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Attorney-Client Privilege Is a Compelling Interest That Outweighs the Right to Prompt Disclosure Under the Public Information Act.

Attorney-client privileged information is generally exempt from disclosure under the [Public Information Act](#) (PIA). However, to withhold information on the basis of this or one of the other exemptions when there has been no previous determination that the matter is exempt, the governmental entity is required under [§552.301 of the Government Code](#) to request the attorney general to determine whether the exemption applies. If this requirement is not satisfied, it must be *presumed* the information must be disclosed in response to a PIA request “unless there is a compelling reason to withhold the information.” [Tex. Gov’t Code §552.302](#). The Legislature did not define what it thought was a “compelling reason.”

In [Paxton v. City of Dallas](#), the Attorney General ruled that it was not and directed the City to disclose due to the failure to timely request the exemption confirmation. The Texas Supreme Court in a 7:2 opinion by Justice Guzman rejected the Attorney General’s conclusion and held that “interests protected by the attorney-client privilege are sufficiently compelling to rebut the public-disclosure presumption that arises on expiration of the PIA’s ten-day deadline.” Failing to meet the PIA’s deadline does not, in and of itself, waive the attorney-client privilege.

The majority reasoned the compelling-reason standard must weigh “the relative importance of a reason for withholding information” against the presumption favoring openness.” A reason is “compelling” only if it is so pressing – i.e., urgent, forceful, or demanding – that it outweighs the interests and statutory presumption favoring public access to the information. The court then examined the attorney-client privilege for governmental entities and determined that it applies there with “special force” because of the government is the representative for the public’s financial and functional interests in governmental affairs.

The majority relied on analogy to other holdings where preservation of the privilege was deemed “compelling” when asserted by private persons. The majority next acknowledged that the privilege may be waived by inadvertent disclosure or offensive use. But it deemed the inadvertent disclosure rationale inapplicable because there had been no *disclosure*, only a failure to make the timely request necessary to rebut the statutory presumption favoring disclosure. It also rejected the analogy to offensive use because failure to meet a statutory deadline is not comparable to simultaneous use of the privilege as sword and shield. The majority opinion buttressed its conclusion that the City had not waived the privilege by pointing out that the PIA refers to waivers by other means, but only imposed a presumption – not a waiver – when the deadline was missed.

The opinion then identifies the countervailing public interest, not as one of disclosure, but in *prompt* disclosure. The PIA exempts attorney-client privilege information from disclosure subject to a presumption favoring disclosure absent a timely request for confirmation of the exemption. From this, the majority perceived the only public interest protected by the PIA was assuring the *prompt* disclosure of non-exempt information. Given the interests at stake and

¹ The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

the irreversibility of disclosure, the majority decided the City's interests in protecting the confidences shared with its attorneys outweighed any right to a prompt disclosure to the public of attorney-client privileged information.

Justices Boyd and Johnson [vigorously disagreed](#). They would have found no reason "compelling" unless "under all the facts and circumstances, [it] is so important and urgent that reasonable minds can only conclude that it clearly outweighs the Act's fundamental policy of ensuring that the public can promptly obtain its information from the government." According to them, nothing in the PIA or the evidence presented by the City elevated to the "compelling" level preservation of the privilege between the City and its attorneys.

Appellate Procedure: The Presumption That Evidence Supported the Trial Court's Ruling If the Reporter's Record is Omitted from the Record on Appeal Does Not Apply to Pre-Trial Hearings Because They Are Presumed Not to Be Evidentiary.

Party Joinder: A Plaintiff Is Not Required to Join Absent Persons to Prevent Potential Inconsistent Liability Unless the Absentee Persons Have Positively Asserted Such a Liability; Mere Possibility Does Not Suffice Dismissal for Failure to Join.

XTO, a mineral lessee, refused to pay royalties to Crawford. Crawford was the owner of roughly 8-acres that remained after his predecessor conveyed two adjoining tracts. According to XTO, under the strip and gore doctrine Crawford's predecessor effectively conveyed the underlying minerals when she conveyed all of her interests in two adjoining tracts without reserving the minerals underlying the 8-acre tract not conveyed. When Crawford sued to recover royalties for the mineral rights under the 8-acre tract, XTO convinced the trial court to dismiss because Crawford had not joined the owners to whom XTO had paid the royalties claimed by Crawford.

In [Crawford v. XTO Energy, Inc.](#), the court in a unanimous opinion by Justice Lehrmann held that the dismissal was an abuse of the trial court's discretion. While the royalty recipients could have asserted a claim that could have created an inconsistent or double liability for XTO, nothing showed that they had actually done so. The mere possibility of such a claim was not sufficient to authorize dismissal under Texas Rule of Civil Procedure 39.

Appellate Procedure: The Presumption That an Omitted Reporter's Record Supports the Judgment Only After a Rebuttal of the Presumption That Pre-Trial Hearings Are Not Evidentiary.

Before reaching the substance of the parties' contentions, the court addressed XTO's arguments that Crawford had waived his complaints. Crawford did not include in the record on appeal a transcript of the hearing on XTO's motions concerning joinder and dismissal. XTO argued that this omission entitled it to a conclusive presumption that evidence was presented that would support the trial court's orders. The court rebuffed this contention because 1) the presumption only arises if the hearing is *evidentiary* and 2) pretrial hearings are *presumed* to be non-evidentiary unless the proceeding by nature or something else in the record indicates that an evidentiary hearing occurred. The court found the recitation in the order that the court considered "the relevant evidence and documents on file with the clerk" sufficient to show that the hearing was not evidentiary in nature.² The opinion does not explain why this statement was not ambivalent about whether evidence *other than the documents on file* was received.

The court decided the hearing was non-evidentiary even though XTO argued *on appeal* that it in fact tendered additional documentary evidence at the hearing. The court explained it found nothing in the record to support this assertion. The assertion, standing alone, was not enough to rebut the presumption that the hearing was non-evidentiary.³ The court also followed its general tendency to favor decisions on the merits instead of procedure. It rejected XTO's contention that Crawford waived his arguments on appeal by failing to include a statement of issues in his merits brief in the Texas Supreme Court. The court explained that the issues were identified in the petition for

² The opinion is silent about why this statement is not ambivalent about whether evidence – i.e., testimony – *other than the documents on file* was received. As *Crawford* demonstrates, practitioners must be precise about the wording of seemingly "routine" recitations in the trial court's orders.

³ The unstated rationale appears to have been that statements in an appellate brief cannot be considered if not supported in the record.

review and the merits brief did not raise additional issues or attempt to change their substance – i.e., no one was misled. No harm, no foul.

Joinder Analysis

The court then turned its attention to whether the trial court abused its discretion by dismissing Crawford's suit for failure to join the owners of previously-conveyed tracts. The remedies Crawford sought included declaratory relief, which may be awarded without affecting the rights of non-parties. Tex. Civ. Prac. & Rem. Code §37.006(a). This provision addresses the effect of the judgment, but party joinder is governed by rule 39. Under that rule, the standard for mandatory joinder of absent persons amenable to personal jurisdiction: 1) inability to afford complete relief without that person; *or* 2) the absent person claims an interest that would practically be more difficult to protect or substantially risks exposing those who are parties to the suit to multiple or inconsistent liability by disposing of the case without the absent person.

Joinder Is Determined Based on the Existence of a Claim, Not the Likely Outcome of That Claim on Its Merits.

This determination is *prospective*, and cannot turn on arguments about the merits of the potential claims of the absent parties. Accordingly, the court rejected Crawford's argument that the case could not be dismissed for failure to join the other landowners because their claims would, according to Crawford, ultimately fail.

Joinder Is Not Required Without the Positive Assertion of a Contrary Or Inconsistent Interest by the Absent Person.

The court was also unimpressed with XTO's claim that Crawford was required to join the other landowners to prevent it from being subject to double liability for the royalty payments that Crawford claimed he was owed. The court said that this unilateral action by XTO was not sufficient. Rule 39 requires that the absent person make a "claim." The court first looked to whether a claim could be inferred on the basis of a conflict between the interests conveyed under the other landowner's leases. After deciding no such conflict existed because nothing showed the deeds purported to convey any mineral interest in Crawford's property, the court then considered XTO's argument that such a claim was possible under the strip-and-gore doctrine. The court was unpersuaded. To make a "claim" for purposes of rule 39 requires some form of positive demand or assertion. The passive receipt of payments that the recipient may not realize includes royalties for mineral interests underlying more than the recipient's own tract does not amount to an affirmative assertion of a right. That these other landowners *could* assert a claim based on the strip-and-gore doctrine does not mean that they were presently making such a claim or would necessarily do so in the future.

Defendants May Be Protected from Inconsistent Liability by Joining Absent Parties, Not Dismissing the Plaintiff's Suit.

If XTO were concerned about the potential for double liability, its remedy was to join the other landowners itself as rule 39 permits, not to have Crawford's suit dismissed because he failed to join the other owners.

Employment Law: Even If an At-Will Employee, Termination of Peace Officers and Fire Fighters Because of Disciplinary Actions Must Comply With Statutory Procedures.

[Texas Government Code chapter 614](#), subchapter B, imposes procedures for disciplinary actions against peace officers or fire fighters not covered by collective bargaining or meet-and-confer agreements. The complaint must be in writing and "signed by the person making the complaint." [Tex. Gov't Code § 614.022](#). The employee must be given a signed copy of the complaint. Further, if the discipline consists of indefinite suspension or termination the complaint must first be investigated and supported by evidence before disciplinary action may be taken. [Tex. Gov't Code § 614.023](#).

In [Colorado County v. Staff](#), the court was called upon to interpret the very broad and imprecise language of the statute. In doing so, it invoked its familiar plain-meaning analysis.

In *Staff*, a sheriff's deputy was terminated after a county attorney reported that a traffic stop video showed the deputy had been abusive to the detainee. After looking into the complaint and available records and other videos, two similar incidents were identified. When the deputy's supervisor terminated the deputy for unprofessional conduct in violation of the department's policy manual, he signed and delivered a written deficiency notice to the deputy.

Statute Does Not Change At-Will Nature of Employment, Only the Necessary Procedures for Discipline-Based Terminations.

Without contesting the substance of the grounds for his termination, the deputy questioned whether the sheriff complied with the statutorily required procedures. The sheriff maintained that these procedures were not mandatory because, like most sheriffs' deputies, the deputy was terminable at will for any reason or no reason at all. In a unanimous opinion penned by Justice Guzman, the court ruled that, even though an at-will employee, when termination was based on disciplinary action, the employer must comply with the statutory procedures.

The opinion suggests that, if the sheriff had terminated the deputy without reference to any disciplinary connection, such compliance would not have been necessary. At first blush, this seems open the door to subterfuge to circumvent statute's procedures. By footnote, the court offers what may have been the basis for this seeming incongruity. Termination of a peace officer for no specific basis carries with it no on-going impediment to future work as a peace officer. Termination for professional misconduct becomes part of the officer's record affecting prospective employment as a peace officer. These protections are necessary to protect the discharged employee prospects for other work from being prejudiced by vindictive or baseless complaints.

Providing a Complaint Signed by a Supervisor Simultaneously With Notice of Termination Satisfies the Statutorily Required Procedures.

Although the court ruled the statute applied to the deputy's discipline-based termination, it rejected the deputy's arguments that the sheriff failed to comply with the statute's procedural requirements. The court ruled that the requirement that "the person making the complaint" must sign it does not require the signatory to be the *victim* of the proscribed conduct. It may be signed, as it was here, by a supervisor acting on information received so long as there is an investigation that reveals some supporting evidence. Here, the evidentiary requirements were satisfied by video evidence and a documented previous incident.

The court also ruled that delivery of the disciplinary notice contemporaneously with suspension of his employment was sufficient to meet the statute's notice requirements. When the disciplinary notice – i.e., the "complaint" – was delivered to the deputy, he had thirty days to appeal the decision. The court ruled that delivery of the disciplinary notice with notice of his termination fulfilled the statutory purpose because the deputy had ample opportunity to challenge the grounds for his termination.