**THE SENATE OF THE STATE OF TEXAS**
**SITTING AS A HIGH COURT OF IMPEACHMENT**



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| **IN THE MATTER OF** | § |
| **WARREN KENNETH** | § |
| **PAXTON, JR.** | § |

**HOUSE MANAGERS' CONSOLIDATED RESPONSE TO**
**PAXTON'S MOTIONS TO DISMISS ARTICLES III & IV**
**(Abuse of Open Records Process, Misuse of Official Information)**

**To the Honorable Dan Patrick, President of the Court of Impeachment:**

The Texas House of Representatives Board of Managers ("House Managers") file this consolidated response to the Motions to Dismiss Articles III and IV ("the Motion") filed by Warren Kenneth Paxton Jr. ("Paxton").

## INTRODUCTION

The Texas Attorney General is the Chief Law Enforcement Officer for the State of Texas. The Office of Attorney General ("OAG") handles and assists in the investigation and prosecution of some of the most egregious crimes — crimes that affect, at least indirectly, all Texans.[1] Warren Kenneth Paxton, Jr. ("Paxton") either did not understand his position and the work his office does (unlikely), or he simply did not care that by thwarting the work of other law enforcement agencies to assist Nate Paul, he was undermining *all* law enforcement efforts to protect Texans, including those of his own agency. Corrupt law enforcement officers hurt Texans and must be stopped. This is true whether the officer is on the beat or heads the State's top law enforcement agency.

The facts supporting Articles III and IV show Paxton is a corrupt law enforcement officer unfit to administer the law and undeserving of Texans' trust. Paxton's Motions to dismiss Articles III and Article IV (collectively, "the Motions") should be denied so that the Senate can decide for itself whether the State's top cop used his authority over open-records requests to further the criminal activity of a donor at the expense of undermining law enforcement agencies at both the state and federal level.

[1] According to the OAG website, the Agency "conducts criminal investigations and apprehensions including cases involving cyber-crimes such as child pornography, online solicitation of minors, identity theft, election fraud, locating and apprehending convicted sex offenders who have failed to comply with mandated sex offender registration requirements, and conducting digital forensics investigations. The OAG also operates the Medicaid Fraud Control Unit which investigates criminal fraud by Medicaid providers, abuse and neglect of patients in health care facilities operated by the Medicaid program, and helps local and federal authorities with prosecutions."

## FACTUAL BACKGROUND

Articles III and IV relate to Paxton's allowing his relationship with Nate Paul to drive important decisions interpreting and enforcing Texas's Public Information Act ("PIA"). This startling corruption started in December 2019 and continued through the Summer of 2020, ultimately culminating in the actions supporting Article V (Disregard of Official Duty-Engagement of Cammack).

To start at the beginning, then-Deputy First Assistant AG Ryan Bangert was surprised when, in December of 2019, Paxton asked him about a disputed open-records request. The requestor was Nate Paul. The Texas State Securities Board ("SSB"), in cooperation with the Federal Bureau of Investigation ("FBI"), the Texas Department of Public Safety ("DPS"), and other federal and state law enforcement officials, had executed search warrants at Nate Paul's businesses and residence.[2] Nate Paul wanted access to the documents that supported the warrants' authorization.

By way of background, a search warrant is presented in two steps. First, a judicial officer must authorize the search. To secure that authorization, a law enforcement officer presents what is called a "probable cause affidavit" containing all the details justifying the need for the warrant. Of course, those details are highly confidential to protect informants and the integrity of the investigation. That is why probable cause affidavits are often filed under seal. And they are always exempt from open-records requests during ongoing investigations under what is colloquially called "the law enforcement exception."[3] Step two is execution of the warrant once it is secured. Upon

[2] Exhibits 21, 22, 24.

[3] TEX. GOV'T CODE § 552.108. *See also* PUBLIC INFORMATION HANDBOOK, Office of the Attorney General (2002) ("Handbook") at 91.

law enforcement's entry onto the premises, the owner is handed a one-page form. To maintain confidentiality, the form contains little factual information, stating only that the officer has permission to enter the property. Nate Paul wanted to get his hands on the probable cause affidavit.

Nate Paul's efforts to obtain the probable cause affidavit from the SSB were unsuccessful. Fortunately for the sake of law enforcement in general and the ongoing Nate Paul investigation specifically, the probable cause warrant was determined to be protected.[4] Despite his position as the "chief law enforcement officer in the State of Texas," in this instance Paxton was somehow bothered by the longstanding open-records law enforcement exception. Paxton thought it was unfair that Nate Paul could not have access to his own search warrant. Paxton commented that he, too, had experienced unfair treatment from law enforcement. He was not happy with the opinion that the probable cause affidavit was exempt from disclosure.[5]

Nate Paul made a second similar open-records request a few months later to DPS. Again, he sought records concerning the search warrants executed at his businesses and home.[6] DPS notified the FBI because the search warrants had been handled through a joint task force and some of the information requested included highly confidential FBI documentation. The FBI submitted a brief to the OAG invoking the longstanding law enforcement exception to disclosure ("the FBI Brief"). Nate Paul, as requestor, would have received a redacted version of this brief, but the OAG's version was unredacted. The redactions in the FBI Brief were extensive.[7]

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[4] Exhibit 88.

[5] *See* Exhibits 28, 29.

[6] *See* Exhibit 87.

[7] *See id*.

Paxton's interest in Nate Paul's file was abnormal, and not just because the opinion involved such a well-established and important law enforcement exemption.[8] Normally, when Paxton was provided a thoughtful open-records draft decision with supporting legal precedent, he did not push back. He might ask a question, but he had never taken such a direct interest in an open-records decision. For Nate Paul, though, he asked for a copy of the open-records handbook (published by the OAG and available on its website) and had a lengthy meeting with the open-records chief.[9]

Over the course of several meetings, Vassar informed Paxton that the law enforcement exception was black and white—the documents were not subject to disclosure.[10] To release them would violate the terms of the Public Information Act and years of legal precedent. Vassar reminded Paxton that the OAG also conducted criminal investigations, so any back-pedaling on the law enforcement exception would damage the OAG's own investigatory missions.[11]

Paxton told Vassar that Paxton had talked to Nate Paul,[12] and that Nate Paul said "he was being railroaded."[13] Paxton also said that "he did not want to use his office, the OAG, to help the feds or DPS."[14] Ultimately, Paxton ordered that his office make the highly unusual ruling of "no

[8] Exhibit 18 at 9:18—19:14.

[9] *Id.* at 10:17—11:8; 18:15-22.

[10] *Id.* at 13:1—14:12; 18:7-22; 19:2-4; 19:13—20:3; 21:8-17.

[11] *Id.* at 13:1-25.

[12] *Id.* at 10:10-14.

[13] *Id.* at 8:19—9:23.

[14] *Id.* at 13:1-12.

decision."[15] This basically left DPS with no advice from the OAG, leaving DPS between a rock and a hard place. If it produced the information, the investigation would be compromised. If it did not produce the information, it lost the safe harbor that an OAG opinion would afford.[16] A "no decision" has not been taken since the 1980s.[17]

In May of 2020, a determined Nate Paul made a third attempt at this information; he filed an open-records request directly to the OAG seeking the *unredacted* version of the FBI Brief. This information was subject to the same law-enforcement exception as involved in the prior two Nate-Paul-related inquiries. But Paxton told Vassar that "we are not helping them" (the FBI).[18]

Paxton then did something he had never done before. He asked Vassar to bring him the entire open-records request file, which contained the *unredacted* FBI Brief. Vassar had the file hand-delivered to Paxton, who maintained exclusive control and custody of that file for seven to ten days.[19]

Not long thereafter, Paxton asked an aide to hand-deliver a manila envelope to Nate Paul at his business in Austin.[20] It is not known what was in that envelope. But what is known is that

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[15] *Id.* at 18:7-22; 19:2—20:17; 21:2-17.

[16] TEX. GOV'T CODE § 552.352 (criminal misdemeanor and "official misconduct" if a "person distributes information considered confidential under" Chapter 552); TEX. PENAL CODE § 8.03(b) (affirmative defense if defendant obtained "a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question").

[17] Exhibit 18 at 18:7-22; 19:2—20:17; 21:2-17.

[18] *Id.* at 25:22—27:17.

[19] *Id.* at 9:18—11:8; 12:20—14:12; 14:19—15:20; 16:8-19.

[20] Exhibit 19 at 27:7—28:7.

Nate Paul's attempts to obtain any further information through the PIA cease.[21] And later, Brandon Cammack (who was "hired" by Paxton as a "special prosecutor" at the request of and referral from Nate Paul and his attorneys) issued grand jury subpoenas to individuals and for information based on confidential information that would be impossible to know unless Cammack had some inside information about the prior FBI investigations—the precise kind of information that was in the unredacted FBI Brief.[22]

## ARGUMENTS & AUTHORITIES

Articles III and IV both pertain to open-records requests. There is another thread that binds the factual allegations that support these articles. They both involve Nate Paul's desire to access confidential information concerning ongoing state and federal investigations against him, and the PIA's long-standing protection of that information under the law enforcement exception. Paxton's course of conduct to ignore well-settled law protecting this information (over strong objections from his advisors) for the benefit of Nate Paul, and to the detriment of multiple ongoing investigations, is astounding. Perhaps less so, but equally curious, is his professed ignorance of how anyone could see his conduct as a corrupt abuse of power.

### I. Paxton's contention that Articles III and IV are unconstitutionally vague and do not allege impeachable conduct are without merit.

Paxton's Motions each assert that Articles III and IV are unconstitutionally vague and do not allege impeachable conduct. These arguments recast the arguments Paxton raised in his Motion to Quash and Request for Bill of Particulars. As such, the arguments are refuted in the House

[21] Exhibit 18 at 28:6-14; 28:22—29:17.

[22] *Compare e.g.,* Exhibit 82 and Exhibit 87 beginning at OAG_SUB-00008792.

Managers' Responses to the Motion and Request, which the House Managers hereby incorporate by reference.

Paxton's argument that these articles are vague is also belied by his fulsome response to the facts that support them. Paxton understands fully what open-records requests and decisions underlie Articles III and IV. He even attached an appendix to his motion on Article IV that precisely lines up with these open-records matters. Paxton is talking out of both sides of his mouth, and the Senate should not be so easily fooled.

## II. Paxton cannot hide behind a technical reading of the PIA to avoid answering for his abuse of authority as chief public information officer to benefit Nate Paul.

Paxton contends his conduct was consistent with the PIA's technical requirements. And he condemns the House as attempting to impeach him for a "disagreement with legal conclusions with his subordinates" and for "allegedly wrong decisions" he may have made in protecting or disclosing public information. Not only do these arguments ignore the actual grounds (abuse and misuse of power) on which he was impeached, they show a self-interested disdain for the statutory scheme to protect confidential law enforcement information.

The Attorney General has a unique and powerful role in Texas' public information process. The OAG website describes its role as "responsible for the integrity of the public information process under the [PIA]" and notes, consistent with its duty under Section 552.011, that it "prepares, distributes, and publishes rulings and other materials to maintain uniformity in the application of the PIA."[23] To honor these dual roles of integrity and consistency, the Legislature

[23] OAG Website; *see also* TEX. GOV'T CODE § 552.011.

has established "a mandatory duty" on the Attorney General to issue promptly written decisions on open-records matters when requested by a governmental body.[24]

Despite his critical role in the process, Paxton suggests his "no decision" in one of the Nate Paul open-records matters was entirely innocent because there was already a pending mandamus against DPS seeking the same information. But as the Texas Supreme Court has admonished a prior administration, the Attorney General "may not refuse to fulfill his duties in order to see what [another governmental body] might do."[25] Paxton claims that, "[h]istorically, OAG had declined to issue decisions if a lawsuit regarding the same information was pending," citing a single OAG opinion.[26] That opinion does not at all support Paxton's claim. That opinion—issued under Chapter 402, not the PIA—refused to resolve a dispute between the Comptroller and a local governmental entity because the trial court order in dispute was subject to appellate review—accordingly, there was no need for AG intervention. In any event, requestors frequently pursue both the OAG's open-records review process and judicial review at the same time, a strategy the Texas Supreme Court has condoned.[27]

Paxton also suggests the opportunity for review of erroneous decisions[28] offers him immunity from impeachment for misuse or abuse of his open-records authority. Beside missing

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[24] *Houston Chron. Pub. Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (referencing the predecessor to TEX. GOV'T CODE § 552.306).

[25] *Houston Chron. Pub. Co.*, 767 S.W.2d at 698.

[26] Op. JM-287.

[27] *See, e.g.*, *Kallinen v. City of Houston*, 462 S.W.3d 25, 28 (Tex. 2015) (mandamus may proceed with or without an AG ruling).

[28] Paxton also asserts that these written decisions are essentially meaningless absent enforcement by the courts. That is far from the truth. Among other things, the decisions are precedential in that

the point of the Articles of Impeachment, this proposition is also just wrong. It is a criminal misdemeanor if a "person distributes information considered confidential under" the PIA, and if the person is a government officer or employee, the distribution "constitutes official misconduct."[29] Paxton is no more above the law than any other government officer or employee.

## CONCLUSION

Federal law enforcement agencies trusted that participation in the Texas public information process, headed by the State's highest law enforcement officer, would protect confidential information about an ongoing investigation. Its trust was betrayed when Paxton abused that process and misused confidential information by placing it in the hands of the subject being investigated. Paxton now tries to justify his actions with technical legal arguments that span the spectrum of irrelevant, to misleading, to outright wrong. Paxton could have and should have protected this sensitive information and should never have allowed his relationship with Nate Paul to skew the outcome of what should have been a straightforward open-records decision based on established precedent. The Motions to Dismiss Articles III and IV should be summarily denied.

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they also permit agencies to withhold information in response to future requests if those requests involve the same type of information and exceptions. TEX. GOV'T CODE § 552.301(a).

[29] TEX. GOV'T CODE § 552.352. *See also* TEX. PENAL CODE § 39.06 (misuse of information).

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**CERTIFICATE OF SERVICE**

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