SUMMARY:

This Public Information Act suit involves the issue of whether the City of Dallas acted within its legal right by relying on the attorney-client privilege as a "compelling reason" for withholding information in response to a PIA request past the required 10 day time frame for requesting an open records determination.

The case has made its way to the Supreme Court of Texas – with opening oral arguments taking place earlier this month. One of our associates was able to attend the opening oral arguments, and we'd like to share some of what they heard.

Attorney General – The Attorney General discussed the history and definition of a "**compelling reason**," which the AG argued **has never and should not now** include attorney-client privilege.

City of Dallas – The City of Dallas focused on the public policy behind the privilege, and fielded questions on whether §§ 552.101 and 552.107 can coexist if the Court accepts the City's argument.

DISCUSSION:

Petitioner's Argument (Attorney General):

Court's Initial Focus - Textual Argument

Why doesn't the plain language of § 552.101 support the inclusion of the attorney-client privilege? *per petitioner's position that 552.101 and 552.107(1) cannot both include the privilege.

Justice Hecht noted that rules can have the same force and weight as a statute or a decision of the court, and asked why those rules would not be included under .101.

Petitioner responded that the Legislature intentionally drafted the language to include categories – listing constitutional, statutory, or judicial decision, **but not**

rules – and therefore weight must be given both to the Legislature's intention in the construction of the sections, and more generally to the intention espoused in the opening of the PIA.

<u>"Compelling Reason" Argument</u>:

The Court moved on, driven by **Justices Boyd and Hecht**, to the "compelling reason" argument surrounding the language in 552.302. Boyd stated that the AG's position was both over and under inclusive, questioning and eventually establishing that petitioner's position is that ***if .101 includes the attorney-client privilege, it is automatically a "compelling reason" under .302, regardless of whether in the instance the reason is compelling or not.***

Petitioner supported this argument with a recitation of the history of the **<u>AG's "compelling reason" standard since 1974</u>**: a compelling reason is shown when there is a law that makes the information confidential, or when third party interests are at stake. Further, he stated the Legislature ratified this standard in 1999, a point **J. Boyd** pushed back on by pointing out the legislature did not codify the standard as petitioner just articulated it.

J. Hecht brought up that petitioner's position would be harsher on attorney client privilege than other areas of law, which led to a discussion about Tex. R. Civ. P. 193.3(d). The petitioner tried to assert that the rule in litigation on inadvertent disclosures paralleled the current topic, but the justice noted that 193.3(d) allowed an indeterminate amount of time before the 10 day period to retract documents, whereas the current question only allowed 10 days total to catch any mistakes.

Petitioner reiterated that the privilege is not absolute. He noted that the TML brief was notable for what it ***did not*** say – that cities were having trouble meeting the 10 day deadline to preserve their privilege.

Finally, **J. Boyd** asked why this particular release of information – which may jeopardize a city investment and therefore adversely affect tax payers – did not fall into the third party exception (the third parties being those tax payers). The petitioner answered that the PIA only applies to government bodies, all of which get support from public funds – extending this to tax payers would render the third party exception moot.

Respondent's argument (City of Dallas):

Public Policy Argument:

Through a rather amiable conversation with the justices, respondent discussed the circumstances surrounding this situation: that the applicability of privilege is undisputed in this case, and there is no good excuse for Dallas' mistake. However, compared to a situation in a discovery context, the AG's position is harsh. Here, the City has not yet even disclosed the information, whereas if this was a discovery situation, Dallas could have inadvertently disclosed it and *still* had an opportunity to claim privilege.

J. Boyd asked, if the court adopted the respondent's position, what would keep cities from deliberately withholding information without asking for a ruling, and upon being sued, simply claiming attorney-client privilege. Respondent answered that for many reasons (i.e. being subject to mandamus, utilizing other potential exceptions, getting a quick ruling would eliminate litigation costs, etc.), the reality is **governmental bodies have incentive to seek AG rulings**.

J. Willet asked if this position would apply with equal force to other privileges, like work product privilege. Respondent was clear that other privileges would need other public policy considerations. Upon determining that respondent's position is the **AG should make these determinations categorically, J. Boyd** questioned why every other exception in Sub. C is not just as compelling – i.e. would a sheriff not argue that .108, and agencies argue that .104 is just as compelling – where is the line? Respondent stated that attorney-client privilege is essentially unique based on the nature of the privilege.

J. Lehrmann asked about the language of .101: The legislature added in the constitutional, statutory or judicial decision descriptors, so why does that not exclude rules? Respondent argued that this drafting decision could easily have been expanding the definition of "law" to in fact be more inclusive.

J. Boyd asked why .107 is necessary if .101 can include attorney-client privilege – respondent agreed that there is overlap, but *it is not complete overlap*, and either way, there is a compelling reason to withhold this information. Boyd pushed on the point that .107 may be rendered completely meaningless if the court takes respondent's position.

Respondent argued that the AG's office often treats rules as law in formal decisions, i.e. Open Records Decision 599; FRCP 6 is law that makes information confidential under .101; etc. Respondent went into an argument comparing and advocating for the reasoning in *In re City of Georgetown* -- the justices had little to say.

Rebuttal:

Petitioner distinguished *In re Georgetown*, stating it involved a different section of the PIA with different language. **J. Willet** asked about the instances Respondent referenced where the AG has considered rules to be law. The petitioner explained this stems from *Industrial Foundation*, establishing the outer limit of .101: as in ORD 599, .101 applies only if there is a statute that gives rulemaking authority to make rules regarding confidentiality. The other informal AG decisions referenced, if based on regular rulemaking authority, may have extended that rule too far.

J. Willet asked what would the AG be arguing if they were in Dallas' shoes – petitioner stated lawyers are used to deadlines with teeth, and the Legislature put it there for a reason. And again, **there is no evidence cities have trouble meeting this deadline if they care about keeping information confidential**.