IN THE SUPREME COURT OF TEXAS

NO. 07-0931

CITY OF DALLAS, PETITIONER,

v.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued October 15, 2008

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 the master of the people, 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. 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 not presented a compelling reason to withhold the information. 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.

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[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/benefits/articles/1825--firefighters-five-step-guide-to-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.*

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 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) (finding a request untimely notwithstanding the agency's request for clarification from the requestor); Tex. 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. 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 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

[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.

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 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-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, 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) (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) (Attorney General John Cornyn); 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 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-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). 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 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). 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) (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-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]

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*, 166 S.W.2d 125, 128 (Tex. 1942) (explaining that "statutes are presumed to be

[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.

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

[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. S1525-26 (Feb. 16, 2005).

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-5561; Tex. Att'y Gen. ORD-630; Tex. 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

[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.

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

[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-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).

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 class, within ten business days after receiving the public information request, satisfies the statute. *See* TEX. GOVT. 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.

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Dale Wainwright
Justice

OPINION DELIVERED: February 19, 2010

[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. GOVT. CODE § 552.012.