

Summary:



On February 3, 2017, the Texas Supreme Court held that the interests protected by the attorney-client privilege constitute a “compelling reason” to withhold information that would otherwise be presumed public under the Public Information Act (PIA).

Background:



In this case, the City of Dallas failed to timely seek an attorney general decision confirming that it could exempt information from disclosure. Both parties agreed the information in question was privileged and subject to one or more categorical exemptions under the PIA. However, the parties disagreed as to the extent of the effect of the missed deadline, considering an untimely request gives rise to a presumption that the information must be disclosed to the requestor absent a “compelling reason.” Attorney General Paxton issued letter rulings concluding the City must disclose the information because of the missed deadlines, and the City challenged the rulings.

Decision:



On review, the Court characterized the question as a statutory-construction issue of first impression through which the Court must determine whether the PIA mandates public disclosure of otherwise confidential attorney-client information solely because the city missed the ten-day statutory deadline. The Court narrowed the issue from the parties’ disagreement in oral arguments and determined the applicable standard was whether a “compelling reason” to withhold the information existed. Declining to adopt the Attorney General’s position based on agency precedent, the Court relied on the unambiguous plain language of the

statute, determining: a reason to withhold information will be “compelling” *only when* it is of such a pressing nature (*e.g.*, urgent, forceful, or demanding) that *it outweighs the interests favoring public access to the information* and overcomes section 552.302’s presumption that disclosure is required.

Balancing Test: Attorney Client Privilege v. Prompt Public Access to Information

Accordingly, the Court implemented a balancing test to determine the relative importance of the public policy considerations behind the attorney-client privilege and the public’s interest in prompt access to public information requested from a government body.

The Court examined the importance of the attorney-client privilege, stating that the interests protected are “quintessentially imperative” in our legal system. Particularly in the governmental context, where the public interest is best served when officials have access to candid legal advice, the privilege applies with special force. Confidentiality once lost is irreversible. This important privilege can be waived, and if waived, it could not constitute a compelling reason; however, the Court determined that failing to timely request a ruling with the ten-day deadline was not a waiver of attorney-client privilege because inadvertent noncompliance is not consistent with the intentional relinquishment of a right through a waiver. There is a difference between the mere ability to waive a privilege and the actual waiving of a privilege.

The Court then examined the competing interest of public disclosure. The Court noted that the public’s right to information under the PIA is not absolute, and the general right of access is not a competing interest to be weighed under the test; the statute only implicates the public’s interest in “prompt” disclosure. While this interest is significant, the statute itself provides exceptions for situations where countervailing interests are more significant. The attorney-client privilege meets the threshold as a more significant interest, compelling enough to rebut the presumption of disclosure. Furthermore, the importance of expediency is addressed elsewhere in the statute, and the PIA provides for civil and criminal enforcement mechanisms and fee shifting to ensure prompt compliance. It is in the government entity’s best interest to comply within the statutory time periods irrespective of this holding. The Court observed that the Legislature’s intent in enacting section 552.302 was to provide a safeguard when significant interests

supporting withholding information outweighed competing interests supporting disclosure. As a result, the Court held that the ability to withhold privileged attorney-client information absent a waiver outweighs the competing interest of prompt disclosure.



Takeaway:

In light of the Court's decision, governmental entities who inadvertently miss a deadline to assert a privilege in a request for an attorney general opinion may still be able to preserve the privilege, provided they can establish a compelling interest that outweighs the public's right to information. Governmental entities that find themselves in this situation should contact counsel immediately in order to ensure the best chance at protected privileged or other sensitive information.