

No. 24-0162

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**In the Supreme Court of Texas**

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KEN PAXTON, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY  
GENERAL; AND GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS  
TEXAS GOVERNOR,

*Petitioners,*

v.

AMERICAN OVERSIGHT,

*Respondent.*

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On Petition for Review  
from the Third Court of Appeals, Austin

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**PETITIONERS' REPLY BRIEF ON THE MERITS**

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## INTRODUCTION

Respondent’s brief demonstrates why this case requires review. Respondent freely admits (at 40-41) that the information at issue “is being withheld pursuant to a process laid out by the” Legislature in the Public Information Act (“PIA”). Under that process, the next step should have been for Respondent to file a complaint with the Travis County district attorney, Tex. Gov’t Code § 552.3215(e), who would have had 30 days to determine if the Act had been violated and whether enforcement would be appropriate, *id.* § 552.3215(g). Without even acknowledging this procedure, Respondent asks this Court instead to deploy “one of ‘the most potent weapons in the judicial arsenal,’” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 107 (1967)): a writ of mandamus, against two of the State’s six executive officers. Respondent’s continued speculation that the Governor and Attorney General *must* have had more documents responsive to their requests fails to “demonstrate that this case falls into th[e] category” of “really extraordinary causes” that merit the issuance of a “preemptory common-law writ.” *Will*, 389 U.S. at 107 (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)).

Respondent has little explanation for why the plain text of section 552.321(b) creates anything other than a venue provision—and for good reason. It provides only the “[a] suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located”—not *whether* such a suit may be filed in the first instance. Tex. Gov’t Code § 552.321(b). To square that circle, Respondent points not to text but to its preferred interpretation of how the Legislature responded to this Court’s decision in *A & T Consultants*,

*Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). That is not how this Court interprets statutes, and it should not start now simply because Respondent would prefer to bring an enforcement action itself rather than go through the District Attorney as required by the Legislature.

Even if the Court were to disagree, however, Respondent’s argument repeatedly conflates “refusal” to comply with the PIA and “withholding” documents pursuant to the PIA. *See, e.g.*, Resp.Br.35-41. The text of the PIA itself reflects that the Legislature knows the difference—and has, in fact, differentiated—between those two concepts. *Compare, e.g.*, Tex. Gov’t Code § 552.324(a), *with, e.g., id.* § 552.353(a). In this instance, Respondent has not stated a facially valid claim that Petitioners “refused” to supply Respondent with public information to which it is entitled. As such refusal is required to waive a government body’s sovereign immunity and subject it to a petition for a writ of mandamus, Respondent’s claims should have been dismissed. *See id.*

The Third Court’s contrary holding calls out for this Court’s attention. As Respondent has itself noted, the Attorney General and Governor receive thousands of requests for information pursuant to the PIA each year. *Open Records Reports, Fiscal Year 2023, Office of the Attorney General*, TEXAS OFFICE OF THE ATTORNEY GENERAL, <https://tinyurl.com/oag-pia-2023> (last accessed Nov. 12, 2024); *Open Records Reports, Fiscal Year 2023, All Agencies*, TEXAS OFFICE OF THE ATTORNEY GENERAL, <https://tinyurl.com/all-pia-2023> (last accessed Nov. 12, 2024). Whether a single trial court can issue a writ of mandamus anytime a requestor can point to some reason to think they *should* have received more documents is, by itself, an important

question. Respondent’s response, however, underscores how the Third Court’s ruling treats the conclusions of the Open Records Division (“ORD”) as mere “recommendation[s] regarding the application of specific PIA exceptions.” Resp.Br.41. Such a ruling has implications for *all* PIA requests, highlighting the need for this Court’s intervention.

## A R G U M E N T

### I. The Trial Court Has No Mandamus Jurisdiction Over Petitioners.

“The jurisdiction of all Texas courts, including this Court, derives from the Texas Constitution and state statutes.” *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 459-60 (Tex. 2011) (orig. proceeding). Article V, section 8 of the Constitution gives district courts “exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, *except* in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.” Tex. Const. art. V, § 8 (emphasis added). Respondent admits (at 14) that “[b]efore 1999, the Texas Code exempted executive officers from mandamus jurisdiction in the district courts and instead, with the exception of the governor, vested that jurisdiction with this Court.” Because nothing the Legislature did in 1999 changed that jurisdictional scheme, that concession is fatal.

#### A. Only this Court has mandamus jurisdiction over the Attorney General, and no court has mandamus authority over the Governor.

As this Court has recently reiterated, subject to a few well-defined limits, our Constitution gives the Legislature significant discretion “to shape the judiciary in response to the State’s changing needs.” *In re Dallas County*, 697 S.W.3d 142, 155

(Tex. 2024) (orig. proceeding). Due to those limits, the Legislature *cannot* convey even to this Court the power to issue a writ of mandamus against the Governor. *See* Tex. Const. art. V, § 8. And it *has* not conveyed upon any court the power to issue a writ of mandamus to the Attorney General to vindicate putative violations of the PIA.

Respondent does not dispute that under this Court’s decision in *Sharp*, its claims are jurisdictionally barred. 904 S.W.2d at 672. *Sharp* explained that for “executive officer[s] named by the constitution,” which includes the Governor and Attorney General, “the legislature conferred exclusive original jurisdiction on this Court over mandamus proceedings . . . in section 22.002(c)[.]” *Id.* “Thus, district courts generally have no jurisdiction over executive officer respondents.” *Id.*

Nothing in the actual text of the statutory scheme has changed to expand the trial court’s jurisdiction since *Sharp*. By statute, the Legislature has still provided that “[o]nly the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state[.]” Tex. Gov’t Code § 22.002(c) (emphasis added). The Governor and Attorney General are still among the six “Officers constituting the Executive Department” of the State. Tex. Const. art. IV, § 1. Thus, by statute, any jurisdiction that district courts might generally have to grant writs of mandamus has been displaced by this Court’s exclusive jurisdiction to mandamus constitutional executive officers.

As to the Governor, Respondent’s suit is subject to an even more specific prohibition: Under section 22.002(a), this Court may issue “all writs of quo warranto

and mandamus . . . against . . . any officer of state government *except the [G]overnor[.]*” Tex. Gov’t Code § 22.002(a) (emphasis added); *see Sharp*, 904 S.W.2d at 672 (“[T]he legislature conferred exclusive original jurisdiction on this Court over mandamus proceedings against executive officers, except for the governor[.]”). This exception for the Governor in section 22.002(a) is mandated by the Constitution, which excludes from even this Court’s “exercise [of] the judicial power of the state” “writs of quo warranto and mandamus . . . against the Governor of the State.” Tex. Const. art. V, § 3(a). Thus, section 22.002(c) mandates that any writ of mandamus against the Governor be issued by this Court, and section 22.002(a) prohibits this Court from issuing a writ of mandamus against the Governor. The only conclusion, then, is that *no* Court has jurisdiction to issue a writ of mandamus against the Governor.

Contrary to Respondent’s repeated suggestion (*e.g.*, at 20) accepting this straightforward reading of the text would not “carve an exception for offices of the Governor and Attorney General.” Leaving aside that Petitioners never raised this argument regarding their *offices* at all, Petitioners have acknowledged (Pet.Br.23) that they are always subject to the requirements of the law—simply “because it is the law.” *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding). Moreover, Texas law applies a strong presumption that they act in good faith to fulfill that duty. *Abbott v. Anti-Defamation League Austin, Sm., & Texoma Regions*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam). But not every legal violation requires the specific legal remedy sought by a plaintiff—especially “if a judicial remedy that seeks to vindicate” that violation “might itself compel violating

some other statutory command.” *Stetson*, 658 S.W.3d at 296. The Legislature simply did not provide the “express statutory authorization” required by *Sharp* to “nam[e] district courts as the proper fora.” 904 S.W.2d at 672.

Moreover, this argument ignores that the PIA reflects a carefully drawn balance between “[t]he interests of one person requesting information” and “the interests of all the members of the public who rely on the functions of the governmental body in question.” *City of Dallas v. Abbott*, 304 S.W.3d 380, 381-87 (Tex. 2010). Part of that balance is that the PIA creates different enforcement mechanisms for different people, which are subject to different standards of proof in different courts. *See* Tex. Gov’t Code §§ 552.3215(b), 3215(e), 324(a), 325. It is well understood that the remedy Respondent seeks—a writ of mandamus—can place the issuing court in an “extremely awkward position.” *Will*, 389 U.S. at 107; *accord Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (reaffirming that an “extraordinary remedy” is “available only in limited circumstances”). There would be nothing particularly novel—let alone “absurd,” Resp.Br.21—if the Legislature declined to allow private parties to force a court into that position where there are other ways to enforce the law.

**B. Nothing in section 552.321(b) expands this Court’s jurisdiction to issue writs of mandamus.**

The Legislature did not do away with these constitutional and statutory limitations on jurisdiction when it enacted section 552.321(b) in 1999. To start, section 552.321(b) makes no jurisdictional grants, but is concerned with venue. Moreover, section 552.321(b) is a general provision which applies to *all* governmental bodies

subject to the PIA. It is controlled by section 22.002(c), which more specifically applies to constitutional executive officers.

1. The plain text of section 552.321(b) demonstrates that it is a venue provision—not a jurisdictional one—and does not upend the constitutional and statutory prohibitions on mandamus actions against Petitioners. *See Dallas Area Rapid Transit v. Johnson*, No. 05-00-00657-CV, 2001 WL 88195, at \*4 (Tex. App.—Dallas Jan. 26, 2001, no pet.). As this Court held in *Wichita County v. Hart*, “the language of some laws unambiguously indicates that the Legislature intended them to be jurisdictional in nature.” 917 S.W.2d 779, 783 (Tex. 1996). Finding express, manifest intent to bestow district courts with jurisdiction to grant writs of mandamus is particularly important here. Because “district courts generally have no jurisdiction over executive officer respondents,” an action against those respondents “would require express statutory authorization by the legislature naming district courts as the proper fora.” *Sharp*, 904 S.W.2d at 672 (citing Tex. Gov’t Code § 552.353(b)(3)).

Section 552.321 comes nowhere close to the clear statement this Court has required to extend mandamus jurisdiction to these defendants. In *Hart*, the act at issue contained a venue provision in which this Court saw “no indication that the Legislature intended [the provision] to be jurisdictional.” 917 S.W.2d at 782-83. “[T]he plain language of the . . . provision d[id] not mention jurisdiction,” and the act’s structure and “legislative history reveal[ed] no hint that jurisdiction was intended to be a part of the [act].” *Id.* at 783.

As in *Hart*, section 552.321 does not mention jurisdiction, and while the language is mandatory, requiring suit in specific locations is for the convenience of the

parties—like any venue provision. *Id.* Moreover, rather than explicitly allowing actions against executive officers, the PIA permits a “suit for a writ of mandamus compelling *a governmental body*[.]” Tex. Gov’t Code § 552.321(a) (emphasis added). Under the PIA, a “governmental body” excludes officers. *Id.* § 552.003(1). The definition does encompass an “office that is within or is created by the executive or legislative branch of state government,” *id.* § 522.003(1)(A)(i), but Respondent sued the Governor and Attorney General—not their offices, CR.713. The two cannot be conflated. *Cf. Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 76 (Tex. 2015).

Respondent’s primary response is to repeatedly invoke (*e.g.*, at 16) this Court’s suggestion in *Sharp* that the Legislature clarify or alter the section 22.002 jurisdictional limitations. True, statutory history, unlike the comments of individual legislators, can provide useful context to inform the words the Legislature chose. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 376-77, 392-93 (2012); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring). But it must still be approached with caution. Speculation about the context in which section 552.321(b) was enacted is insufficient to justify rewriting its text—let alone the text of the Constitution. *Ditech Servicing, LLC v. Perez*, 669 S.W.3d 188, 193 n.41 (Tex. 2023) (“We must rely on the words of the statute, rather than rewrite those words to achieve an unstated purpose.”). Because no express intent to alter it exists, the scheme of jurisdiction under section 22.002(a), (c), and article V, section 3(a) of the Constitution, which “the Legislature clearly intended,” still controls. *Sharp*, 904 S.W.2d at 682 (Hecht, J., dissenting).

It would be particularly dangerous for this Court to interpolate an intent to create mandamus jurisdiction in the trial court given what the Court actually said in *Sharp* and what the Legislature actually did in response. Specifically, *Sharp* provided examples of what express authorization to bring an action against an executive officer might look like. *Id.* at 672, 681. In particular, this Court cited Government Code section 552.353(b)(3), which describes “a petition for a declaratory judgment *against the [A]ttorney [G]eneral* in a Travis County district court.” Tex. Gov’t Code § 552.353(b)(3) (emphasis added); *see Sharp*, 904 S.W.2d at 672. Similarly, section 552.324 (cited in the preceding provision) limits the suits a governmental body can bring to one “filed in a Travis County district court *against the [A]ttorney [G]eneral* in accordance with section 552.325.” Tex. Gov’t Code § 552.324(a)(1) (emphasis added). In each, the Legislature explicitly indicated that the suit could be brought against an executive officer.

Section 552.321 does not explicitly address mandamus actions against executive officers such as the Attorney General or the Governor. Rather, it provides that the generally proper forum for any mandamus actions under the PIA, which are not otherwise prohibited by law, is a district court. *See id.* § 552.321(b). True, that may have the *effect* of limiting the availability of mandamus relief against these six individuals as the designated venue lacks jurisdiction to issue such relief. *Supra* pp. 3-6. But as Respondent’s own authority establishes, the Legislature was presumed to have been aware of that legal background when it created that new venue provision. *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (orig. proceeding). Because this Court will not presume an implied repeal, that choice must be read to give full effect to both statutes

where possible. *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) (orig. proceeding).

Contrary to Respondent’s repeated suggestion (*e.g.*, at 16-22), this reading is entirely consistent with the notion that section 552.321(b) was passed in response to *Sharp*. After all, *Sharp* did not ask the Legislature to expand mandamus relief available in trial court—only to clarify that mandamus relief was unavailable in the first instance against these individuals in this Court. 904 S.W.2d at 681. That could be accomplished by giving some *other* court mandamus jurisdiction or simply by removing it from this Court. *Cf. Young Conservatives of Tex. Found. v. Smatresk*, 78 F.4th 159, 162 (5th Cir. 2023) (Ho, J., dissenting) (“When faced with an unlawfully discriminatory statute . . . a court has two options. It can level up . . . [o]r it can level down[.]”); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 416-17 (5th Cir. 2020). Respondent’s entire argument assumes the former; the plain text reflects the latter. That conclusion is only further buttressed by the fact that the very same act that amended the PIA to add section 552.321(b) also empowered district attorneys to seek declaratory judgment actions to enforce the PIA’s substantive requirements. Act of May 25, 1999, 76th Leg., R.S., ch. 1319 (S.B. 1851), § 28, 1999 Tex. Gen. Laws 4500, 4511-12. This carefully reticulated provision creates a host of new procedures to ensure that such actions are not subject to the limitations of the courts’ mandamus jurisdiction (whether statutory or constitutional). *See id.* There would have been no need to go through that effort had the Legislature intended section 552.321(b) to allow a private party to seek mandamus relief anytime he thinks a governmental body might have conducted an insufficient search for documents.

2. Moreover, even if section 552.321(b) were a jurisdictional grant, rather than the mere venue provision that it is, Respondent would still be unable to seek a writ of mandamus in a district court against Petitioners because section 22.002(a), (c), and article V, section 3(a) of the Constitution trump section 552.321(b). The general/specific canon applies when a “general authorization and a more limited, specific authorization exist side-by-side.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). In such a scenario, “[t]he terms of the specific authorization must be complied with.” *Id.* That is because “the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.” Scalia & Garner, *supra*, at 183. While section 552.321(b) could provide an exception to section 22.002(c) by being the later-enacted statute, Tex. Gov’t Code § 311.026(b), that exception should be “express,” not implied. *Sharp*, 904 S.W.2d at 672.

Section 552.321(b) applies generally to governmental bodies, but section 22.002(c) applies exclusively to the six executive officers mentioned in the Constitution. *See* Tex. Const. art. IV, § 1; *Sharp*, 904 S.W.2d at 672. Section 22.002(c) is thus the more specific provision, and “the specific provision will ordinarily prevail unless the general provision is the later enactment *and* the manifest intent is that the general provision prevail.” *EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 554 S.W.3d 572, 583 (Tex. 2018) (emphasis added). Although section 552.321(b) is the later enactment, it contains no manifest intent that it prevails over section 22.002, as discussed above. Therefore, this Court “must presume that the Legislature’s omission” of any reference to executive officers in section 552.321 “is

intentional and purposeful.” *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 699 (Tex. 2020).

Respondent is wrong (at 22-24) to argue that section 552.321(b) is more specific than section 22.002(c) merely because it applies particularly in the PIA context. In applying this canon, it is vital to determine which is the relevant metric for comparison; statutes can be narrower or broader depending on the angle from which you are looking. *See, e.g., Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996). In this instance, the larger statutory context indicates that officers, rather than legal actions, should be deemed the relevant metric for distinguishing the general from the specific provision. After all, section 22.002(c) has remained unchanged since 1985, *see* Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 1, sec. 22.002, 1985 Tex. Gen. Laws 1720, 1723, and the constitutional principles within which it operates since much earlier, *see* Tex. Const. art. V, § 3(a). As this Court recognized in *Sharp*, “district courts generally have no jurisdiction over executive officer respondents. Any exception to this rule would require express statutory authorization by the legislature[.]” *Sharp*, 904 S.W.2d at 672. Section 552.321(b) provides no such authorization: It directs where mandamus petitions elsewhere authorized are to be filed. *Supra* p. 9.

This conclusion is further supported by “[s]eparation-of-powers concerns [which] caution . . . against reading legislation, absent clear statement,” to alter the balance between coordinate branches of government. *Kucana v. Holder*, 558 U.S. 233, 237 (2010). Due to their unique constitutional roles, the Legislature will typically specify when it intends executive officers to be covered by a statute. *See, e.g.,*

Tex. Gov't Code §§ 411.0251(5), 572.002(12), 659.003(a)(1). Courts presume the choice not to do so in a particular statute to have been “for a purpose.” *City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 185 (Tex. 2022) (quoting *City of Richardson v. On-cor Elec. Delivery Co.*, 539 S.W.3d 252, 260 (Tex. 2018)). They do not extend generally applicable statutes to cover the gaps. For example, the Sixth Court of Appeals held that section 273.061, which was specific to the election context, was limited by section 22.002 because it was specific to executive officers. *See Hargett v. McDaniel*, 717 S.W.2d 688, 689-90 (Tex. App.—Texarkana 1986, no writ). Therefore, section 22.002(c) is the more specific authorization in this case and its terms must be complied with over those of section 552.321(b).

3. Nor does this plain-text reading of section 552.321(b) render it superfluous, given that the Texas Civil Practice and Remedies Code generally provides that venue will lie “in the county of the defendant’s principal office in this state, if the defendant is not a natural person.” Tex. Civ. Prac. & Rem. Code § 15.002(a)(3). *Contra* Resp.Br.21.<sup>1</sup> Under generally applicable rules of statutory interpretation, the use of the term “person” in such a statute will not include the sovereign unless the Legislature so provides. *See Chambers–Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345-47 (Tex. 2019). Until 1999, the Legislature had made no such specific provision, leaving venue ambiguous—and creating the problem seen in *Sharp* about whether such a petition could be filed directly in this Court. That the venue the

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<sup>1</sup> Even if it did, this Court has emphasized that the rule against superfluity is a guide to understanding the text the Legislature chose—not a hard and fast rule. *See Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 581 (Tex. 2022).

Legislature chose has the collateral consequence of limiting the availability of the relief as to certain specific officers no more renders the provision superfluous than it transforms it from a venue provision to a jurisdictional grant.

## **II. Petitioners’ Sovereign Immunity Has Not Been Waived.**

Even if the trial court did have subject-matter jurisdiction to issue a writ of mandamus against the Attorney General or Governor, sovereign immunity would prevent it from exercising that jurisdiction here. The PIA waives sovereign immunity for a mandamus action only “if the governmental body . . . *refuses* to supply public information[.]” Tex. Gov’t Code § 552.321(a) (emphasis added). Further, “[t]o invoke a waiver of immunity,” requestors “must allege *facts* to support their claim.” *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 394 (Tex. 2022) (emphasis added). In this case, Respondent has failed to bring its claim within the PIA’s waiver of sovereign immunity because Petitioners have not “refused” to comply with the process to withhold documents set forth in the PIA. Respondent’s arguments to the contrary amount to nothing more than speculation and conjecture.

### **A. Petitioners have not refused to comply with the PIA.**

As noted above (at 9-10), the PIA has a number of different remedies, each of which is subject to a number of conditions. The Legislature is entitled to place such conditions on its waiver of immunity, and such conditions are themselves jurisdictional requirements. *See El Paso Educ. Initiative, Inc. v. Amex Props., LLC*, 602 S.W.3d 521, 534 (Tex. 2020) (holding that Local Government Code chapter 271 “conditions a waiver of immunity on a ‘properly executed’ contract, placing

contract authorization as a jurisdictional consideration”); *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 784 (Tex. 2018) (holding that “when the Legislature conditions an immunity waiver on the existence of a statutory violation, the elements of the violation are jurisdictional facts”). The PIA waives sovereign immunity for a mandamus action only “if the governmental body refuses to request an attorney general’s decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.” Tex. Gov’t Code § 552.321(a) (footnotes omitted). But Respondent’s allegations, taken as true, do not show that the Governor or Attorney General refused to take any of those actions.

1. The PIA does not define “refuses,” but rules of “statutory construction . . . require[] [courts] to apply the common meanings of a word used in a statute” unless it is clear the Legislature meant to apply a different meaning. *Harris Cnty. Appraisal Dist. v. TWC*, 519 S.W.3d 113, 121 (Tex. 2017); see Tex. Gov’t Code § 311.011(a). The ordinary meaning of “refuse” is to “indicate unwillingness to do, accept, give, or allow,” not just to “fail,” “leave undone,” or “omit to perform.” *City of El Paso v. Abbott*, 444 S.W.3d 315, 324 (Tex. App.—Austin 2014, pet. denied).

Respondents are entitled “to complete information about the affairs of government and the official acts of public officials and employees.” Tex. Gov’t Code § 552.001(a). However, “complete information,” for the purposes of the PIA, does not include unfettered access to government documents. To best advance public interests, Texas law “shield[s] some information from public disclosure.” *Paxton v. City of Dallas*, 509 S.W.3d 247, 249-50 (Tex. 2017). Further, to “promote broader

public interests,” paramount privileges like the one between an attorney and client must shield information from public dissemination. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Seeking a decision from ORD regarding whether certain documents are subject to disclosure under the PIA, and abiding by that decision, is not a *refusal* to supply public information. ORD is the entity that is charged with administering the PIA. Tex. Gov’t Code §§ 552.011, 552.301; *Univ. of Tex. v. Gatehouse Media Tex. Holdings, II, Inc.*, 656 S.W.3d 791, 811 (Tex. App.—El Paso 2022, pet. granted) (Alley, J., dissenting); *City of Georgetown v. Putnam*, 646 S.W.3d 61, 69 (Tex. App.—El Paso 2022, pet. denied). The Legislature delegated that authority specifically to allow for unified application across the swath of documents subject to the PIA and across the diverse regions of our State. *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 69 (Tex. 2015) (Boyd, J., dissenting) (“It is difficult to overstate the Attorney General’s role in this process. The Act assigns to the Attorney General the duty to ‘maintain uniformity in the application, operation, and interpretation’ of the Act and authorizes the Attorney General to ‘publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on this chapter.’” (quoting Tex. Gov’t Code § 552.011)).

As a result, ORD’s conclusions are not mere “recommendations” as Respondent suggests (at 41); they are legal opinions that are due significant respect—if not, strictly speaking, deference. *See e.g., Hous. Chron. Pub. Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.) (“We consider that great weight should be given” ORD’s decisions because “the legislature

has specifically delegated to the Attorney General the duty of interpreting the [PIA] and aiding in its enforcement.”); *Houston P'ship*, 468 S.W.3d at 85 (Boyd, J., dissenting) (according “deference to the Attorneys General’s interpretations of the [PIA], which are . . . persuasive but not controlling.”); *Kneeland v. NCAA*, 850 F.2d 224, 228 (5th Cir. 1988) (“The usual deference paid to formal opinions of state attorneys general is accentuated [where] the Texas Legislature has formally invited its Attorney General to interpret [an act] when asked to do so.”); see also *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 629-30 (Tex. 2013) (“In our ‘serious consideration’ inquiry, we will generally uphold an agency’s interpretation of a statute it is charged by the Legislature with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute.”). When a governmental entity seeks such an opinion, the burden for showing a violation of the act necessarily shifts—not because, as Respondent suggests (at 39), such a ruling creates an advice-of-counsel defense, but by operation of ordinary rules of administrative law. See *State v. Pub. Util. Comm’n*, 883 S.W.2d 190, 204 (Tex. 1994).

Moreover, the PIA’s text does not require governmental bodies to waive such core privileges as the attorney-client privilege simply because documents would otherwise be considered public information were they not privileged. *Paxton v. City of Dallas*, 509 S.W.3d at 256; see also *Univ. of Tex. Sys. v. Franklin Ctr. for Gov’t & Pub. Integrity*, 675 S.W.3d 273, 279 (Tex. 2023). Were it otherwise, for example, OAG would be drastically handicapped in its representation of the State because “public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly

and significantly serves the public interest.” *Franklin Ctr.*, 675 S.W.3d at 279 (quoting *Paxton v. City of Dallas*, 509 S.W.3d at 260). “Without the privilege, clients may withhold information, limiting the effectiveness of legal representation. With candid communication, attorneys can provide optimal legal representation, and clients can obtain the advice they need.” *Id.* at 280.

2. The record here amply demonstrates that, rather than “indicat[ing] unwillingness” to abide by the PIA, *City of El Paso v. Abbott*, 444 S.W.3d at 324, Petitioners made diligent, good faith efforts to comply and provide Respondent with all public information to which it was entitled. Those efforts were described in sworn affidavits by Petitioners’ public-information coordinators, demonstrating that the governmental bodies did just what the PIA required them to do. *Id.* at 324-25.

“[O]ther than requiring that the governmental body ‘promptly produce public information . . .,’ the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available the public information requested.” *Id.* (quoting Tex. Gov’t Code § 552.221(a)). Where a governmental body “establishe[s] that it was willing to supply the requested information and, to the extent that it located it or received it from the individuals named in the request, it actually had done so. . . . the trial court lack[s] subject-matter jurisdiction.” *Id.* at 325. Petitioners cannot “refuse” to provide information which does not exist. Therefore, by providing all responsive information, not found to be excepted from disclosure by ORD, that Petitioners located or received, Petitioners willingly complied with the PIA.

The Governor's public-information coordinator submitted an affidavit explaining how he: (1) "conducted and oversaw a diligent and good faith search for the information," CR.368; (2) sent "the request[s] to all public information liaisons in every division within the agency that may maintain responsive records," *id.*; (3) "circulated the request[s] [to] all employees, who in turn responded with potentially responsive documents," *id.*; (4) sought letter rulings from ORD as appropriate, *id.*; (5) abided by those letter rulings, CR.369; and (6) released responsive records to Respondent, *id.* In conclusion, the public-information coordinator averred that he had neither "refused to produce [responsive] public information to which [Respondent] was entitled" nor "expressed an unwillingness to do so." CR.371.

Similarly, the Attorney General's public-information coordinator stated that she (1) sent the request to the relevant officials, "as well as their executive assistants and staff members," CR.511; (2) provided to Respondent documents "deemed to be responsive and subject to disclosure," CR.512; and (3) requested letter rulings as appropriate, *id.* She also averred that she had never refused to produce responsive information to which Respondent was entitled. CR.513.

Respondent attacks (at 46) these affidavits as insufficiently specific. But it is blackletter law that a party need not disclose the contents of a document to claim an exemption to the PIA. Instead, the governmental body need only "ask the Attorney General to decide whether the information fits within one of the Act's exceptions." *Houston P'ship*, 468 S.W.3d at 69 (Boyd, J., dissenting). It is only when a governmental body fails to timely request a decision from ORD, or ORD determines the information is not excepted from disclosure, that "the requested information is presumed

to be subject to required public disclosure[.]” *Id.* at 70 (internal quotation mark omitted); see *Paxton v. City of Dallas*, 509 S.W.3d at 253 (“[The] burden to rebut the public-disclosure presumption . . . was triggered when the City failed to timely seek an attorney general decision.”).

Applying this rule properly is particularly significant here where many of the objections sound in privilege. CR.755-57, 791-98, 900, 911, 922. As this Court has recognized, privilege logs and the evidence used to back them must be non-specific: Describing the documents in detail would *itself* waive the privilege such documents are designed to protect. *In re Silva*, 692 S.W.3d 324, 325 (Tex. 2024) (orig. proceeding) (Blacklock, J., concurring). Moreover, although Respondent expresses disbelief (at 44) that certain documents may no longer exist due to publicly available retention policies, it nowhere explains what more Petitioners *could*, let alone *should*, have provided to substantiate that they located no such documents.

Given this evidentiary showing, it cannot be said that Petitioners’ actions amount to a “refusal” to provide public information and abide by the PIA. Rather, Petitioners engaged in good-faith efforts to review all potentially responsive information and determine whether Respondent was entitled to it, or whether it was covered by some exception, such as a privilege. They did not make that determination alone, but sought and abided by ORD decisions. Consequently, the PIA has not waived Petitioners’ sovereign immunity in this case.

**B. Respondent has not carried its burden to allege facts sufficient to bring its claims within the PIA’s waiver of sovereign immunity.**

Even if the trial court had jurisdiction over Petitioners *and* Petitioners had refused to provide Respondent public information to which it was entitled, the trial court still could not issue a writ of mandamus based on Respondent’s mere speculation about what documents Petitioners *should* have in the face of affidavits about what documents Petitioners *do* have. Conclusory assertions that Petitioners must have refused to follow the PIA are insufficient when a court’s jurisdiction—and executive officers’ immunity—are at stake. *See State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009). This Court has repeatedly held that “[t]o invoke a waiver of immunity,” plaintiffs “must allege *facts* to support their claim.” *Dohlen*, 643 S.W.3d at 394 (emphasis added). “[I]f . . . plaintiffs were allowed to stand on talismanic allegations alone, the constraining power of pleas to the jurisdiction would practically be eliminated.” *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 638 (Tex. 2012).

In the context of the PIA, that key principle means that assumptions about the existence of responsive, unproduced emails are “legally insufficient evidence” to bring a claim within the PIA’s waiver of sovereign immunity. *City of Dallas v. Dall. Morning News, LP*, 281 S.W.3d 708, 716 (Tex. App.—Dallas 2009, no pet.). If a requestor could defeat a plea to the jurisdiction by simply accusing a governmental body of mistake or misconduct without evidence, every requestor would be able to show jurisdiction in every case. Additionally, such an approach would nullify the “presum[ption] that public officials act in good faith and without” improper motive in performing their public functions. *Anti-Defamation League*, 610 S.W.3d at 923.

Respondent insists (at 26, 37) that cases like *Patel*, 469 S.W.3d 69, and *Matzen v. McLane*, 659 S.W.3d 381 (Tex. 2021), are unhelpful in assessing the burden applicable here because they involve separate waivers of sovereign immunity. But the rule that a plaintiff seeking to invoke a waiver of sovereign immunity must affirmatively demonstrate that his claim falls within the scope of that waiver derives from the principle that only the Legislature can waive sovereign immunity, and thus only the Legislature can determine the terms under which that waiver applies. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002). As a result, the bedrock principle that a plaintiff must affirmatively demonstrate that it has met those conditions applies across fields of law in this State. *E.g.*, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019); *El Paso Educ. Initiative*, 602 S.W.3d at 534; *Alamo Heights ISD*, 544 S.W.3d at 784.

The burden is thus on requestors not only to overcome the presumption of good faith, but also to bring their claims within the PIA's waiver of sovereign immunity—not on government officials to disprove them. *See Matzen*, 659 S.W.3d at 394. Respondent is not entitled to an inference that Petitioners' disclosure is incomplete simply because it claims Petitioners' assertions to the contrary “def[y] belief,” are “highly implausible,” and are “not credible.” CR.725-26; *see also, e.g.*, RR.20-21 (arguing that “there is good reason to believe that there wasn't a complete search for or compilation of these records”); RR.21 (“We also don't believe that everything during that time period would have been attorney-client [privileged].”).

Aside from these speculations, Respondent has offered no facts that if proven would show the Petitioners have refused to provide information to which

Respondent is entitled. Instead, it merely impugns the affidavits describing the processes used to search for responsive records. *E.g.*, RR.24; Resp.Br.41. Such a position is, however, without limit and cannot be squared with the principle that this Court “presume[s] that public officials act in good faith.” *Anti-Defamation League*, 610 S.W.3d at 923.

### **III. This Case Merits the Court’s Review.**

Resolution of this dispute has the potential to affect thousands of PIA requests per year—and, if applied consistently—every PIA request in the State. This dispute may affect thousands of requests every year solely for the OAG. *City of Dallas v. Abbott*, 304 S.W.3d at 384; *Open Records Reports, Fiscal Year 2023, Office of the Attorney General*, TEXAS OFFICE OF THE ATTORNEY GENERAL, <https://tinyurl.com/oag-pia-2023> (last accessed Nov. 12, 2024). In 2023, Texas governmental bodies received a combined total of more than 1.2 million requests for public information. *Open Records Reports, Fiscal Year 2023, All Agencies*, TEXAS OFFICE OF THE ATTORNEY GENERAL, <https://tinyurl.com/all-pia-2023> (last accessed Nov. 12, 2024). The PIA has over 70 enumerated exceptions—some waivable, some not. *see* Tex. Gov’t Code §§ 552.101-.163. Improperly providing requestors with certain confidential information, or certain failures or refusals to provide public information, can result in criminal penalties. *Id.* §§ 552.352-.353. As a result, identifying who has the burden to prove what when it comes to establishing those exceptions will have a very real effect on hundreds of thousands of public servants across the State.

The process the trial court has adopted is unworkable. After all, it denied Petitioners’ pleas to the jurisdiction because some public records “may have [been]

identified . . . as ‘non-responsive’ and therefore excluded” from review. Resp.Br.7. The only way to be certain that absolutely no public records are misidentified is to personally review all documents that may fall into the scope of the request. Such a reality is untenable. For example, the Fifteenth Court recently heard argument in a case where a representative *sample* of documents determined to be *responsive* amounted to multiple terabytes of data. Oral Argument, *Tex. Dep’t of Pub. Safety v. Texas Tribune*, No. 15-24-00010-CV (Tex. App. [15th Dist.] Oct. 30, 2024). Yet Respondent’s view is that any person making a request can force a trial court to review not just those documents but every document that *could* have been responsive, as well as the protocols by which they were collected and identified. Resp.Br.51. The Legislature has not provided enough judges to undertake such a herculean endeavor—probably because it never contemplated it should be undertaken.

A plea to the jurisdiction is meant to prevent such overwhelming and frivolous litigation. However, the trial court has rendered it a useless tool in the PIA context, because it held that a dissatisfied requestor’s hunch that a governmental body must have more information is sufficient to waive sovereign immunity. Consequently, these issues clearly merit this Court’s review.

## PRAYER

The Court should grant the petition for review, reverse the court of appeals' judgment, and dismiss the case for lack of jurisdiction.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

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