attorney-client communications, but it failed to request the Attorney General's decision within ten business days as section 552.301 requires. Instead, the City waited until the twenty-sixth business day after receiving one request and the forty-ninth business day after receiving the other. According to the record, the City never provided any explanation for having missed the deadlines.[6] The parties agree that section 552.302 requires the City to disclose the communications unless a "compelling reason" exists to withhold them, but they disagree on whether the City established a compelling reason. The Court holds that "a reason to withhold information will be 'compelling' only when it is of such a pressing nature (e.g., urgent, forceful, or demanding) that it outweighs the interests favoring public access to the information and overcomes section 552.302's presumption that disclosure is required." *Ante* at 259. The Court's test leans in the right direction, but it ultimately come up short.

With regard to the Court's first element, the Court makes no effort to define how "pressing" is sufficient. Because the Act does not define the term "compelling" or the phrase "compelling reason," we must apply their common, ordinary meanings unless "a different or more precise definition is apparent from the term's use in the context of the statute." *R.R. Comm'n of Tex. v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 568 (Tex. 2016) (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)). Under the common, ordinary meaning of the term, a reason that is "of such a pressing nature" so as to be *compelling* is one that is not just "urgent" or "forceful," but so "urgent" and "forceful" that it effectively *demands* and *requires* the desired result. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 463 (2002) (defining "compelling" as "*demanding* respect, honor, or admiration," and "compel" to mean to "call upon, require, or command

without possibility of withholding or denying") (emphases added).[7] The term "compelling," in other words, connotes "force or coercion, with *little or no volition* on the part of the one compelled." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 183 (2nd ed. 1995) (emphasis added).[8] "To be compelling, a justification must be more than simply legitimate or good; it should be persuasive to the point of demanding respect or acquiescence." ***275** *City of Dallas v. Abbott*, 304 S.W.3d 380, 393 (Tex. 2010) (WAINWRIGHT, J., dissenting). In short, when a reason is compelling, reasonable minds can only conclude that it demands and requires the intended result. *See* *People v. Wells*, 279 Ill.App.3d 564, 216 Ill.Dec. 23, 664 N.E.2d 660, 664 (1996) (concluding that "compelling reasons" are "reasons over which reasonable minds would not diverge").

The Court's second element recognizes that the determination of whether a reason is compelling requires balancing competing interests. *Ante* at 259. Although this is true, the presumption that section 552.302 imposes ensures that the scales are not evenly balanced. Instead, as the federal common-law cases on which the Court relies recognize, the balancing test uses "scales [that] tilt decidedly toward transparency." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011). Under the Act, as under the federal common law, the presumption in favor of transparency is "no mere paper tiger," and "[i]f not overpowering," is "nonetheless strong and sturdy." *F.T.C. v. Standard Fin. Mgmt. Co.*, 830 F.2d 404, 410 (1st Cir. 1987) (internal citation omitted). This is because the Act recognizes that, "as in so many other instances, justice is better served by sunshine than by darkness." *Id.* at 413.

Considering the statutory context and the term's common meaning, a "compelling reason" to withhold public information despite the government's failure to timely assert an exception is a reason that, under all the facts and circumstances, is so important and urgent that reasonable minds can only conclude that it clearly outweighs the Act's fundamental policy of ensuring that the public can promptly obtain its information from its government. *See* *Wells*, 216 Ill.Dec. 23, 664 N.E.2d at 664 (stating that compelling reasons are "forceful and impelling reasons irresistible in sense and purpose" that "clearly demonstrate" the proposed conclusion). In other words, a compelling reason is one that undeniably outweighs the Act's express goal of ensuring that the people (the "master") are able to promptly obtain public information from their public "servants." TEX. GOV'T CODE § 552.001(a).

II.

The City's Proposed Compelling Reasons

In these cases, the City asserts three reasons to justify withholding the information ***276** at issue. First, the City contends that a compelling reason exists because the information falls under section 552.101's exception for information that is "confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Second, the City argues that the fact that the information is attorney-client privileged is itself a compelling reason. Finally, the City asserts that a compelling reason exists because publicly disclosing the communications would "substantially harm" the City's interests in ongoing and future contract negotiations. The Court rejects the City's first argument, accepts the second, and does not reach the third. I conclude that none of the City's asserted reasons are compelling under section 552.302.

A. Section 552.101: "confidential by law"

The City first contends that a compelling reason exists because section 552.101 excepts attorney-client communications from the Act's disclosure requirement. *Id.* § 552.101 (providing a general exception for information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision").[9] The City makes this argument because Texas Attorneys General have long held that section 552.101 itself provides a compelling reason to withhold information under section 552.302. Unlike the City, however, they have construed section 552.101 to except only information that is confidential in a "mandatory" sense, meaning the law *prohibits* the government from disclosing the information even if it wanted to disclose it. *See* Tex. Att'y Gen. Op. ORD–676 at 2 (2002); Tex. Att'y Gen. Op. ORD–665 at 1 n.5 (2000); Tex. Att'y Gen. Op. ORD–400 at 1 (1983); Tex. Att'y Gen. Op. ORD–325 at 1 (1982).

The Attorney General contends that section 552.101 does not apply to attorney-client communications because they are subject only to "discretionary" or "permissive" confidentiality, in the sense that a governmental body may

withhold its own attorney-client communications but is not prohibited from voluntarily disclosing them. *See* Tex. Att'y Gen. Op. ORD–676 at 2 (explaining that the privilege "rests with the client governmental body, and like any client, the governmental body is free to waive it"); *see also* Tex. Att'y Gen. Op. ORD–522 at 4 (1989) (distinguishing "information 'deemed confidential by law' " from permissive exceptions "that protect information that may be disclosed at the discretion of governmental bodies"). Instead, the Attorney General asserts that only section 552.107 excepts attorney-client communications from required disclosure. *See* TEX. GOV'T CODE § 552.107 (excepting "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct"). Alternatively, if section 552.101 broadly encompasses permissive as well as mandatory confidentiality, the Attorney General argues that only ***277** mandatory confidentiality constitutes a compelling reason and a governmental body's own attorney-client communications are never mandatorily confidential.

The Court does not decide whether section 552.101 excepts attorney-client communications or itself constitutes a compelling reason as the City contends, concluding instead that the existence of a compelling reason "does not turn on whether the attorney-client privilege falls within one statutory exception or another." *Ante* at 255. According to the Court, "the attorney-client privilege, which is protected by one or more statutory exceptions to public disclosure, protects and advances interests that provide independently compelling reasons to withhold privileged information unless confidentiality has been waived." *Ante* at 256 (footnote omitted). I reject the City's argument because the existence of a compelling reason does not turn merely on the basis for any of the Act's exceptions at all.

Construing sections 552.301 and 552.302 together within their statutory context, the Act permits the government to withhold public information despite its failure to timely and properly request the Attorney General's decision *only* if an exception applies *and* a compelling reason exists. Under the Act, public information is *always* "presumed to be subject to required public disclosure," and only an exception can overcome that presumption. TEX. GOV'T CODE §§ 552.021, .301(a), .302; *see also id.* § 552.306 (providing that the Attorney General's role is to determine "whether the requested information is within one of the exceptions"). Nothing in section 552.302 or the remainder of the Act suggests that a governmental body can withhold information by showing a compelling reason *instead of* an applicable exception after it failed to timely comply with section 552.301. That construction would ignore the relationship between the two sections and encourage the government to intentionally refuse to comply with section 552.301 whenever it concludes that no exception applies.

Instead, when a governmental body fails to timely and properly request the Attorney General's decision "about whether the information is within [an] exception," *id.* § 552.301(a), section 552.302 imposes an additional presumption that applies *even though* an exception overcomes the foundational presumption favoring disclosure. Although an applicable exception overcomes the Act's foundational presumption of openness, the governmental body's failure to timely and properly assert that exception results in a new presumption that the information remains "subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302. Section 552.302, in other words, imposes an *additional* requirement—not an *alternative* requirement—that applies when a governmental body fails to timely assert an applicable exception as section 552.301 requires. As a result, the mere fact that one of the Act's exceptions applies *or* that a compelling reason exists is insufficient to overcome the government's failure to timely and properly assert an exception, because the Act requires both. *Id.*

The Court agrees that the Act always requires an exception to avoid disclosure and that establishing a compelling reason without also establishing an applicable exception is insufficient. *Ante* at 256 (affirming that "even under the compelling-reason standard, information cannot be withheld unless a statutory exception applies, because public information remains public unless it is expressly excepted from disclosure."); *see also ante* at 264 ("[S]ection 552.302's 'compelling reason' safeguard applies ***278** only to information the [Act] already excepts from disclosure."). But the Court concludes that merely establishing an exception is *sometimes* sufficient, even though it concedes that if it were "*always*" sufficient "the compelling-reason requirement would be rendered a nullity." *Ante* at 256 (emphasis added). The Court asserts that exceptions and compelling reasons are not *always* "mutually exclusive," *ante* at 268, and rejects "the notion that statutory exceptions are categorically distinct from compelling reasons and that something more is always required to rebut the presumption that arises from

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a governmental body's failure to timely request an attorney general decision," *ante* at 264.

The Court goes on, however, to conclude that an exception and a compelling reason are *never* mutually exclusive when the attorney-client privilege is at stake, and that the exception for attorney-client communications is categorically and always a compelling reason, regardless of the facts and circumstances of the particular case. Yet the Court can provide no statutory basis for deciding when the interests that an exception protects are categorically compelling and when they are not. Instead, based solely on its own view of the attorney-client privilege's importance, the Court concludes that the privilege—which the Act treats as the basis for an exception under section 552.301—also constitutes a compelling reason under section 552.302. *Ante* at 277. When the attorney-client privilege is at issue, in other words, the Court is willing to render the compelling-reason requirement "a nullity." *Ante* at 256.

Contrary to the Court's approach, the Act treats each of its exceptions equally. Each exception applies only if a particular set of facts exists. [10] Under the Act, those facts establish an applicable exception that the government may assert under section 552.301; and if it fails to timely and properly assert the exception and the facts that establish it, section 552.302 requires a compelling reason in addition to the exception, regardless of which exception applies. While the Court asserts that, in "some instances, important policies and interests that animate a statutory exception are compelling *in their own right*," *ante* at 256, it then holds that the interests that animate the attorney-client privilege are compelling in *all* instances. Based on the Act's language, context, and structure, and honoring its mandate that we construe its language "liberally ... in favor of granting a request for information," TEX. GOV'T CODE § 552.001(b), an exception to the Act's disclosure requirement cannot always independently establish a compelling reason to withhold the information when the government fails to timely and properly assert the exception. Otherwise, as the Court concedes, section 552.302 is rendered a "nullity" because *we* think "the interests that animate a statutory exception" are important enough. Under the Act, section 552.302 requires "something more."

That "something more" is a "compelling reason," and whether it exists depends on the particular facts and circumstances of each individual case. *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) ***279** (holding that the determination of whether a compelling reason exists to grant public access to judicial records must be determined "in light of the relevant facts and circumstances of the particular case"); *Standard Fin. Mgmt.*, 830 F.2d at 410–11 (same) (quoting *Nixon*, 435 U.S. at 599, 98 S.Ct. 1306); *Compelling Need*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Generally, courts decide whether a compelling need is present based on the unique facts of each case."). I thus agree with the Court's rejection of the Attorney General's long-held position that only two reasons can ever qualify as compelling under section 552.302. *See ante* at 269. [11] Instead, to determine whether a compelling reason exists in any given case, courts must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations" that justify withholding each particular document. *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016) (quoting *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002)). And any decision to withhold any particular document "must be narrowly tailored to serve that reason." *Id.* (quoting *Baxter*, 297 F.3d at 548). When a compelling reason is required, "[b]road and general findings ... are not sufficient to justify closure." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (quoting *In re N.Y. Times Co.*, 828 F.2d 110, 116 (1987)). Broadly establishing an exception does not demonstrate at the particular-document level a compelling reason for withholding.

In other words, establishing an exception does not end the analysis; it begins it. The same facts and circumstances supporting an exception can also be relevant to establishing a compelling reason, but the compelling-reason analysis requires more than a generalized claim. It requires proof of *particular* circumstances such that no reasonable person would demand the documents' production. Thus, regardless of whether section 552.101 excepts privileged attorney-client communications from the Act's disclosure requirement as the City contends, the fact that information is excepted under any of the Act's exceptions does not itself provide a compelling reason under section 552.302.

B. The Attorney–Client Privilege

The City next argues that the fact that the attorney-client privilege protects the communications is itself a compelling reason to withhold the communications despite the City's

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failure to timely request the Attorney General's decision. The Court agrees, holding that "absent waiver, the interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption that arises on expiration of the [Act]'s ten-day deadline." *Ante* at 250. To reach this result, the Court attempts to distinguish between an exception to disclosure and the "policies and interests that animate" the exception, holding that the policies and interests can constitute a compelling reason even if the exception itself cannot. *Ante* at 278. Because the Act treats the ***280** policies and interests as the basis for the exception, however, this is a distinction without a difference. Ultimately, the Court's holding substitutes the Court's own preference for balancing the competing interests for the approach the Act requires. And even if the interests that an exception protects under section 552.301 could also constitute a compelling reason under section 552.302, the Court both undervalues the interests that section 552.302 protects and overvalues the interests the privilege protects to reach the result the Court desires.

1. The Act's approach to balancing the competing interests

The Court bases its conclusion on its view that the interests the attorney-client privilege protects are "of utmost importance." *Ante* at 265. Like the Court, the Act recognizes the importance of these interests, but it protects them by excepting privileged attorney-client communications from its disclosure requirement. As the Court itself explains, the Act

> addresses the competing values of transparency and the need for confidentiality *by excepting* confidential attorney-client communications from mandatory public disclosure. In doing so, the [Act] recognizes the importance of the attorney-client privilege and affirms that the public interest is best served when those sworn to protect it are guided by fully informed legal advice in conducting public affairs.

Ante at 270 (emphasis added).

In this and every other relevant sense, the Act treats confidential attorney-client communications the same as all other confidential information. The Act provides numerous specific exceptions for particular types of confidential information,[12] and a ***281** broad exception for all information that is "considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. As the Court notes, the Act provides these exceptions because it recognizes the importance of "the individual and other interests at stake in disclosing that information." *Ante* at 251 (quoting *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011)).

But the Act also recognizes and protects the broader interests that support the public's right to promptly access public information. The Act's very existence is a tribute to the "fundamental philosophy" that "government is the servant and not the master of the people," and "that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees, ... so that they may retain control over the instruments they have created." TEX. GOV'T CODE § 552.001(a). The Act protects these "fundamental" interests by requiring governmental bodies to respond to a request for public information "promptly, ... as soon as possible under the circumstances, ... within a reasonable time, [and] without delay." *Id.* § 552.221(a).

An inherent conflict exists between the interests in granting an attorney-client privilege to the government and the interests in granting the public prompt access to public information. Granting evidentiary privileges to the government necessarily undermines the goal of ensuring that the "people remain in control of their government" by creating a risk "that a broad array of materials in many areas of the executive branch will become 'sequester[ed]' from public view." *In re Bruce Lindsey*, 158 F.3d 1263, 1274 (D.C. Cir. 1998) (quoting *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997)). Carefully balancing these inherently conflicting interests, the Act protects the government's privileged attorney-client communications by providing an exception to the disclosure requirement, but it does not permit the government to unilaterally withhold communications based on that exception. To protect the broader interests in the public's right to promptly access public information, the government must ask the Attorney General to decide whether

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the exception for attorney-client communications applies within ten business days. TEX. GOV'T CODE § 552.301(b). Under the Act's approach, if the government fails to timely ask for the Attorney General's decision, the communications "must be released unless there is a compelling reason to withhold" them, *even though they are privileged and the exception applies. Id.* § 552.302. By contrast, under the Court's approach, the communications need not be disclosed because they are privileged and the exception applies, *even though the government failed to timely ask for the Attorney General's decision.*

2. The public's interest in *prompt* disclosure

Applying its balancing test, the Court concludes that the only public-information interest that the government's failure to timely assert the privilege implicates is the public's interest in "expediency." *Ante* at 265; *see also ante* at 264 (holding that the ***282** government's failure to timely comply with section 552.301 only "implicates the public's interest in the 'prompt' production of public information"). According to the Court, this interest carries little weight because the government's failure to timely assert the privilege leads only to "delay" and "gamesmanship and obstructionism." *Ante* at 265. "When weighed against the need for expediency," the Court concludes, "the interests protected by the attorney-client privilege—and the irremediable consequences of disclosure —are demonstrably more compelling." *Ante* at 265.

This analysis ignores the value the Act expressly and repeatedly places on what the Court calls "expediency." The Act contains numerous provisions that demonstrate the importance it places on the public's interest in *prompt* access to public information. The Act expressly recognizes that the public is entitled "*at all times* to complete information about the affairs of government." TEX. GOV'T CODE § 552.001(a) (emphasis added). Its foundational provision requires governmental bodies to make public information "available to the public *at a minimum during the normal business hours of the governmental body.*" *Id.* § 552.021 (emphasis added). When the government receives a request for public information, the Act expressly requires that it provide the information "promptly," which the Act defines to mean "as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* § 552.221(a). Numerous other provisions also demonstrate the Act's recognition that, when it comes to the public's right to public information, time is of the essence:

— If the government cannot provide information within ten business days after the date the information is requested, it must "certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication," *id.* § 552.221(d);

— If the government determines that responding to the request requires "programming or manipulation of data," it must provide the requestor written notice of that determination within twenty days after it receives the request, *id.* § 552.231;

— If the government determines that its costs to comply with the request will exceed a predetermined limit, it must provide a written estimate to the requestor "on or before the 10th day after the date on which the public information was requested," *id.* § 552.275(e);

— If the request seeks a third party's proprietary information that may be subject to an exception, the government "shall make a good faith attempt to notify that person ... within a reasonable time not later than the 10th business day after" it receives the request, *id.* § 552.305(d);

— If a person files a complaint with a district or county attorney complaining of a violation of the Act, the district or county attorney shall respond to the complaint "[b]efore the 31st day after the date a complaint is filed," *id.* § 552.3215(g);

— The district or county attorney must notify the government before filing suit, and to avoid that suit, the government must cure the violation "before the fourth day after the date" the government receives the notice, *id.* § 552.3215(j);

— If the government believes the Act excepts requested information from its disclosure requirement, it must ask the Attorney General to decide whether an exception applies "within ***283** a reasonable time but not later than the 10th business day after the date of receiving the written request," *id.* § 552.301(b);

— If the Attorney General notifies the government that he needs additional information to make his decision, the government "shall submit the necessary additional information to the attorney general not later than

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the seventh calendar day after the date the notice is received," *id.* § 552.303(d);

— The Attorney General must "promptly render a decision ... determining whether the requested information is within one of the exceptions," not "later than the 45th business day after" the Attorney General received the request for decision, *id.* § 552.306(a); and

— If the government decides to sue to challenge the Attorney General's decision, it must "bring the suit not later than the 30th calendar day after" it receives the Attorney General's decision; otherwise, it "shall comply with" the Attorney General's decision, *id.* § 552.324(b). [13]

In short, when it comes to the public's right to public information, the Act recognizes that access delayed is usually access denied. As the federal-court decisions on which the Court relies acknowledge, "a necessary corollary to the presumption [in favor of government transparency] is that once found to be appropriate, access should be immediate and contemporaneous. ... To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). [14]

In light of the Act's repeated emphasis on *timely* access, the Court's attempt to minimize that interest by suggesting that the requestor or the Attorney General can simply file suit to compel disclosure borders the absurd. *Ante* at 263. By requiring the government to timely seek the Attorney General's decision on whether an exception applies, the Act seeks to avoid the very delays that such a suit will inevitably cause. "Indeed, for the presumptive right ***284** [of access] to be suspended or nonexistent until after the judge has ruled on a motion, would be to impair the important interest in contemporaneous review by the public ...." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43 (C.D. Cal. 1984) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). "The public cannot properly monitor the work of the courts with long delays in adjudication based on secret documents." *Lugosch*, 435 F.3d at 127. When "fundamental" interests like those the Act protects are at stake, the loss of a protected right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (addressing First Amendment rights)).

Section 552.302's compelling-reason requirement itself demonstrates the importance the Act places on the public's interest in *prompt* access to public information. Section 552.302 protects that interest by imposing the compelling-reason requirement as a consequence for the government's failure to timely assert an exception. The Court asserts that "the interests protected by the attorney-client privilege ... are demonstrably more compelling" than the public's interest in prompt access to public information because the consequences of disclosure are "irremediable" and the public "has no right of access to privileged information in the first instance and only a rebuttable presumption of access in the second." *Ante* at 265. But the same is true for all information the Act excepts from its disclosure requirement. Section 552.302's compelling-reason requirement *only* applies when an exception applies and "the public has no right of access to the information in the first instance and only a rebuttable presumption of access in the second." Section 552.302 places such great weight on the public's right to prompt access that it requires disclosure of information *even though* it is privileged, confidential, and excepted, unless a compelling reason exists.

Under the Court's reasoning, the interests that support *any* of the Act's exceptions will *always* outweigh the public's interest in prompt access, because the public never has "a right of access" to excepted information, and the release of that information will always result in a loss of confidentiality that is "irremediable." Under the Court's approach, every exception always satisfies the compelling-reason requirement and thus nullifies the requirement completely. The Act, however, places such great value on prompt access to public information that it requires the information to be disclosed unless a compelling reason exists, even though the public has no right to the information and the loss of confidentiality would be irremediable.

3. The government's interest in the attorney-client privilege

According to the Court, the interests that support the attorney-client privilege always and necessarily outweigh the public's interest in prompt access to public information because the privilege protects both the "free flow of information

between attorney and client" and "the broader societal interest of effective administration of justice." *Ante* at 250; *see also ante* at 260 (explaining that the privilege's purpose is to "encourage clients to make full disclosure to their attorneys" (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976))), —— (stating that the privilege preserves "the just and orderly operation of our legal system" (quoting *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997))). But the Court ***285** fails to consider these interests within the context of the fact that *the government* has no inherent right to any attorney-client privilege. [15] In Texas, the Act both grants that right to the government and imposes limitations on that right, one of which requires the government to properly assert any applicable exception within ten business days after receiving the public's request for its information. *See* TEX. GOV'T CODE § 552.301. This limitation does not exist when a private party asserts the privilege on its own behalf. Under the Act, the privilege is subject to different limitations when *the government* relies on the privilege to withhold *public* information.

For this reason, the Court's reliance on a lack of "waiver" under its own common-law and procedural rules is misplaced. *See ante* at 250 (holding that the attorney-client privilege is a compelling reason under section 552.302 unless it has been waived, and the failure to meet section 552.301's deadline "does not, in and of itself, constitute waiver"). [16] The Court concludes that the attorney-client privilege is always a compelling reason under the Act because "[m]erely missing a statutory deadline does not mirror any of the conduct our rules and case law recognize as waiving a privilege." *Ante* at 263. But "our rules and case law" do not apply here, and sections 552.301 and 552.302 speak nothing of "waiver" at all. [17] The government's failure ***286** to timely comply with section 552.301 does not "waive" the privilege, and the information therefore remains subject to an applicable exception. But because the government failed to timely assert the privilege as the Act requires, section 552.302 requires it to release the information even though it is privileged and excepted from required disclosure, unless a compelling reason exists to withhold it. TEX. GOV'T CODE §§ 552.301, .302. Under the Act, whether the government has "waived" the privilege under our common law and rules is irrelevant to the compelling-reason issue. Instead, the issue is whether there is a compelling reason to withhold the information despite the government's failure to timely and properly assert that it is privileged and confidential.

Ultimately, the Court concludes that the attorney-client privilege is always independently a compelling reason that outweighs the public's interest in prompt access to public information because the harm that results from a loss of the privilege "threatens the foundation of a justice system that thrives on full and candid legal representation." *Ante* at 266. According to the Court, if the Act requires the government to disclose its attorney-client communications when its employees miss a deadline through mere oversight, mistake, or inadvertence, "governmental entities might well choose to forego fruitful self-analysis and decide not to seek needed legal advice." *Ante* at 266 (quoting *City of Georgetown*, 53 S.W.3d at 333). "Eviscerating the privilege by compelling disclosure in pursuit of 'promptness,' " the Court laments, "may have a wide-reaching and chilling effect on communications between governmental bodies and their counsel." *Ante* at 266. These results would harm the interests of "both the governmental body and the taxpayers it represents," and would "undermine the attorney-client privilege's fundamental purpose by impairing frank discourse between a governmental body and its counsel." *Ante* at 267.

The parade of horribles the Court describes might well seem compelling, if only there were some factual basis to support the Court's dire predictions. Reality, however, belies such sophistry. For more than twenty-two years, Texas Attorneys General have issued hundreds of decisions requiring governmental bodies to disclose their attorney-client communications, holding that the "mere fact that the information is within the attorney-client privilege ... does not alone constitute a compelling reason to withhold the information from public disclosure" under section 552.302. [18] *See* Tex. Att'y Gen. Op. ORD–630 at 5 (1994). [19] Acknowledging these hundreds of ***289** Attorney–General decisions, the Court momentarily retreats from its dire predictions and suggests only that there is "no proof of" and "we do not know" the decisions' impact. *Ante* at 269–70. Of course, even if that were true, then at best the predictions on which the Court bases its holding are mere speculation that provides no reason—much less a "compelling" reason—to withhold the information. But what the ***290** hundreds of decisions prove is that the Court's central justification for its holding is simply factually incorrect. Disproving the Court's prediction of "systemic harm," the Attorney General's consistent decisions for the past twenty-two years have not "prevented governmental bodies from seeking legal advice" or generating attorney-client communications. If that holding were likely to cause the

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government to "forego fruitful self-analysis and decide not to seek needed legal advice," have a "wide-reaching and chilling effect on communications between governmental bodies and their counsel," and "impair[ ] frank discourse between a governmental body and its counsel," surely it would have done so by now.

4. Applying the Act's approach

Because neither an exception nor the interests it supports can independently qualify as a compelling reason that outweighs the public's interest in prompt access to public information under the Act, I agree with the Attorneys General that the attorney-client privilege alone cannot and does not constitute a compelling reason under section 552.302. This does not mean that section 552.302 could never permit the government to withhold attorney-client communications if the government fails to timely comply with section 552.301. As discussed, whether a compelling reason exists depends on the facts and circumstances of each case. I thus agree with the Court that "the public's interest in maintaining confidentiality [of the government's attorney-client communications] must be factored into the analysis," *ante* at 265, but the compelling-reason standard requires that factoring to occur in each individual case, because the public's interest and the harmful effects of disclosure will vary from case to case.

In most cases, the relevant facts and circumstances will also include the government's diligence (or lack thereof) and the reasons for its failure to timely and properly assert the privilege. *See, e.g.*, *State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015) ("A litigant's mistaken understanding of [Texas Rule of Appellate Procedure 52.3(e)] is not a compelling reason for this Court to consider an unreviewed mandamus argument."); *In re Dorn*, 471 S.W.3d 823, 824 (Tex. 2015) (holding that urgency resulting from the party's "own making" fails to provide a "compelling reason" for failing to first seek mandamus relief from court of appeals under Tex. R. App. P. 52.3(e)). And when a third party's interests are at stake, the relevant circumstances may include the efforts the third party made to protect the information once the third party received notice of the request. So if, for example, a governmental body establishes that a natural disaster or some other cause beyond its control prevented it from timely asserting its privilege when it was otherwise prepared to do so, those facts may support the finding of a compelling reason to withhold the information despite the noncompliance. Similarly, as discussed below, a compelling reason might exist if the governmental body establishes that substantial harm would result if the information is released. But the Act requires a compelling reason *in addition to* the fact that the information is privileged and therefore excepted from disclosure.

The Court fears that requiring "public disclosure of confidential attorney-client communications as an automatic —and irremediable—sanction for missing a statutory deadline ... would be a jurisprudential course fraught with peril." *Ante* at 266. The course the Court describes, however, is a legislative course, not merely a jurisprudential one. Even if reality justified the Court's unfounded fears, we are not at liberty to substitute our own preferred ***291** standards for those the Act imposes. Contrary to the Court's holding, the Act treats the attorney-client privilege as the basis for an exception, not as a compelling reason to withhold such communications when the government fails to timely assert the privilege. The limits on our authority compel us to apply the Act as written.

C. Harm to the City's interests

Finally, in one of the two cases before us today (Cause No. 15–0073), the City contends that it demonstrated a compelling reason by establishing that the disclosure of its attorney-client communications would "likely inflict substantial harm to the public or the entity." Because the Court concludes that the attorney-client privilege itself provides a compelling reason, it does not reach this argument. *Ante* at 266 n.117. I would reach the argument and conclude that the City has failed to establish sufficient harm in this case.

In support of its argument, the City relies on a summary-judgment affidavit in which an assistant city attorney testified that disclosure would "cause substantial harm to the City's bargaining position on a multi-million dollar long-term transaction." According to the affidavit, the communications include "critical information" about issues "critical to on-going negotiations" over a landfill gas lease, identify the lease's "significant provisions" that the City believes "need to be corrected," and disclose "the mechanics" of how the City "decides how and whether to settle disputes." The affiant asserts that disclosure of the information would harm the City's bargaining position in these negotiations and would "prejudice the City in future disputes." Because the Attorney General did not submit any evidence controverting these factual assertions, the City argues that it established a

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compelling reason to withhold the information as a matter of law.

The Attorney General disagrees. Consistent with his predecessors' long-held view that only mandatory confidentiality and harm to a third party can be a compelling reason under section 552.302, the Attorney General argues that harm to the interests of the governmental body that failed to comply with section 552.301 can never qualify as a compelling reason under section 552.302. *Compare* Tex. Att'y Gen. Op. ORD–676 at 12 (2002) ("Harm to the interests of the governmental body that received the request is not a compelling reason.") *with* Tex. Att'y Gen. Op. ORD–586 at 3 (1991) (stating that the "need of a governmental body, other than the body that has failed to timely seek on open records decision, may, in appropriate circumstances, be a compelling reason for non-disclosure"). According to the Attorney General, protecting the privilege of a party who had the opportunity to claim it but failed to do so cannot constitute a compelling reason because it does nothing to further the purpose of the attorney-client privilege.

I agree with the Attorney General that harm to a third party's interest can be a compelling reason under section 552.302. [20] ***292** In fact, many of the Act's specific exceptions protect information because a third party has a privacy, proprietary, or other interest in that information. [21] And section 552.305 includes specific provisions to protect a third party's private interests in otherwise public information. TEX. GOV'T CODE § 552.305; *see also id.* § 552.326 (permitting a governmental body to raise exceptions that involve "the property or privacy interests of another person" in a suit filed under the Act even if the governmental body failed to raise those exceptions in its request for the Attorney General's decision).

But based on section 552.302's actual language, harm to a governmental body's own interests can also qualify as a compelling reason. As explained, section 552.302's plain language permits withholding despite noncompliance not for any specific reason or type of reason, but for *any* "compelling reason." Applying the statute's plain language despite the Attorney General's longstanding construction to the contrary, *see Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 914–15 (Tex. 2004) (holding that "neither legislative ratification nor judicial deference to an administrative interpretation can work a contradiction of plain statutory language"), even a noncomplying governmental body's own interests may qualify as a reason to permit withholding under section 552.302, but only if that reason is "compelling" under the particular facts and circumstances.

In this case, however, the City's evidence of harm to its own interests, although uncontroverted, fails to provide a compelling reason to withhold the information. TEX. GOV'T CODE § 552.302; *see* *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 154 (Tex. 2012) ("Evidence that no one disputes does not necessarily establish a fact as a matter of law.") (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005) ("Undisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed."). Certainly, the ***293** City's affidavit establishes that disclosure of the communications would be likely to result in some harm to the City's interests. Disclosing communications that identify which lease provisions the City believes to be "critical to the current Lease negotiations" and "critical information" about those provisions would likely weaken the City's bargaining position to at least some extent and thus potentially cause some harm to the City's interests. And disclosing "the mechanics" of how the City "decides how and whether to settle disputes" could "prejudice the City in future disputes."

But other than the affidavit's broad assertion that the resulting harm would be "substantial," the City has provided no evidence of the extent of harm the disclosure would cause. The affidavit explains that the City is renegotiating a "multi-million dollar long-term transaction," but makes no effort to describe the extent to which disclosure would weaken the City's position or harm the City's interests. To demonstrate a compelling reason based on an argument that release of public information would harm the governmental body's interests, the governmental body must provide sufficient facts regarding the nature and extent of the alleged harm to permit the Attorney General or the courts to balance that harm against the public's interest in prompt access to public information. *See, e.g.*, *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006) (holding that magistrate did not abuse her discretion in refusing to seal records in light of "the inadequacy of the City's declarations, which largely make conclusory statements about the content of the documents—that they are confidential and that, in general, their production would, amongst other things, hinder ... future operations with other agencies, endanger informants' lives, and cast [police] officers in a false light. These conclusory offerings do not rise to the level of 'compelling reasons' sufficiently specific to bar

the public access to the documents."); *see also* *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987) (requiring party seeking protective order against discovery request to show "particular, articulated and demonstrable injury, as opposed to conclusory allegations").

The City's vague assertion that release of the information at issue would cause "substantial harm" is insufficient to support the conclusion that the alleged harm creates a compelling reason to withhold the information under section 552.302. *See* *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013) (holding that an affidavit was conclusory when there was a "lack of a demonstrable and reasoned basis on which to evaluate [the affiant's] opinion"). In short, although the City may have established a "good reason" to permit it to withhold the information, it did not establish a compelling one. The City failed to establish that disclosure would cause such harm to the City's own interests that the need to avoid the harm is so important and urgent that reasonable minds can only conclude that it clearly outweighs the Act's fundamental policy of ensuring that the public can promptly obtain public information from its governmental bodies.

III.

Conclusion

The Court contends in these cases that the attorney-client privilege is essential and vital to the operation of our judicial system. The Texas Public Information Act agrees, but it exists to promote the "fundamental philosophy" that the public is entitled to promptly access "information about the affairs of government and the official acts of public officials and employees," which is essential and vital to our "constitutional ***294** form of representative government." TEX. GOV'T CODE § 552.001(a). The Act balances these competing interests by permitting the government to promptly assert its privileges and request the Attorney General's decision on whether they trigger an exception to the Act's disclosure requirement and by requiring a compelling reason to withhold even privileged information when a governmental body fails to timely seek the Attorney General's decision.

Relying on the Act's plain language, I conclude that a "compelling reason" is one that is so important and urgent that reasonable minds can only conclude that it clearly outweighs the Act's fundamental policy of ensuring that the public can promptly obtain public information from its governmental bodies. Because the Act requires both that an exception apply and that a compelling reason exist, neither the Act's exceptions nor the privileges and confidentiality that trigger an exception are sufficient alone to establish a compelling reason. The Act does not support the Attorney General's position that only certain reasons, or certain types of reasons, can be "compelling," and instead supports the City's contention that, under some circumstances, harm to the governmental body's own interests can present a compelling reason. In these cases, however, the City has failed to demonstrate such harm.

Because the City has failed to demonstrate any compelling reason to withhold the attorney-client communications at issue, the Act requires the City to disclose them. Because the Court holds otherwise, I respectfully dissent.

All Citations

509 S.W.3d 247, 60 Tex. Sup. Ct. J. 350

Footnotes

1 TEX. CONST. art. I, § 2.

2 TEX. GOV'T CODE § 552.001(a).

3 *See id.* §§ 552.101–.156.

4 *Id.*

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5 *See id.* § 552.301.

6 *See id.* § 552.302.

7 *See* *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

8 *See* *In re Cty. of Erie*, 473 F.3d 413, 418–19 (2d Cir. 2007).

9 *See, e.g.*, *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005).

10 TEX. GOV'T CODE § 552.001(a).

11 *Id.* § 552.021.

12 *Id.* § 552.002(a) ("Public information" means "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by a governmental body, by its employees or officers in their official capacity if the information pertains to official business of the governmental body, or "for a governmental body" if it owns, has a right of access to, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information).

13 *Id.* § 552.221(a).

14 *Id.* § 552.001(a).

15 *Id.* §§ 552.101–.156.

16 *Id.* § 552.101.

17 *Id.* § 552.107.

18 *Id.* § 552.120.

19 *E.g.*, *id.* §§ 552.102, .114, .115, .117, .1176, .1235, .124.

20 *Id.* § 552.1085.

21 *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011).

22 TEX. GOV'T CODE § 552.001(a).

23 *Id.* § 552.301(a).

24 *Id.* § 552.301(b).

25 *Id.* § 552.302 (emphasis added).

26 *Id.* § 552.321(a).

27 *Id.*

28 *Id.* § 552.3215.

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29 *Id.* § 552.323(a).

30 *Id.* §§ 552.351–.353.

31 *Id.* § 552.324(a).

32 *Id.* § 552.323(b).

33 *Id.* § 552.107. The evidence and professional-conduct rules "expressly deem certain attorney-client communications to be 'confidential.' " *In re City of Georgetown*, 53 S.W.3d 328, 333 (Tex. 2001) (orig. proceeding). Texas Rule of Evidence 503(a)(5) defines a communication as "confidential" if it is "not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client; or reasonably necessary to transmit the communication." Under Rule 503(b), a client "has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client," subject to limited exceptions. Texas Disciplinary Rule of Professional Conduct 1.05(b) imposes a duty of confidentiality and prohibits a lawyer from knowingly revealing confidential information. Rule 1.05(a) defines "[c]onfidential information" to include "privileged information" that is protected by Texas Rule of Evidence 503 and "unprivileged client information." The Attorney General has ruled that information considered confidential solely under Rule 1.05—including "unprivileged client information"—is not considered confidential under the PIA because Rule 1.05 "permit[s] disclosure of client information '[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with ... other law.' " Tex. Att'y Gen. Op. ORD–676 at 2 (2002) (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(4)). The Attorney General has thus concluded that "a governmental body's information that is otherwise made confidential *solely* under rule 1.05 is subject to the rule's 'other law' exception to confidentiality when it is requested under the [PIA]." *Id.* This case does not involve unprivileged information protected from disclosure under Rule 1.05.

34 TEX. GOV'T CODE § 552.101.

35 The City did not assert a reason for the untimeliness in proceedings below, but at oral argument before this Court, the City's attorney said "we missed the deadlines in both of these instances. It was inadvertence I believe. There's ... nothing in the record to indicate anything else." *Paxton v. City of Dallas*, Oral Arg. No. 15–0073, 2016 WL 4992647, at *6 (Tex. Sept. 14, 2016).

36 *See* TEX. GOV'T CODE § 552.302.

37 *See* Tex. Att'y Gen. OR2008–08859 (Hotel case); Tex. Att'y Gen. OR2010–08285 (Landfill case).

38 According to the Office of the Attorney General, mandatory exceptions include the confidential-by-law exception and those covering information made confidential under the PIA, including sections 552.102 ("Confidentiality of Certain Personnel Information"), .109 ("Confidentiality of Certain Private Communications of an Elected Office Holder"), .110 ("Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information"), .113 ("Confidentiality of Geological or Geophysical Information"), .114 ("Confidentiality of Student Records"), .115 ("Confidentiality of Birth and Death Records"), .117 ("Confidentiality of Certain Addresses ... and Personal Family Information"), .118 ("Confidentiality of Official Prescription Program Information"), .119 ("Confidentiality of Certain Photographs of Peace Officers"), .120 ("Confidentiality of Certain Rare Books and Original Manuscripts"), .121 ("Confidentiality of Certain Documents Held for Historical Research"), .123 ("Confidentiality of Name of Applicant for [CEO] of Institution of Higher Education"), .124 ("Confidentiality of Records of Library or Library System"), .126 ("Confidentiality of Name of Applicant for Superintendent of Public School District"), .131 ("Confidentiality of Certain Economic Development Information"), .133 ("Confidentiality of Public Power Utility Competitive Matters"), .134 ("Confidentiality of Certain Information Relating to Inmate of

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Department of Criminal Justice"), .135 ("Confidentiality of Certain Information Held by School District"), .136 ("Confidentiality of Credit Card ... Numbers"), .138 ("Confidentiality of Family Violence Shelter Center ... Information"), .139 ("Confidentiality of Government Information Related to Security or Infrastructure Issues for Computers"), .140 ("Confidentiality of Military Discharge Records"), .142 ("Confidentiality of Records Subject to Order of Nondisclosure"), .145 ("Confidentiality of Texas No–Call List"), .148 ("Confidentiality of Certain Personal Information Maintained by Municipality Pertaining to a Minor"), .151 ("Confidentiality of Information Concerning Information Regarding Select Agents"). *See* OFFICE OF THE ATTORNEY GENERAL, PUBLIC INFORMATION HANDBOOK 42–43 & n.158 (2016) (citing Act of May 30, 2011, 82d Leg., R.S., ch. 1229, §§ 3–21, 23–26, 28–37).

39 *E.g.*, Tex. Att'y Gen. ORD–677 at 10 (2002).

40 *Cf.* TEX. R. CIV. P. 193.3(d) (actual disclosure of privileged information or materials does not waive the privilege absent disclosure with intent to waive the privilege or failure to claim the privilege within ten days after the party actually discovers the disclosure occurred).

41 *Abbott v. City of Dallas,* 453 S.W.3d 580, 587–88 (Tex. App.–Austin 2015).

42 *See* TEX. R. APP. P. 41.3 ("[T]he court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis ....").

43 *City of Dallas v. Paxton*, 2015 WL 601974, at *5 (Tex. App.–Corpus Christi 2015).

44 In this appeal, we have received *amicus curiae* briefs from the Freedom of Information Foundation of Texas, which supports the Attorney General's position; and the Texas Municipal League, Texas City Attorneys Association, and Texas Association of Counties, which are aligned with the City of Dallas.

45 *See* TEX. GOV'T CODE § 552.302.

46 *See id.* § 552.001(a) (under the PIA, "each person is entitled, *unless otherwise expressly provided by law*, at all times to complete information about the affairs of government and the official acts of public officials and employees" (emphasis added)); *see also Doe v. Tarrant Cty. Dist. Attorney's Office*, 269 S.W.3d 147, 153–54 (Tex. App.–Fort Worth 2008, no pet.); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.–Fort Worth 2005, no pet.).

47 Because the parties agree the attorney-client exception applies to the requested information, we need not consider whether privileged and confidential attorney-client information is also protected by the confidential-by-law exception. *See* TEX. GOV'T CODE §§ 552.101, .107.

48 *See id.* §§ 552.301–.302.

49 *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016).

50 *Id.*

51 TEX. GOV'T CODE § 552.001 (demanding liberal construction to implement the state's policy of open government and to favor disclosing information about governmental affairs).

52 *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014).

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53 *See, e.g.*, Tex. Att'y Gen. ORD–630 at 3 (1994); Tex. Att'y Gen. ORD–552 at 1 (1990); Tex. Att'y Gen. ORD–319 at 1–2 (1982); Tex. Att'y Gen. ORD–150 at 2 (1977); Tex. Att'y Gen. ORD–34Tex. Att'y Gen. ORD–34 at 2 (1974).

54 Tex. Att'y Gen. ORD–677 at 10 (2002). The PIA expressly prohibits a governmental body from releasing information that is "confidential under law" and imposes criminal liability when a person distributes information that is considered confidential under the PIA. *See* Tex. Att'y Gen. ORD–676 at 2 (2002) (citing TEX. GOV'T CODE §§ 552.007, .352).

55 *See* Act of May 25, 1999, 76th Leg., ch. 1319, § 21, sec. 552.302, 1999 Tex. Gen. Laws 4500, 4509; *see also* Tex. Att'y Gen. ORD–630 at 3 (1994); Tex. Att'y Gen. ORD–552 at 1 (1990); Tex. Att'y Gen. ORD–319 at 1–2 (1982); Tex. Att'y Gen. ORD–150 at 2 (1977); Tex. Att'y Gen. ORD–34Tex. Att'y Gen. ORD–34 at 2 (1974).

56 *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (quoting *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)).

57 *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016); *see also* *Boeing Co. v. Paxton*, 466 S.W.3d 831, 838 (Tex. 2015) ("While the Attorney General's interpretation of the [PIA] is entitled to due consideration, as with other administrative statutory constructions, such deference must yield to unambiguous statutory language.").

58 *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) ("If an ambiguous statute that has been interpreted by a court of last resort or given a longstanding construction by a proper administrative officer is re-enacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it."); *see also* *Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 915 (Tex. 2004) ("[N]either legislative ratification nor judicial deference to an administrative interpretation can work a contradiction of plain statutory language.").

59 *See, e.g.*, *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014) (looking to dictionaries, treatises, and state- and federal-court constructions in similar contexts).

60 THE AMERICAN HERITAGE DICTIONARY (5th ed. 2016).

61 NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

62 WEBSTER'S THIRD NEW INT'L DICTIONARY (2002).

63 BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "compelling need").

64 *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996) (holding exigent circumstances present a compelling reason for this Court to exercise discretion to decide a *quo warranto* without prior presentment to the district court).

65 *Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009); *see also* *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 431–32, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "compelling-state-interest test" as a method "whereby the government's interest in the law and its purpose are balanced against an individual's constitutional right that is affected by the law").

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66 *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155, 160 (Tex. 1993).

67 *See, e.g.*, *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 765 (Tex. 2014).

68 *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) (" '[O]nly the most compelling reasons can justify non-disclosure of judicial records.' " (quoting *In re Knoxville News–Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983))); *U.S. v. Kravetz*, 706 F.3d 47, 59 (1st Cir. 2013) (" 'Only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access.' " (quoting *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002))); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (" '[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.' " (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982))); *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (a party seeking to seal "documents attached to a dispositive motion must meet the high threshold of showing that 'compelling reasons' support secrecy" (citing *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003))).

69 *Rudd Equip.*, 834 F.3d at 593 (quoting *Knoxville*, 723 F.2d at 474).

70 *See id.* at 594 ("[I]n making this determination, a court must balance the litigants' privacy interests against the public's right of access, recognizing our judicial system's strong presumption in favor of openness."); *Kravetz*, 706 F.3d at 59 ("[A] court must carefully balance the presumptive public right of access against the competing interests that are at stake in a particular case."); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011) ("Decisions on the sealing of judicial documents require a balancing of interests, although the scales tilt decidedly toward transparency."); *Lugosch*, 435 F.3d at 120 ("[A]fter determining the weight of the presumption of access, the court must 'balance competing considerations against it.' " (quoting *U.S. v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995))); *Kamakana*, 447 F.3d at 1179 ("[T]he court must 'conscientiously balance[ ] the competing interests' of the public and the party who seeks to keep certain judicial records secret." (quoting *Foltz*, 331 F.3d at 1135)).

71 *Cf.* *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 431–32, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (recognizing that in applying the compelling-interest test "context matters" and "relevant differences" should be taken into account (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995))).

72 *See* TEX. GOV'T CODE § 552.302.

73 *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

74 *U.S. v. Edwards*, 303 F.3d 606, 618 (5th Cir. 2002).

75 *U.S. v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997).

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76 *Trammel v. U.S.*, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

77 *Upjohn Co. v. U.S.*, 449 U.S. 383, 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

78 *Fisher v. U.S.*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

79 *See, e.g.*, *Upjohn Co.*, 449 U.S. at 390, 101 S.Ct. 677.

80 *Id.* at 389, 101 S.Ct. 677.

81 *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005)).

82 *Id.* at 418–19.

83 *Upjohn Co.*, 449 U.S. at 389, 101 S.Ct. 677.

84 *See* *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036–37 (2d Cir. 1984) ("[T]he availability of sound legal advice inures to the benefit not only of the client ... but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.").

85 *Guidiville Rancheria of Cal. v. U.S.*, No. 12–cv–1326 YGR, 2013 WL 6571945, at *2 (N.D. Cal. Dec. 13, 2013).

86 *Grand Jury Investigation*, 399 F.3d at 534; *see also* *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 169–70, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011) (" 'The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture.' " (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (2000))).

87 *Post* at 3 (BOYD, J., dissenting).

88 *Grand Jury Investigation*, 399 F.3d at 534.

89 8 JOHN H. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) ("The history of [the attorney-client] privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned." (citing *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577))).

90 *See* *Pearson v. Miller*, 211 F.3d 57, 64 (3d Cir. 2000).

91 *See Compelling Need*, BLACK'S LAW DICTIONARY (10th ed. 2014) (a need is "compelling" if it is "so great that irreparable harm ... would result if it is not met").

92 *See supra* n.89.

93 28 S.W.3d 511, 512–13 (Tex. 2000) (orig. proceeding).

94 *Id.* at 516–20; *see also* *id.* at 525 (BRISTER, J., dissenting) ("I agree with the Court that Ms. Anderson should not be deprived of her property without a compelling reason, but attorney-client confidentiality is a compelling reason.").

95 904 S.W.2d 643, 646–47 (Tex. 1995).

96 *Id.* at 647 (emphasis added).

97 *See Hanson v. Wells Fargo Home Mortg., Inc.*, No. C13–0939JLR, 2013 WL 5674997, at *3 (W.D. Wash. Oct. 17, 2013) ("Courts generally accept attorney-client privilege and the work-product doctrine as a 'compelling reason' justifying a motion to seal." (citing *Lugosch*, 435 F.3d at 125)); *Travelers Indem. Co. v. Excalibur Reinsurance Corp.*, No. 11–CV–1209 (CSH), 2013 WL 4012772, at *5 (D. Conn. Aug. 5, 2013) ("[I]t is well-settled within the Second Circuit that the attorney-client privilege may be a sufficiently compelling reason to defeat the public's right of access to judicial documents."); *Travelers Prop. Cas. Co. of Am. v. Centex Homes*, No. 11–3638–SC, 2013 WL 707918, at *2 (N.D. Cal. Feb. 26, 2013) (accepting attorney-client privilege as a compelling reason to allow a party to refile redacted version of document attached to summary-judgment motion); *TriQuint Semiconductor, Inc. v. Avago Techs. Ltd.*, No. CV 09–1531–PHX–JAT, 2011 WL 6182346, at *5 (D. Ariz. Dec. 13, 2011) (accepting attorney-client privilege as a compelling reason justifying sealing court records); *Asdale v. Int'l Game Tech.*, No. 3:04–CV–703–RAM, 2010 WL 2161930, at *5 (D. Nev. May 28, 2010) (accepting attorney-client privilege and the work-product doctrine as providing both good cause and a compelling reason to seal nondispositive and dispositive motions, respectively).

98 *Wilcox v. Bibin*, 2:15–CV–00261–EJL–REB, 2016 WL 740396, at *3 (D. Idaho Feb. 24, 2016); *see also* *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594–95 (6th Cir. 2016) ("[O]nly trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is typically enough to overcome the presumption of access." (quoting *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002))); *Ancier v. Egan*, CV No. 14–00294 JMS–RLP, 2015 WL 6757528, at *2 (D. Haw. Nov. 4, 2015) ("Generally, compelling reasons that are sufficient to overcome this strong presumption exist when court filings contain attorney-client communications." (citing *Creative Tent Int'l Inc. v. Kramer*, No. CV–15–8005–PCTS–MM, 2015 WL 4638320, at *3 (D. Ariz. Aug. 4, 2015))); *Guidiville Rancheria of Cal. v. U.S.*, No. 12–cv–1326 YGR, 2013 WL 6571945, at *9 (N.D. Cal. Dec. 13, 2013) ("[T]he attorney-client privilege ... establishes compelling reasons for sealing.").

99 *In re Nationwide Ins. Co.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding).

100 *See* TEX. R. EVID. 511(a).

101 *Id.* 511(b).

102 1 MCCORMICK ON EVIDENCE § 93 (7th ed. 2013) (emphasis added).

103 TEX. R. CIV. P. 193.3(d); *see also* TEX. R. EVID. 511(b)(2) ("When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).").

104 *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 439 (Tex. 2007) (orig. proceeding); *see also* TEX. R. CIV. P. 193.4 cmt. 4 ("The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege.").

105 *See* TEX. R. CIV. P. 193.3(d) ("A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence."); TEX. R. EVID. 511(b)

("Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.").

106 *In re M–I L.L.C.*, 2016 WL 2981342, at *7, 505 S.W.3d 569, 579–80 (Tex. 2016); *see* *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) ("In an instance in which the [attorney-client] privilege is being used as a sword rather than a shield, the privilege may be waived.").

107 *Republic Ins. Co.*, 856 S.W.2d at 163.

108 *See* TEX. GOV'T CODE §§ 552.0038(f), .008(b), .134(d), .156(d).

109 *Id.* § 552.302.

110 *Id.* §§ 552.001, .101–.156.

111 *See id.* §§ 552.001(a), .021, .301–.302.

112 *See* *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011); *cf.* *U.S. v. Kravetz*, 706 F.3d 47, 59 (1st Cir. 2013) (" 'Though the public's right of access is vibrant, it is not unfettered. Important countervailing interests can, in given instances, overwhelm the usual presumption and defeat access.' " (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998))).

113 TEX. GOV'T CODE § 552.221(a).

114 *See id.* § 552.302.

115 *See, e.g.*, *id.* §§ 552.107 (categorically excepting attorney-client privileged information from the statute's public-disclosure requirement), .302 (rebuttably presuming otherwise exempt information is open to the public); *cf.* *In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998) (recognizing that, although the federal Freedom of Information Act (FOIA) "[did] not itself create a government attorney-client privilege[,] 'Congress intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of FOIA' " (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980))); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000) ("Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization ... and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest ....").

116 *See* *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005) ("Abrogating the privilege undermines that culture and thereby impairs the public interest."); *cf.* *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 169, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011) ("[T]he objectives of the attorney-client privilege apply to governmental clients."); *Grand Jury Investigation*, 399 F.3d at 533 ("There is, then, substantial authority for the view that the rationale supporting the attorney-client privilege applicable to private entities has general relevance to governmental entities as well."); *Ross v. City of Memphis*, 423 F.3d 596, 602 (6th Cir. 2005) ("We see no reason that [the] function [of promoting full and frank communications and encouraging observance of law] is no longer served simply because the corporation is a municipality or, more broadly, that the organization or agency is a government entity. Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The privilege helps insure that conversations between municipal officials and attorneys will be honest and complete. In so doing, it encourages and

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facilitates the fulfillment of those obligations."); 8 JOHN H. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961) ("The policy of the privilege has been plainly grounded since the latter part of the 1700s .... In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.").

117 TEX. GOV'T CODE § 552.324(a)(2).

118 *In re Lindsey*, 148 F.3d 1100, 1112 (D.C. Cir. 1998) ("We may assume that if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and government lawyers.").

119 *In re City of Georgetown*, 53 S.W.3d 328, 333 (Tex. 2001) (orig. proceeding).

120 *See* *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) ("[The attorney-client] privilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.' " (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488 (1888))); *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir. 1998) ("We may assume that if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and government lawyers."); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests," it "needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors"); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) ("The policy objective of [the attorney-client] privilege is certainly consistent with the policy objective of [an exemption] intended to protect the quality of agency decision-making by preventing the disclosure requirement of the [Freedom of Information Act] from cutting off the flow of information to agency decision-makers. Certainly this covers professional advice on legal questions which bears on those decisions. The opinion of even the finest attorney, however, is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent.").

121 *E.g.*, TEX. GOV'T CODE §§ 552.321 (requestor or attorney general suit for writ of mandamus), .3215 (action for declaratory or injunctive relief against a governmental body for violating the PIA), .323 (fee-shifting provisions favoring substantially prevailing plaintiffs).

122 *See id.* §§ 552.321, .3215, .323.

123 *Id.* § 552.001 (demanding liberal construction to implement the state's policy of open government and to favor disclosing information about governmental affairs).

124 *See id.* § 552.302. In light of this holding, we need not address the City's alternative argument that "substantial harm" to its bargaining position constitutes a "compelling reason" for withholding the requested information.

125 *Post* at 36–37 (BOYD, J., dissenting) ("Because the Act requires both that an exception apply and that a compelling reason exist, neither the Act's exceptions nor the privileges and confidentiality that trigger an exception are sufficient alone to establish a compelling reason."); *id.* at 30 ("[N]either an exception nor the interests it supports can independently qualify as a compelling reason that outweighs the public's interest in

prompt access to public information under the Act."). *But see id.* at 33 n.20 (agreeing the Court could consider the " 'policy of preventing bioterrorism' " that underlies section 552.152's exception from public disclosure "when deciding whether a compelling reason exists").

126 *Id.* at 33–34.

127 *See* TEX. GOV'T CODE §§ 552.151, .152.

128 The dissent's claim to "acknowledge the privilege's importance" falls flat because the analysis does not recognize or evaluate the interests underlying the privilege in declaring those interests are necessarily overcome by delay and necessarily overpowered by the public's interest in promptness. *Post* at 3 n.1, 30 (BOYD, J., dissenting). The dissent, instead, relies on the circular argument that the Legislature excepted privileged information from disclosure to protect important interests, but those interests cannot be "compelling reason[s] to withhold information from disclosure" because the Legislature excepted privileged information from disclosure to the public. *See id.* at 16–17.

129 *Id.* at 16.

130 *See, e.g.*, TEX. GOV'T CODE §§ 552.106(a) (excepting from mandatory disclosure "a draft or working paper involved in the preparation of proposed legislation"), .122 (excepting from mandatory disclosure a test item developed by an educational agency funded by state revenue, a licensing agency, or a governmental body).

131 *Post* at 13 (complaining that "the Court can provide no statutory basis for deciding when the interests that an exception protects are categorically compelling and when they are not").

132 *Id.* at 30. The dissent intimates that an untimely request for an attorney general decision equates to "failure to timely and properly assert the [attorney-client] privilege." *Id.* While it is true that, in this case, the City did not timely and properly assert a *statutory exception* to disclosure, the City has jealously guarded its attorney-client privilege, asserting it as a "compelling reason to withhold the information" from disclosure. There is no statutory deadline for asserting the attorney-client privilege or for claiming a "compelling reason to withhold the information."

133 *Id.* at 31.

134 *Id.* at 3, 26–29.

135 *Id.* at 14 & n.11.

136 *See supra*, nn.88–92.

137 *See supra*, nn.81–88, 116.

138 8 JOHN H. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) ("The history of [the attorney-client] privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned." (citing *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577))).

139 *See, e.g.*, *post* at 2–3 (BOYD, J., dissenting) ("Under the Court's holding, establishing the exception will always constitute a compelling reason .... obliterat[ing] the sole method by which the Act compels the government to timely and properly assert the attorney-client privilege.").

140 Hon. Neil M. Gorsuch, *Law's Irony*, 37 HARV. J. L. & PUB. POL'Y 743, 752–53 (2014).

141 *Post* at 1–3, 6–8.

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1 Contrary to the Court's assertion, I do not "dismiss[ ] the importance of the privilege in the government context as mere hyperbole." *Ante* at 260. I acknowledge the privilege's importance, just as the Act does by excepting privileged attorney-client communications from its disclosure requirement. What I find hyperbolic is the Court's suggestion that governmental bodies will stop relying on legal advice unless we hold that the privilege is itself a compelling reason to withhold information when a governmental body fails to timely and properly assert the exception. As discussed below, history has proven otherwise.

2 It is undisputed that the government's attorney-client communications are "public information" under the Act. "Public information" includes all information "that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business," either (1) by a governmental body, (2) for a governmental body, if the governmental body owns the information, has a right of access to the information, or "spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information," or (3) "by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body." TEX. GOV'T CODE § 552.002(a).

3 It is undisputed that the City of Dallas is a governmental body under the Act. *See* TEX. GOV'T CODE § 552.003(1)(A)(iii) (including in definition of "governmental body" "a municipal governing body in the state").

4 The Court criticizes the Attorney General for taking a "constrained" and "restrictive" view of the statutory language," *ante* at 257, 270, yet that is exactly what the Act instructs the Attorney General and this Court to do.

5 While the Court acknowledges that the Act imposes a deadline for asserting a "statutory exception," it contends that there is "no statutory deadline for asserting the attorney-client privilege." *Ante* at 269 n.132. To the contrary, section 552.301 imposes both a ten-day deadline for asserting the applicable exception and a fifteen-day deadline for asserting the reason the exception applies. Here, the City missed both deadlines, and thus failed to timely and properly assert the privilege, regardless of how "jealously" it has attempted to guard the privilege thereafter.

6 At oral argument before this Court, the City's attorney asserted that the City simply "missed the deadlines in both of these instances. It was inadvertence, I believe. There's ... nothing in the record to indicate anything else."

7 Similarly, Black's defines "compel" as to "cause or bring about by force, threats, or overwhelming pressure" and—within the legal context—to "convince (a court) that there is *only one possible resolution* of a legal dispute." *Compel*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

8 Consistent with their common, ordinary meanings, Texas statutes repeatedly use the terms "compel" and "compelling" to refer to court orders, subpoenas, statutes, and other authorities that effectively demand and require their intended result. *See, e.g.*, TEX. BUS. & COM. CODE §§ 15.10(g)(5)(E) (referring to court order "compelling" oral testimony); .13(a), (b), (d) (same); TEX. CIV. PRAC. & REM. CODE § 171.021(c) (referring to court order "compelling" arbitration); TEX. CODE CRIM. PROC. art. 46C.104(a) (referring to court order "compelling" testimony); TEX. ELEC. CODE §§ 221.009(a) (referring to court order "compelling" voter to reveal vote); 231.006 (referring to subpoena "compelling" production of election records); TEX. EST. CODE § 309.056(c)(3) (referring to order compelling production of estate inventory); TEX. FAM. CODE § 157.372 (referring to court order "compelling" return of kidnapped child); TEX. FIN. CODE §§ 35.204(a) (referring to court order "compelling" compliance with subpoena); 185.203(a) (same); TEX. GOV'T CODE § 33.023(d) (referring to court order "compelling" judge to submit to physical or mental examination); TEX. HEALTH & SAFETY CODE §§ 12.002(b) (referring to court order "compelling" compliance with statutory requirements); 314.003(a) (referring to court order "compelling" compliance with civil investigative demand); TEX. INS. CODE §§ 823.351(b–1) (referring to court order "compelling" witness testimony or production of documents);

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4201.601 (referring to commissioner's order "compel[ling]" production of information); TEX. LOC. GOVT. CODE §§ 54.044(b), (c) (referring to orders "compelling" testimony and production of documents); 325.089 (referring to court order "compelling" compliance with bond requirements); TEX. NAT. RES. CODE § 86.001 (referring to statute's purpose of "compelling" ratable production of natural gas); TEX. OCC. CODE § 1702.367(a) (referring to subpoena "compelling" testimony of witness or production of documents); TEX. PROP. CODE § 114.008(a)(3) (referring to court order "compel[ling]" trustee to pay money or restore property); TEX. TRANSP. CODE §§ 284.204(b)(2) (referring to order "compelling" attendance of witnesses and production of documents); 682.005 (same); 707.009 (same); 730.007(c)(2) (referring to subpoena "compelling" production of photographic image); TEX. WATER CODE §§ 54.016(g) (referring to court order "restraining, compelling or requiring" district to comply with consent agreement); 65.513 (referring to court order "compelling" district to comply with bond conditions); 66.319 (same).

9 Although the City acknowledges that the rules of evidence currently provide the basis for the confidentiality of attorney-client communications, *see generally* TEX. R. EVID. 503, it contends that the rules merely codify judicial decisions that first recognized the attorney-client privilege as a matter of common law. *See In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001) (explaining that the "rules of procedure and evidence, as well as the statutes that preceded them, have embodied work-product and attorney-client privileges that have long been part of the common law"). Thus, according to the City, attorney-client communications are "considered confidential by law" that exists "by judicial decisions," and thus section 552.101 applies and excepts them from the Act's disclosure requirement. TEX. GOV'T CODE § 552.101.

10 If, for example, the facts establish that requested information is in a government employee's personnel file and its "disclosure would constitute a clearly unwarranted invasion of personal privacy," section 552.102 excepts it from the Act's disclosure requirement. TEX. GOV'T CODE § 552.102(a). If the information relates to "litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party," section 552.103 excepts it from disclosure. *Id.* § 552.103(a). And if the information "deals with" the "prosecution of crime" and its release would "interfere with" that prosecution, section 552.108 excepts it from disclosure. *Id.* § 552.108(a).

11 Texas Attorneys General have repeatedly held that a compelling reason exists only if either (1) the information is subject to "mandatory" confidentiality, or (2) release of the information would implicate or harm a third party's interests. *See, e.g.*, Tex. Att'y Gen. Op. ORD–676 at 1 (2002); Tex. Att'y Gen. Op. ORD–630 at 2 (2002); Tex. Att'y Gen. Op. ORD–150 at 2 (1977). But the Act's plain language limits the qualifying reasons not to any specific reasons or types of reasons, but to any reason that is "compelling." We cannot judicially amend this plain language to limit the Act's scope, despite the Attorney General's office's longstanding practice of doing so.

12 *See* TEX. GOV'T CODE §§ 552.102 (certain personnel information); .1081 (certain information regarding those who participate in the execution of a convict); .1085 (sensitive crime scene images); .109 (certain private "correspondence or communications of an elected office holder"); .110 (trade secrets and certain commercial or financial information); .113 (geological or geophysical information); .114 (student records); .115 (birth and death records); .117 ("certain addresses, telephone numbers, social security numbers, and personal family information"); .1175 (certain personal identifying information of peace officers, county jailers, and others); .1176 (certain information regarding members of the State Bar); .118 ("information on or derived from an official prescription form or electronic prescription record filed with the Texas State Board of Pharmacy"); .119 (certain photographs of peace officers); .120 (certain rare books and original manuscripts); .121 (certain documents held for historical research); .123 (the name of an applicant for chief executive officer of an institution of higher education); .1235 (the identity of a private donor to an institution of higher education); .124 (the records of a library or library system); .126 (the name of an applicant for superintendent of a public school district); .127 (personal information relating to participants in a neighborhood

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crime watch organization); .128 (certain information submitted by a potential vendor or contractor); .129 (certain motor-vehicle inspection information); .130 (certain motor-vehicle records); .131 (certain economic-development information); .132 (crime victim or claimant information); .1325 (certain information in a crime-victim impact statement); .133 (public power utility competitive matters); .134 (certain information relating to an inmate of the Department of Criminal Justice); .135 (certain information held by a school district); .136 (credit card, debit card, charge card, and access device numbers); .137 (certain email addresses); .138 (information regarding a family violence shelter, victims of trafficking shelter center, or sexual assault program); .139 (information related to security or infrastructure issues for computers); .140 (military discharge records); .141 (information in an application for a marriage license); .142 (records subject to a nondisclosure order); .143 (certain investment information); .145 (the Texas no-call list); .146 (certain communications with legislative budget board employees); .147 (social security numbers); .148 (certain personal information maintained by a municipality pertaining to a minor); .149 (records that the comptroller or an appraisal district received from a private entity); .150 (information that could compromise the safety of a hospital district officer or employee); .151 (information regarding select bioterrorism agents); .152 (information concerning the personal safety of a public employee or officer); .155 (certain property tax appraisal photographs); .156 (continuity of operations plans).

13 Many other provisions impose similar time deadlines that apply in specific circumstances. *See, e.g.*, *id.* §§ 552.008(b–2) (requiring Attorney General to establish briefing deadlines for disputes involving information sought for legislative purposes and to decide such disputes "not later than the 45th business day after the date the attorney general received the request for a decision"); .024(c–1) (same for disputes over redacted information regarding government employees); .130(d) (same for redacted information regarding motor vehicle records); .136(d) (same for redacted information regarding credit cards and similar access cards); .138(d) (same for redacted information regarding family violence and sexual assaults); *see also id.* §§ 552.1085(f) (requiring government to notify next of kin regarding a request for a sensitive crime scene image not "later than the 10th business day after" the government receives the request); .1175(g) (same for disputes over redacted information regarding peace officers, judges, and others); .269(a) (requiring government to "promptly" adjust the amount charged for copies of information in accordance with the Attorney General's determination).

14 *See also* *Lugosch*, 435 F.3d at 123 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right to access is found.") (emphasis added); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) (holding that the public interest in access to public information "encompasses the public's ability to make a *contemporaneous* review of the basis of an important decision of the district court") (emphasis added); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984) ("The presumption of access normally involves a right of *contemporaneous* access.") (emphasis added).

15 The Court asserts that, when the government itself is the client whose communications are at issue, the privilege applies with "special force" because it protects the public's interest by encouraging government officials to seek legal advice when formulating public policy and conducting government business "on behalf of the public." *Ante* at 260 (quoting *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007)). But the Court ignores that when the government asserts the privilege, the presumption that favors the public's interest in prompt access is equally accentuated. *See* *Standard Fin. Mgmt.*, 830 F.2d at 410 (noting that the "appropriateness of making court files accessible is accentuated in cases where the government is a party"); *In re Application of Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980) ("The presumption is especially strong in a case ... where the evidence shows the actions of public officials."). Just as the government ultimately acts on behalf of the public, the information it possesses belongs to the public, and the public, "in delegating [that] authority, do not

give their public servants the right to decide what is good for the people to know and what is not good for them to know." TEX. GOV'T CODE § 552.001(a). Instead, the people, acting through their elected legislators, have decided whether to grant governmental bodies the right to claim the attorney-client privilege as a basis for concealing the public's information from the public. As a result, certain "limitations to the government attorney-client privilege ... may render an otherwise protectable communication unprotected." *Cnty. of Erie*, 473 F.3d at 418 n.5.

16 *See also ante* at 277 (holding that the privilege protects interests that are "independently compelling reasons to withhold privileged information unless confidentiality has been waived").

17 *Contrast* TEX. GOV'T CODE §§ 552.0038(f) (providing that an individual "waives the confidentiality" of records held by a public retirement system if the records become "part of the public record of an administrative or judicial proceeding related to a contested case"); .008(b) (providing that a governmental body that releases information to a legislative member, agency, or committee "does not waive or affect the confidentiality of the information" or "waive the right to assert exceptions to required disclosure of the information in the future"); .134(d) (providing that the release of the information regarding a prison inmate to certain eligible entities for law-enforcement purposes "does not waive the right to assert in the future that the information is excepted from required disclosure"); .156(d) (providing that the disclosure of information regarding an agency's continuity of operations plan "to another governmental body or a federal agency ... does not waive or affect the confidentiality of that information"); *see also id.* § 552.326(a) (providing generally that "the only exceptions a governmental body may raise in a suit filed under [the Act] are exceptions that the governmental body properly raised" in its request for the Attorney General's decision).

18 The Court incorrectly declares that I "repudiate" the "underlying rationale" of this construction of section 552.302. *Ante* at 269. To be clear, I do not agree with the Attorneys General's long-held conclusion that only two reasons (mandatory confidentiality and harm to a third party) can ever be compelling, *see supra* n.11, but I do agree with their holding that the mere fact that information is attorney-client privileged does not constitute a compelling reason under section 552.302.

19 *See also, e.g.*, Tex. Att'y Gen. Op. OR2016–26762 at 1 (2016); Tex. Att'y Gen. Op. OR2016–26708 at 1 (2016); Tex. Att'y Gen. Op. OR2016–26782 at 2 (2016); Tex. Att'y Gen. Op. OR2016–26355 at 1 (2016); Tex. Att'y Gen. Op. OR2016–26022 at 1 (2016); Tex. Att'y Gen. Op. OR2016–25036 at 1 (2016); Tex. Att'y Gen. Op. OR2016–24517 at 1 (2016); Tex. Att'y Gen. Op. OR2016–24334 at 2 (2016); Tex. Att'y Gen. Op. OR2016–23955 at 2 (2016); Tex. Att'y Gen. Op. OR2016–23689 at 1 (2016); Tex. Att'y Gen. Op. OR2016–23232 at 2 (2016); Tex. Att'y Gen. Op. OR2016–22178 at 1 (2016); Tex. Att'y Gen. Op. OR2016–21609 at 2 (2016); Tex. Att'y Gen. Op. OR2016–20676 at 1 (2016); Tex. Att'y Gen. Op. OR2016–19742 at 2 (2016); Tex. Att'y Gen. Op. OR2016–16274 at 2 (2016); Tex. Att'y Gen. Op. OR2016–15596 at 1 (2016); Tex. Att'y Gen. Op. OR2016–13176 at 2 (2016); Tex. Att'y Gen. Op. OR2016–11856 at 1 (2016);

Tex. Att'y Gen. Op. OR2016–09021 at 2 (2016); Tex. Att'y Gen. Op. OR2016–06110 at 2 (2016); Tex. Att'y Gen. Op. OR2016–04321 at 1 (2016); Tex. Att'y Gen. Op. OR2016–03008 at 1 (2016); Tex. Att'y Gen. Op. OR2016–00799 at 2 (2016); Tex. Att'y Gen. Op. OR2015–27069 at 1 (2015); Tex. Att'y Gen. Op. OR2015–26538 at 2 (2015); Tex. Att'y Gen. Op. OR2015–26325 at 2 (2015); Tex. Att'y Gen. Op. OR2015–23096 at 1 (2015); Tex. Att'y Gen. Op. OR2015–22782 at 1(2015); Tex. Att'y Gen. Op. OR2015–21206 at 1 (2015); Tex. Att'y Gen. Op. OR2015–21273 at 1 (2015); Tex. Att'y Gen. Op. OR2015–21250 at 1 (2015); Tex. Att'y Gen. Op. OR2015–20022 at 2 (2015); Tex. Att'y Gen. Op. OR2015–19528 at 1 (2015); Tex. Att'y Gen. Op. OR2015–18374 at 1 (2015); Tex. Att'y Gen. Op. OR2015–16995 at 1 (2015); Tex. Att'y Gen. Op. OR2015–16428 at 1 (2015); Tex. Att'y Gen. Op. OR2015–11264 at 1 (2015); Tex. Att'y Gen. Op. OR2015–11026 at

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1 (2015); Tex. Att'y Gen. Op. OR2015–10858 at 1 (2015); Tex. Att'y Gen. Op. OR2015–09177 at 1 (2015); Tex. Att'y Gen. Op. OR2015–08783 at 1 (2015); Tex. Att'y Gen. Op. OR2015–08104 at 1 (2015);

Tex. Att'y Gen. Op. OR2015–07847 at 1 (2015); Tex. Att'y Gen. Op. OR2015–06823 at 1 (2015); Tex. Att'y Gen. Op. OR2015–06582 at 1 (2015); Tex. Att'y Gen. Op. OR2015–06121 at 1 (2015); Tex. Att'y Gen. Op. OR2015–05774 at 1 (2015); Tex. Att'y Gen. Op. OR2015–05223 at 2 (2015); Tex. Att'y Gen. Op. OR2015–04386 at 2 (2015); Tex. Att'y Gen. Op. OR2015–04356 at 1 (2015); Tex. Att'y Gen. Op. OR2015–03323 at 2 (2015); Tex. Att'y Gen. Op. OR2015–01280 at 1 (2015); Tex. Att'y Gen. Op. OR2015–00851 at 2 (2015); Tex. Att'y Gen. Op. OR2014–22569 at 1 (2014); Tex. Att'y Gen. Op. OR2014–20386 at 2 (2014); Tex. Att'y Gen. Op. OR2014–18679 at 2 (2014); Tex. Att'y Gen. Op. OR2014–17855 at 1 (2014); Tex. Att'y Gen. Op. OR2014–16893 at 1 (2014); Tex. Att'y Gen. Op. OR2014–16682 at 2 (2014); Tex. Att'y Gen. Op. OR2014–16253 at 1 (2014); Tex. Att'y Gen. Op. OR2014–16253 at 1 (2014); Tex. Att'y Gen. Op. OR2014–12075 at 2 (2014); Tex. Att'y Gen. Op. OR2014–12072 at 2 (2014); Tex. Att'y Gen. Op. OR2014–11614 at 1 (2014);

Tex. Att'y Gen. Op. OR2014–11382 at 1 (2014); Tex. Att'y Gen. Op. OR2014–11296 at 2 (2014); Tex. Att'y Gen. Op. OR2014–10699 at 2 (2014); Tex. Att'y Gen. Op. OR2014–10477 at 1 (2014); Tex. Att'y Gen. Op. OR2014–10424 at 1 (2014); Tex. Att'y Gen. Op. OR2014–08748 at 3 (2014); Tex. Att'y Gen. Op. OR2014–07913 at 1 (2014); Tex. Att'y Gen. Op. OR2014–07208 at 1 (2014); Tex. Att'y Gen. Op. OR2014–06251 at 1 (2014); Tex. Att'y Gen. Op. OR2014–05700 at 2 (2014); Tex. Att'y Gen. Op. OR2014–04581 at 3 (2014); Tex. Att'y Gen. Op. OR2014–04344 at 2 (2014); Tex. Att'y Gen. Op. OR2014–04134 at 1 (2014); Tex. Att'y Gen. Op. OR2014–03504 at 2 (2014); Tex. Att'y Gen. Op. OR2014–00789 at 1 (2014); Tex. Att'y Gen. Op. OR2014–00816 at 1 (2014); Tex. Att'y Gen. Op. OR2013–17978 at 1 (2013); Tex. Att'y Gen. Op. OR2013–17964 at 1 (2013);

Tex. Att'y Gen. Op. OR2013–17799 at 1 (2013); Tex. Att'y Gen. Op. OR2013–15173 at 3 (2013); Tex. Att'y Gen. Op. OR2013–14328 at 1 (2013); Tex. Att'y Gen. Op. OR2013–13319 at 3 (2013); Tex. Att'y Gen. Op. OR2013–13170 at 2 (2013); Tex. Att'y Gen. Op. OR2013–12677 at 1 (2013); Tex. Att'y Gen. Op. OR2013–12690 at 1 (2013); Tex. Att'y Gen. Op. OR2013–12142 at 2 (2013); Tex. Att'y Gen. Op. OR2013–09446 at 3 (2013);Tex. Att'y Gen. Op. OR2013–09181 at 1 (2013); Tex. Att'y Gen. Op. OR2013–08067 at 1 (2013); Tex. Att'y Gen. Op. OR2013–07113 at 1 (2013); Tex. Att'y Gen. Op. OR2013–05127 at 1 (2013); Tex. Att'y Gen. Op. OR2013–03626 at 2 (2013); Tex. Att'y Gen. Op. OR2013–03522 at 2 (2013); Tex. Att'y Gen. Op. OR2013–03235 at 2 (2013); Tex. Att'y Gen. Op. OR2013–01354 at 1 (2013); Tex. Att'y Gen. Op. OR2013–01014 at 2 (2013); Tex. Att'y Gen. Op. OR2012–19685 at 1 (2012); Tex. Att'y Gen. Op. OR2012–18133 at 2 (2012); Tex. Att'y Gen. Op. OR2012–16940 at 1 (2012); Tex. Att'y Gen. Op. OR2012–16170 at 1 (2012); Tex. Att'y Gen. Op. OR2012–13326A at 2 (2012); Tex. Att'y Gen. Op. OR2012–15343 at 1 (2012); Tex. Att'y Gen. Op. OR2012–15268 at 1 (2012); Tex. Att'y Gen. Op. OR2012–14586 at 1 (2012); Tex. Att'y Gen. Op. OR2012–14409 at 1 (2012); Tex. Att'y Gen. Op. OR2012–13949 at 2 (2012); Tex. Att'y Gen. Op. OR2012–13326 at 2 (2012); Tex. Att'y Gen. Op. OR2012–12032 at 1 (2012); Tex. Att'y Gen. Op. OR2012–11953 at 2 (2012); Tex. Att'y Gen. Op. OR2012–11243 at 2 (2012);

Tex. Att'y Gen. Op. OR2012–10820 at 1 (2012); Tex. Att'y Gen. Op. OR2012–09574 at 1 (2012); Tex. Att'y Gen. Op. OR2012–09465 at 2 (2012); Tex. Att'y Gen. Op. OR2012–09387 at 1 (2012); Tex. Att'y Gen. Op. OR2012–09099 at 1 (2012); Tex. Att'y Gen. Op. OR2012–08205 at 2 (2012); Tex. Att'y Gen. Op. OR2012–07757 at 2 (2012); Tex. Att'y Gen. Op. OR2012–07651 at 1 (2012); Tex. Att'y Gen. Op. OR2012–07149 at 1 (2012); Tex. Att'y Gen. Op. OR2012–06193 at 1 (2012); Tex. Att'y Gen. Op. OR2012–05813 at 2 (2012); Tex. Att'y Gen. Op. OR2012–04159 at 2 (2012); Tex. Att'y Gen. Op. OR2012–02452 at 2 (2012); Tex. Att'y Gen. Op. OR2012–01807 at 2 (2012); Tex. Att'y Gen. Op. OR2012–00156 at 2 (2012); Tex. Att'y Gen. Op. OR2012–18915 at 3 (2011); Tex. Att'y Gen. Op. OR2011–18675 at 3 (2011); Tex. Att'y Gen. Op. OR2011–17569 at 1 (2011); Tex. Att'y Gen. Op. OR2011–12747 at 1 (2011); Tex. Att'y Gen. Op. OR2011–11066 at 1 (2011); Tex. Att'y Gen. Op. OR2011–10068 at 1 (2011); Tex. Att'y Gen. Op. OR2011–09673 at 2 (2011);

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Tex. Att'y Gen. Op. OR2011–09143 at 1 (2011); Tex. Att'y Gen. Op. OR2011–08740 at 2 (2011); Tex. Att'y Gen. Op. OR2011–08057 at 2 (2011); Tex. Att'y Gen. Op. OR2011–07794 at 1 (2011);

Tex. Att'y Gen. Op. OR2011–07237 at 1 (2011); Tex. Att'y Gen. Op. OR2011–07013 at 1 (2011); Tex. Att'y Gen. Op. OR2011–05559 at 2 (2011); Tex. Att'y Gen. Op. OR2011–05534 at 1 (2011); Tex. Att'y Gen. Op. OR2011–04966 at 1 (2011); Tex. Att'y Gen. Op. OR2011–04326 at 1 (2011); Tex. Att'y Gen. Op. OR2011–03582 at 1 (2011); Tex. Att'y Gen. Op. OR2011–03393 at 1 (2011); Tex. Att'y Gen. Op. OR2011–02463 at 2 (2011); Tex. Att'y Gen. Op. OR2011–02189 at 2 (2011); Tex. Att'y Gen. Op. OR2011–02059 at 1 (2011); Tex. Att'y Gen. Op. OR2011–02091 at 1 (2011); Tex. Att'y Gen. Op. OR2011–01280 at 1 (2011); Tex. Att'y Gen. Op. OR2010–18214 at 2 (2010); Tex. Att'y Gen. Op. OR2010–17492 at 1 (2010); Tex. Att'y Gen. Op. OR2010–16966 at 2 (2010); Tex. Att'y Gen. Op. OR2010–16999 at 1 (2010); Tex. Att'y Gen. Op. OR2010–15391 at 2 (2010); Tex. Att'y Gen. Op. OR2010–15134 at 2 (2010); Tex. Att'y Gen. Op. OR2010–15140 at 1 (2010); Tex. Att'y Gen. Op. OR2010–14576 at 2 (2010); Tex. Att'y Gen. Op. OR2010–13943 at 2 (2010); Tex. Att'y Gen. Op. OR2010–11553 at 1 (2010); Tex. Att'y Gen. Op. OR2010–10853 at 2 (2010); Tex. Att'y Gen. Op. OR2010–08618 at 1 (2010); Tex. Att'y Gen. Op. OR2010–07143 at 1 (2010); Tex. Att'y Gen. Op. OR2010–05908 at 1 (2010); Tex. Att'y Gen. Op. OR2010–05699 at 1 (2010); Tex. Att'y Gen. Op. OR2010–05549 at 2 (2010); Tex. Att'y Gen. Op. OR2010–05341 at 1 (2010); Tex. Att'y Gen. Op. OR2010–05203 at 2 (2010); Tex. Att'y Gen. Op. OR2010–03923 at 1 (2010); Tex. Att'y Gen. Op. OR2010–02743 at 1 (2010); Tex. Att'y Gen. Op. OR2010–02297 at 2 (2010); Tex. Att'y Gen. Op. OR2010–01967 at 1 (2010); Tex. Att'y Gen. Op. OR2010–00243 at 2 (2010); Tex. Att'y Gen. Op. OR2010–00016 at 1 (2010); Tex. Att'y Gen. Op. OR2010–00062 at 1 (2010); Tex. Att'y Gen. Op. OR2009–18436 at 2 (2009); Tex. Att'y Gen. Op. OR2009–15185 at 1 (2009); Tex. Att'y Gen. Op. OR2009–14597 at 2 (2009);

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20 Although I agree that a third party's interests *can* constitute a compelling reason under section 552.302, I do not agree that a third party's interests will *always* provide a compelling reason. As explained above, the determination of whether a compelling reason exists must depend on the particular facts and circumstances of each individual case. Thus, to respond to the Court's concern that it should be permitted to consider a "substantial threat of physical harm" to an employee or the "policy of preventing bioterrorism" when deciding whether a compelling reason exists, *see ante* at 268, I agree that the Court should consider such facts, just as it should consider the harm that would result from disclosing attorney-client communications, but it must consider those in light of all the facts and circumstances of each particular case.

21 *See, e.g.*, TEX. GOV'T CODE §§ 552.102(a) (excepting information in a personnel file when its disclosure "would constitute a clearly unwarranted invasion of personal privacy"); .104 (certain information related to competition or bidding); .109 (information when release would "constitute an invasion of privacy"); .1081

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("identifying" information regarding persons who participate in a convict's execution); .1085 (sensitive crime scene images); .109 (certain private correspondence or communications of an elected office holder); .110 (third party's trade secrets and commercial or financial information); .114 (students' education records); .115 (birth and death records); .117 (certain persons' addresses, telephone numbers, social security numbers, and personal family information), .1175 (certain persons' personal identifying information); .1176 (certain persons' home addresses, home telephone numbers, electronic mail addresses, social security numbers, and birth dates); .123 (the name of an applicant for chief executive officer of an institution of higher education); .1235 (the identity of a private donor to an institution of higher education); .126 (the name of an applicant for superintendent of a public school district); .127 (personal information of participants in a neighborhood crime watch organization); .132 (information regarding crime victims); .136 (credit card, debit card, charge card, and access device numbers); .137 (certain email addresses); .138 (information regarding a family violence shelter, victims of trafficking shelter center, or sexual assault program); .140 (military discharge records); .141 (information in an application for a marriage license); .147 (social security numbers); .148 (certain personal information pertaining to a minor); .149 (certain records received from a private entity); .154 (the name of an applicant for certain executive positions of the Teacher Retirement System).

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