ORAL ARGUMENT – 01/03/2001
00-0453
CITY OF GEORGETOWN V. JOHN CORNYN

HEATH: In 1999, the legislature amended the Texas Public Information Act to provide certain categories and information. And in our case the completed reports are public information unless they are expressly made confidential by other law.

ABBOTT: Do you know the extent to which, if any at all, the amendments that were enacted in 1999 had any relationship to anything in the Ethel(?) _____?

HEATH: I'm not advised of that.

ABBOTT: So these amendments that were made were pretty much undertaken within the confines of what the Texas legislature itself wanted to achieve?

HEATH: Yes. I believe that is correct.

O'NEILL: Let me look at that same provision and follow-up with a question. Under expressly confidential under other law, you're contending that the includes privileged information?

HEATH: I'm contending that includes attorney/client privileged information, which is expressly designated as confidential in disciplinary rule 1.05.

O'NEILL: But how do you square that with the legislature's specific reference to the exclusion of attorney/client information in 552.022(16). Didn't the legislature indicate they knew the difference between the two _____?

HEATH: I think what the legislature was doing there was something that is perhaps more practical help to persons who are using the law. And that is because the information is attorney fee bills. And there they say, Attorney fee bills are public unless they are covered by the attorney/client privilege. In an attorney fee bill, that's going to be the issue 99% of the time. If you get a description of the work done, the question is going to be: Is it something that is covered by the attorney/client privilege? And so the legislature put that in. And as you recall, §552.022 where this occurs was originally a list of examples and it was something that was telling people how to administer the act. So I think what they were saying is, here is the exception that's always going to apply.

Now in our case in exception #1, completed reports, some times those are going to be things that are covered by the attorney/client privilege, but not necessarily. And probably most of the time, the attorney/client privilege is not going to be an issue there. So I think that's what's happened.

ABBOTT: Along those same lines to that question and your answer, isn't it true that the only way that you can win in this case would be if we construe other law to be a rule of procedure or a rule of professional conduct passed by this court?

HEATH: I think that, plus I think there are common law doctrines or common law origins of the attorney/client privilege. So I think you could do it there, but we certainly contend...

ABBOTT: Let's take it one step at a time though. If we conclude that a rule passed by this court concerning the code of professional conduct or concerning rules of civil procedure are not considered to be other law, then you are going to rely solely upon perhaps common law decisions by this court as establishing the other law aspect required in order to establish the confidentiality aspect?

HEATH: Right. I would rely on those. I'm not going to concede the first point of that though, that those rules of procedure and rules of disciplinary procedure are not other law.

ABBOTT: Are you familiar with any case issued by this court saying that our rules are tantamount to law?

HEATH: I cannot give you a case on that. The AG in this case does not dispute that this is other law and has not treated it as something other than other law. But one thing that's important to recall about the disciplinary rules is, that the statutes incorporate those and hold people to those standards. In Ch. 82 of the Gov't Code, it indicates that attorneys are required to abide by the disciplinary rules. And there are penalties that are imposed by the state of Texas if I don't. They are disciplinary rules. I can lose my license if I do not abide by the disciplinary rules and the statutes say that. There is another place where they refer to in the statutes the disciplinary rules as other law. It is not in the context of the open records act. I believe it's ch. 22.54, but I would have to get back with you on the exact reference there.

But it seems to me that's the first issue here: Is this information that is confidential by other law? In this case the legislature said expressly confidential by other law. You go to other law and if you look at the exhibits that we have prepared, Tab 2, which are the disciplinary rules and the rules of evidence and there they talk about this type of information as being confidential. That's the term they use. They didn't talk about something less than confidential. They used the exact term that the legislature used in 552.022.

There seems to be no question that at least the rules of this court considers this to be confidential. They were in place. The legislature used the indication that information that is confidential is not covered by .022. This was in place. Surely they were aware of that, and were incorporating that into what they say is confidential.

ABBOTT: If we construe rule 503 to be other law establishing the scope of what may be

deemed to be confidential, aren't we going to pretty much create such a wide area of protection that it is going to make many, many documents held by governmental entities are going to be able to cloak them from being able to be disclosed?

HEATH: I don't believe so. I don't think it's anything other than - certainly it's nothing more than what would be excepted from disclosure under existing law, under 108.

ABBOTT: Under the confidentiality provisions, isn't it true that the attorney/client privilege continues long past the conclusion of litigation?

HEATH: That is correct.

ABBOTT: It goes on forever.

HEATH: That is correct.

ABBOTT: Now that would be totally inconsistent with what the legislature clearly intended by §552.103?

HEATH: In .103, which talks about pending or contemplated litigation, you couldn't raise the .103 exception there.

ABBOTT: Buy here's my point. At a minimum in enacting .103, the legislature was trying to prevent from having certain documents that were involved in the litigation process from being disclosed. Presumably so that the cities or whatever governmental entities wouldn't have to show all the cards on the table. Do you agree with that?

HEATH: That is correct.

ABBOTT: However, if we look at and apply rule 503, dealing with the confidentiality aspect, what you are saying is that cities and other governmental entities are going to be able to forever cloak from disclosure anything that would be confidential, which would broaden 552.103 way beyond what the legislature even intended to accomplish by that particular statutory provision?

HEATH: I think we can't look just at .103 to determine the legislative intent. Because 107 is there too, and .107 I think is broader than .103.

ABBOTT: Let's go to my point though. What would happen is if we rely upon rule 503 of the Texas Rules of Evidence? You agree that it is going to cloak forever from disclosure certain documents? It would affect many documents: every single document that could fall with the parameters of attorney/client privilege, every single memo, every single report.

HEATH: I'm not saying that every single report that would fall within .103 . There can be and you can fashion a remedy that would give a different degree of disclosure to material or different protection material under .021 than .022.

ABBOTT: When you talk about us fashioning remedies, it almost makes it seem as though we are going be creating the law.

HEATH. No. Because I think what you look at is under .021 it talks about information law, under other law. And that applies just to what the AG and others have referred to as super public information. Information that is automatically public, and perhaps not necessarily covered under .021. However, under .021 you have all information that is required to be released. The confidential other law exception is .101, but there they are talking about judicial decision. And I think you could say that 503 information may not fall within §101 of the subsection (c) exceptions even though it may fall within confidential by other law referred to in .022. Those two are not necessarily the same.

ABBOTT: Didn't the legislature signal that they clearly intended for the exceptions in .103 and .107 not to apply to everything in .022 by adding at the end of .022(1): except as provided by 522.108? In other words, the documents that we are dealing with in this particular case, a report, must be disclosed. And they provided a single exception to the exceptions, and that is except as provided by §552.108.

HEATH: It's a single exception plus the exception of expressly confidential under other law.

HANKINSON: You cited some legislative history to us that the legislature did not intend to deprive governmental entities of the benefit of the attorney/client privilege. How does the attorney/client privilege dovetail with the specific provisions of the open records act that are at issue here? How does it work?

HEATH: It works in that if it is covered by the attorney/client privilege under .105 and 503, then it is information that is expressly confidential by law. And under .022 is not automatically public.

Under .021, there are other exceptions there that may apply. And there are other provisions that apply and other considerations that apply under .021. But under .022 what it means is, that that information is confidential under .022 and was not intended to be released. I don't think the legislature intended to make governmental bodies go into a negotiating session, a mediation, a settlement negotiation and have its cards lying face up on the table while everyone else are held close to their chest.

HANKINSON: How does .103 fit into the statutory scheme then since its definition is much broader of litigation related material than obviously either the work product privilege, or the

attorney/client privilege are, and since it does have the trigger than when the litigation is over the confidentiality protection ceases? How does the attorney/client privilege and the work product privilege then dovetail with .103?

HEATH: I think the attorney/client privilege certainly would be encompassed within materials that would fall within .103. But there is some materials that may fall within .107 of the act, which is information. And quoting them from memory here, but essentially that the attorney has a duty to his client to keep confidential or not to reveal. There may be some information that would continue to be protected under .107 even after the .103 exception had gone away.

HANKINSON: But .103 is what was invoked by the City of Georgetown in this case when it made its request to the AG?

HEATH: That's correct. And one thing that's important to recall is, that there are two different statutory schemes running parallel here. There is the .021 scheme, which says everything is public unless it's excepted under (c). And there you have to go to the AG. You have to raise a subsection (c) exception, and so forth. And we did that and the AG said we were right on that. But then he said under .022, which we are not required to go to the AG on, that's something different and the subsection (c) doesn't apply here.

HANKINSON: If I understand the AG's position, his position is that you cannot look at any exception in part (c) of the statute, in order to avoid 552.022.

HEATH: Right. And we are looking outside of subsection (c). We are looking to Rule 105 and rule 503.

HANKINSON: Then that's my question in terms of how the statutory scheme works. How do you get there under the procedures in place under the Open Records Act if you are required to invoke an exception from part (c)? And in fact you are invoking something that is outside of the statute, then how do you get there? How does this work?

HEATH: If you look at Tab 4, you have the .021 statutory scheme all of which is tied to claiming a subsection (c) exception. And we did that. And the .022 scheme is separate and doesn't rely on subsection (c). That is a separate scheme. The AG is not necessarily even a part of that scheme.

ENOCH: If the report is not attorney/work product, or not entitled to protection as attorney/work product, do you have an argument that it remains confidential anyway? Your argument seems to be that this is attorney/work product, therefore, it's privileged and therefore it's excepted from disclosure. If it's not privileged do you have an argument that it's still protected from disclosure?

HEATH: If it does not fall under .105 or 503, and we think there are three instances where it could fall under those, one of which is attorney work product; other consulting expert opinion which fits within the 503 definition or attorney/client privilege generally. We still have those. But basically we think it is attorney work product and we think the evidence is uncontradicted on that.

ENOCH: If it's attorney work product, but it is given to human resources people who are not a part of the decision makers isn't that issue waived?

HEATH: It may be there is no evidence of that in the record, and I don't think that happened.

ABBOTT: Would you please clarify based upon the record that we have developed in this case exactly to whom these documents had been shown?

HEATH: They have been shown to - of course the consulting engineer developed them, gave them to the city attorney, they were given to the city council, the mayor, the manager. The manager attached the report to his self-evaluation. There was speculation but there was no testimony in the record to suggest that anybody else other than the council received copies of that. And he forwarded that back to the council, the mayor, etc.

BAKER: Would you have given it to the personnel people employed by the city to maintain those records?

HEATH: As I said, there is no evidence in the record that that happened. There was some speculation and the question that I think that that happened. There is no evidence of it. I believe that that was not the case. The evidence is, there is no evidence of that in the record. Someone speculated on that.

BAKER: Is it a correct statement of the facts that the request by the Statesman was only for the city manager's self-evaluation?

HEATH: The William County Sun made the initial request: requested the self-evaluation. This was attached to it. And when that opinion came out, the Statesman came in with another question asking for the report.

BAKER: So in other words, the Statesman asked for it because you had asked for an opinion on something that wasn't requested?

HEATH: Yes.

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RESPONDENT

CORNYN: Unlike information in the possession of a private litigant, which is presumptively private, information held by a governmental body like the city of Georgetown, is presumptively public. It's important for the court to focus on the different public policy justifications behind the legislature's decision to pass the Public Information Act on one hand, as well as the court to look at the justifications for discovery privileges on the other hand.

Under the scheme set up by the legislature, all information in the possession of the city of Georgetown is presumptively public subject to exceptions under subchapter (c).

PHILLIPS: Prior to 1999, would the exceptions have prevailed and this information have been shielded from disclosure?

CORNYN: I believe so.

PHILLIPS: This wasn't essential to the scheme _____?

CORNYN: To the contrary. I believe it is essential to the scheme...

PHILLIPS: Current to post-1999?

CORNYN: That's correct. Because in 1999, the legislature as you can see by the evolution of 552.022 in one of the exhibits we handed out to the court, the legislature over the years and culminating in 1999 increasingly made certain items subject to public inspection under categories that we call "super pubic information"...

OWEN: Mr. Heath argued that the state would have to lay its cards on the table for example in going into mediation or settlement talks. Why would the legislature want to hamper the state in that manner?

CORNYN: Because the public policies underlying the public information act are larger and more over-arching than considerations given to a private litigant in private litigation. The legislature could well have decided that issues of public responsibility and accountability by elected and appointed officials was a more important public policy justification when it came to this very narrow issue of completed reports than protection of that in a litigation context by a privilege under .103.

HANKINSON: But your analysis extends beyond just the litigation context.

CORNYN: That's true that our analysis does extend beyond the litigation context. In other words, all information is presumptively public. What Mr. Heath's client is arguing is that

because they happen to be in litigation that something that the legislature has declared as public unless it is expressly confidential under other law cannot be revealed to the newspaper in this case.

HANKINSON: The consequences of the position that you have taken would make any completed report from an attorney to its client, for example someone like the city of Georgetown, open to the public even outside the litigation context. Isn't that the consequence of the argument that you are making?

CORNYN: That is the consequence of the statute that the legislature passed. And the legislature made very clear, as you can see by our handout that shows the progression and the evolution of §.022, that the legislature made it very clear that there were 18 categories of information, including completed reports that would be subject to public inspection unless there was a express provision under the constitution.

HANKINSON: There is a statement in your brief that the 1999 amendments do not open to the public all litigation related information or even all privileged information. But in fact, that really is the case under the interpretation you would have us give to the statute?

CORNYN: I agree with Mr. Heath, that completed reports include a universe of information that is far larger than information that might be subject to any privilege. And so the application here to apply .022(a)(1) to a completed report in this context is a very narrow application.

HANKINSON: But it's important for us to understand the consequences of that interpretation in trying to ascertain what the legislature intended in the amendments to the statute. And so my question again goes back to the fact that if an attorney in fact does a report to his or her client, someone like the city of Georgetown or a school district or a county or the state of Texas for that matter, then in fact that could be a completed report that would have to be disclosed even though it is pure attorney/client privileged material under the law, and that's your position?

CORNYN: That is a possible consequence. Of course, we know in this case it does not include a completed report of that description. The completed report is of a consulting engineer who was hired to evaluate a wastewater facility in the city of Georgetown...

OWEN: If the legislature wanted to waive its attorney/client privilege for all state agencies, why didn't it do so in more clear language?

CORNYN: As we pointed out in our brief, the legislature knows the difference between something that's expressly confidential under the law, and something that's subject to an attorney/client privilege.

OWEN: We use the word 'confidential' in our rules dealing with attorney/client privilege. Why didn't they make it crystal clear that they intended such a broad waiver?

CORNYN: We submit they did make it crystal clear. And that the fact that Mr. Heath argues that under the disciplinary rules, the word "confidential" as used does not make confidential in this court's disciplinary rules the same thing that the legislature provided as a rule of art.

OWEN: Our Texas Rule of Evidence also uses 503.

CORNYN: The confidential communication. But this is a statute, and I don't think you can presume, indeed I think all the evidence is the contrary, that the legislature considered expressly confidential under other law to be a term of art. Because in the Public Information Act, 552.101 information is expressly confidential under law includes the constitution, court decisions or statutes. And so it's very clear and certainly it's been the practice of the AG in evaluating requests for AG's opinions to treat it as strictly limited to the constitution, to court decisions and to statutes that mandate confidentiality.

ABBOTT: In that regard, what about Mr. Heath's argument that ch. 82 of the Gov't Code incorporates the provisions of the disciplinary rules?

CORNYN: Well we certainly disagree and there is no indication that the legislature had that in mind when they passed the Public Information Act. It's important to note the differences in the character, as well as the consequences of Mr. Heath's argument. If in fact discovery privileges are expressly confidential under law, then that means that a governmental entity cannot waive the privilege because it's a crime to distribute information that is expressly confidential under the Public Information Act. You can't waive it even if it's to the city's advantage to reveal that information.

And I would point out as well that the discovery privileges do not mandate confidentiality. It's a discretionary privilege given in a litigation context. And certainly as we would submit, the over-arching purpose behind the Public Information Act is really counter intuitive I think to most lawyers who are used to discovery privileges because...

HECHT: The idea in any litigation with the state, you could get the state's attorney's file basically. It seems like that would have invoked more or a response out of the legislature. Somebody in the course of the debate would have said, Wait a minute, do we really want to go this far and revoke the attorney/client privilege in essence for most things, most important things in all litigation? And it's not there.

CORNYN: This case is not that broad. Indeed, there has been no request for an attorney's file. It is merely for a consulting engineer's evaluation of the wastewater facility.

PHILLIPS: Would there be a principle _____ for ruling against the city of Georgetown in this case and yet preserve any confidences in a completed report, etc, anything other than a fee bill?

CORNYN: Yes, because a completed report is inevitably a narrower item of a request for production than would be an attorney's file or some broad request. Obviously, there are discovery privileges that are subject to discretionary exceptions in the public information act. In .007 for the attorney/client privilege and .111 for work product. And those are discretionary privileges.

BAKER: You take that same position with regard to .103. Would you explain your position on why it's discretionary? When you read the language it doesn't indicate it may be.

CORNYN: We submit in order to read the statute, you would have to include §552.022(1)(a), which makes clear that these are not excepted from any provision under the...

BAKER: Well what bothers me, there seems to be some tension between your argument that there is a presumption at the outset that all information is public. And yet, the legislature has clearly provided a series of exceptions to that presumption. So they recognized that there is going to be tension and so they give the exception. I see the same tension between your argument that .103 is discretionary because of what .022 says when there is no discretionary language in .103. And the other thing is that this report if it's litigation implicated is then open to the public after the litigation is over. And what's for us to say we don't agree with your discretionary analysis and this is going to be open anyway, so it's subject to .103 for the time being and that this case is over, and that's all we have to say.

CORNYN: Under §552.022, the legislature in 1999 made clear that it intended in essence to preempt for these 18 items located in that laundry list under .022...

BAKER: Well then why is it .103, other

CORNYN: Well it's not other law because it's part of this statute. We submit that it would be...

BAKER: Well it's other law in the context of the argument you're making that .022 makes it open, but .103, at least the way the city looks at it, makes it closed.

CORNYN: Our position to the contrary that it's not other law, but even more importantly, is it's not made expressly confidential under other law for the reasons that we pointed out.

ENOCH: As I understand your position, this is a consulting expert. And in any other circumstance consulting experts in connection with litigation is not discoverable.

CORNYN: With some exceptions.

ENOCH: Your argument is that irrespective of this being a consulting expert's report, irrespective of it being in connection with litigation, it is not made expressly confidential by other

law. And, therefore, it is not excepted from disclosure to favor of the public information request?

CORNYN: Under the narrow categories contained in .022(a)(1)...

ENOCH: Because it's a completed report?

CORNYN: That's correct.

ENOCH: Why aren't our rules of discovery other law that makes that confidential? It's not subject to disclosure.

CORNYN: Even if it were other law, we would say it's not rendered expressly confidential by the discovery privileges because discovery privileges can be waived. Confidentiality under other law and contemplated under the Public Information Act is information that if you release it you can be indicted and convicted of official misconduct as a public official. So it is different in terms of the character and the consequences that attend to the release of that information.

PHILLIPS: Can you give me an example of some information that has been made confidential by a judicial proceeding?

CORNYN: Under the common law privacy decisions, the AG treats that information as confidential under court decisions when in fact it's highly intimate information in which the public has no real interest in disclosure of that information. Common law privacy is treated as confidential by court decision by the AG's office.

OWEN: Under 552.002, exception 16, it specifically says that information that's in an attorney's fee bill that is not privileged under the attorney/client privilege, you don't have to disclose that. Why would the legislature take pains to say, Well attorney/client privileged information in a bill is clearly not required to be disclosed, but if the attorney writes the same information in a formal evaluation to the client, then it is disclosed. How does that make sense?

CORNYN: We believe that that makes our point, because the legislature does know the difference between privileged and confidential under other law. And indeed if they intended to except from the coverage of .022, the super public information provision of the act, they knew how to do it. But they instead said that the completed reports are public information because of the over-arching public interest.

OWEN: But completed reports would include lawyer's memos or evaluations. Completed evaluations would include a attorney/client memo evaluating a case would it not?

CORNYN: It could.

OWEN: And why would they say, Yes, that's required to be disclosed, but if the same information is contained in that same lawyer's bill to the client it's protected. How does that make sense?

CORNYN: Because completed reports would be a larger universe of information to which the public has a very real interest as taxpayers paying for matters such as this wastewater facility. And a completed report by an attorney isn't necessarily a much narrower concept. The legislature could have in balancing the public interest in accountability and responsibility of public officials said that for purposes of completed reports, we think the public interest overrides any narrow concern that a litigant would have.

OWEN: But you can't get the same information if you include it in the bill. It's protected in the fee.

CORNYN: If it's subject to privilege under §16, that's correct. It would be protected. But not if it's a completed report.

OWEN: If it's in the evaluation memo it's not protected?

CORNYN: That's what the legislature said, we believe.

ABBOTT: If we rule in your favor, will that not be precedent that would stand for the proposition that in the future your office is going to have to disclose all completed reports and all completed investigations unless they fall within §.108?

CORNYN: You make a very good point. The rule we believe that we're arguing for because we believe the legislature has mandated it it applies to the office of AG. And the answer to that is, yes.

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RIGGS: I think too often we focus on so many legal issues that sometimes we forget what we're actually talking about here. And I'm constrained to discuss the content of this report. And I will not discuss the content of it.

O'NEILL: We're more concerned than with the content of this report aren't we?

RIGGS: I think the court does not need to make as broad a ruling as the court may be concerned with. There is good reason for distinguishing between the attorney/client privilege, the attorney work product and the consulting expert privilege, if in fact, this report falls within the consulting expert privilege.

O'NEILL: Where in the statute do you find support for distinguishing between those three?

RIGGS: In the Open Records Act, I think there is still room under §552.101, which protects information deemed confidential by a judicial decision to protect the attorney/client privilege. I think the legislature did intend to distinguish between confidential, and the legislature had a very specific intent because that is a term of art used throughout the open records act. I don't think you look to the term "confidential" as used for example in ethics rule 105 or in the rules of evidence. I think the AG is correct in that point, that the legislature did intend to open some documents that would be deemed confidential under the rules of ethics if we were in a private context of private attorneys.

ABBOTT: Under .101, because there have been judicial decisions saying that attorney/client communications are confidential, that that is shielded from disclosure?

RIGGS: There is a vehicle for making that argument, and I think the *Hart v. Gossum* case cited by the City actually applies that rationale. There is a vehicle for raising that exception and raising the attorney/client privilege, which is really a common law doctrine...

ABBOTT: Here's my point. What if in the future this court or any other court issued a judicial decision that said that expert reports were confidential. Would that change the analysis and result in this case?

RIGGS: If this court had issued a decision and later issued a subsequent decision, we would have a concern, and we would probably be back arguing that issue. It's kind of hard to anticipate. But I think that 552.101 includes information to make confidential by judicial decision. And that would include the attorney/client privilege. And if in fact this court called that information confidential by common law that, yes, it would be within 552.101.

O'NEILL: Is that also called a work product?

RIGGS: If this court deems that information to be confidential by common law, yes I think it is within 552.101.

HANKINSON: It could also affect consulting expert reports if this court by decision said that they were confidential.

RIGGS: It could. Yes. The legislature in using confidential by law throughout the act, in 552.101 protects information deemed confidential as the AG indicated by a constitutional privacy, common law privacy. It would also include trade secret and other information...

ENOCH: It seems to me the argument may be a little bit upside down. It's hard for me

to conceive of a privileged document not being confidential. But it is easy for me to perceive a confidential document not being privileged. The courts deal all the time in documents that are clearly confidential that are put into the public domain. Because of the nature of the litigation it loses its confidential status. You can't prove that there is a patent violation without disclosing what's in the patent. You may try and seal the records to keep them from being widely disseminated but, the truth is, the confidential information has become shared with others. That's different than a privilege. The privilege may be that even though the information is relevant to the particular litigation we've just determined that for the sake of fairness in the dispute, how to handle it, that information just cannot be disclosed regardless. So it seems to me even if the legislature wanted to use confidentiality as a term of art, it could not by just calling it confidential exclude privileged communication. Privileged communications are going to be confidential. It merely is at some point may be some confidential information that might be discloseable under request for information, maybe not. But I don't think that that necessarily means that the privilege was - consulting expert's report as an example is privileged. I think it's confidential.

Now it might be disclosable when it's no longer related to litigation, because the privilege no longer applies and therefore it may no longer be confidential. But it seems to me as long as the document is privileged under whatever rules the court applies or the statute applies, it would meet the test of confidentiality.

GRIGGS: I think this gets back to your question to AG Cornyn. You asked why are privileges from discovery different under the Open Records Act? And it's because the Open Records Act says so. This court governs when parties can obtain information from litigants. That's within the constitutional duties of this court. It is for the legislature to decide what information the public may obtain from government agencies. And in fact to decide what will be available to the public, which in fact when you're dealing with the attorney/client privilege in the context of government agencies, the public is part of the client. An issue that all government lawyers grapple with. It's for the legislature to determine what may be obtained by the public outside or inside the context of litigation through the Open Records Act.

ENOCH: That argument then goes to what the courts have been asking, which is, Well that's the argument, and that's the basis for it, then the state is not entitled to attorney/client privilege.

GRIGGS: We believe that that issue is not before the court today, because the city of Georgetown did not raise the attorney/client privilege.

HECHT: Let me ask you though. I'm not clear about what your position is on it. Under .022(a)(1), can you get the government lawyer's report to the government about pending litigation?

GRIGGS: I think so. I think that's what the legislature intended...

HECHT: I understood you earlier to say it might not cover attorney/client privilege, but now you say it does?

GRIGGS: I think there is room to distinguish between attorney/client privilege and the kind of reports the legislature intended to cover under §552.0221. If you look also at 552...

HECHT: I don't know what that means. You can get them or you can't them.

GRIGGS: There's a difference between final reports and attorney/client communications. If a governmental agency says: AG tell us whether this rule is valid. And the AG issues an informal letter giving advice, is that necessarily a report. Is that a report within what the legislature intended to cover under this section? If you look at the other sections of 552.022, you see that there are certain types of information that in the private sector would almost always not be available.

HECHT: So what is your position on that? If the government says: Tell us what you think about our position in this case? And the state's lawyer writes back and says: I think thus and so. Is that under (a)(1) or not?

GRIGGS: It depends on what the nature of the information is, whether it's advice, recommendation or whether it's a report.

HECHT: If it is advice or recommendation, is it or not?

GRIGGS: If it is in for example the form of an AG opinion, under art. 4, §22, it's available.

HECHT: If he's just writing his client like every lawyer does and says: You know we've got a pretty good position in this case, although this witness didn't do very well, and I don't know we may lose. Signed the AG. Can you get that or not?

GRIGGS: I think under the new amendments to the act, yes they intended to make that available.

HANKINSON: So what would be protected then? Why isn't this a complete waiver?

GRIGGS: When the AG meets with his client and talks with his client and has communications about the _____, I think you need to settle this case, we've got a bad witness, I don't think he can be compelled to reduce that to writing. I don't think he can be compelled to disclose that. The Open Records Act applies to tangible documents, things that are already transcribed.

HANKINSON: But in fact you are now asking the lawyers who advised the government to

never put anything in writing, so they don't have to disclose it. Is that basically the position? As long as you keep talking about it and you don't put it in a letter to your client or in a report it's protected?

GRIGGS: Well it is one way to avoid the problem. We would not ever...

O'NEILL: The subsection doesn't say completed written form.

GRIGGS: The Open Records Act applies only to - it's an established principle under the Open Records Act that it applies to information already in existence. It's not a form of interrogatory. It doesn't require governmental entities to answer questions - only to provide documents. And you see that within the basic requirement that triggers the obligation to ask for an AG decision. It only applies to a written request for information. And since 1973, there have been myriad decisions saying: You don't have to go out and create information in response to requests under the Open Records Act. It applies to written information.

BAKER: Just going back to the line of questions that Justice Hecht was asking, because I'm having the same difficulty that he is. Is your position then, that once it goes in writing whether it's attorney/client privileged information and advice, consulting expert report, or work product that 552.022(a)(1) mandates its disclosure? Or is there anything that remains protected in the context of those 3 categories of information as under an exception?

GRIGGS: I think the legislature meant something by report. It's like the word "deliberation" under the Open Meetings Act. All attorney/client communications are not necessarily reports.

OWEN: What about evaluations?

GRIGGS: Yes, and they can be investigations, which is also included under §552.022(1).

HANKINSON: I still don't understand what it is that is protected. I hear you saying that this is a complete waiver, that once it goes in writing, it must be disclosed. Is there anything that goes in writing in those 3 categories of information that remains protected from disclosure?

GRIGGS: Absent looking at an actual writing, which is what we do under the Open Records Act, is actually look at the documents and make that determination, that's hard to say.

HANKINSON: So then following up on Justice O'Neill's earlier question. Are you able to give us any way to interpret the statute that would in fact narrowly cover the document that is in this case, but would not have the broad implications that you and AG Cornyn have been discussing with us?

GRIGGS: Absolutely.

HANKINSON: If you were writing the opinion, what would that interpretation look like?

GRIGGS: That the city of Georgetown did not properly raise the attorney/client work product or consulting expert privileges.

HANKINSON: Then we're not going to interpret that the statute. Then we're talking about a waiver point.

GRIGGS: Exactly.

HANKINSON: I want to go back to the statutory interpretation question. What would your opinion look like? How would you interpret the statute? What would it say in a way that would be a narrower construction of the statute and only address the issue presented in this case, the document issue and not have the broad implications we've been talking about?

GRIGGS: I think the court can reserve and leave the door open for whether a common law privilege, the attorney/client privilege could be deemed other law making information confidential.

PHILLIPS: Can't hear the question from Phillips.

GRIGGS: I think much of it derives from the court's rules rather than from actual case law and the common law. I think if you look back, many are privileges from discovery created by the court pursuant to its constitutional authority, and do not find their origin in the common law.

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REBUTTAL

PHILLIPS: Should we presume a presumption of closedness then just because it used to be closed and say, well the Open Records Act generally is open, but this stuff has been closed forever, so unless they do it very clearly, we're going to read the statute another way?

HEATH: I wouldn't put it that way. But it would - I think if you look at the whole scheme certainly there is a presumption of openness and much information is open. And we're not saying the completed report should not as a general matter be open. However, if you look at the entire scheme of the act, §552.055 say: This act does not affect the scope of civil discovery. They are not intending to get in and alter those rules of civil discovery. They did say: unless confidential by other law. We've talked about well they understand the difference between privileged and confidential. And if that's the case, and if they wanted to make this information something that was not excepted from 552.022 they would say: expressly made confidential by other law. But we're not talking about rules of procedure. We're not talking about the common law. And by confidential, we're not talking about the confidential that the SC was talking about in Disciplinary Rule 105, or

in Rules of Civil Evidence 503.

HECHT: Why did they add the language to (a)(1), then? Why did they amend it the way they did in 1999 in 552.022?

HEATH: They amended that because they wanted to make reports generally confidential and most of the time they did. It's just these kind of reports that fall in a specific category of confidentiality. In our case, the information that would fall under attorney/client privilege, work product, etc., that are excepted out of that because they are confidential. The problem is 98% of completed reports are going to be public under 552.022 and I think that's what they intended to do...

HECHT: Wouldn't that have been the case before the 1999 amendment?

HEATH: Before 1999, .022 was looked at as essentially examples. The way the act was originally structured in 1973, what is now .021 (and at that time was 301 of the act) said: all information is public with the following exceptions only. Everything is public. Here are exceptions. Section 6 gave some specific categories of public information, but the interpretation very early on was those were examples. They did not override the exceptions, and that remained the law until 1999.

ABBOTT: Under that analysis, can you name a report, evaluation or investigation that is subject to or involved in an on-going lawsuit that you think could be disclosed under your analysis?

HEATH: Let's say you have a report that is the basis of the lawsuit. It wasn't made in contemplation of the litigation. It wasn't made by a consulting expert for purposes of defending the litigation. I think that would certainly be discoverable, and would be available under the Open Records Act.

ABBOTT: Can you name a report, evaluation or investigation that would otherwise fall under .103?

HEATH: What I said just before, I think would fall - might fall under .103. But 103 excepts everything that relates to litigation assuming the relation is real and not made up, so forth, that the attorney for the governmental subdivision determines should be withheld from disclosure. It doesn't mean that can come and get it in civil discovery or something. So 103 is much broader. I think what I said before might be excepted under 103 because it relates to litigation.