ORAL ARGUMENT — 3/3/99
98-0617
CITY OF GARLAND & HOLIFIELD V. DALLAS MORNING NEWS.

QUALITY OF TAPE(S) WHEN ORAL ARGUMENTS ARE BEING DONE AWAY FROM THE COURT SOMETIMES ARE VERY MUFFLED, HARD TO UNDERSTAND. A LOT OF BACKGROUND NOISE IN THIS PARTICULAR TAPE. HARD TO UNDERSTAND QUESTIONS FROM SOME OF THE JUDGES.

HINTON: In the interest of time, we have handed out an exhibit, which should be before you, and I will limit my remarks to that document before you.

The case that you have before you is an Open Records question. We feel that there is only one document before you, and that is a document which was sealed at the TC, and is before you as Exhibit B.

We feel that there needs to be a correction of a fundamental error and the interpretation of the case that has preceded this. And that would be at the Dallas CA. The Dallas CA case was reasoned correctly and they followed the correct statutory interpretation. However, the Dallas CA unfortunately was misled by the *Lett* decision. And the *Lett* decision, which inappropriately relied on Ord. 615. The AG's opinion in Ord.615 did not analyze the case authority that was in effect and followed the dictates of this court's 1943 decision in the *Blackmon* case In the *Blackmon* case this court said, that in interpreting statutes when they are lifted from other jurisdiction as this particular exemption and TORA is, and that is exemption 11, or currently recodified 111. It's nearly the identical language as you can see from the handout that we have before you. The _____ language is at the top, and the bottom right-hand is where we have the TORA language, which is exemption 11, which is to exempt interagency/ intraagency communications.

HANKINSON: The City of Garland did not make a request under 552.301 of the Code for an AG opinion in this case?

HINTON: That is correct.

HANKINSON: Wasn't the City of Garland required to do that under the statute?

HINTON: No.

HANKINSON: Why not?

HINTON: It was only permissive as in the *City of San Antonio v. AG* case. As the court there pointed out, the *City of San Antonio v. AG*, is only a permissive requirement - permissiveness that _____ to go to it. Also, more importantly in this particular case, is that this

document is a draft.

GONZALES: Are you saying by that, that it's not a public document?

HINTON: Yes. And also what we're saying is, that the AG under the statute does not have jurisdiction to determine in the first instance whether or not it is a public document or not.

HANKINSON: But assuming it was a public document, was there a requirement then that the matter be taken to the AG within 10 days?

HINTON: No. There is not a requirement. If assuming it was a public document and you do not go to the AG's office, it is simply a presumption.

GONZALES: Is it not a public document because it is a draft, is that your argument?

HINTON: It's not a public document because the only evidence concerning that the document before this court is the affidavit of Mr. Holifield.

GONZALES: But you're not suggesting that an agency keeps all its documents in draft form, then...

HINTON: No, not at all. What we're suggesting is, and there have been various federal courts which have addressed that particular issue, and that is the reason that the court is the final arbiter of that issue of whether or not it is indeed a public document once it was requested. But here Mr. Holifield said, that there were errors in that document. He never had accepted it. He had never given birth to it, if you will. He had never taken it as his. And he specifically said that there were errors in that document and it never would have gone out in the form that it was in.

BAKER: But he gave it to the rest of the council didn't he?

HINTON: Yes.

BAKER: How far out does it have to go before it gets to be a public document? Do you intimate that it might have to go outside the confines of the council?

HINTON: I don't think it's not so much a matter. It's one of distribution. Because I think that the decision-maker needs to get input in _____. I think if he had publicized it in the paper, he would have adopted it. But clearly as he said in this affidavit, he was trying to get input in a very serious matter as a very key employee in that organization. He was trying to get input. Now certainly at some point in time geographically, I guess, if you keep distributing it out into the city it would become - he would have adopted it at that point. But not here, not when he's talking to my office, not when he's talking to the city council, when he's talking to his bosses trying to get information: Did I get this right? What do you think? It's not any different than any

of us doing a deliberative due process. And that's the reason for this exemption so that we as a decision-maker can have input...

BAKER: Assume that the party who was the employee, the subject of this memo, instead of settling had sued the city. Wouldn't he be entitled to get this document if it was a wrongful termination?

HINTON: If we had a lawsuit such as that and then there had been a request under the new rules, we would have claimed the deliberative process privilege presented this document to the court. And that's what Justice White was talking about in *EPA v. Mink*. There's always been a contention, an ability for the court to take these difficult discovery issues and try to decide them. And in that particular instance, the court would have to weigh the deliberative process privilege. And one thing I would like to make clear to everyone on the court is that that privilege is for the benefit of the pubic. It's not for the benefit of the decision-maker. It is so that the best decision can come out, and so erroneous decisions do not come. Here in this case where Mr. Holifield said, there's an error in there. If I would have ever sent it out, I would have correct the error.

ABBOTT: Let's assume that the draft were a final draft with it concerning an employment matter, an employment decision, would you consider that draft to be subject to the Open Records Act?

HINTON: If it was a final draft and had been adopted by Mr. Holifield, and he had adopted that document as his document, then I believe that as to Mr. Holifield, then there would be a strong argument that probably it would be...

ABBOTT: So it's not your position then that the particular subject matter that we are dealing with, being an employment record, an employment decision requires this document to be exempt from open records?

HINTON: No. It has to deal with the issue of whether or not it is an interoffice, interagency memorandum in a letter.

ABBOTT: No, not that it's an interagency letter, but that it's not a final draft?

HINTON: That's correct.

ABBOTT: And what I'm trying to get at, I want to know if I should consider the subject matter of this being involving an employment decision. Are employment decisions not subject to open records disclosure?

HINTON: When an open records request is made if there are actual critiques of an employee, other than the employee themselves as previously indicated, then we would take the

idea that this is an employment consultation between that individual and that decision-maker, and it would not be released generally to the public. If that document had been - we have ratings and things such as that, we would tell them if they had received their increases, what merit increases that had received...

GONZALEZ: But there you're withholding the information because of the privilege for personnel decisions, isn't that right?

HINTON: Yes, under that one.

ENOCH: This was intended to be some sort of writing to Mr. Hager, or not?

HINTON: As Mr. Holifield said in his affidavit, he might have sent it to Mr. Hager, but he never did.

ENOCH: But it was drafted as if this was something that would go to Mr. Hager?

HINTON: That's correct.

ENOCH: If it in draft stage had gone to Mr. Hager, would you still be here arguing that it's not subject to being made public?

HINTON: Depending on the facts of that particular issue, yes. I would be arguing. If it was in a draft stage there might be an opportunity to inform Mr. Hager to correct it. But it would also come under the personnel privilege that we have available to us of those matters which might be of embarrassment or what have you if we had given it to Mr. Hager.

ENOCH: If this had been not a draft, but had been the final agreement, this is the final statement and counsel had signed off on it, and it was a memo to Mr. Hager, but for some reason Mr. Holifield said, “You know, I’m not going to send it to Mr. Hager", and it just goes back in the file, is that then subject to open records?

HINTON: No. It is not, because he didn’t take that last - the story that I’m always reminded of is of President Lincoln who would write these scathing letters to his critics. He would write it out, read it, and then tear it up and throw it away or file or what have you.

ENOCH: Why in your brief do you make the argument that this memo that’s draft for Mr. Hager was not delivered to Hager as the basis for why it’s not - if the document is not delivered to him even if it’s in final form would not make it a public document. Why do you argue that it’s not a public document because it’s a draft deal? Why do you leave out that other point?

HINTON: I think that is clear from the affidavit that Mr. Holifield filed in this matter and

which is before you as competing motions for summary judgment and it was not as a matter of fact delivered to him. The key thing that I think is that Mr. Holifield has indicated in our brief stated, "there were errors in that document." And if it had even gone out something similar to that, he would have had to have corrected those. He knew that it was wrong. He clearly knew that it was not his final thoughts on that person.

ENOCH: What makes this a pre-decisional document? Is it because you're thinking the city council has to mark "approved" on it, or is it because it's got mistakes in it, or is it because it wasn't delivered to Mr. Hager? What principle applies to us determining that this was or was not a document subject to open records?

HINTON: I would probably say all of those because the cases from the federal courts that have looked at that where there were very involved histories of the US Air Force in Viet Nam where they were draft histories, there were various draft histories that were sought, and the courts there I guess even one of the drafters and a CIA historian were seeking to get his draft. He said, "I declassified it. It was finished. I ought to be able to have it." And there the courts clearly said that a draft document is presumptively that this is a draft document. But that has been clearly case authority from the federal court.

HANKINSON: Assuming this is a public record, what was the City of Garland required to prove in order to prove the exemption that the City relied upon?

HINTON: If it was a public record and had not been delivered and put in his file, then I believe that we would still make the same argument that it was a deliberative process.

HANKINSON: But is there anything else that you would be required to prove, or what proof is required to show deliberative process? What does the proof look like for this exemption to apply, the legal requirements?

HINTON: I would say that for the drafter and for that evidence to be unrebutted to you, which it is in this case that it was a draft, I think this case clearly brings that issue to you that this was a draft, that it was never adopted by the drafter, Mr. Holifield. And I point again to the cases which we cited in our brief, which was the CIA historian dealing with the war in Viet Nam, who had actually drafted it himself and he was trying to get the CIA to release it. He was doing that under _____. And there the court determined that it's still a deliberative process. It hadn't been finally edited. It hasn't been finally corrected, and they have not adopted it.

HANKINSON: So if the city provides proof that goes unrebutted that the document is a draft, then the requirements of the deliberative process privilege are met, that's it, that's the end of the story?

HINTON: That is correct.

O'NEILL: How do you respond to the argument that if you are not required to meet the statute to request the opinion within 10 days what incentive would you ever have to produce anything, because it would be to the governmental bodies best interest to sit back and wait and hope that the party would sue. In those cases they wouldn't have the means to do that. How do you address that concern?

HINTON: I address it on two fronts. On the first one, as the law was applicable then. Requesting again the AG's opinion is certainly is a permissible thing. If you don't, you obtain a presumption. Under the laws that existed then if we had a requestor who sued us, then we would have to rebut that presumption, as we did this time in that presumption, we rebutted it, and the evidence we presented that this was a draft was unrebutted.

Under the law today, and I would like to stress that, as TORA as currently drafted that if you fail to request an opinion from the AG there are a multitude of things that could happen to your client. One of which is, that if you make the wrong guess and you don't go to the AG, then your client could face criminal charges: 6 months in jail and $1,000 fine.

O'NEILL: But does that not indicate legislative intent that the requirement was mandatory rather than permissive before these amendments were made?

HINTON: No. I think that's just an example that the - as I have followed TORA as best I can through the years, nearly every legislative session there is something that is _____, something is adjusted to it, there's some change made. There are bills pending now in the legislature seeking to change TORA.

O'NEILL: But agree that before these amendments that you talked about there would be no incentive for the governmental body to produce any information, to request an AG opinion? Not to produce, no request and just sit back and the party doesn't sue, you never have to produce them, you have to wait for them to file suit.

HINTON: No. I think each one has to be decided on its merits because in some instances, you wouldn't want to seek an AG opinion, which many governmental entities do, but in many instances when the AG has already ruled on certain documents, then there's no requirement that you go to the AG and seek an opinion.

O'NEILL: That's very document specific though, isn't it?

HINTON: I forgot what number we're up to. At least 615. I know we're up to 615 of open records decisions that are there and to be reviewed by all governmental agencies. But at that particular time, it was just an opportunity and the City wanted to and it's still - in the _____ case which they rely on, there the agency, the DPS when the man had been passed over for a ranger's position they went there and the AG ruled that it was, that in the _____case it was a pre-decisional document. It was the advice and consulting of the various entities; and,

therefore, it was not producible. They did not have to produce it. And the *Gilbreath* court came in and decided that it should be.

* * * * * * * * * *

RESPONDENT

WATLER: The CA correctly held that the Dallas Morning News was entitled to a writ of mandamus compelling the City of Garland to release the Hager memo. Reversing the CA on the open records issue would require this court to recognize a new evidentiary privilege, a privilege that will be applied far and beyond the few open records act cases that are litigated each year.

ABBOTT: Have you ever had a case in the trial stage when discovery was requested of your particular client and you lodged an objection, perhaps a privilege on the basis that the discovery request requested employment information of one of the employees of the company you represented?

WATLER: No, I don't believe there is any such privilege. And I think that's one of the shortcomings of the position by the City of Garland. There is nothing per se that exempts employment related materials from either discovery or from Texas Open Records Act.

ABBOTT: If we affirm the CA, does that mean that every draft memo, every draft of any kind of piece of paper that Andy Taylor has written concerning potential employment decisions at the AG's office that he had written to John Cornyn is going to be subject to disclosure under the Open Records Act?

WATLER: No, because anything that is otherwise privileged from discovery that is the test, and the one and only test, that's set up by exemption 11 under the Open Records Act.

ABBOTT: What would exempt Andy Taylor's memos from discovery?

WATLER: It's our position that what exemption 11 exempts is only materials that are otherwise discoverable: attorney/client privilege; attorney work product, or any other kind of privilege; common law, evidentiary privilege or privileges recognized by our rules of evidence.

ABBOTT: A memo that Andy Taylor writes to John Cornyn concerning an employment decision is not going to be attorney/client work product?

WATLER: That's correct, and it would not be exempted from discovery.

ABBOTT: So you're saying then in the future all drafts of memos that Andy Taylor could write concerning employment decisions at the AG's office are subject to Open Records Act?

WATLER: If they're not otherwise privileged, that's correct.

ABBOTT: Can you think of any privilege that would cover them?

WATLER: None other than the privileges that our law already recognizes: attorney/client privilege; attorney work product; in some instances it may be a physician/patient - the whole range of privileges that our rules of procedure recognize. None of which are at issue here. None of which have been asserted by the City of Garland.

O'NEILL: You concede in your brief though that there is a deliberative privilege. I thought you were just at odds with Mr. Hinton over the breath of that deliberative privilege.

WATLER: We are at odds over the interpretation of a deliberative process privilege. This court has never recognized a deliberative process privilege, and it should not recognize a deliberative process privilege in this case. And the reason is, is what the legislature did in 1973 when it enacted the Texas Open Records Act and it provided exemption 11 at that time, now codified as 111, but that exemption simply says, that the only thing that may be withheld from a request under TORA is an interagency or intraagency memorandum that would not be available by law to a party in litigation with the agency. That's the only thing it does. The only test that it sets up is the test of whether or not it would be exempted from discovery by a party in litigation.

HECHT: Work product is not always a ____ attorneys. It can be when the parties or their agents _____. Why wouldn't this be work product?

WATLER: It's conceivable that a memorandum of this type may qualify as work product privilege. But in this particular case that is not a privilege that Garland relies on. That is not one that they pleaded in the TC. That's not one that they in any sense preserved error on in the TC. Not one that they've asserted here before this court. It is possible certainly that you could hypothesize a situation where a memorandum of the type that was created in this case might constitute attorney work product or attorney/client communication.

HECHT: You keep saying attorney work product, but work product is broader than attorney work product. So in answer to Judge Abbott's question earlier, if two employees of the AG's office were communicating about a matter, that might be covered by work product?

WATLER: If it's in the context of anticipating litigation or preparing for litigation, something of that nature, that certainly may give rise to the work product claim or perhaps attorney/client privilege claim.

PHILLIPS: Under your view of this Act, what obligation does a governmental body like the City of Garland have to keep all of its drafts?

WATLER: Well there's no record-keeping requirements per se imposed by the Open Records Act. If information is public information, then it has be made available upon request. The Act itself does not impose any kind of record keeping or record retention requirements.

OWEN: I thought it was a criminal violation to destroy a public record? That means you have to keep it.

WATLER: I believe the correct interpretation would be that in the routine course, of course, city governments can empty their wastebaskets and dispose of things in the routine course. What they can't do is in any way spoliate documents or conceal documents, or prevent things from being discovered for that purpose.

GONZALEZ: For example, they have a policy about e-mail. At the end of the day they destroy all incoming messages. So if you get an open record's request and you destroy that, you're okay?

WATLER: There are separate statutes that impose retention and record keeping requirements. Those statutes appear outside of the Texas Open Records Act.

ENOCH: It seems to me that you have to give a reasonable interpretation to a statute. And just because a statute can be read that way if it doesn't produce a reasoned conclusion at the other end, then that's not the way you can interpret it. It seems to me the pre-decisional notion meets a particular need of government agencies not to have to negotiate against themselves. Your you agency is negotiating with a contractor to produce - taking bids, making bids, it seems to me there's a tremendous number of documents that are final, there is nothing wrong with them, that are documents the agency reviews, studies, decides in the process of negotiating with some third-party, it seems to me to say that this piece of paper that's a discussion paper, that is by it's very nature designed to go to a third-party and they decide not to send it to a third-party, to take this interpretation that you have, the third-party would be entitled to see all of their preliminary thoughts that have been reduced to writing as a part of in open records. The agency could not have a negotiations among itself before it makes its presentation because all of that information would be available to the third-party?

WATLER: Several thoughts come to mind. The primary one, and I believe the point that may be overlooked in your question there, is that there are other exceptions within the Act. We happen to be looking at one. But there are exceptions that permit the withholding of information. For instance, when a government is involved in taking bids or negotiating to purchase real estate, or that sort of thing. So there may be other exceptions within the Act.

ENOCH: But here's an agency that's involved in the decision of terminating an employee.

WATLER: And there's another provision which they relied on that ended at a certain point. And that is the litigation exception. And it does exactly that. In fact, it speaks in terms of allowing a government to withhold settlement negotiation information. That's part of the litigation exception. That's an example where the legislature in its wisdom has provided to other places against the eventuality of what you're talking about.

ENOCH: With the assumption if we're making a decision to terminate an employee that is a litigation question?

WATLER: It can be. Certainly Garland in this case took that position, that this memo and other memos that were prepared were done in anticipation of litigation. That exception, §108 of the Act expires, or the basis of that expires at the time that either the litigation is over with or there is no longer any expectation. So in this particular case when the City of Garland actually reached a settlement, there never was litigation, they released several of these memorandums except the one that we are here concerned about today.

ENOCH: And that might affect work product as well?

WATLER: Again, they are not contending that it's work product.

HECHT: Hager assumed it was work product?

WATLER: That's my point that I really want to impress upon the court, that what you're being asked to do here today, because I believe that a decision as urged by Garland will have application far beyond simply TORA cases. Because the standard is can it be withheld in discovery? That's the standard. So if you say that there is some sort of broad base deliberative process privilege, you ipso facto are recognizing a discovery privilege. Never before in Texas in the course of employment litigation against city governments have these types of memos been privileged from discovery. For instance, if this memo hypothetically had a comment that Mr. Hager is getting up in years and he doesn't perform his job quite the way he used to, and we ought to replace him with a younger worker at a lower salary, under Garland's interpretation, if Mr. Hager brought a lawsuit, Garland could withhold that in discovery from Mr. Hager and thereby conceal evidence...

ABBOTT: Why wouldn't in the future any smart litigant make an open records request for the document first, and then after you get the document, of course, then would bring suit as opposed to making a mistake of filing suit first, and having the documents foreclosed?

WATLER: The answer is, the litigation exception.

ABBOTT: But there wouldn't be any litigation?

WATLER: It does not have to be merely pending if litigation is reasonably anticipated. Here, there never was litigation pending with Mr. Hager, but it was withheld because in their opinion was reasonably anticipated, and that never was actually...

ABBOTT: Why are you unmoved by the federal pre-decisional cases?

WATLER: Because in 1973, when our legislature enacted our Open Records Act, we

borrowed exemption 5 from the Federal Freedom of Information Act. The deliberative process privilege was a creature only of federal law. There had been no case in Texas, and to this day, there is no case from this court saying that our agencies or our city governments under Texas law have something called a "deliberative process" privilege. And if you look at the plain language, and that's the primary duty of this court, is to give effect to the plain language of the statute, not to look for legislative meaning. You only do that unless the plain language is in some sense ambiguous.

O'NEILL: In 1973, in *EPA v. Mink* decided by the US SC, they used the word "or" in there. They said, deliberative "or" _____?

WATLER: Correct.

O'NEILL: And that was out there in 1973?

WATLER: Yeah, it was. I think if the court is to give some effect to a deliberative process privilege, and to be clear, I don't believe the court should do that, but if the court were to say there is a deliberative process privilege it is our position that the AG in ORD 615 did correctly delineate what the scope of that privilege is. And he did correctly require and recognize that there has to be some close correlation between the internal memo and the policy making function of the agency involved.

HANKINSON: Do most states recognize the deliberative process privilege?

WATLER: Most states recognize it under their open records laws or the FOI laws.

HANKINSON: Are there any jurisdictions in which a state has legislated so that there is not such a process or in which courts have recognized there is not a deliberative process privilege?

WATLER: I can't say, because I don't know the answer to that.

HANKINSON: With respect to just the state of the law, this is not some wild hair scheme privilege. It's rather well established in American jurisprudence. I know it's a question of statute. I understand that, but just generally.

WATLER: It was somewhat established in federal law in 1973. But what the legislature simply did is it evidenced an intent only to allow the withholding of documents if they are privileged in discovery. And my point is, that in 1973 there was no such thing under Texas law as a deliberative process privilege. It was not _____ in discovery under Texas law in 1973.

Section 552.005 of the Act, is a section of the Act that deals with the effect of the Open Records Act on the scope of civil discovery. And it specifically says, that the

exceptions from disclosure in our Open Records law do not create new privileges from discovery. This was added by the legislature in 1989. It's not an original part of the Act. In 1989, as of that time, there had never been a single Texas case that had ever recognized the deliberate process privilege or much less even discussed it in _____ decisions.

HECHT: Work product involves a deliberative process?

WATLER: No, those are distinct privileges.

HECHT: To employees of the group or deliberating on in the case of work product litigation. Why doesn't that subsume some deliberative process?

WATLER: There may be overlap but certainly there is a distinct privilege, and if it's work product, nor even on our part that a governmental body has the right to withhold it. But if it's not work product, and it's just some sort of pre-decisional and just sort of vague pre-decisional deliberative standard, who knows what it means. What it means is every internal document gets withheld. We say that that's completely inconsistent with the plain language of the Act in multiple ways.

HECHT: Was the US SC right when it said in *Sears* that the public has only a marginal interest in draft documents concerning agency policy?

WATLER: Not in my opinion. But I will acknowledge that that was the ruling of the court that protects in that particular case.

* * *

AG

PARSLEY: The AG has an interest in this case, because the CA _____ the Act in such a way that essentially eliminates the AG's role as decision-maker under the Act. Accordingly, the AG urges this court to affirm the CA's judgment while correcting the erroneous construction of the CA's _____ the Act.

GONZALEZ: What is the AG's role?

PARSLEY: The AG's role is as the initial decision-maker under the Act. If a governmental body believes that information is either not a public record, not public information, or is exempted from release, from disclosure in some way, the Act puts an affirmatively duty on the governmental body to seek an AG's opinion within 10 days of receiving the written request.

HECHT: Every time?

PARSLEY: Every time.

HECHT: So if they ask the city attorney here for his personal checks, clearly not covered by the Act, he's still got to go get an AG's opinion?

PARSLEY: Yes. That is our position.

ABBOTT: Why is that not subtracting a word from the statute? The statutes says, that if you fail to obtain a report from the AG, then it's presumed open. And are you not - doesn't your argument mean that if they fail to request an AG opinion it's not presumed open, but is open, and you're eliminating the word 'presumed' from the statute

PARSLEY: Not entirely. You have to understand the underlying presumption, which is really what the CA ignored when it construed the act. When you construe the entire Act together, before you even get to the 302 presumption, there is a presumption of openness in the Act. Government information is presumed to be open and accessible to the public.

GONZALEZ: That's government information?

PARSLEY: That's government information.

GONZALEZ: So if I have a request for my phone records, is that government information?

PARSLEY: Our position would be that you should inquire with the AG's office, submit the documents, outline...

GONZALEZ: They want my sons medical records. I still have to go to the AG's office for the AG to tell me that that's not governmental records?

PARSLEY: No. It's going to be something that the government body collects, maintains or assembles in the course of conducting its business.

OWEN: But I thought you were saying that if a request comes in and the agency determines that it's not a public record, they still have to go to the AG and have the AG say that it's not a public record. So under Judge Gonzalez' example, if his son's medical records are requested, he has to ask the AG to bless it before you could move forward. Is that what you're saying your position is?

PARSLEY: Our position is, to the agency if it's your son's medical records, it's not something that was collected, assembled, or maintained in the government's business, then you can withhold that information. If you are sued to produce that information, then all you can show if it is determined that it is a public record, is a compelling interest in withholding it.

HANKINSON: Where does the compelling interest standard come from? It's no place in the statute.

PARSLEY: It's stacking of presumption on a presumption to get to compelling interest. You start with the initial presumption of openness that the public information will be released to the public. In order to prevent it from being released to the public, the governmental body must request a decision from the AG's office and submit written statements why it is not to be released. Why it is exempted from the disclosure. If the governmental body does not do that, then 302 says, that the information is presumed public. And that's not a presumption standing alone. It's actually a presumption on a presumption. It's a legislative incentive to have governmental bodies come to the AG to make a decision on whether it is public information, and whether it is exempt...

OWEN: But then the Act further provides, if the agency doesn't do that, they don't go to the AG, they still can sit there and wait for either the AG to sue them or the private individual to sue them. And it says you go to court. It doesn't say you automatically turn over the documents or you've got any increase burden of proof does it?

PARSLEY: It does provide that you should make - if you don't seek an AG's opinion, you should provide the information within 10 days.

OWEN: But it also says specifically if you do not, then it's up to the AG or the private party could ask for the documents to bring them in?

PARSLEY: That is true.

OWEN: And there is an incentive even under the old Act, is there not, it is a criminal offense not to produce those?

PARSLEY: Yes. The Act does not anticipate governmental bodies unilaterally determining what is public information and what should be exempted from release. The Act anticipates that the governmental body is going to give the information to the requestor absent seeking an AG opinion to the contrary.

HECHT: On the substantive issue, is it the opinion of the AG that interoffice memos kicking around ideas and proposing plans that may or may not get adopted are subject to disclosure to the parties?

PARSLEY: As far as the substantive issue, we've really - our brief didn't really approach that. Our concern in our briefing was the Act and the way that it affects, that it is supposed to be construed. Our position is that if it's in question, you should present it to the AG's office for a determination. Because going back to the idea that the Act does not permit the governmental body to within itself make the decision whether it's public information or not, or should be exempted.

HANKINSON: Even if there is a prior AG opinion that says it is exempted from disclosure?

PARSLEY: That is very document specific.

HANKINSON: But if I'm an agency, and I've got the same document and the AG has already said that I don't have to disclose it.

PARSLEY: Then you are protected. And that is appropriate under the Act.

HANKINSON: You don't have to go to the AG every time?

PARSLEY: No, you don't. But I think it's encouraged unless it's very specific to prevent waiver so that you have to go to the _____ demonstration level.

HECHT: So I take it by your response, that you do not support the respondent's position on the substantive issue in the case?

PARSLEY: No, we do, because that's our AG's opinion is 615, and we do stand behind that, the deliberative process privilege.

HECHT: So it is your position then, that a memorandum, documents that are sent around in an office like the AG's office, or city's office proposing plans, discussing alternatives, that are ultimately not adopted, they are just for kicking ideas around, those would be subject to disclosure?

PARSLEY: I think under 615, the way that the deliberative process privilege was construed is that those matters are exempted from disclosure which are internal agency memoranda consisting of advice, recommendation and opinions that have pertained to policy-making.

O'NEILL: So you would have us recognize such a privilege that they are asking us not to recognize? It's my understanding, you do agree with the deliberative process privilege. And my understanding of their argument was, they don't think we should recognize one.

PARSLEY: 615 - Side A of Tape 1 runs out. **Missing some from Side A, of Parsley's response to Justice O'Neill**.

The argument that the court may want to consider that it's the Texas privileges that were adopted in 1973 as opposed to the federal privileges that were adopted is a valid argument. It was not the law at the time 615 was issued. So we stand behind our AG opinion that the deliberative process privilege is appropriate under the federal privileges. But should this court determine that it was Texas privileges that were adopted in 1973, then that would be appropriate to reject the deliberative process privilege.

ABBOTT: I'm going to try one more time. With regard to employment issues, which I will consider do not involve policy, are you stating on behalf of the Texas AG that all drafts, all scratches on pieces of paper, on memos before decisions are made concerning employment decisions for every employee who works for the AG's office, is subject to open records?

PARSLEY: My argument would be that I believe what the AG's position is, is that if when the agency receives the request if it's responsive to the request, you submit the material to the AG. And the AG makes the determination as to whether or not it is subject to the Act.

PHILLIPS: And if you have ever written anything on a scrap paper, then you've got to keep it unless you get rid of it pursuant to a written termination policy? That's a process question.

PARSLEY: I believe that Justice Gonzalez's comment was more correct. You can dispose of drafts during the regular course of your business, but...

PHILLIPS: Whether you have a retention policy that covers drafts or not, if you're writing something and you think _____, you just throw that away?

PARSLEY: Arguably, yes. If you receive open records request right before you throw it away, then you need to send that scribble to the AG's office. The open records act prevents governmental employees from wilfully destroying documents.

O'NEILL: It doesn't have exception for retention policies. 351 says, if it's a public record and you wilfully destroy it, you've committed an offense.

PARSLEY: As I understand it, the document retention system does circumvent the destruction in the open records act.

OWEN: Specifically records? The open records act would say, you don't have to comply with this?

PARSLEY: I honestly do not know all the details.

OWEN: What if I ask John Cornyn tomorrow for all the draft memos that were being _____ around in his office about whether to hire you or hire Greg Coleman, would I be able to get those?

PARSLEY: We would have to take the drafts and send them to...

OWEN: Well you are the AG. Would you give them to me?

PARSLEY: But I'm not the expert on open records.

OWEN: But you're the lawyer here. Would you give them to us or not?

PARSLEY: Under 615, I believe they would be accessible to you because they're not talking about a policy. They are talking about an internal personnel matter. So under the AG's opinion 615, I believe they would be available to you.

HECHT: The AG asked to be here today, and it is a little perplexing that we can't understand whether the AG supports the respondent, or the petitioner, or nobody, or what their position is on the statute. You've given us the best answer you can on that?

PARSLEY: Let me say, we stand behind the open records decision, behind 615. And our primary concern with appearing before the court was to bring the court's attention to the fact that the CA misconstrued the Act, and removed any incentive for anyone to seek an AG's opinion. And that was our primary concern and that's the limits that our brief took. We didn't embark on a discussion of the merits or whether the respondent was correct in that regard.

* * * * * * * * * *

REBUTTAL

****TAPE IS VERY HARD TO UNDERSTAND ON THIS SIDE****

LAWYER: If I heard the arguments correct from the AG and the News, the News is advocating today for the first time that there not be a deliberative process privilege.

BAKER: Well I think he said it doesn't exist in his view, rather than there not be one. _____?

LAWYER: It came about for the purposes before the court when the legislature adopted the Texas Open Records Act. And specifically recognizing the case law that had been adopted by the federal jurisdiction concerning this particular type of record.

HECHT: Is there a privilege in litigation?

LAWYER: Yes, in the federal courts.

HECHT: In the state courts?

LAWYER: Yes, I believe the state courts that we have cited to you they have raised the deliberative process privilege...

HECHT: In disclosure, but in litigation?

LAWYER: Yes.

HECHT: Be sued for false termination and you assert the deliberative process privilege?

LAWYER: Yes, I believe you could. It is the common law privilege, and that's what they were talking about in *EPA v. Mink*.

HANKINSON: Was this privilege recognized under Texas law, not federal law, at the time the legislature enacted the statute in 1973?

LAWYER: This is a common law privilege that has been asserted even in the courts of England. And I would suggest that, yes, that privilege was recognized. It hasn't been litigated and I have not found the case law.

HANKINSON: So your position is it was recognized as part of the common law dating back to England, but the question has not been raised specifically in any Texas court case or opinion of record?

LAWYER: That's correct. We have not been able to find one.

HANKINSON: Would you respond to Mr. Watler's argument that the plain language of the statute would require us to reject this deliberative process privilege?

LAWYER: The statutory construction would be that the legislature did not intend to adopt a statute or an exemption that had no meaning. And that is the argument that the ____ is making to the court today, that it enacted a nullity in other words.

HANKINSON: Why would it have been a nullity? Aren't there other privileges with respect to the litigation aspect that would come within this particular exemption?

LAWYER: There are other provisions in the sections, but under this deliberative process privilege, it is found here in this particular exemption.

HANKINSON: I understand that. But are there other bases for invoking this particular exemption under the statute?

LAWYER: No, I do not believe so.

O'NEILL: Let me ask you about the failure of the city to go to the AG within 10 days. You said that the statute is permissive. Yet §301 uses the word 'must' three times. How can we reconcile that?

LAWYER: Because a complete reading of the statute says that if we are sued, then it is a presumption. It is simply a presumption that the document is open.

O'NEILL: And how is that different from the overall presumption under the Act?

LAWYER: Here, we were arguing at the TC and before this court, that this was not a document subject to an exemption.

O'NEILL: Assuming we don't agree with you on that, how do you distinguish the presumption in the exception from the presumption in the overall, overarching provisions in the Act?

LAWYER: I believe that the Dallas CA correctly addressed that by saying the presumption is simply that it is a presumption. The AG as they appeared before you today are arguing that they have some rule-making authority. They are some type of administrative body, such as the PUC or TNRCC, and you have to go to them and do some exhaustive administrative remedy. I find nothing in the Act that says that.

PHILLLIPS: So evidentiary _____ does not change _____ depending on whether or not you go to the AG?

LAWYER: No. It is our position the Dallas CA stated once we're rebutting, it disappears.