NO. 07-0931

IN THE
SUPREME COURT OF TEXAS

CITY OF DALLAS,
Petitioner,

vs.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondent.

BRIEF OF *AMICUS CURIAE* UNITED STATES SENATOR JOHN CORNYN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

SECONDARY MATERIALS

Senator John Cornyn, as *amicus curiae*, respectfully submits this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

John Cornyn is a United States Senator for the State of Texas. As Attorney General of Texas from 1999-2002, John Cornyn presided over more than 20,000 Texas Public Information Act ("PIA") rulings and issued 19 formal opinions on open records issues. Indeed, several of Senator Cornyn's opinions as Attorney General are cited by the parties in their briefing. Senator Cornyn retains an interest in litigation involving the PIA, particularly where, as here, it involves his opinions as Attorney General.

As a result of his experiences as Texas Attorney General, Senator Cornyn has been a champion in Congress of granting citizens greater access to government information and records. Indeed, one of Senator Cornyn's signature legislative accomplishments was the passage of the "OPEN Government Act of 2007," which marked the most substantial change to the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, in well over a decade. Drawing on his experience as Attorney General of Texas, Senator Cornyn modeled key provisions of the federal OPEN Government Act on the Texas PIA. Signed into law by President Bush on December 31, 2007, the PIA-based OPEN Government Act was co-authored by Senator Cornyn and Senator Patrick Leahy (D-Vermont) and is designed to make

the federal government more open and transparent. Thus, Senator Cornyn retains a keen interest in the proper interpretation and application of the PIA.

Senator Cornyn was a Justice of this Court from 1990 to 1997.

Pursuant to Texas Rule of Appellate Procedure 11, Senator Cornyn certifies no fee was paid or received for the preparation of this brief.

STATEMENT OF THE CASE AND STATEMENT OF JURISDICTION

As *amicus curiae*, Senator Cornyn adopts the Statement of the Case and the Statement of Jurisdiction of the Respondent, Attorney General Greg Abbott.

SUMMARY OF ARGUMENT

The PIA is arguably the strongest and most successful open government law in the nation, making Texas governmental bodies transparent by giving citizens prompt access to their records. Indeed, the PIA has been so effective that it served as the model for the recent Congressional overhaul of the federal Freedom of Information Act ("FOIA"). Texas has earned national accolades for the speed with which its governmental bodies respond to citizens' PIA requests, and this speed is directly attributable to the stringent statutory deadlines that the PIA imposes and enforces. The PIA's deadlines and enforcement mechanisms are now the model for open government laws nationwide, as exemplified by the OPEN Government Act's PIA-based amendments to the federal FOIA.

There is accordingly widespread agreement and acceptance, both in Austin and across the nation, that the Texas PIA is perhaps the strongest open government law in the country. The PIA provisions that penalize government agencies for tardiness in responding to information requests are understood and appreciated as effective open government policies. This Court should not construe the PIA in a manner that contradicts this understanding of and appreciation for Texas law. Any judicial weakening of the PIA's deadlines would run contrary to the expressed will of the Texas Legislature and, moreover, would undermine the PIA's well-earned status as the national model for a strong open government law.

ARGUMENT

The Court should not weaken the PIA, which has become the national model for a strong open government law.

A. The Legislature drafted the PIA as an exceptionally strong open government law.

As this Court has previously recognized, the Texas PIA is a strong open government law that broadly favors the public disclosure of governmental information. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). The strength of the PIA's disclosure requirement is confirmed by the statutory requirement that the PIA "shall be liberally construed in favor of granting a request for information." TEX. GOVT. CODE § 552.001(b). Accordingly, this Court and the courts of appeal have consistently recognized that they must

interpret and apply the PIA to favor the public dissemination of information. *See, e.g., City of Garland*, 22 S.W.3d at 356; *Industrial Found. of the South v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668, 682 (Tex. 1976) ("We decline to adopt an interpretation [of the PIA] which would allow the court in its discretion to deny disclosure even though there is no specific exception provided."); *Simmons v. Kuzmich*, 166 S.W.3d 342, 346 (Tex.App.—Fort Worth 2005, no pet.); *Envoy Med. Sys., L.L.C. v. State*, 108 S.W.3d 333, 336 (Tex.App.—Austin 2003, no pet.); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 561-2 (Tex.App.—San Antonio 2000, pet. denied).

As a strong open government law, the fundamental principle embodied in the PIA is "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. GOVT. CODE § 552.001(a). This Court has recognized that the PIA "contains a strong statement of public policy favoring public access to governmental information and a statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information." *City of Garland*, 22 S.W.3d at 364. Accordingly, the Court should once again interpret the PIA so as to err on the side of public disclosure.

B. A strong open government law requires enforceable deadlines, which is why the federal FOIA was recently amended based on the PIA.

The key to the strength of the PIA is the stringency of its deadlines. It has long been the rule in Texas that "to assert an exception [to disclosure] under the TPIA, the governmental agency must timely request an attorney general's opinion concerning the applicability of such an exception to disclosure." *Simmons*, 166 S.W.3d at 346 (applying TEX. GOVT. CODE § 552.301(a)). Indeed, "[w]ithout such a request . . . the information requested is presumed to be subject to disclosure and must be released." *Id.* The Legislature mandated a tight timeline for requesting an attorney general opinion. The governmental body "must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." TEX. GOVT. CODE § 552.301(b). Where a governmental body fails to request an opinion from the Attorney General in compliance with this statutory timeline, a presumption in favor of disclosure arises that can only be rebutted by showing a "compelling reason to withhold the information." TEX. GOVT. CODE § 552.302; *Simmons*, 166 S.W.3d at 350; *Jackson v. Texas Dept. of Public Safety*, 243 S.W.3d 754, 757-58 (Tex. App.—Corpus Christi 2008, no pet.) (analyzing the presumption in favor of disclosure under the PIA). In sum, the PIA compels Texas

governmental bodies to respond promptly to citizen inquiries and assigns real consequences to the failure to do so.

C. The federal FOIA was recently amended to include strict, enforceable deadlines, which were modeled on the PIA.

In contrast to the strength of the PIA, the central weakness of the federal FOIA was its lack of any statutory mechanism to enforce its deadlines. Prior to the passage of the OPEN Government Act of 2007, FOIA, 5 U.S.C. § 552, did not impose ***any*** consequences on federal agencies for failing to meet its deadlines. As a result, federal agencies were notoriously slow and inefficient in responding to citizens' FOIA requests. For example, a survey by the National Security Archive found that 53 of 57 federal agencies reported backlogs in processing FOIA requests, with at least 12 of those agencies admitting to having requests that had been pending for more than 10 years. *See* James C. Ho & Tara Magner, *A Victory for Open Government*, AUSTIN AMERICAN-STATESMAN, September 17, 2007. The routine failure of federal agencies to timely respond to citizen inquiries undermined the fundamental purpose of the federal FOIA and created a situation in which nondisclosure through delay was commonplace.

Senator Cornyn recognized this fundamental flaw in the federal FOIA and looked to the Texas PIA in his effort to correct it. As a former Attorney General of Texas, Senator Cornyn is intimately familiar with the Texas PIA, and he used the PIA as a model for his proposed reform of the federal FOIA. In particular, Senator

Cornyn believed that the federal FOIA needed a provision analogous to the strong statutory deadline scheme of the PIA.

In partnership with Senator Patrick Leahy of Vermont, Senator Cornyn introduced the OPEN Government Act. One of the lawmakers' key goals was to strengthen the federal FOIA's deadlines. The OPEN Government Act's basis in the Texas PIA was well known to the Senate. Indeed, Senator Leahy explicitly noted that "some of the provisions in the bill we introduce today are modeled after sections of the Texas Public Information Act." 151 Cong. Rec. S1525-26 (Feb. 16, 2005). Senator Cornyn echoed that sentiment, declaring "I am thus especially enthusiastic about the OPEN Government Act because that bill attempts to incorporate some of the most important principles and elements of Texas law into the Federal Freedom of Information Act." 151 Cong. Rec. S7384 (June 24, 2005). Senator Cornyn also pointed out that "Texas is known for having one of the strongest, most robust freedom of information laws in the country, and I have enjoyed working with my colleagues here in Washington to spread a little of that Texas Sunshine." 152 Cong. Rec. S2302-03 (March 16, 2006).

In amending the federal FOIA, Congress sought guidance from Texas officials familiar with the PIA. Texas Assistant Attorney General Katherine M. Cary, chief of the state's Open Records Division, offered testimony to the Senate

on the success of the Texas PIA. Ms. Cary emphasized the importance of the PIA's statutory deadlines:

> Under the Texas Public Information Act, as under FOIA, requested information is to be "promptly released." Texas law defines this to mean as soon as possible without delay. Any governmental body that wants to withhold records from the public must, within 10 days, seek a ruling from the Texas Attorney General's Office, specifically from my division, the Open Records Division.
>
> In Texas, a governmental body that fails to take the simple but required procedural steps to keep information closed has waived any exceptions to disclosure unless another provision of law explicitly makes the information confidential. ***This waiver provision—above all else—has provided meaningful consequences to prevent government from benefiting from its own inaction.*** Under Texas law, if a governmental body—state, county, or local—disregards the law and fails to invoke the provisions that specifically protect certain categories of information from disclosure, it has forfeited its right to use those disclosure exceptions.
>
> ***The OPEN Government Act would institute a very similar waiver provision***, and it attempts to strike a careful balance so as not to negatively affect third parties' rights or violate strict confidentiality. The Texas experience shows that finding this balance is realistic, fair and workable.

Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005: *Hearing Before the S. Subcomm. on Terrorism, Technology and Homeland Security*, 109th Congress (March 15, 2005) (statement of Texas Assistant Attorney General Katherine M. Cary) (emphasis added).

The most explicit acknowledgment of the OPEN Government Act's substantial debt to the PIA came when Senator Cornyn read into the Congressional Record a letter sent by Texas Attorney General Greg Abbott:

> As you know, the Texas Public Information Act declares that "government is the servant and not the master of the people," and "[t]he people do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." The OPEN Government Act of 2005 will bring similar benefits to all Americans and ensure that FOIA finally lives up to its noble ideals.

151 Cong. Rec. S1522 (Feb. 16, 2005, Exhibit 2) (the quotations in General Abbott's letter are from TEX. GOVT. CODE § 552.001(a)).

The OPEN Government Act became federal law when it was signed by President Bush on December 31, 2007. Notably, Section 6 of the Act amended the federal FOIA to clarify the "time limits for agencies to act on requests" and to insure agency compliance with those time limits. These PIA-like deadline provisions are now codified at 5 U.S.C. § 552(a)(6)(A) and § 552(a)(4)(A)(viii), but, in order to permit federal agencies to prepare to follow them, they do not take effect until December 31, 2008. 5 U.S.C. § 552(a). Accordingly, the federal courts have yet to interpret them.

D. Weakening the PIA's deadlines would undermine its status as the model for a strong federal open government law.

The Texas Legislature designed the PIA to be the strongest, most effective public information act in the United States. Texas has rightfully received national

accolades for its status as the leading state for open government, and Congress recognized the strength of the PIA by modeling the OPEN Government Act on it. To weaken the PIA now would run contrary to all of this. The Court should not send a mixed message by relaxing the PIA's deadlines or minimizing the consequences of a governmental body's failure to comply with them.

Separately, because the recent OPEN Government Act amendments to the federal FOIA have yet to be interpreted by the federal courts, it is possible—indeed, likely—that the federal courts will look to this Court's PIA jurisprudence when they are called upon to apply its new federal progeny. The PIA's undisputed status as the model for federal law adds an extra degree of importance to this Court's PIA decisions as they, too, will likely serve as models in the federal system. Congress adopted the PIA as its model in strengthening the federal FOIA's deadlines, and any move away from vigorous enforcement of the PIA's deadlines by this Court would be detrimental not only to transparent government in Austin but also in Washington.

CONCLUSION AND PRAYER

In the PIA, Texas is fortunate to have the most vibrant and effective open records law in the nation. This Court should interpret the PIA so as to maintain that strength and to further the Legislature's stated goal of transparent government. Senator Cornyn has worked to spread "Texas sunshine" in Washington by

successfully amending the federal FOIA to more closely resemble the PIA, including by incorporating into federal law the PIA's stringent and enforceable deadlines for agency responses to citizen inquiries. As such, any decision by this Court that relaxes or weakens the PIA's deadlines would run contrary to the PIA's well-deserved status as the national model for a strong open government law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded on this 8th day of October, 2008, to the following counsel of record by regular U.S. mail.

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