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Supreme Court of Texas.
CITY OF DALLAS, Petitioner,
v.
GREG ABBOTT, Attorney General of Texas, Respondent.
No. 07-0931.

October 16, 2008.

Appearances:
James B. Pinson, Assistant City Attorney, Dallas, TX, for Petitioner.
James C. Ho, Office of the Attorney General of Texas, Austin, TX, for Respondent.

Before:

Wallace B. Jefferson, Chief Justice; Nathan L. Hecht, Harriel O'Neill , Dale Wainwright , Scott A. Brister , David Medina , Paul W. Green , Phil Johnson and Don R. Willett , Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. In this last cause this morning, Justice Willet is not sitting and the cause is 07-0931, City of Dallas v. Greg Abbott, Attorney General of Texas. We're ready to hear argument in that case.
SPEAKER: May it please the Court. Mr. James Pinson will present argument for petitioner. He reserves five minutes for rebuttal.

ORAL ARGUMENT OF JAMES B. PINSON ON BEHALF OF THE PETITIONER

MR. PINSON: May it please the Court. This Court's intervention is necessary to prevent the attorney general and now the Court of Appeals from interpreting the Public Information Act in a way that ignores a governmental body's compelling interest in protecting its confidential attorney-client communications. The City's appeal presents issues regarding the compelling reason exception and the start date of the ten-day deadline in the Public Information Act. I would like to address first the compelling reason issue and then time permitting, the ten-day deadline issue.
Nine years ago, the legislature amended the PIA to provide that when a governmental body misses a deadline in the process seeking an Open Records Decision, the governmental body must disclose requested information that might otherwise be accepted from disclosure unless

there's a compelling reason to withhold the information.

JUSTICE HECHT: Could you have met the deadline in this case?

MR. PINSON: I -- you know, the record does not really show that. What the record shows is that the City was within ten days of responding to the second, the clarification letter that we got from the requester. We were, I think, 13 days after the first request. So --

JUSTICE HECHT: Looks like it would have been pretty easy to just -- files, get the form out and send it to the attorney general and say, "We think some of this is privileged," or something.

MR. PINSON: That -- that could have been and we're not saying that -- that it -- it couldn't have been done sooner. But we did not do it until 13 days after the first request and that's pretty much all the record shows.

But this case does raise a question of first impression and that is is protection of attorney-client confidentiality a compelling reason under the Public Information Act? The legislative history of the 1999 amendment adding the compelling reason exception does suggest that a legislative intent -- that the legislature intended that the amendment would operate generally as a forfeiture of discretionary exceptions under the PIA. But the legislative history contains no mention of privileged public information, much less any consideration of potential waiver of lawyer-client privilege or any other privilege resulting from a missed deadline. In chapter 22 of the Government Code, the legislature has delegated authority to this Court and the Court of Criminal Appeals to make rules regarding privilege subject only to legislative override. Nothing about the language or legislative history of the compelling reason exception suggests that the legislature intended to give privileged information less protection than is given under the rules of evidence or other law.

JUSTICE O'NEILL: They -- they did apparently want to give the attorney general a gate-keeping function.

MR. PINSON: And --

JUSTICE O'NEILL: And -- and where I'm a little bit confused is if the attorney-client privilege in itself is a compelling reason, then there's no need to request an attorney general opinion on it --

MR. PINSON: Well --

JUSTICE O'NEILL: -- What-- withhold it and let the other side move for what's being withheld and then you go to Court?

MR. PINSON: Well, we -- we --

JUSTICE O'NEILL: What -- what happens then?

MR. PINSON: -- we -- we -- and the Court of Appeals expressed that concern that, you know, if the City's arguments were adopted, then there would be no incentive. But we think that that concern is overblown because the same thing could be said about information --

JUSTICE O'NEILL: Well --

MR. PINSON: -- that is confidential.

JUSTICE O'NEILL: The -- the -- I understand you could still request one, but what if you didn't? What -- what happens then? What if you say, "This is privileged, I'm not gonna request an opinion from the attorney general. I'm just gonna withhold it as privileged." What then?

MR. PINSON: Well, I do believe the attorney general does have a gate-keeping function and I believe that that factors such as deliberate delay, deliberate intention to withhold information without seeking, an -- an attorney general's decision could be relevant. But that is not the situation here. There is no evidence and the attorney general is not contending in this case that there was any deliberate delay. But what we do --

JUSTICE O'NEILL: No, I understand. But I'm -- I'm just still trying to figure out, if I'm the city and I've got an attorney-client privilege document that I don't want to turn over and, you know, I might request the attorney general to opine on some other documents but I just don't even submit that to the AG. How is the other side -- what's the mechanism for the other side to get it?

MR. PINSON: It is a -- a suit for a writ of mandamus under the act.

JUSTICE O'NEILL: So then it goes directly to the trial court?

MR. PINSON: It goes to the Court. Yes, your Honor. And as -- as I was saying, the same kind of concern could apply to information that the disclosure is prohibited by law or information implicating the rights of -- or interest of third parties, certainly, governmental bodies are not refusing to ask for AG decisions as to those categories of information.

JUSTICE HECHT: How -- how does it work when the request comes in? Does -- does it go to a department that handles [inaudible], go to a lawyer at some point? How -- how does that work? How does it -- how is the City's decision made?

MR. PINSON: Well, in -- in a big city like Dallas, it goes first of all to whoever the requester addresses the inquiry to. It gets directed to the appropriate department. And then that department is responsible under our internal procedures to find -- to locate, identify responsive information and also to seek a clarification if that's needed or to ask the requester to narrow the request, if it's a broad request, to try to work with the requester to find out exactly what the requester is desiring. And then, of course, at some point, if the department recognizes that information may be accepted from disclosure, this coordination with the City Attorney's Office. And then within that ten days under the Act, there needs to be a decision made as to whether to seek an attorney general decision and then a letter is drafted. It has to be sent to the AG's office within ten days. The exceptions that are being asserted of course need to be included in that letter.

CHIEF JUSTICE JEFFERSON: How many requests do you get on an annual basis? Would you -- can you estimate that [inaudible]?

MR. PINSON: Oh, we get certainly hundreds. I -- I would probably say thousands a year. We get lots. And you know, we get -- we get requests that my office is not even aware of because most of the time, when we get requests, the city provides the information. So, I'm sure it's only a small minority of those that actually end up getting sent over to our office for coordination.

JUSTICE MEDINA: Do you have to state all your requests for clarification in -- in the same letter? For example on the tenth day, you decide to get a clarification on a particular request. They may be -- they may -- they may be requesting ten different things. You get that request back it say's, "No, you got to produce that." Then you say, "Well, what about this? What about this?" Or does it all have to be presented, all your exemptions have to be presented in one request or can they be piece mailed?

MR. PINSON: They -- in -- when we ask for an AG decision --

JUSTICE MEDINA: Right.

MR. PINSON: -- they all have to be asserted within ten business days under the Act.

JUSTICE MEDINA: Okay. So when the -- the AG's office makes a decision and if you made the request on the tenth day, then time is expired for you if you have to produce it, right? Even though you just

got notice of the opinion that you're not exempt from that requirement. The way -- the way it stands now, you would have to produce those immediately.

MR. PINSON: That -- I -- that's right, your Honor.

JUSTICE MEDINA: Unless you're just asking for an opportunity to have notice. Okay, we thought the law was this. The attorney general tells us "No, it's something else. Let me get my staff together and give me another ten days to -- to get the documents out."

MR. PINSON: Well, the -- the ten-day deadline has to do with invoking the Open Records Decision process. The governmental body has a duty to promptly produce public information for inspection or copying upon request and so that ten-day deadline doesn't actually apply to the duty to provide the information. I hope that has answered your question. So when we get the AG ruling, then of course we have to respond promptly as to the information that we withheld pending a ruling.

JUSTICE MEDINA: All right.

JUSTICE HECHT: But there's a memo and it's from Jones and there happens to be three Joneses in the legal department and it's written to Smith. And so you're reading down through there and you can't tell whether it's privileged or not, who makes that -- who makes the decision whether it's privileged and whether to turn it over, whether it's privileged or not? Who at the city does that?

MR. PINSON: That, I would say, is almost always done within the City Attorney's Office --

JUSTICE HECHT: So --

MR. PINSON: -- to make the final decision about invoking privilege.

JUSTICE HECHT: Somebody over in the department is supposed to recognize that this could be privileged and then to ask your advice on them, right?

MR. PINSON: That's -- that's right. And with -- with as big an entity as the city of Dallas, we couldn't handle all the open records requests that come in. So they are channeled and the department that is -- the -- the appropriate department is primarily responsible for processing the request, but at some point, you know, we do train our department directors and staff and work with them to help them recognize, you know, appropriate exceptions to raise.

JUSTICE HECHT: But if the -- if the department director sees the memo, it's clearly from a lawyer. It looks like it involves advice on an issue. But the department director, "Well, there's nothing in here that matters. I'm gonna go ahead and give it to him." Could the -- could the director do that without asking the city attorney for advice?

MR. PINSON: Well, they should not do that --

JUSTICE HECHT: But they -- but they might?

MR. PINSON: It -- it might happen and if that were to happen, that is not an authorized disclosure, that hasn't been authorized by the governmental body to waive privilege as to that information. But they should not do that.

CHIEF JUSTICE JEFFERSON: Just to be clear, if we agreed with you that the ten-day deadline runs not from the initial letter but from the -- the answer to the clarification, then we wouldn't reach this compelling reason question. Isn't that -- isn't that correct?

MR. PINSON: I believe that's right.

CHIEF JUSTICE JEFFERSON: Okay.

MR. PINSON: I think that's right. And I'd like to point out that, you know, it's only in 1999 that the attorney general adopted this

tolling rule. And before then, the AG applied the way I read his -- his rulings of rule pretty much what we're contending should be applied in this case and that is that if you have an unclear request and you ask for a clarification, then the ten days starts running when you get the clarified request. That gives you adequate notice to respond.

JUSTICE BRISTER: Is there a limit on that?

MR. PINSON: Well --

JUSTICE BRISTER: In other words, as we all know, litigators can go back and forth clarifying a document request forever.

MR. PINSON: Yes -- yes, your Honor, good faith is certainly the limit on that and -- and I -- and the AG has the gate-keeper function to review this and to make the determination of whether the governmental body has been acting in good faith.

JUSTICE O'NEILL: The legislature seemed to delegate to the attorney general tremendous authority in interpreting the Open Records Act. And since the attorney general has applied a tolling analysis, the legislature has not seen fit to get rid of that. The legislature seems to have acquiesced in that interpretation, hadn't it, by not amending the Act?

MR. PINSON: No, not -- not when it's only been eight or nine years since that's been adopted. Certainly --

JUSTICE O'NEILL: Well they've had a chance. They've -- they've been in session. They've had a chance to change it.

MR. PINSON: But -- but -- and also, when the long-standing interpretation before then was to apply the deadline from the date of the clarification. So we've got a situation where the attorney general since the Act was adopted, I believe, in the late 70's, you know, has not been consistent with how he's been applying the deadlines under the Act. So, did the legislature intend otherwise before '99 because it was a longer period of time than now?

JUSTICE MEDINA: Counsel, that's -- that's the biggest book I've ever seen up at an oral argument.

MR. PINSON: Those are all the cases --

JUSTICE MEDINA: Are those requests? Or are those cases?

MR. PINSON: Those are all of our cases, your Honor.

JUSTICE WAINWRIGHT: It is not, for legislative sessions, enough time for the legislature to say, "We have a problem here I need to change it."?

MR. PINSON: Well, I -- it is if -- if the problem comes to the legislature's attention, I think. But I -- I believe that this case is a good indication that there is a problem with the way these deadlines are being applied especially, you know, since '99 we cited hundreds and hundreds of missed deadline rulings in our reply brief and a few of those involved attorney-client privilege. And --

JUSTICE O'NEILL: Let me ask you about the -- the 552.022.

MR. PINSON: Yes, your Honor.

JUSTICE O'NEILL: I'm -- it's unclear to me from the statute that if you are withholding information, attorney-client privileged information, under 022, whether you have to request an attorney-general decision.

MR. PINSON: Well, that is a reading of the Court's opinion in City of Georgetown, because the Court said that --

JUSTICE O'NEILL: Well, the Court recited --

MR. PINSON: -- that --

JUSTICE O'NEILL: -- the fact that a decision was requested. But as I read the statute, 552.301 that requires a request of decision says, "A governmental body that receives a written request for information

that it wishes to withhold and that it considers to be within one of the exceptions under subchapter C," so it seems to me that the only thing by statute that the attorney general is called upon to interpret is subchapter C exceptions.

MR. PINSON: That's right. And 022 of course is not in subchapter C, which was why it wasn't necessary in City of Georgetown to invoke the work product exception.

JUSTICE O'NEILL: So your position then would be if the information is requested under 552.022 and I'll -- you -- you call that super public information, I'll call that core public information.

MR. PINSON: That sounds good.

JUSTICE O'NEILL: If -- if information is requested under 022, then there is no need to request an attorney general decision. Is that a reasonable reading of the statute?

MR. PINSON: I -- I think that is very arguable. In City of Georgetown, of course, a request was made. There was just the issue of whether the right exception had been asserted but I think it could be read broadly to mean that. But in our case, we're dealing with 301 and 302 where certainly you do have to assert exceptions under subchapter C in order to satisfy 301. And if you don't, then you have to have a compelling reason.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, counselor. The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. James Ho will be presenting for the respondent.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE RESPONDENT

JUSTICE MEDINA: Mr. Ho, why is this case so significant to the Attorney General's Office?

MR. HO: For the simple reason that the Public Information Act is a core requirement of Texas democracy and access to documents. And these particular provisions go to the core of what makes Texas PIA special. Texas has become a model for the nation when it comes to the issue of open government. And for good reason, the PIA imposes strict deadlines on government agencies.

JUSTICE O'NEILL: It -- it's also a bit of a model too for not wanting to favor inadvertent waivers of important privileges. We've gone out of our way in the discovery context to say an inadvertent waiver is -- we don't like 'gotcha's' on important privileges. So, do we want governments -- because of a missed deadline or inadvertence to suffer a complete waiver by the governmental entity privileges that we all deem important?

MR. HO: In a civil discovery context, inadvertence can or it depends on the situation whether inadvertence can or cannot be deemed enough to -- to lose the privilege. Texas Rules of Civil Procedure 193.3(d) makes clear that in that setting, if you fail to assert the privilege within ten days, you do lose the privilege. And then the critical point here is, under the PIA, section 302 it's quite clear, the legislature intended a ten-day, ten-business day period. And if -- and if the government agency does not assert, does not ask for an opinion within that ten-day period, documents are supposed to be disclosed --

CHIEF JUSTICE JEFFERSON: Well, let's assume that the disclosure is

going to be of the attorney-client privilege matter that for the City could result in millions or even billions of dollars in damages, you know. It reveals negotiations about the proposed annexation before it becomes public or about an ordinance that will affect property values somewhere. And then that's just disclosed. Why wouldn't that be a compelling reason even if you missed a -- a ten-day deadline to not force turning that information over?

MR. HO: Sure. I -- I think the answer is it could be a compelling reason. That's not this case, of course. But in -- in this hypothetical future case, there -- there are exceptions. There is a compelling reason doctrine that the attorney general has long established previous to the 1999 amendment and the legislature expressly intended to codify. For one, if -- if the information must be exempt, if -- if it's -- it would be unlawful to actually disclose a document. That would be a long established reason not to disclose.

JUSTICE HECHT: In this example, it wouldn't be, as opposed to attorney-client privileges.

MR. HO: Certainly. Well, if -- if you stipulate that from the hypothetical, there would be a second exemption that again the AG has long recognized. And that's harm to third parties, where there's harm to a third party privacy interest or proprietary interest, any of those.

JUSTICE HECHT: And would there be in that case in the -- in the hypothetical?

MR. HO: There -- there could be. I'd have to know exactly, you know, more about what specific kinds of documents we're talking about, whether one of the many exemptions provided in the PIA -- PIA that the legislature has recognized, one of those exemptions might very well apply. Again, it's -- it vary content and -- and circumstance-specific.

JUSTICE HECHT: Well, for example, it -- it might prejudice the taxpayers because they're depending on the City to protect its legal rights because they have to pay for government and so they want the City to do that. And if the City messed up and missed a deadline and waived a -- a claim of privilege that resulted in millions or billions of dollars of liabilities, would -- would the general's position be that -- that involves third persons because they are taxpayers or not?

MR. HO: Not automatically, not categorically. It would depend again on whether or not there was a specific exemption provided by the legislature that -- that this category of documents would fit in.

Well, let my try to give the Court some comfort in this area because I recognize the source of the concern with -- with the following two answers. First of all, that obviously is not this case here. There's -- there's no allegation of any of these hardships. But just to be clear, although there have been two well-established exemptions or compelling reasons, the categories that the attorney general established, we're not here to ask the Court to necessarily foreclose the option of a third or additional categories. This case simply doesn't present that and so we're not asking for -- for that limitation here. All we're asking for is the recognition that -- that these two categories are very much in existence, that the City has not satisfied either of these conditions. And they don't really put forth any additional evidence of -- of why there might be an exemption or compelling reason.

JUSTICE HECHT: Is there any question that the documents are privileged?

MR. HO: I believe it's been found by the -- the trial court below.

JUSTICE HECHT: And the State doesn't attack that at this -- at

this point?

MR. HO: We do not.

JUSTICE HECHT: And is there any question that the request for clarification was in good faith in this -- in this situation?

MR. HO: The issue of good faith has not been challenged. I think that what's -- what's really at heart here is whether there was really any legitimate confusion about what that first letter talked about. Let me maybe address that for a second. Let's be clear about two things. The City does not dispute that the exhibits in question, F and G, they don't dispute that these fall within the scope of the first letter nor do they dispute that sixteen business days passed before the City ever requested an opinion for the attorney general. These admissions under the ten-day rule under the PIA are fatal.

Now, the City does argue that the first letter didn't ask for these exhibits with sufficient specificity, essentially. And therefore, the ten-day clock should essentially be re-set, re-started. Nothing, in either the PIA or attorney general opinions, require specificity or authorizes the resetting of the clock.

JUSTICE O'NEILL: Well, but just as a practical matter, if -- if I'm in a -- we're not subject to the Open Records Act, but if we were, then someone said, "All judicial decisions or -- or judicial deliberations," and we were to say, "Well, what do you want? Can you clarify that? What do you mean? Do you mean discussions and conference? Do you mean administrative discussions? What do you mean?" You're telling me that because the first one could encompass it, then we've got to look at every single thing that has ever been produced in our Court forever. We've got to start looking for that in trying to protect the privilege until we get clarification.

MR. HO: Well, let me try to lay out a couple of reasons why the Court shouldn't be concerned (inaudible) subject to the PIA. First of all, all you have to do is ask for a clarification under the sub 222 structure and the clock stops-- it tolls during this period while -- while clarification is -- is being sought.

Second of all, if there were some sort of voluminous request of the kind that the -- your Honor is suggesting, there are additional remedies that -- that governmental bodies can take. Section 263 was expressly adopted by the legislature in reaction to some of these sort of hardship pleas by government agencies. Now what 263 says is if you get a voluminous request that is gonna be relatively costly-- for one, the requester has to pay for it as long as governmental body wants the requester to pay for it.

And two, all you have to do is send essentially a -- an estimate of what the cost will be to the requester and essentially ask the requester, "Do you really want every opinion or -- or all the documents you're talking about, if you really want all this stuff, it's gonna be very expensive. Here's approximately what it's gonna take." That too would toll the period. And -- and then the requester would have the duty to either pay-- make a pre-payment of cash or put up a bond. And until they were willing to do that or until they were willing to narrow the scope of their request, the clock would stop and in fact if they did pay to put up the bond, the clock would then reset and then the legislature here was very expressed. Under -- under 263, the clock would reset once that bond was paid. Of course, the City didn't use any of these options and that's why we're here today."

JUSTICE O'NEILL: Now, let me ask you a question about 022 which we call, I'll say core public information. There does not appear to be a vehicle for requesting an attorney general's decision under that

chapter. Can you address that if I'm withholding information under 022, do I need to get an attorney general decision?

MR. HO: I -- I would think so. There -- there's really no difference between 022 and -- and a regular public information if you will.

JUSTICE O'NEILL: Well, except that, it's not subchapter C, it's subchapter B.

MR. HO: I -- I think that may go to what specifically must be alleged in terms of what exemptions must be specifically stated to the attorney general. But I believe the 301, 302 structure would still hold. You still have to ask for an attorney general opinion, I'd be happy to take -- take a closer look at that and correct if I'm wrong.

JUSTICE O'NEILL: Well, again, 552.301 said, and that's subchapter G, it says that, "Governmental body that receives a request and wants to withhold and that it considers to be with one of -- within one of the exceptions under C." And so that seems to confine the attorney general's role to opining on the statutory exceptions.

MR. HO: I believe that's right, I -- I

JUSTICE O'NEILL: So if I'm getting a request for super public information, for really core information that -- that the legislature carved out as really, really public information, I don't have to request an attorney general decision because -- well, I may or may not, but in City of Georgetown we said, "Confidential other law includes attorney-client privilege," so they've made the argument that it just doesn't make much sense to say attorney general -- I mean, attorney-client privileged information is not a compelling reason. If it would preclude -- its production under 022 for super public information but under the other sections that is not quite as core public, you lose it.

MR. HO: Let me address that alleged disharmony right -- right away. There is no disharmony, let's just be clear. First of all in Georgetown, the Court went out of its way to make clear that the City of Georgetown had complied with 301, had submitted the request in timely fashion.

JUSTICE O'NEILL: But --

MR. HO: -- the question is when they don't --

JUSTICE O'NEILL: Didn't say if necessary?

MR. HO: It -- it may or may not have and I'd be happy to address that subsequently. What we're talking about here is when a city has sat on its rights, has -- has failed to assert its -- its obligations under the 301 structure. And the -- the attorney general opinions have been clear on this front, whether it's super public or core public or regular information, regular public information, the 302 structure applies. That's already 676 which they don't note but -- but 676 makes quite clear that super public, core public, it's -- it's all the same structure. Attorney-client privilege can be asserted but if it's not asserted in a timely -- timely fashion, it's lost.

JUSTICE O'NEILL: But -- but don't they -- isn't there a distinction drawn between the subchapter C exceptions and confidential under other law for super public information? So, in City of Georgetown, we seem to acknowledge the premise that the attorney-client privilege is so important under other law, not under subchapter C, but under other law that they're going to withhold it even for core public information.

MR. HO: By what -- to -- to give a more comprehensive answer, I should take another closer look at 301 but I'm -- there -- there's nothing from what I can tell in 301 and 302 that suggests that core public information would be exempt from the entire structure of -- of

asking for an attorney-client -- an attorney general opinion getting that -- that process, and it wouldn't make much sense if the legislature really intended for -- for prompt disclosure.

JUSTICE O'NEILL: Well, no, it -- it actually does make sense because 022 -- the -- we said in City of Georgetown that subchapter C exceptions don't apply. This information is so public and so core and so important, these exceptions don't apply. And the statute that says you have to request attorney general decision, you only have to request one on the exceptions. So, if the exceptions don't apply to 022, why would you need to request an AG opinion?

MR. HO: Well I think the reason why it wouldn't make sense in terms of the legislative structure is when we're talking about super public information or core public information and nevertheless, an attorney-client privilege is asserted, if the City doesn't have to -- to assert that in timely fashion, you've essentially unraveled the 301, 302 structure.

CHIEF JUSTICE JEFFERSON: Let me go back just for a second to the compelling reasons and you gave a couple examples and you said those weren't necessarily exhaustive and I wanna focus in -- on the third party harm example. How would a -- a governmental entity, a city or other agency, prove that harm to a third party without necessarily having to disclose the attorney-client information? How -- how would that be done? You don't submit like you do in trial court, you know, in camera, do you?

MR. HO: Well you actually have a submission to the attorney general's office and you can offer --

CHIEF JUSTICE JEFFERSON: Of the -- of the confidential information?

MR. HO: Correct. Or you can offer representative samples which I believe is what occurred in this case. You offer up the representative samples and the attorney general's office through their open records division who essentially take a look at -- at these documents in camera and determine whether they fit within the exemption. As to how the third party exemptions work, there are number of third party exemptions throughout the PIA, trade secrets, privacy, even federal law.

CHIEF JUSTICE JEFFERSON: So the process works so that you -- you do, in fact, have to reveal your trade secret to the AG's office and you're -- and -- and just -- and expect and I'm sure this occurs confidentiality of that office.

MR. HO: You don't have to -- you don't have to disclose everything. You can just do a representative sample. So you could -- it should be confidential in any event but -- but there is that added protection under the PIA.

JUSTICE MEDINA: So, like an in camera submission, the judge -- and the AG's office is the judge of that.

MR. HO: Correct.

JUSTICE HECHT: In civil discovery, it's not uncommon for the request to be quite broad and the response to be equally broad starting with blanket privileges, irrelevance, work product, all sorts of things, and nobody yet has really focused on which document is at issue. Is the attorney -- is this request for an attorney general opinion different from that? Does -- does the requester have to be more specific or can a requester come in this situation and say, "Okay, we've gotten a very broad request. We're pretty sure it calls for attorney-client privilege information. We don't know what it all is yet." What do you think?

MR. HO: Well, I -- there are a couple of things that -- that are

at play here. First, there's no question that the requester is allowed to make a broad request. There's also no question that the governmental body can respond either by saying, "This is going to be very expensive, are you sure?" And toll the clock that way or that the government can ask for a narrowing. What we don't have here is any sort of confusion.

JUSTICE HECHT: So when the government asked for -- the attorney general for an opinion on the broad request and say, "Here's a -- a very broad request. We're almost certain it -- it calls for attorney-client privilege information. We don't want to turn it over." What do you think?

MR. HO: Well, I see what you're saying here, if there -- if there is no effort to clarify, the government is sort of ready to go to the AG right then and there. Absolutely. The City can -- can exercise its rights under the clock and say, "This is so broad. It's clearly gonna exempt -- trigger attorney-client privilege or any number of other exemptions.

JUSTICE O'NEILL: Well, you --

JUSTICE HECHT: Well, that wouldn't be very productive. It seem like -- I mean the City could easily comply with the ten-day rule by just always sending in a letter to the attorney general saying there's probably privilege here and then it wouldn't narrow the issue.

MR. HO: Well, there would have to be a specific representation of what exemptions would apply. That's the 15-day rule under 301. There would have to be some sort of representation as to what these documents are so that's --

JUSTICE O'NEILL: And you got to submit them, don't you? I mean --

MR. HO: You got to submit that or -- or at least a representative sample. I think the representative sample, one of the benefits of that is to -- to reduce the -- the size and scope of the inquiry.

JUSTICE WAINWRIGHT: Well, the Attorney General's Office essentially acts as a judge on discovery pursuits. You are broadening the request depending on how reasonable the expense and others factors come into play.

MR. HO: And when you -- when you say in terms of expense, I mean, what the attorney general -- the office does is that it simply determines whether exemptions apply. As to whether the request is too broad, not broad enough, that's really up to the requester who may or may not be willing to pay for the costs and up to the City to decide whether the City wants to -- to simply hand over the documents and charge a big fee or to request a bond before they go to this process or not.

JUSTICE O'NEILL: You state one of the -- a reason that could be compelling is to protect third party interest or if it's protected by other law, right?

MR. HO: Where -- where disclosure is prohibited under some law, yes.

JUSTICE O'NEILL: Under some law. And so, if some law outside the Act itself, so if you can point to something beyond the exceptions itself, that is a compelling reason if it's --

MR. HO: And it wouldn't have to be beyond the Act. If the Act itself does have certain mandatory prohibitions and I understand it --

JUSTICE O'NEILL: Okay. But -- but --

MR. HO: -- and those would be as well.

JUSTICE O'NEILL: -- but let's look the other law. If another law protect it -- well, in City of Georgetown, we said attorney-client privilege is another law, 503 exists outside the -- the Public Information Act. So, why isn't this confidential under other law that

would make it sufficiently compelling?

MR. HO: I think the Georgetown case establishes a very different -- deals with a very different framework and it's different on a -- on a -- on a number of levels. Georgetown was about section 022, of course --

JUSTICE O'NEILL: I understand.

MR. HO: -- in this case was 302. Those two statutes are different in a number of ways. Let's begin with text. 022 is about confidential under other law. This statute is about compelling reason. A term of art that the legislature understood in 1999 to encompass the body of attorney general opinion that had preexisted 1999, and that's controlled by the legislate history.

JUSTICE O'NEILL: But if compelling reason, as you define it, is something that's confidential under other law and in City of Georgetown we said, "This is confidential under other law," why didn't that get you there?

MR. HO: Well, let's be clear. I think the legislature would be very surprised if -- if we were to depart from the attorney general's framework and go off into some new direction. In 1999, the legislature had numerous AG opinions establishing not only the compelling reason framework generally but attorney client privilege specifically. And the legislature essentially adopted it without question. There's some reference in the legislative history that expressly endorses the attorney general's framework. So -- so there will be a -- not only distinction in text, a distinction in legislative history, and also of course a distinction in the substantive purposes of these provisions. 30 -- I'm sorry, 022 is about the substantive exemptions, substantive protections that exist in the PIA, whereas, 302 is about one of the core purposes of the PIA, prompt disclosure and penalizing agencies for sitting on their rights for -- for not acting within a timely fashion.

In my closing seconds, I'd like to make essentially one final point. Texas again has become a model for the nation on the issue of open government laws. Late -- late last year, Congress approved major reforms to the federal Freedom of Information Act. In doing so, Congress relied on the very same provisions of the PIA that are at issue in this case. This Court should not accept the City's invitation to water down what has really become one of the most nationally-acclaimed provisions of Texas law. If there are no further questions.

CHIEF JUSTICE JEFFERSON: Thank you very much, Counsel.

REBUTTAL ARGUMENT OF JAMES B. PINSON ON BEHALF OF THE PETITIONER

JUSTICE MEDINA: That's -- that's a pretty compelling argument to leave everything status quo.

MR. PINSON: Well, your Honor, I -- I think the status quo is -- is messed up because I think the legislature would be surprised to know that the attorney general is consistently --

JUSTICE MEDINA: Do you think Congress is messed up, is that what you're saying?

MR. PINSON: No, I'm -- I'm --

JUSTICE MEDINA: Are you referring to Congress?

MR. PINSON: No. I'm -- I'm only referring to the -- this situation here where the AG is consistently applying an analysis where it's saying, "Governmental body, you blew the ten-day deadline, therefore,

you have to -- you've waived your privilege. You have to release this privileged information. However, we see that this information is 022 information and under City of Georgetown, you may withhold it." There's something wrong when the AG is saying that super public information, that's privileged can be withheld. Regular public information, that's privileged has to be disclosed.

JUSTICE HECHT: Well, the dysfunction of the civil discovery system is nothing to take advantage of but I just wonder why this doesn't work the same way. Why when you get a giant request, you don't just the next day send a letter to the attorney general and say, "So many documents have been asked for, we don't even know what they all are, they almost certainly include attorney client privilege and maybe some other stuff. We request an opinion-- stop -- stop the -- meet the deadline, stop the clock and -- and take care of it that way." I mean, it doesn't focus the issue, it may be counter-productive, but isn't that a way around the deadline?

MR. PINSON: It might be a way around the deadline, your Honor, and probably that approach is resorted to at times. But it's inconsistent with the policy of the act to encourage governmental bodies to work with requesters to provide access to public information promptly. And I think the -- the open -- the Public Information Act is very different from the discovery context as your Honor mentioned a few minutes ago. When the Act encourages and authorizes governmental bodies to seek clarification, to -- to seek a narrowing if it appears that the requester may be asking for more information, than the requester may really want, those -- those are all good things. They not only benefit the governmental body but they benefit the requester too because requesters often have to pay for this information. So, it's a good thing all the way around for -- for there to be cooperation and that's why --

JUSTICE HECHT: But it could be abused and that's a concern. But -- but the government could say, "Well, you haven't been clear enough. Try again, try again, try again."

MR. PINSON: That's right. It could be --

JUSTICE HECHT: It will never be clear enough.

MR. PINSON: And -- and as -- as I said earlier, I believe that good faith does come into process but I don't believe that there is any whiff of good -- bad faith in -- in this case. There was --

JUSTICE HECHT: Does -- does the attorney general have -- make some determination of good faith in circumstances like that or is it further along when the case goes to Court?

MR. PINSON: Well, I -- I don't know if he would -- he would phrase it on those terms but I -- I am aware from some of his rulings that he's determined that the governmental body was justified in seeking a clarification and that the deadline began running upon the receipt of the clarification. And since '99 I believe he's been applying this tolling rule that makes it operate a little bit differently. But the real difference between this tolling rule and the previous interpretation is at most ten days. We're not talking about a long delay here especially in light of the fact that under the open -- the Public Information Act, the governmental body can treat a request as having been withdrawn if a request for clarification hasn't been responded to in sixty days. Certainly prompt compliance with the Act is important but the legislature has also recognized that the interest about governmental bodies ought to be protected also.

JUSTICE WAINWRIGHT: Is there anything in the record to indicate whether the City has a policy on these types of requests or how often

the City asks for clarification whether to just release the information?

MR. PINSON: I don't know if there's anything in writing. I -- I believe the situation in this case was that the Civil Service Department received the request and felt like they needed to ask the requester, you know, "What assessment center are you interested in? Are you interested in a particular year?" And they got -- they got a response. The -- the requester said, "The 2001 assessment center for fire lieutenant and captain." That certainly knocked out a lot of potential responsive information. And then the clarification it said, "Additionally, I want stuff, I want to find out information about mirroring and this and that." And it appeared to be a new request. And whether that was foolish or smart or not, that -- that was relied on as being a -- a request for additional information.

JUSTICE WAINWRIGHT: But there's certainly no indication, I would take it that the City asked for clarification and the overwhelming majority is there's nothing suggesting --

MR. PINSON: Nothing suggesting that, your Honor. Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions? The cause is submitted, Counselor. Thank you. That concludes this historic day of our return to SMU and there will be occasions for us to mingle later in a reception and then I hope those of you who came will join us later for our tribute to Justice Jim Baker. Thank you, once again, Dean and staff for your courtesies and thank you students for your rapt attention, this has been good. The marshal will now adjourn the Court.

SPEAKER: All rise. O yay, O yay, O yay. The Honorable, the Supreme Court of Texas, now stands adjourned.

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