

# **RECORD OF PROCEEDINGS**

## **of the**

# **HIGH COURT OF IMPEACHMENT**

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On the Trial of  
Warren Kenneth Paxton Jr, Attorney General of Texas

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### **THE SENATE OF THE STATE OF TEXAS**

### **SITTING AS A HIGH COURT OF IMPEACHMENT**

#### **EIGHTH DAY**

(Thursday, September 14, 2023)

#### **APPEARANCES**

Mr. Rusty Hardin, Ms. Jennifer Brevorka, Ms. Megan Moore, Ms. Leah M. Graham, Mr. Armstead Lewis, Mr. Dick DeGuerin, Mr. Mark White III, Ms. Harriet O'Neill, Ms. Erin M. Epley, Mr. Mark E. Donnelly, Ms. Terese Buess, Ms. Donna Cameron, Ms. Stella Jares, Mr. Dan McAnulty, Ms. Aisha Dennis, Mr. Daniel Dutko, on behalf of the House Board of Managers.

Mr. Tony Buzbee, Mr. Anthony Dolcefino, Mr. Anthony Osso, Mr. Christopher D. Hilton, Ms. Allison M. Collins, Ms. Amy S. Hilton, Ms. Kateland R. Jackson, Mr. Joseph N. Mazzara, Mr. J. Mitchell Little, Mr. Colby Holler, Mr. Judd E. Stone II, Attorneys for Respondent.

#### **PROCEEDINGS**

(9:05 a.m.)

THE BAILIFF: All rise. The Court of Impeachment of the Texas Senate is now in session. The Honorable Lieutenant Governor and President of the Senate Dan Patrick now presiding.

PRESIDING OFFICER: Good morning, everyone. Please bring in the jury. I see the bag pipes are gone but the crickets are still here.

(Senators entered the Senate chamber)

PRESIDING OFFICER: Senator Hughes, I believe you're doing the prayer this morning.

SENATOR HUGHES: Let's go to the Lord in prayer.

Heavenly Father, when we consider who you are, the one who has always existed before time, way back into eternity who always was, and always will be; when we consider that you made everything we see, things we cannot see, us, every molecule, every particle of each of us, just because of who you are, we owe you everything. We owe you our lives.

And, Father, when we consider, on top of that, all that you've done for us, the gifts that you lavish upon us, that you heap upon us, our very lives, and especially those of us in this country, in this state, the special blessings we enjoy of liberty and opportunity and justice, unknown in the history of the world, uniquely, uniquely given to us here, from your hand, we know we each have a responsibility in preserving those things as stewards, each one of us, whatever our role.

So, Father, we thank you. Thank you for who you are, for what you have done. We confess our failure to acknowledge you as we ought to look to you to humble ourselves before you. And we just thank you for loving us. The ultimate expression of your love for us, that Jesus Christ, God's son, God himself, would humble himself and come to this earth and take on human form and live that beautiful life, and then pay the penalty for all of our sins on the cross, and then raise from the dead on the third day. We thank you for Him.

Your Word says that since You gave Him for us, there is nothing you'll hold back. So, Father, we ask you for wisdom that you promise to give. We ask you to be honored in these proceedings today by everyone here, whatever their role. Thank you for loving us so much.

In Jesus' name we pray. Amen.

THE JURY: Amen.

PRESIDING OFFICER: Thank you, Senator.

You may be seated.

Members, can we have a little quiet in the courtroom?

Can I have both parties come forward?

(At the bench, off the record)

PRESIDING OFFICER: Is the defense ready to call their first witness?

MS. COLLINS: We are, Your Honor.

PRESIDING OFFICER: And who would that be?

MS. COLLINS: Justin Gordon.

PRESIDING OFFICER: Bailiff will bring in Justin Gordon.

Counselor, state your name for the record.

MS. COLLINS: Of course. Allison Collins.

PRESIDING OFFICER: I always give you the time check.

Members, House, you have two hours, 34 minutes and 49 seconds remaining.

Respondent, eight hours, 38 minutes and no seconds remaining.

(Witness entered the Senate chamber)

PRESIDING OFFICER: Were you here on Day 1 to be sworn in?

THE WITNESS: Yes, sir.

PRESIDING OFFICER: I thought so. Please have a seat.

JUSTIN GORDON,

having been first duly sworn, testified as follows:

**DIRECT EXAMINATION**

BY MS. COLLINS:

Q. Good morning, Mr. Gordon. How are you today?

A. Good morning. I'm good. Thank you.

Q. Could you please turn on your microphone? And go ahead and adjust it pretty close. The acoustics in here can be a little difficult.

A. Is that okay?

Q. Yes. That's much better.

Could you please state your name for the Court?

A. My name is Justin Gordon.

Q. And where are you currently employed?

A. I'm employed in the open records division of the Texas Attorney General's Office.

Q. And what is your position there?

A. I'm the open records divisions chief.

Q. How long have you been the chief of the open records division?

A. I began in 2015, at the beginning of General Paxton's term.

PRESIDING OFFICER: Excuse me. I think you're going to have to speak louder and a little closer.

A. Okay. I began in 2015. In January of 2015.

Q. (BY MS. COLLINS) What does the open records division do?

A. Our division handles a number of responsibilities regarding the Texas Public Information Act. That includes enforcement and review of public information decision requests. We also provide training for governmental bodies on the Public Information Act.

Q. Okay. I'm going to ask you just to slow down a little bit while you're talking, okay, to help the court reporter out.

Can you tell us how many public information ruling requests your division handles a year?

A. Last year we did over 40,000. In the previous fiscal year, we did just under 40,000.

Q. And does your division maintain a record for each ruling request?

A. Yes. We maintain both, an internal record of our ruling requests; we also post all of our letter rulings on our website after they are issued.

Q. Do you recall a request for ruling from the Texas State Securities Board in the fall of 2019 for some records related to Nate Paul?

A. Yes.

Q. Do you recall if any records were released as a result of that ruling request?

A. I do not believe any records were released in response to that ruling request.

Q. Do you recall if there was a request for reconsideration of that ruling?

A. Yes, there was.

Q. How frequently does the open records division receive requests for reconsideration or complaints about a ruling?

A. That's very common. I don't have an exact number to provide you, but that's something that we see certainly on a monthly basis, if not weekly.

Q. Were you also involved in deciding a request for ruling from DPS, The Department of Public Safety, in the spring of 2020, which we're going to call "the big request" for ease of reference? Do you recall that one?

A. Yes, I do.

Q. Was that also related to Nate Paul, if you recall?

A. It was.

Q. At some point as one of your duties as part of your employment, did you make a summary of that file?

A. I did.

MS. COLLINS: Your Honor, if I may approach the witness?

PRESIDING OFFICER: Yes, you may.

MS. COLLINS: I'm going to approach with what is marked as AG –

PRESIDING OFFICER: Hold on one second.

Yes, Senator Whitmire.

SENATOR WHITMIRE: I can't hear the entire –

PRESIDING OFFICER: Allison, you're going to have to speak louder as well.

MS. COLLINS: Even louder, okay.

PRESIDING OFFICER: That will do it.

MS. COLLINS: I'm going to approach with what has been marked at AG 205, and it has been pre-admitted.

PRESIDING OFFICER: Members, do you need for – for us to review with the court reporter what has already been said? You're okay? Everyone's okay?

SENATOR WEST: I do.

PRESIDING OFFICER: You do?

SENATOR WEST: Yes.

PRESIDING OFFICER: Okay. So let's go back to where you began the question on DPS.

Senator West?

SENATOR WEST: Securities.

PRESIDING OFFICER: Securities.

MS. COLLINS: No problem.

Q. (BY MS. COLLINS) Do you recall receiving a request for ruling from the Texas State Securities Board in fall of 2019 for some records related to Nate Paul?

A. Yes.

Q. Do you recall if any records were released as a result of ORD's ruling?

A. No, I do not believe any records were released in that ruling.

Q. Do you recall if there was a request for reconsideration of that ruling?

A. Yes, there was a request for reconsideration.

Q. How frequently does ORD receive requests for reconsideration or complaints about a ruling?

A. That's very frequent. I don't have an exact number to provide to you, but it's something that we see, if not on a – on a weekly basis, then certainly monthly, many – several times a month we receive reconsiderations.

Q. Do you also recall being involved with a request from DPS in the spring of 2020 related to Nate Paul?

A. Yes.

Q. Now, we've been calling that "the big request" to help distinguish them. Will you understand what I'm saying if I call it "the big request"?

A. Yes.

Q. Thank you.

And at one point, as part of your employment, did you create a summary of this file?

A. Yes.

MS. COLLINS: Your Honor, I now am going to approach the witness with what has already been admitted as AG 205.

PRESIDING OFFICER: Okay.

Q. (BY MS. COLLINS) Mr. Gordon, do you recognize this document?

A. I do.

Q. Is it a fair and accurate depiction of the summary that you created for this file?

A. Yes. It is the summary I provided for the file.

Q. Well, let's talk about it. Let's walk through it together. Okay?

A. Okay.

Q. First, how would you describe this particular request, the big request?

A. It started off as what I would have characterized as a relatively routine request from The Department of Public Safety. The Department of Public Safety routinely briefs our office on law enforcement matters. They, again, very commonly submit rulings to our office.

However, as the ruling was being – was being reviewed, it took a turn procedurally. And then there was a number of procedural irregularities that occurred with the file that made it – that made it unique.

MS. COLLINS: And, Erick, if you could please pull up AG Exhibit 205, and highlight the first paragraph please.

Q. (BY MS. COLLINS) And Justin – and, Mr. Gordon, I think it's consistent with what you just said, that there were procedural issues that made this file unique; is that correct?

A. That's correct.

Q. Okay. And when was the request received by your office?

A. On March 13th.

Q. Okay. And at this point this is when you're talking about it was very routine?

A. Correct.

Q. Do you recall what exception DPS was asserting?

A. They sought to withhold the information under the law enforcement exception. That's Government Code Section 552.108.

Q. Is that – there are generally two types of exceptions under the PIA; is that right?

A. That's correct. There are two – we characterize them as two separate types of exceptions. There's a – an exception for confidentiality provisions that we would also call "mandatory exceptions." And there's a type of exception that is just a normal exception disclosure that we would call a permissive exception to disclosure.

Q. And which type is the law enforcement exception?

A. Section 552.108 is a permissive exception. The governmental body has the option to raise it or not to raise it.

Q. What happens if they do not raise it?

A. Nothing happens if they do not raise it. We won't – we won't address it if they don't – if they do not raise it.

Q. So if they don't raise it and you don't address it, what's the end result as it relates to the request? Are those records released or are they withheld under the law enforcement exception?

A. Oh, they would be released. They would not be withheld under the law enforcement exception.

Q. So let's talk about some of the procedural irregularities in this file.

MS. COLLINS: I'm now on the second paragraph, Erick, if you could blow that up for the senators.

Q. (BY MS. COLLINS) Where did this file first start to take a turn towards the unique?

A. Where you have – where you have it highlighted, I described that –

PRESIDING OFFICER: Excuse me one second. I'm very sorry. I'm very understanding with eight grandchildren and a lot of little ones, but we really can't have a distraction.

I'm sorry. You might have to step out. I really apologize, but I don't want to distract the jurors. I'm very sorry for that.

MS. COLLINS: May we continue? Thank you.

Q. (BY MS. COLLINS) You – I believe you were about to point out to us where the procedural issues started to rise in this file.

A. Sure. So we have – we have a statutory 45-day deadline by which we have to issue all of our rulings. That's from the Government Code. And as we were approaching that deadline, the – the DPS submitted a – a follow-up – a follow-up correspondence to our office explaining that the requested information may implicate the interest of the – of the FBI. And at that time they also submitted additional records.

So in the initial submission, they only submitted a representative sample, which they are permitted to do. In fact, the PIA requires them to do that if the records are voluminous. And they had done that in the initial submission.

However, when they submitted the subsequent submission, they submitted additional documents, not the same representative sample that they had submitted earlier. And the new documents were substantially different than the documents that had been originally submitted and were of a different character, so they have –

Q. I'm going to stop you. I think that's a great spot. And just to summarize, so essentially the original representative sample that DPS sent in did not match with the sample that they later sent to your office in May of 2020; is that right?

A. That's correct.

Q. And they sent that second sample at the time that they were notifying the FBI that they might have an interest in the file in the information being sought by the request?

A. That's correct.

Q. Is that considered a procedural violation under the Public Information Act?

A. Yes. Governmental bodies are required to submit all of the records that they want a ruling on or in a – or a proper representative sample by the 15th business day after receiving the request, which had been, you know, substantially before this time period.

Q. So the sample was also late; is that correct?

A. That's right. That's correct.

Q. What is the consequence for a procedural violation of this nature?

A. Under the Public Information Act, failure to comply with the procedural requirements and requesting decision from our office results in a presumption that the information is released unless the exception that they're raising constitutes a compelling exception. And our office has concluded that Section 552.108 does not constitute a compelling reason.

That's a fancy way of saying that they waive that exception and they would – they would waive it for the information that they had the procedural violation on.

Q. And that would be all of the information that they provided as the second sample in May of 2020?

A. Correct. Anything in that representative sample, the second set of documents that – that was not in the first set.

Q. And is it your understanding that that second set of documents had also been provided to the FBI?

A. Oh, I – I'm not sure if they provided that second set of documents to the FBI. I – I don't remember that.

Q. You-all – so this late – was the notice to the FBI also late?

A. Yes. Governmental-wise there are procedural requirements, and there are also due process requirements in the Public Information Act. And – and because of those deadlines, there are – there are certain notice requirements. So the only notice requirements in the act that applies to third parties is in Section 552.305.

That section requires governmental bodies to notify third parties if their privacy or proprietary interests are at issue. And that notice is supposed to come within 10 days of receiving the requests. Otherwise, there's – there's also the due process element of that notice needs to be made in time for those – for those comments to be received by our office before – you know, in time for us to be aware of them and also in time for the requestor to receive notice.

Q. And in this instance was the notice given close in time to your statutory deadline to issue a ruling?

A. Yes. We received it just a couple of – a couple of weeks before our – our 10-day deadline – or our 45-day deadline.

Q. The second sample of documents – the second set of documents that you were provided by DPS, how were those provided to you? Hard copies? On a CD? Do you recall?

A. I don't recall if they were a CD or if they were – if they were a hard copy.

Q. Okay. So you sent this – the notice went out to the FBI and you received a copy of it. What happens next?

A. So at that point we were kind of up against it with respect to the timelines. You've got the – you've got the highlights here with respect to the – you know, to kind of what was going on in this file. We had also been notified by the requestor in this file that – that he had filed a lawsuit against DPS in this case, which added a whole nother layer of – of complexity to it.

Because the late notice, because the notice was received so close up against our 45-day deadline, we didn't feel like the – the third party who was notified, FBI, would have had – would have had time to submit comments to our office in time. And so we – while we were waiting for those comments so that we could receive them and review them from the FBI, we – we took a 10-day extension on it and then gave ourselves a 10-day extension, which is permitted under the PIA.



Q. All right. I'm going to ask you just to slow down a little bit, okay. You're doing great.

So you get – you extend it for 10 more days. Does the FBI eventually provide your office with comments?

A. Yes.

Q. And do you know if the FBI also provided the requestor with a copy of those comments?

A. The – at the time when we identified the documents – we actually only found the comments because the requestor let us know that he had received comments, and so then we went and – and tracked them down. This is at the beginning of COVID, so our mail – our mail intake was kind of – was kind of thrown off. So when the requestor notified that we had received comments, we went and tracked those down.

To add another procedural, you know, complication to it, at that time the requestor notified us that his copy – copy of the comments had been completely redacted. Our copy did not have any redactions on it. It just had a reference that – at the end that the version that had been provided to the requestor was redacted.

MS. COLLINS: And, Your Honor, if I may approach with what has been marked as House Managers' 46 but has not been admitted into evidence yet.

PRESIDING OFFICER: You may approach the witness.

Q. (BY MS. COLLINS) Mr. Gordon, do you recognize the – the document that I placed in front of you?

A. I do.

Q. What is it?

A. This appears to be a copy of our internal ruling file pertaining to the – the DPS file that we have been discussing.

Q. And does it appear to be a complete and accurate copy of the file?

A. I'm sorry. I'm just double-checking.

Q. Take your time.

A. Yes, it does.

Q. I appreciate your thoroughness.

MS. COLLINS: At this time we move to admit House Managers' 46.

PRESIDING OFFICER: Any objection?

MS. GRAHAM: Mr. President, no objection to the admission. However, in this document, it contains a copy of the unredacted FBI brief, which not only contains personal identifying information, but a number of sensitive information of the types of operations plans, and other sensitive law enforcement information, which Nate Paul had been trying to get for a while.

If it comes in, we just ask that it be redacted because that information has not been publicly made available.

MS. COLLINS: And, Your Honor, we'll get to that on the next request. But I will represent to this Court that that is not the case. As has been discussed by other witnesses, this brief was, in fact, released publicly.

PRESIDING OFFICER: So they did not object, and I'll let her go along with her line of questioning, and we'll get back to that issue, but thank you for bringing it up. Go ahead.

MS. COLLINS: Thank you.

Erick, if you could pull up, towards the back of that Exhibit 46, the Bates number at the bottom is 8803 –

MS. GRAHAM: Mr. President, I do have to – I'm sorry, before this is shown to the jury, there is personal identifying information –

MS. COLLINS: And –

MS. GRAHAM: May I finish?

PRESIDING OFFICER: Stop. Stop talking over each other.

MS. GRAHAM: – that has not been released publicly. It may have been released to Nate Paul at General Paxton's direction.

However, it has not been made public to the world at large. There's very sensitive law enforcement operation plans, details about search warrants, how investigations are done, and also specific names of individuals that are identified and involved.

PRESIDING OFFICER: Come on up to the bench. Please come up to the bench.

(At the bench, off the record)

PRESIDING OFFICER: A little quiet, please.

(At the bench, off the record)

PRESIDING OFFICER: Members, take your seats.

So we're going to proceed slowly, carefully.

You may proceed.

MS. COLLINS: Thank you.

Q. (BY MS. COLLINS) Mr. Gordon, as a preliminary matter, if a document is released after a ruling request or a ruling decision, would that be released to a subsequent requestor for that same information?

MS. GRAHAM: Objection. Calls for speculation.

PRESIDING OFFICER: Overruled.

A. Yes. There's a specific section that directly addresses that. Section 552.007 of the Government Code prohibits the governmental bodies from selectively releasing information and provides that different information has been released to one requestor that it would be released to a subsequent requestor, unless there's a special right of access that applied to the initial requestor.

SENATOR: Can the witness slow down?

THE WITNESS: I'm sorry.

PRESIDING OFFICER: All right. Mr. Gordon – Mr. Gordon, repeat your answer. Slow down.

THE WITNESS: Yes, sir.

A. Yes. There is a specific section of the Public Information Act that addresses that. It is Section 552.007. It provides that if information is released to one requestor, then it would be released to a subsequent requestor. It prohibits the selective release of information to one requestor and not to another. So if information has been released by a governmental body, then it would be released to subsequent requestors, unless there's a special right of access that only applied to the initial requestor.

For example, if I asked for my driver's license number and receive it, you wouldn't release my driver's license number to the next person because I have a right of access to that.

Q. (BY MS. COLLINS) Thank you for that explanation.

MS. COLLINS: Erick, could you please pull up within House Managers' 46 at Bates 8803, which is page 77 within that PDF.

Q. (BY MS. COLLINS) Mr. Gordon, can you see that on your screen?

A. Yes, I can.

Q. Does this appear to be a fair and accurate picture of the redacted brief the FBI provided to Mr. Larsen?

A. That's correct.

MS. COLLINS: And, Erick, if you could scroll to the next page, so to 78, and go down.

Q. (BY MS. COLLINS) Is this showing an entirely redacted page?

A. Yes.

Q. And does that continue through the majority of this brief?

A. Yes.

Q. Is this unusual?

A. Yes.

Q. Can you explain why?

A. Under the Government Code, if a third party submits comments to our office objecting to the release of information, they're required to notify the requestor and provide the requestor with a copy of those comments. They are permitted to redact the comments, but only to the extent that it – it reveals the information that is requested.

In this case, they've redacted the entirety of the brief including all of the substantive arguments.

Q. And why does that – why is that – why does that matter?

A. That matters because the requestor was not put on notice about what arguments the governmental body was making and it would have been unable to respond to them to our office in order to refute any statements that were made or directly address the – the statements that were provided by the briefing third party.

Q. Is this another procedural violation of the PIA?

A. Yes.

Q. So, so far we've talked about at least three procedural violations or irregularities with this file?

A. Yes.

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Restate the question.  
Sustained.

Q. (BY MS. COLLINS) Can you estimate for us how many procedural irregularities we have discussed related to this file so far?

A. There was the failure to submit the representative sample or – they – they submitted the documents late.

Q. Uh-huh.

A. The representative sample that they submitted the second time was not – indicated that the first representative sample was not actually representative. They did not notify the third party in a timely fashion. And then when the third party briefed us, they substantially redacted their briefing to us – or I'm sorry, they substantially redacted the copy of the briefing that was provided to the requestor.

Q. Are you able to tell us how frequently you work on a file that has four different procedural irregularities?

A. We see a lot of procedural irregularities. These are pretty unique, though, in the way that they – in the way that they came in. Ordinarily what we see are missed deadlines. So it would be pretty rare that we see four completely different procedural violations like this.

Q. And, again, what can be the consequence of a procedural irregularity of the nature you've been discussing?

A. If a governmental body fails to comply with the procedural requirements of the act, then they would waive their discretionary exceptions.

Q. Meaning that any documents that fell within a discretionary exception would be released?

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Sustained.  
Rephrase your question.

Q. (BY MS. COLLINS) All right. So what's the consequence of that, of the permissive exceptions being waived?

A. If a permissive exception is waived, then we would not apply it or review in it the context of those documents. And if that's the only exception that's addressed, then those documents would be – would be released.

Q. And in this particular file, the DPS file in front of you, was the only exception raised the law enforcement exception?

A. That's correct.

Q. And it is a permissive exception?

A. That's correct. They did not raise any confidentiality provision. They only raised the law enforcement exception.

Q. Do you recall meeting with the attorney general about this file?

A. Yes.

Q. And I don't want you to go into what anyone said at that meeting, okay, but could you please tell us what topics were discussed?

A. We discussed this topic, this DPS file.

Q. Did you discuss options for how to proceed?

A. Yes.

Q. And what were those options?

A. The primary options were to release the information, to conclude that there had been a procedural violation and a failure to establish that the information was excepted from disclosure. And then the second exception, which was the primary option, was the closed letter that we ended up issuing.

Q. Did you agree with the – with issuing the closed letter?

A. Yes.

Q. Why?

A. It was correct. The – the procedural background of the – of the request put the requestor at a significant disadvantage and allowing the – I guess the procedural actions that were taken would have really been a detriment to that requestor. There was already a pending lawsuit and courts will give our letter rulings great weight. And rubber stamping the actions in this procedural context would have, or could have – I don't know what the Court would have done with our ruling – but it could have tilted the scale in favor of a – of a governmental body who had failed to comply with the procedural requirements.

Q. And I want to make sure I understood your testimony a moment ago. You considered releasing all of the information. What do you call that within ORD?

A. Pouring out.

Q. And would that have been supportable under the law, in your opinion?

A. It would have been pushing it. I – I agree with the – with the closed – with the closed letter. I feel like releasing it all would have been – would have been pushing it.

Q. To your knowledge, had ORD issued closed letters of this nature in the past?

A. Yes.

MS. COLLINS: Erick, I'm going to ask you to pull up the closed letter, which is within House Managers' 46 at page 2.

And please take it off the screen before finding the new page and placing it there.

MS. GRAHAM: Counsel, what was the Bates number that you directed him to, please?

MS. COLLINS: It's page – it's page 2 of the PDF, which is in front of you.

MS. GRAHAM: OAG 8728?

MS. COLLINS: I don't have it in front of me, but it's the closed letter.

Q. (BY MS. COLLINS) Mr. Gordon, does this appear to be a complete and accurate copy of the closed letter?

A. Yes, it does.

Q. And in that letter you reference a prior ORD decision, right?

A. That's correct.

Q. Why? Why did you reference that prior ORD decision?

A. Well, there was – there were a lot of reasons. The – the primary reason is that what this open records decision specifies is that if a lawsuit is filed after a ruling request is made – I'm sorry. Let me take it back and maybe simplify it.

Under the Public Information Act a requestor can sue a governmental body if they believe they're improperly withholding documents. What this open records decision provides is that if a requestor files a lawsuit after a governmental body has issued – or has requested a decision from our office, then our office should still go on and issue a ruling.

Prior to this decision, we routinely closed files and did not issue determinations where the issue that was – that would come before us in the decision was in court. So we would demurrer and – and close that letter and let the Court decide.

Q. And in your opinion, how did this DPS file differ from – the closed letter that you issued in this case, how did that differ or was distinguished from the ORD decision?

A. It was all of the procedural irregularities, especially the redacted FBI brief. That was the – the primary issue that prevented us from – from ruling in accordance with due process. It was the – it was the heavily redacted FBI brief.

Q. And why did that cause you so much heartburn?

A. Again, our rulings are given weight – or great weight, quote/unquote, by the Courts. And in the face of that – of those procedural irregularities, giving a rubber stamp of approval to them could have tilted the scales in that – in that court, even despite the procedures being handled incorrectly.

Q. Could it also set bad precedent?

MS. GRAHAM: Objection. Leading.

MS. COLLINS: I'm asking his opinion, Your Honor. It's not – it's a yes or no. He can say what he would like.

PRESIDING OFFICER: Overruled.

A. I'm sorry. I didn't understand – I didn't hear the question.

Q. (BY MS. COLLINS) Sure. Could it also set bad precedent in PIA requests coming into your office?

MS. GRAHAM: Objection – objection, Your Honor. The relevance of the – this personal witness' opinion is not relevant to any issue in this proceeding. And what he considers a good or bad precedent is purely subjective and not at issue in this case.

MS. COLLINS: He's –

PRESIDING OFFICER: Overruled.

MS. COLLINS: Thank you.

Q. (BY MS. COLLINS) You can answer the question.

A. I wouldn't characterize it as a – as a precedent. So many of our rulings are fact specific. What I do think it could have resulted in, because DPS and FBI routinely brief our office, it could have, again, been seen as condoning that type of heavy redaction, which then could have led to that – that type of action being taken in future requests and for future requestors. So I wouldn't have characterized it as a precedent.

But it could have indicated that, you know, we thought that was okay. And then they would – because they do it routinely, I mean, they request decisions from us routinely, they could have seen that as a, Oh well, now we've got the stamp of approval to do this and now we're – we'll keep doing it.

Q. And now while all of this is going on, were you made aware of a request from Mr. Larsen for a copy of the FBI brief?

A. Yes.

Q. How were you made aware of that?

A. That came in as a Public Information Act request. The Public Information Act request was forwarded to my division for – for handling. And when I say "handling," I mean, we collected the documents. So we collected the unredacted brief in processing that Public Information Act request, and we provided it to our public information office.

Q. As to the DPS ruling itself, did that closed letter result in the release of any documents?

A. It did not.

Q. Okay. So this request from Mr. Larsen comes in for a copy of the brief. Do you know what happened after that was received?

A. I know what happened after the fact. Because it involved open records decision documents, our division does not rule on decision requests for our own documents, so it was handled by another division. But through the process of this whole – this whole circumstance, I – I did become aware of what issued or what happened with that – with that public information request.

Q. And your division maintains those files, even if it doesn't necessarily make the decision on the request, correct?

A. That's correct. They were – because the FBI submitted the brief to our office, we were the ones who maintained that as part of our work file.

Q. Have you reviewed the ORD file for the FBI brief request before?

A. So just to clarify, our office – or my subdivision does not have a – a file on that public information request. We have the file that's here before me as this PDF. And, yes, I have reviewed that. But I have not seen the – I have not seen the opinions file or the public information office file involving that – that ruling request for that brief.

Q. Now, in the file in front of you, there is a copy of the unredacted FBI brief, correct?

A. That's correct.

Q. Would you take a look at it, please.

A. Okay. I'm looking at page –

Q. And what I want you to look for, you know, you – you're the chief of ORD. I want you to set aside law enforcement exception for a moment. I want you to look at that brief and let me know if you think there are any mandatory exceptions to public disclosure that are flagged within that brief.

A. Not to nitpick, but there is a – Mr. Larsen's e-mail address is at the end of the brief. But the – he was – he was the requestor. So, no, but other than that, I don't see any – any confidential information on the face of the document.

Q. Thank you.

And just one more thing on – forgive me.

MS. COLLINS: Your Honor, if I might – may approach with what has been marked as AG 34.

PRESIDING OFFICER: You may.

Q. (BY MS. COLLINS) Mr. Gordon, do you recognize the document I placed in front of you?

A. I do.

Q. And what is it?

A. This would appear to be the internal file for the opinions ruling requests that we've been discussing that was Mr. Larsen's request for the unredacted FBI brief.

Q. Does OAG receive requests for copies of PIA briefing on other occasions?



A. Yes.

Q. Does that occur with – can you tell us with any sort of frequency how often you receive that type of request for briefing?

A. If I had to guess, I would say it would be once a month, probably less than once a month, at the – yeah, at the – not – it's not very common. It's not a weekly occurrence.

Q. And were you familiar with Joe Larsen?

A. Yes.

Q. How?

A. I've worked with Joe Larsen for a long time. He is a well-known open government lawyer. He's also involved with the Freedom Information Foundation, which our office has partnered with in the past to perform trainings. He's routinely sought after to provide his – to provide input on Public Information Act requests. I've also observed a number of cases that he's handled because he – he ends up handling – often handling, you know, important Public Information Act cases. So I – I've known Mr. Larsen for a long time.

Q. Was – based on your knowledge of Mr. Larsen and working with him, was it surprising or unusual for him to submit a request for a copy of that redacted brief?

A. No, I wasn't surprised at all that Mr. Larsen would ask for that.

Q. And you started to walk us through what OAG does when it receives a request for documents that OAG itself holds. I just want to make sure that's clear for the jurors, okay. So let's walk through it.

So what's the first step OAG would do when it receives a request for records that it itself holds?

A. The – that would be received and handled by the attorney general's public information office –

MS. GRAHAM: Objection, Your Honor. I apologize to the witness, but at this point it's clear from the witness' own testimony that once this request that's about to be discussed was made, it went to a different division, not his, that he does not oversee. And he's previously testified that he was not involved.

So any information that he has about specifically how it was handled or by whom would be hearsay or speculation.

MS. COLLINS: Your Honor, right now I'm asking him to walk through the general process of how this is handled, which is something that as the chief of ORD he is intimately familiar with.

PRESIDING OFFICER: The witness can answer.

Overruled.

A. When a request comes into our public information office, the public information officer will identify the divisions that they believe maintain documents and they will notify those divisions. Those divisions then collect the information. Generally we collect the information unless there's some issue with the request, like

we don't understand it or it would require a cost estimate. Those divisions, my division in that case, will – will respond back that we maintain documents, and then we'll follow that up by providing those documents.

If a decision is required, then the public information officer will prepare that decision and they will send it to our division. As soon as we receive that, we – as soon as we see that we've received a – a request from the attorney general's office, it gets segregated out. And at this time it would have been forwarded to the opinions division.

Q. (BY MS. COLLINS) So ORD is not deciding decisions on documents held by ORD; is that right?

A. That's correct.

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Sustained.

You can reask the question.

MS. COLLINS: I think the point has been made, Your Honor.

I'm going to move to admit AG 34. It is an internal business record of OAG. It was actually given to us pursuant to a business affidavit that has been on record for more than 14 days.

MS. GRAHAM: And, Your Honor –

PRESIDING OFFICER: Any objection?

MS. GRAHAM: – as we discussed at the bench, the issue is not the business records affidavit. It is protecting the sensitive information of law enforcement, how they conduct their investigations, and specifically the individuals involved. A – an exact identical copy of the same brief we just talked to you about at the bench is also contained in this document.

And so I have no objections, as long as she's willing to protect law enforcement and the integrity of the investigations and redact that sensitive information. With those redactions, no objection.

MS. COLLINS: And, Your Honor, the chief of ORD has now looked at this brief and told you that there were no mandatory exceptions and no confidential information within that brief. He's also testified that once a brief is given to one – once documents are given to one requestor, they are given to any subsequent requestor. They are considered public.

And so I do believe that he is, one, more than very highly qualified to speak to this file and that there are no confidentiality concerns raised within it based on this witness' testimony.

MS. GRAHAM: Brief response, Your Honor?

PRESIDING OFFICER: Yes.

MS. GRAHAM: Everything my – my colleague said misses the point. All I'm trying to do is make sure that the sensitive law enforcement information, which is in front of you, the identities of the individuals involved in the investigation, how they conducted the investigation, their sensitive operations plans, the – their sealed search

warrant affidavits, and the details contained within, how they communicate with each other, who was on those communications, and when they were sent, all of that information, I just would ask, would be redacted. Otherwise –

MS. COLLINS: And, Your Honor, very quickly –

PRESIDING OFFICER: Hold on. Stop, stop, stop, stop, stop. Don't talk over each other. Court reporters have a tough job as it is.

Come up for a moment again.

(At the bench, off the record)

PRESIDING OFFICER: Members, we will take a break in a little bit, just a little bit.

Everybody be seated, please.

So as we have been going through this testimony, slowly continue.

Q. (BY MS. COLLINS) Mr. Gordon, the file placed in front of you marked as AG 34, is there any search warrant inside this file?

A. There is no search warrant inside this file.

Q. Are there any e-mails between the FBI and DPS inside this file?

A. There are no e-mails between the FBI and DPS in this file.

Q. Did you notice any victim information inside this file?

A. I did not.

Q. And if the redacted FBI brief had been released to one requestor, it would be released to other requestors?

A. That's correct.

Q. And you've had a chance to look at this file now, correct?

A. Yes.

Q. And at the back of it, you'll see that – well, let's – let's walk through it.

So I think you've testified that based on this file before you, does it appear that OAG sent a notice to the FBI about this request for their redacted version of a brief?

A. Yes, it does.

Q. Did the FBI respond?

A. Yes, they did.

Q. And I want you to take a close look at their response brief, and specifically the last page under the signature line. It's the last page of the file.

Are you there?

A. Yes, that's page 6 of the draft.

PRESIDING OFFICER: The witness needs to stay close to the mic and speak up.

Q. (BY MS. COLLINS) Does it indicate that the version sent to Mr. Larsen was redacted?

MS. GRAHAM: Objection, Your Honor. Counsel is mischaracterizing the evidence and honestly misleading the witness. The document –

PRESIDING OFFICER: Overruled.

Q. (BY MS. COLLINS) You may answer the question.

A. On this brief, it does not say "redacted" after the cc list to Mr. Larsen.

Q. And this brief was filed by a Mr. McPhillips from the FBI; is that right?

A. That's correct.

Q. And from the front of this brief, was it filed – and it's actually marked as received by open records on or about June 18th, 2020? Do you see that?

A. Yes.

Q. And then I want you to look immediately in front of this brief is the – is a copy of the redacted brief at issue. Do you see that?

A. I'm sorry. Would you repeat the question? I'm –

Q. Yeah. If you go – keep flipping forward in the file, the next thing you see is a copy of the blacked-out brief that the FBI had filed first.

A. Oh, I believe that's – I don't see in this –

Q. The Bates at the bottom of the page I would like to direct you to is 49982.

A. 49982? Oh, yes, okay. That's the last page of the redacted version?

Q. It's the last page of the brief that the FBI filed in May of 2020, right?

A. That's correct. I'm sorry. I was looking for the version that was actually redacted. There is no redacted version.

Q. I apologize. There is no redacted version here.

And when you look under the signature – first, who signed this brief from May 2020 for the FBI?

A. Matthew Phillips (sic).

Q. So the same Mr. –

A. McPhillips.

Q. – McPhillips?

A. Yes.

Q. And underneath his signature line, what does it indicate next to Mr. Larsen's signature – I mean, next to Mr. Larsen's name on the copy list?

A. Next to Mr. Larsen's name on the copy list it says it was redacted.

Q. So the first brief was sent to Mr. Larsen, redacted. Is that what that represents to you?

A. Yes.

Q. And so the second brief, the June 2020 one, based on what you – the documents before you, was that redacted when it was sent to Mr. Larsen?

A. It does not indicate that it was redacted.

Q. Does that indicate to you that the FBI provided a copy of this brief directly to Mr. Larsen?

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Sustained.

Rephrase your question.

Q. (BY MS. COLLINS) What does that indicate to you?

A. That indicates that they provided this – the same copy of this brief that they provided to DPS not – unredacted.

Q. And I want you to take a look at this June 2020 brief and tell me how it compares to the May 2020 brief.

A. They look – they look very similar. There's some – there is some different language certainly at the beginning, but they look – they look very similar.

Q. Other than the first paragraph, they are very similar?

A. Yes, that's correct.

Q. So based on the documents in this file, does it appear that Mr. Larsen provided – I mean, that the FBI provided this information itself to Mr. Larsen?

A. Yes.

Q. And the very front of this file is the decision issued in this case. It starts with Bates 49954. Do you see that?

A. I do.

Q. And you just looked at the FBI's June 2020 brief addressing whether or not that blacked-out brief should be released to the public, right? You just looked at it?

A. I did.

Q. Did it anywhere in there argue that their redacted brief should be withheld from public disclosure?

A. No. It looked like the arguments applied to the documents that were issued in the underlying DPS file.

Q. And so when that happens, when the comments don't address the information being sought, what in your experience in ORD happens in a file like that?

A. In that case we would not apply the exception to the – to the documents that are submitted. We ordinarily – because this opinion was done by opinions, they used slightly different language than us. But we've got boilerplate for that type of circumstance; either that the entity that submitted the arguments is arguing against the release of information that was not submitted to our office, or that the arguments that they have submitted don't apply to the – to the information that is – that is at issue.

Because we have a presumption of openness, there has to be an exception to disclosure in order to withhold the information. And if it's a discretionary exception, it wouldn't be applied to information that they don't seek to withhold. If it's a discretionary exception, they have to seek to withhold it in order for the exception to be applied to it.

Q. And the FBI – so the FBI just didn't address their – their redacted brief at all based on this file; is that right?

A. That's right.

Q. Which would result in what ultimately for the requestor?

A. That would result in the information – that would result in the arguments that are raised not being addressed to the information for which there – there are no arguments. And if there are no other arguments, then the information would be released.

Q. Okay. So I want to make sure we all understand what your testimony has been here today. So we have the first request to TSSB in the fall of 2019.

Was any information disclosed to Nate Paul as a result of OAG's ruling?

A. No.

Q. Then we move on to the big request to DPS in the spring of 2020. Was any information released to Nate Paul as a result of that ruling?

A. No.

Q. And then we get to this third request. And what we see is that the FBI provided a copy of the brief directly to the requestor itself; is that right?

A. That's right.

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Overruled.

Repeat the question and answer.

Q. (BY MS. COLLINS) We get to this FBI request for the – for their blacked-out brief. And what we see is that the FBI directly gives a copy of the brief to the requestor –

MS. GRAHAM: Objection.

Q. (BY MS. COLLINS) To Nate Paul; is that correct?

MS. GRAHAM: Objection, Your Honor. It should be made clear for the record that we're talking about two different briefs, one in May and one in June. And the one in June, yes, there's no dispute: The FBI provided that to Nate Paul's counsel. That is not the one that contains the sensitive information that we have been discussing.

PRESIDING OFFICER: Clarify.

MS. COLLINS: Of course.

PRESIDING OFFICER: I sustained the objection. Clarify.

Q. (BY MS. COLLINS) So the – what we're seeing from this file is that the FBI provided a copy of its June 2020 brief directly to Mr. Larsen; is that right?

A. Yes, that's correct.

Q. And you've also testified that that June 2020 brief is very similar to the May 2020 redacted brief, right?

A. Yes, that is correct.

Q. And that ultimately because the FBI did not address why their redacted brief should be – should not be released to the public, it was released?

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Sustained.  
Rephrase your question.

Q. (BY MS. COLLINS) What was the ultimate outcome of the opinion on this FBI request related to its redacted brief?

A. The opinion concluded that the unredacted brief could be released to the requestor.

Q. And you've reviewed that brief?

A. Yes.

Q. And you did not see any mandatory exceptions within that brief that would require OAG to – to apply its own redactions before release?

A. That's correct.

MS. GRAHAM: Objection. Leading.

PRESIDING OFFICER: Overruled.

A. That's correct.

Q. (BY MS. COLLINS) And after – after this ruling in August of 2020 on the FBI brief, do you recall one way or another if Joe Larsen, on behalf of Nate Paul, continued to seek information from public safety agencies through public information requests?

A. Yes, he did.

Q. And how do you know that?

A. He continued – well, he had a – he continued to pursue complaints against the Texas State Securities Board all the way through September of that year, seeking to obtain documents that TSSB was withholding from him in the context of Public Information Act requests. So then that – so that continued, you know, throughout the summer and into the fall.

Q. And after ORD rules on a request, what does ORD do with the documents that the governmental agency provided to you to make your ruling?

A. We send the documents back to the governmental body.

Q. You don't keep a copy?

A. No.

MS. COLLINS: Those are all my questions for this time. Thank you.

PRESIDING OFFICER: Thank you, Ms. Collins.

MS. GRAHAM: Cross-examination, Your Honor.

PRESIDING OFFICER: Yes.

MS. COLLINS: I'm so sorry. One thing, we are moving for admission of HM 46 and AG 34, based on this witness's testimony.

MS. GRAHAM: Your Honor, same objection. All we're trying to do is protect the sensitive law enforcement operations, who was involved, when e-mails were sent, what the subject of those e-mails were, what the FBI's operations plans were, how they work with the State Securities Board, the FBI, the DPS. If that information is redacted –

PRESIDING OFFICER: Okay. Hold on.

MS. GRAHAM: – no objection.

PRESIDING OFFICER: Hold on. We've discussed this at length. He testified there was nothing confidential. The FBI could be here. They could be called.

MS. GRAHAM: Yes. Yes, Your Honor – or Mr. President. Yes, that's correct.

PRESIDING OFFICER: Either one. It doesn't matter.

MS. GRAHAM: Okay. Yes, sir.

PRESIDING OFFICER: But they're not here.

MS. GRAHAM: They're not. However, I would like to, for the record, remind the Court that it was Mr. Bangert's testimony opposite to Mr. Gordon's –

MS. COLLINS: Your Honor, I'm going to insist that she not state testimony of another witness in front of this witness.

PRESIDING OFFICER: Okay. Both of you just stop for a moment. Okay.

MS. COLLINS: Your Honor, if I could – I just want to make sure that there's no misunderstanding or misstatement here.

PRESIDING OFFICER: Hold on. Hold on.

Jurors, please, take your seats again.

MS. COLLINS: I just want to make sure that there's no misunderstanding here.

You have a complete copy of those files in front of you, and you can see for yourself that there are no copies of search warrants. There are no copies of the actual e-mails within those files which appear to be the documents that counsel is concerned about. And I just want to make sure that's clear for the record that those documents are not in those files.

PRESIDING OFFICER: And – and we have reviewed them while – while up here going through this testimony.

Is it your representation as an officer of the Court that this document has already been – already been released to the public?



MS. COLLINS: Yes.

PRESIDING OFFICER: Both documents?

MS. COLLINS: Yes.

PRESIDING OFFICER: And that was the testimony?

MS. COLLINS: It was.

PRESIDING OFFICER: I have to overrule your objection. I will admit into evidence AG 34 and OAG Exhibit 46.

MS. COLLINS: That should be HM 46 and AG 34, Your Honor.

PRESIDING OFFICER: Oh, I'm sorry. HM 46, yes.

(Exhibits HBOM 46 and AG 34 admitted)

MS. COLLINS: Thank you, Your Honor. Those are my questions for now.

PRESIDING OFFICER: Your witness.

### CROSS-EXAMINATION

BY MS. GRAHAM:

Q. Good afternoon – morning, Mr. Gordon.

PRESIDING OFFICER: Please state your name for the record – for the –

MS. GRAHAM: Leah Graham.

Q. (BY MS. GRAHAM) You talked about this decision being fact specific. Do you recall the testimony?

A. Yes.

Q. So let's talk facts. The requestor in this case was Nate Paul's lawyer, correct?

MS. COLLINS: Objection. Speculation.

MS. GRAHAM: I believe that same testimony was elicited on direct that –

PRESIDING OFFICER: Overruled.

Go ahead.

Q. (BY MS. GRAHAM) Correct?

A. We did not know that at the time. It's become apparent that that is the case now, but we did not know that at the time.

Q. And your original opinion, as it relates to the request for the full release of the DPS file, was that it should not be released and that the law – law enforcement exception applied, true?

A. That's the – that's the big DPS file that we're referring to?

Q. Yes, sir.

A. The original draft on that, I believe, did have – did just address it under the law enforcement exception.

Q. And that was your opinion that it should not be disclosed under the law enforcement exception, correct?

A. No, that was not my opinion. That was just the first draft that was on the – on the ruling.

Q. Who drafted the first draft?

A. I'm not sure if that was the drafter on the ruling or if that was me. It – I don't remember.

Q. You had direct conversations with Ken Paxton about this specific request for a full copy of the DPS file, true?

A. Yes.

Q. He made it clear to you that he wanted to find a way to release the documents that Nate Paul's attorney was requesting, true?

MS. COLLINS: Objection, Your Honor. That's improper testimony through – through this counsel. Assuming facts that have not been addressed with this witness.

MS. GRAHAM: Your Honor, this testimony has already been elicited.

PRESIDING OFFICER: Overruled.

Q. (BY MS. GRAHAM) True?

A. No.

Q. Mr. Paxton did not summon you to his office to talk about this file?

A. Yes, he did.

Q. He did not put pressure on you to either not release – to either not rule against the requestor or to release the information?

A. No, I would not – I would not classify it as – as "pressure." The decision that we made was not –

Q. Sir, I appreciate that. I'm not asking you what the decision was made. I was asking about your conversation with Mr. Paxton.

He had one of two things that he wanted to occur: Either release the information or, at a minimum, figure out a way not to rule against the requestor, true?

MS. COLLINS: Same objection, Your Honor. Assuming facts not before this witness.

PRESIDING OFFICER: Sustained.

Q. (BY MS. GRAHAM) In your conversation with Ken Paxton about this particular DPS file, can you recall any other time when Mr. Paxton directly came to you and got involved on a DPS open records request?

A. No.

Q. Ultimately you did exactly what Mr. Paxton wanted, correct? You did not rule against the requestor, Nate Paul's attorney, true?

MS. COLLINS: Again, objection, Your Honor. Assuming facts not before this – this witness.

PRESIDING OFFICER: Overruled.

Q. (BY MS. GRAHAM) True?

A. I'm sorry, could you repeat the question?

Q. Yes, sir.

Ultimately, the opinion was not to rule against the requestor, which was exactly what Ken Paxton was pressuring you to do, correct?

MS. COLLINS: Again, Your Honor, I'm going to object. She's now mischaracterizing this witness' testimony. He said he was not pressured.

PRESIDING OFFICER: Sustained.

Q. (BY MS. GRAHAM) By not ruling you were not ruling against the requestor? By making a no decision, that's not ruling against the requestor, true?

A. That's correct. We didn't rule against either party, the requestor or the governmental bodies at issue.

Q. Now, earlier you said that the OAG decision not ruling against Nate Paul's attorney, quote, tilted the scale in terms of how a Court would ultimately decide whether or not to rule on the disclosure of that information. True?

A. No. If I said that, I may I have misspoken. It did – we did not want to tilt the scale. We didn't want to put – we didn't want to tip the scale either way. We wanted to maintain the status quo and allow the Court to review it completely de novo without our opinion, which is do great weight tilting the scale based on the procedural requirements.

Q. Withholding the information would have been detrimental to the requestor. That's what you said on direct. Do you remember that?

A. I'm sorry. Could you repeat the question?

Q. You said, Withholding the requested information would have been detrimental to the requestor. Do you recall that testimony?

MS. COLLINS: I'm going to object, Your Honor. I don't recall him – that testimony either. So mischaracterization of his testimony.

MS. GRAHAM: And I'm happy to put her on the stand. I'm asking the witness if he recalls his –

PRESIDING OFFICER: We can –

MS. GRAHAM: – testimony.

PRESIDING OFFICER: We can check with the court reporter.

MS. GRAHAM: I have a quote: It would have been detrimental to the requestor.

PRESIDING OFFICER: Okay. I'm going to overrule.

You can answer yes or no.

A. Yes. It would have concluded that the information could be withheld.

Q. (BY MS. GRAHAM) Now, on June 8th, after the opinion came out, Johnna Ward – do you know who that is?

A. Johnna Ward?

Q. Yes, sir.

A. Yes.

Q. Okay. On June 8th, she was asking if you still had the file in your possession. Do you recall that?

A. Yes.

Q. And – and the file she's referring to was the entire DPS file, correct?

A. Yes.

Q. And within that file is – one part of it would have been the probable cause affidavit that Nate Paul was looking for, correct?

A. No. I – I believe that that – if I'm not mistaken, I think that that was after the ruling had been issued.

Q. It is, sir. That's not my question.

Included within the DPS file would have been the probable cause affidavit that Nate Paul was looking for, true?

A. No.

Q. The probable cause affidavit would not have been within the DPS file?

A. Not after we issued a ruling. We would have sent the documents back to – to DPS.

Q. But by June 8th, after the decision was released, do you recall Johnna Ward e-mailing you and specifically asking you if you still had it – it was still checked out to you and asking when you were going to return it? Do you recall that?

A. Yes.

Q. We talked a lot about precedent and what – and what should be publicly disclosed. You would agree with me that a search warrant is treated substantially differently than a probable cause affidavit, or search warrant affidavit, in terms of whether or not that should be released to the public, correct?

A. There are different exceptions that can apply to those, but I would not characterize anything as what can or should be released to the public. It needs to have an exception that applies to it.

But both can be released to the public. A search warrant affidavit is more likely to have an exception that applies. They're not automatically confidential.

Q. Correct.

MS. GRAHAM: No further questions, Your Honor.

PRESIDING OFFICER: Redirect?

MS. COLLINS: Very briefly.

**REDIRECT EXAMINATION**

BY MS. COLLINS:

Q. In any of these requests, could either party have filed a lawsuit challenging the outcome?

A. Yes.

Q. Did anyone file a lawsuit of – for the outcome of the FBI brief ruling request?

A. No.

MS. COLLINS: That's all I have, Your Honor.

PRESIDING OFFICER: And just so the Court knows, because it has been unusual, either side can ask questions from the podium or their tables, in case anyone is asking.

Can the witness –

MS. GRAHAM: Requires no redirect, Your Honor.

PRESIDING OFFICER: Pardon?

MS. GRAHAM: Witness requires no redirect – recross.

PRESIDING OFFICER: Can the witness be excused?

MS. COLLINS: Yes, Your Honor.

Thank you, Mr. Gordon.

THE WITNESS: Am I released, Mr. President?

PRESIDING OFFICER: I'm checking with the House.

Yes, you can be released. Thank you.

Defense will call their next – no, we're going to take a break. I'm sorry. We'll call your next witness after our break.

How about five minutes after 10:00, a 20-minute break? 11:00. I'm sorry, we're past the 10:00 hour. Five minutes after 11:00.

(Recess: 10:43 a.m. to 11:12 a.m.)

**AFTER RECESS**

PRESIDING OFFICER: Please call the next witness. Who will that be?

MR. HILTON: Thank you, Your Honor. Chris Hilton for the attorney general. The next witness is Austin Kinghorn.

PRESIDING OFFICER: Bailiff, please bring in Mr. Kinghorn.

MR. HILTON: And, Your Honor, I'd just like to – while Mr. Kinghorn is coming in, I just want to clarify for the record, for the jury, and for the public, at the end of the day yesterday we had called Professor Michael Gerhardt, who was intended to be one of our expert witnesses. Last night the Court ruled that the expert testimony we were going to provide would not be heard. And so to the extent there was confusion, I just wanted to make the jurors aware and the public aware that that was the Court's ruling and that's why those witnesses aren't here.

PRESIDING OFFICER: And the Court ruling was based on objection from the House, under Rule such and such.

MR. HILTON: Yes.

PRESIDING OFFICER: And we took about an hour to deliberate and look at all the questions.

MR. HILTON: That – that's right. I apologize for –

PRESIDING OFFICER: And we ruled –

MR. HILTON: Yeah.

PRESIDING OFFICER: And we ruled in favor of the House on that.

MR. HILTON: I just wanted the public to be aware. That's right.

PRESIDING OFFICER: And you were very kind to pull them from your witness list.

(Witness entered the Senate chamber)

PRESIDING OFFICER: Mr. Kinghorn, I believe I already swore you in in the group.

THE WITNESS: Yes, sir.

PRESIDING OFFICER: You may be seated. Speak loudly and closely to the mic. Thank you.

AUSTIN KINGHORN,

having been first duly sworn, testified as follows:

**DIRECT EXAMINATION**

BY MR. HILTON:

Q. Austin, good morning. Thank you for being here. We both need to speak slowly and loudly into the microphone, I am told.

You've testified in this chamber before, before the Senate, correct?

A. Yes, I have.

PRESIDING OFFICER: Turn the mic on.

A. Yes, I have.

Q. (BY MR. HILTON) So you know the acoustics in here can get a little bit weird, especially for our folks in the back.

A. That's correct.

Q. So please just introduce yourself to the jury and tell us about your career.

A. My name is Austin Kinghorn. I'm the associate deputy attorney general for legal counsel at the Office of the Attorney General.

Would you like me to go back a bit?

Q. Yeah, sure. Why don't – if you could, please, just start with law school, walk us through what you've done up to the present day.

A. So I graduated from Baylor Law School in 2010. After that I did a clerkship on the Fourteenth Court of Appeals for then-Justice Jeff Brown. I did a stint in commercial litigation.

PRESIDING OFFICER: Stay close to the mic.

THE WITNESS: Yes, sir.

A. I did a stint in commercial litigation. After that, primarily doing insurance defense. After that, I went to work for the AG's office in the civil Medicaid fraud division.

When Justice Brown was elevated to the Texas Supreme Court, I went to work for him again as a staff attorney. And I worked at the court for about six and a half years in that capacity for Justices Brown and later Justice Jane Bland, and then came back to the AG's office in the general counsel division. From there I was promoted to general counsel, and then most recently to the title that I hold now.

Q. (BY MR. HILTON) Thank you, sir. And tell us a little bit about your work for the attorney general and your – your current roles both as general counsel, opinions committee, and your current title.

A. Right. So as the associate deputy for legal counsel, I'm over two divisions. It's a general counsel division and the opinion committee. In that role, I am both the division chief of general counsel and general counsel for the agency and also chair of the opinion committee.

Q. How many employees do you oversee?

A. Nineteen.

Q. Okay. And are you proud of your time at the attorney general's office?

A. I am very proud.

Q. I think this is a bit of a silly question but it's come up a lot. Are you a RINO? Do you know what a RINO is?

A. Yes, I do. I've been called a lot of four-letter words. That's not one of them.

Q. What are your politics? Are you conservative?

A. Yes, I am.

Q. Again, I think it's a silly question, but it's being asked. On a scale of 1 to 10, how conservative do you think you are?

A. Eleven.

Q. Fair enough.

What I would like to do today with you is go through these Articles of Impeachment, see if there's any perspective you can provide as to each. And I appreciate you being here, helping explain the work of the agency for the jury.

So let's start with Article I, which relates to the Mitte Foundation and the intervention into that lawsuit.

Were you directly involved in that lawsuit or that intervention in any way?

A. I was not.

Q. Okay. But are you familiar with EAMs?

A. Yes, I am.

Q. Unfortunately, we've talked a lot about EAMs during this trial. What's your understanding – what is an EAM to you?

A. The executive approval memorandum is a document that the agency relies on to seek and obtain executive approval of various agency actions or engagements.

Q. And do you receive EAMs as part of your work?

A. I do.

Q. Okay.

A. I probably see – receive one or more a day.

Q. What do you do if you have concerns about an EAM?

A. If I have concerns about an EAM, you know, typically the – the practice is going to be to reach out to who circulated the EAM, and, you know, engage with that person directly, try to flesh out the issues. You know, sometimes it's – it's simply a matter of correcting something in an EAM and recirculating it. So the first step is always just get in touch with the folks who are asking for the executive action and connect and make sure you have an understanding of what is going on.

Q. If you get an EAM that you're concerned about or you're proposed a course of action that you don't agree with, do you just go ahead and sign the EAM anyway?

A. No, I do not.

Q. Okay. So what does signing the EAM signify?

A. That would signify that you have reviewed the EAM, you reviewed the legal authority in it, the explanation of the rationale for the actions being sought, and that you approve of that action being taken.

Q. So if someone at the attorney general's office signs an EAM, does that mean they've approved that action?

A. That's correct.

Q. What about – let me ask you this: Does the attorney general have to have an EAM that's fully approved by his subordinates before he takes an action?

A. No, he does not.

Q. Why not?

A. The attorney general's authority and the first assistant's authority flow directly from the Texas Constitution and from statutes, specifically Government Code Chapter 402. The EAM process exists to vet certain proposals, but it is ultimately not binding on the person or persons who actually possess the constitutional executive power to act as attorney general or on behalf of the Office of the Attorney General.

Q. So just to make that clear, the attorney general has the legal authority to act without an EAM approved by his subordinates?

A. Absolutely.



Q. Okay. Does that include the authority to sign a contract?

A. Yes, it would.

Q. Okay. Let's look at an example of an EAM.

MR. HILTON: Can we pull up House Exhibit 62, please, Mr. Arroyo.

Your Honor, I believe this has already been admitted into evidence. And I'm going to try and go electronic today. So we'll see if it works.

And, Mr. Arroyo, if you can just zoom in on the signatures at the top of this EAM and maybe capture the subject line as well.

Q. (BY MR. HILTON) Have you – have you seen this EAM before, Mr. Kinghorn?

A. Yes, I have.

Q. Okay. And – and which EAM is this?

A. This is a EAM requesting approval to intervene in the Mitte Foundation litigation.

Q. You weren't a signatory on this EAM, correct?

A. No, I was not.

Q. Okay. But let's look at the first signatory. That's – that's Mary Henderson. Who is that?

A. Mary Henderson at the time was in our financial litigation division as a – and she had a senior attorney role in that division.

Q. And what does her signatures on this EAM indicate?

A. That would indicate that she has approved of the – the action described in this EAM, and it – it looks like she's the one who actually circulated this EAM.

Q. Well, why do you say she's the one who circulated it?

A. It – it says from Mary Henderson. And also she's the first signatory. So typically the first signatory on the document, the lowest signatory, would be the person who actually routed the document for approval.

Q. So does this indicate that Mary Henderson and Cat Day actually authored this EAM? Is that what this says to you?

A. That's likely the case, yes.

Q. Do you know whether the attorney general ever spoke with Mary Henderson or Cat Day about this EAM?

A. I do not know.

Q. Okay. Who is next on the signature line? Who is Josh Godbey?

A. Josh Godbey at the time was the division chief for the financial litigation division.

Q. And what does his signature here indicate?

A. That would also indicate approval of the action that the EAM is seeking.

Q. And who's next up the chain on this EAM?

A. That's Darren McCarty.

Q. What was his role at this time?

A. At the time he was the deputy attorney general for civil litigation. So you – you would see his name a lot on EAMs like this involving requested courses of action in active litigation.

Q. And, again, I want to be clear about what his signature means here. When he's DocuSigned this EAM, what does that indicate to you as general counsel of the agency?

A. That indicates approval of the action that is sought by the EAM.

Q. And the same question with Mr. Mateer. What was his role and what does his signature here indicate to you?

A. Jeff Mateer was the First Assistant Attorney General at the time. And his signature would indicate approval of the action the EAM seeks.

Q. And would it be your expectation that all of these people who signed this EAM have read it?

A. It would. I mean, that is certainly the point.

Q. That's what you normally do within OAG, right?

A. Correct.

Q. And would it be your expectation that they understood the memorandum before they signed it?

A. I would not sign an EAM that I did not fully –

MS. EPLEY: Objection, Your Honor. The question calls for speculation.

MR. HILTON: I'll move on.

Thank you, Mr. Arroyo.

PRESIDING OFFICER: Sustained.

Q. (BY MR. HILTON) All right. Let's move on to – to talking about Article II. That's about the foreclosure guidance letter. It's been called a lot of things in this courtroom. That's what I'm going to call it.

Do you understand what I'm referring to? Are you familiar with that letter?

A. I do understand it, and I am familiar with it.

Q. Okay. Did you work on that guidance letter personally?

A. In a very limited capacity. Early on I performed some very perfunctory research on it. I – I never participated in the drafting of the letter itself.

Q. Okay. Who asked you to do that, that research?

A. Ryan Vassar.

Q. And did you – did you form a conclusion as to what was the ultimate outcome in your limited role?

A. As memory serves, I – I didn't form any firm conclusions at the time. I – I performed a couple of hours, maybe three hours, of research. And – and really just had enough time to kind of come up with some general parameters of what the issues were.

And Mr. Vassar and I had a phone conversation about what we had found so far in our respective research. And he took it from there. And I never had another conversation with anyone else about the letter moving forward.

Q. Did you see the letter once it was ultimately issued?

A. Only when it was issued, yeah, when it went up on the website.

Q. Right. So typically you weren't involved in the drafting process, so you don't know how they got from A to Z on that?

A. That's right.

Q. Okay. But you saw the final letter?

A. I did.

Q. Did you agree with the analysis of that conclusion in that letter?

A. I do.

MS. EPLEY: Objection, Your Honor. Relevance.

PRESIDING OFFICER: Overruled.

Q. (BY MR. HILTON) And just – sitting there – as you sit there today, can you briefly explain what that letter does in your view? Well, rather – let me rephrase.

How – can you explain the conclusion of the letter?

A. The – the legal conclusion?

Q. Yes.

A. The legal conclusion essentially was that under the circumstances of COVID at the time with 10-person restrictions on in-person gatherings, that there was a possibility that – that a public sale, as defined by statute, that that necessary element to proceed on the foreclosure wouldn't be satisfied if you didn't have a situation where anyone who wanted to be a bidder on a property that was under foreclosure would have an opportunity to bid on it and, thus, get the best, most fair value for the property.

Q. Well, let me make sure I understand each piece of that. So – so you mentioned the public sale issue. That's a requirement out of statute?

Did – did I understand you?

A. That's right.

Q. Okay. And you mentioned a bidder being excluded. Why would that be the case?

A. I'm sorry, could you repeat that?

Q. I – I thought you mentioned the 10-person requirement might result in a bidder not be able to participate in a foreclosure sale. Why would that be the case?

A. Correct. So normally these sales are open to the public. Anyone who wants to go bid on a property can. And that, of course, has the effect of – of increasing the price typically. And the COVID restrictions at the time – the governor's executive orders only permitted 10 people to gather at once in what was considering – I think the nomenclature was at the time a public gathering.

Q. I want to make sure I understand what you're saying. If there were bidders that were excluded, that could drive the price down of the sale?

A. Yeah. That's certainly a possibility.

Q. Okay. Did – in your view, does that letter shut down foreclosure sales in the state of Texas?

A. I – I don't have an opinion on whether it did or didn't. I do know it was nonbinding and informal legal guidance.

Q. Did you work on any other COVID-related opinions or guidance documents?

A. I worked on a great number of them. You know, during my first several months at the agency starting in June of 2020, COVID-related work was the vast majority of what I was doing.

Q. And if you could just briefly, for a minute here, explain to the jury, explain to the public, you know, we're trying to explain the work of the Office of the Attorney General today. So explain what it was like to be working on these issues during COVID.

A. It was intense. It was a demanding time, as I'm sure it was for a lot of people in this room. We were on the cutting edge of a lot of novel legal issues. A lot of folks were looking to the AG's office for guidance and direction on how to respond, how to navigate the challenges that were coming forward, especially as it – as it pertained to the governor's executive orders, which were coming out.

We were – we were often looked to for guidance how to comply with those, what they meant construing them. And we fielded those requests from – from all corners.

Q. Was it unusual during that time to have expedited requests or to be working on short deadlines?

A. That is never unusual at the OAG, under any circumstances.

Q. Particularly so during COVID?

A. Sure. Particularly so.

Q. Let's talk –

A. Anyone who came to us with a problem needed an answer and wanted an answer, at least quickly.

Q. Understood.

Let's talk about opinions and guidance documents from the attorney general's office more – more broadly. What kinds of guidance can the attorney general issue?

A. Well, there's a range of options. A lot of folks in this room are probably familiar with our formal legal opinions. Under Chapter 402 of the Government Code, an authorized statutory requestor may request a formal legal opinion from the OAG. And that opinion, while not binding, is a source of persuasive legal authority that Courts typically will look to and consider when resolving a case. But we have other tools in our belt beyond that.

Additionally, under Chapter –

Q. Before I go – I just wanted to clarify one thing. You mentioned that a lot of the folks in this room might be familiar with that formal legal opinion.

Why would that be the case? Why would these senators and some of these House members be familiar with that?

A. Chairs of legislative committees, senators and House members are authorized requestors under the statute.

Q. Okay. Does the attorney general's office work frequently with those authorized requestors regarding their requests for opinions?

A. We – we frequently work with members of the Legislature on a host of issues, and – and try to be as solicitous as possible in – in being helpful and giving the first legal guidance we can.

Q. And I'm sorry to interrupt you. So that was the formal legal opinion process.

A. Yes, sir.

Q. We're moving on to the next category, so I apologize for interrupting.

A. Sure. So under Chapter 418 of the Government Code, which is the Texas Disaster Act, the AG's office has additional authority to provide legal counsel to local political subdivisions during a declared disaster. Authorized requestors include mayors, county judges, county commissioners, emergency management directors.

Beyond that, the office has historically operated with the understanding that we have broad legal authority with the attorney general as the chief legal officer of the state to issue informal guidance of public note, of public interest that would have a wide applicability to the public at large, especially in disaster situations where there's a need to get good information out to the public on pressing issues.

And that – that authority I think flows directly from the attorney general's constitutional and statutory authority as the attorney general, as the chief legal officer of the state.

Q. Other than the foreclosure guidance letter, can you recall any examples of other COVID-related guidance that was issued that also fell in that – that third category you described?

A. We – we put several guidance documents out on issues that a lot of folks are facing. Churches, private religious schools. I know that we did some opinions on – on access to vacation homes – not opinions, letters – on access to vacation homes in other states, whether – where golf courses fell in terms of the governor's order for – for shutdown purposes.

So there were a lot of topics that we put something out there short of a formal opinion that was designed to provide generally applicable informal legal guidance to the public at large.

Q. So it's fair to say – is it fair to say that the foreclosure letter was not unique in that regard? It was not the only informal guidance that was put out?

A. That's correct.

MR. HILTON: Let's look at a couple of other examples of guidance from this time.

Mr. Arroyo, if you could pull up House Exhibit 105.

And I believe this has already been admitted, Your Honor.

Q. (BY MR. HILTON) Are you familiar with this document, Mr. Kinghorn?

A. Yes, I am.

Q. And just very briefly, what is this – this document?

MS. EPLEY: Objection, Mr. President. This document is not in evidence.

MR. HILTON: I apologize. I thought it had been admitted. It's House Managers' Exhibit 105. And I would offer it if it hasn't been admitted.

PRESIDING OFFICER: We thought it was pre-admitted, Ms. Epley.

MS. EPLEY: No, Mr. President. I don't believe so. We don't object. It's our document to begin with. I just wanted to make sure the record was clear.

MR. HILTON: I apologize. I – I tried to get this smoothed out with counsel before we started, but, yes, I offer it, if it hasn't already been admitted.

PRESIDING OFFICER: It will now be admitted into evidence. That's exhibit – what's the number, 105?

MR. HILTON: House Exhibit 105, Your Honor.

PRESIDING OFFICER: All right. Admitted into evidence.

(HBOM Exhibit 105 admitted)

Q. (BY MR. HILTON) Mr. Kinghorn, if you could, please, just – if – to the extent that you can, please just describe briefly what – what this document is.

A. This was a general guidance document that the agency issued to house – houses of worship during the COVID pandemic.

Q. Is this a full-blown opinion under Chapter 402?

A. It is not.

Q. And is this a disaster counsel letter under Chapter 418?

A. No, this is not.

MR. HILTON: Mr. Arroyo, if you could show us the bottom of the page. There's a date next to the exhibit stamp.

Q. (BY MR. HILTON) And when was this letter issued?

A. It says April 27 of – of 2020.

Q. Do you think it was any way improper for the agency to issue this guidance?

A. No, I do not. And, in fact, I think this is – this is the kind of guidance a lot of folks were looking to the attorney general to provide.

Q. Let's look at another example –

MS. EPLEY: May I seek clarification? He was confirming that the guidance in regards to the house of worship example – or excuse me, Exhibit 105 is not something he takes issue with, correct, not the foreclosure letter itself?

MR. HILTON: Your Honor, she can cross-examine the witness.

MS. EPLEY: No, I'm clarifying –

MR. HILTON: This is my examination and she shouldn't be able to –

PRESIDING OFFICER: You can cross-examine on that.

MS. EPLEY: Okay. Thank you.

MR. HILTON: Thank you, Your Honor.

Let's briefly look at House Exhibit 104 next. I also thought this one had been pre-admitted. Maybe I'm wrong. To the extent that it wasn't, I'd offer House Exhibit 104.

PRESIDING OFFICER: Thumbs up.

MR. HILTON: Great.

Q. (BY MR. HILTON) Mr. Kinghorn, have you seen this letter? Rather, are you familiar with this letter?

A. Yes. Generally speaking, yes.

Q. Okay. This is a letter in response to Chairman Frank?

A. Yes. This is the one about the golf courses, okay. I had to read a little bit into it.

Q. Okay. Great.

MR. HILTON: Let's look at the last page, please, Mr. Arroyo. If you can just zoom in on that text, please.

Q. (BY MR. HILTON) So this letter, was this a – a full-blown Chapter 402 opinion?

A. No, it was not.

Q. And how can you tell that?

A. It's got some language there caveating that it is – is not a formal opinion issued Section – pursuant to Section 402.042, which is our formal opinion statute.

Q. It says on the letter that it is not a formal opinion under Chapter 402?

A. That's right.

Q. So if someone were to say that this was a Chapter 402 opinion, they would be wrong. Do you agree?

A. I do.

Q. Are you aware that the foreclosure guidance letter has substantially similar language in it?

A. Yes, I'm aware of that.

Q. Okay. And who was this letter signed by?

A. Ryan Vassar.

Q. So Ryan Vassar signed an informal guidance letter?

A. Yes.

Q. Does that indicate to you whether Mr. Vassar thought he had the authority to sign that letter? Do you think there was an issue with authority for issuing this letter?

A. I – I assumed that he operated under the authority to – to issue this letter on behalf of the agency.

Q. Did you think a requestor was necessary for the foreclosure letter?

A. No, I did not personally.

Q. Do you have any personal knowledge as to why one was sought?

A. I do not.

Q. So you would have no reason to disagree with me if I were to tell you that a requestor was demanded because –

MS. EPLEY: Objection.

Q. (BY MR. HILTON) – someone was trying to –

MS. EPLEY: Objection.

Q. (BY MR. HILTON) – get out of doing work?

MS. EPLEY: Objection, Mr. President. I'm sorry. Counselor is testifying to facts not known to this witness.

I'm sorry, counselor is testifying to facts not known to this witness.

PRESIDING OFFICER: Sustained.

MR. HILTON: You can take that down, Mr. Arroyo.

Q. (BY MR. HILTON) I think that's enough for Article II. I think we're going to skip Articles III and IV because I don't think you have any unique responsibility with regard to the PIA; is that true?

A. I do not, that's right.

Q. And we've heard plenty about the PIA today.

But as an aside, does the attorney general have the authority to access any case file or file in the agency?

A. Yes, I believe he does. He's the attorney general.

Q. Why – why does that give him the right to access any file he wants?



A. Well, I guess there's kind of an old saying in the legal profession that his name is on the wall. It's his agency, and – and he's the duly-elected attorney general. So it's his law firm. He – he gets to see a file if he wants to see it.

Q. So if someone were to say that the attorney general improperly accessed a file, would that make sense to you?

A. That would not – that would not compute to me.

Q. Me neither.

MR. HILTON: Can you pull up Article IV briefly, Mr. Arroyo.

Q. (BY MR. HILTON) Do you see the allegation here where it says, Paxton improperly obtained access to information held by his office?

Did I read that correctly?

A. Yes.

Q. Okay. Let's go to Article V now.

MR. HILTON: You can take that down, Mr. Arroyo.

Q. (BY MR. HILTON) Are you familiar with the contract with Brandon Cammack?

A. I am.

Q. Okay. Did you have any involvement with hiring him?

A. I did not.

Q. Did you have any involvement with drafting the contract or executing it or anything like that on the front end?

A. I did not.

Q. Okay. When did your involvement with this particular contract begin? When did your familiarity with it begin?

A. Sometime later after the contract had been terminated, I believe Mr. Cammack reached out to our office to inquire about payment on the contract for the outstanding invoices.

Q. And when you say "reached out to our office," does that mean he reached out to you as general counsel, someone in your division? Do you recall?

A. My best recollection is that it was a phone call to the general counsel division. I think he was looking for someone to talk to about it.

Q. Okay. Do you remember a date for that phone call?

A. I don't.

Q. Was that before or after you had been promoted to general counsel?

A. I believe it was after.

Q. Okay. And when were you promoted to general counsel?

A. During the month of November of 2020.

Q. Okay. So sometime after your promotion in November 2020, Mr. Cammack called to inquire about payment on his contract; is that – is that your testimony? I just want to make sure I understand the timeline.

A. That's right.

Q. Okay. You were made aware of this phone call. What did you do with that information?

A. I conferred with Lesley French, our chief of staff, on that, primarily because she had more awareness of these – these issues and what had been happening at the time. As I said before, I had no involvement with the contract. So she and I – I recall discussing it –

MS. EPLEY: Objection, Mr. President. The question calls for hearsay – or he's about to get into hearsay at this point.

MR. HILTON: And let me clarify. Please don't –

PRESIDING OFFICER: Sustained.

MR. HILTON: Yeah. Thank you. Of course, I agree.

Q. (BY MR. HILTON) Please don't relay the contents of any conversation that you had with anyone else. Don't tell me what anyone said.

Again, I'm just asking, you know, once you became aware of this request for payment, what happened next? You said you conferred with Lesley French. Please pick up there.

A. My best recollection on this is that at some point a call was made to Mr. Cammack.

MS. EPLEY: Objection. Anything he could state after that is going to be hearsay.

MR. HILTON: We – we don't know what he's going to state next, so I don't think that's true.

PRESIDING OFFICER: Overruled.

MS. EPLEY: In that case anything next is nonresponsive. May he ask another question?

PRESIDING OFFICER: You can break it down into questions.

Q. (BY MR. HILTON) Did you reach out to Mr. Cammack?

A. Yes.

Q. What was the purpose of reaching out to Mr. Cammack?

A. To follow up on his inquiry.

Q. What did you want Mr. Cammack to know when you followed up with him?

MS. EPLEY: Objection, Your Honor. Hearsay.

MR. HILTON: I didn't ask for what he said. I asked for what he wanted Mr. Cammack to know in response to his inquiry.

PRESIDING OFFICER: Overruled.

A. The purpose of the call was to inform Mr. Cammack of how he might proceed about processing his invoices under the contract.

Q. (BY MR. HILTON) And what were Mr. Cammack's options to get paid at that point?

A. There remained work within the scope of services that had not been satisfied before we could issue payment. Specifically the preparation of a report of his findings hadn't been completed. So what I relayed to him, and I believe this was over a voice mail, was that we couldn't make payment on the contract until the – until that – that commitment had been made.

Q. If Mr. Cammack had sent you that memo that he had contracted to – to provide, what would you have done?

A. Subject to any other clerical reason that – that we might have to shore up, from my view it was a payable invoice because it was a valid contract at the time that the services were performed.

Q. Did you ever hear back from Mr. Cammack after you advised him that if he sent you the memo he could get paid?

A. I did not.

Q. Mr. Cammack never called you?

A. Not to my knowledge.

Q. And, again, when was this, to the best of your recollection?

A. My best recollection is it – it would have been sometime in November or later.

Q. Let's go ahead and skip ahead to Article VII, just briefly. Are you aware of the attorney general's office internal report regarding the events underlying this impeachment proceeding?

A. Yes.

Q. And broadly speaking, what is that report as you understand it?

A. That report is the findings of a 10-month investigation that was conducted internally at the Office of the Attorney General concerning the allegations that the whistleblowers raised.

Q. Did you ever review that report?

A. I did.

Q. How many times and what was the nature of your review?

A. Two, no more than three times, I was provided a copy and asked for general feedback on the document; proposed edits, revisions, things along those lines.

Q. Were you ever directed by anyone to make sure that the report was a sham?

A. No.

Q. Were you ever directed to make sure it included false or misleading statements?

A. Absolutely not.

Q. Are you aware of anyone else receiving such a direction?

A. Absolutely not.

Q. What would you have done if you had identified a false or misleading statement in that report when you reviewed it?

A. If I had identified a false and – or misleading statement, I would have immediately raised that issue to the folks who were working on the report for consideration.

Q. When was that report published?

A. That was August 24th, I believe, of '21.

Q. And just to be clear, I'm – I'm looking at the text of Article VII here. The allegation is, Paxton directed employees of his office to conduct a sham investigation. Are you aware of that occurring?

A. I'm not aware that that occurred.

Q. And you're one of the employees who, at least to some degree, worked on the report?

A. That's right.

Q. The report was published in August 2021, you said?

A. That's right.

Q. And it's been on the attorney – has it been on the attorney general's office website continuously since that time?

A. Yes, it has.

Q. So was that before or after November 8th, 2022, that this report was issued to the public?

A. After.

Can you repeat the question?

Q. I'm sorry?

A. Repeat the date.

Q. Was the report made public before or after the attorney general's election on November 8th, 2022?

A. Oh, I'm sorry, before. Before. Before.

Q. It's been on the attorney general's office website continuously since then?

A. That's right.

Q. Was there – are you aware of whether there was a reporting on the issuance of that report?

A. There's been extensive reporting on the issues that were discussed in that report.

Q. When did that reporting begin, as far as you're aware?

A. That reporting began pretty much immediately when the whistleblowers reported General Paxton to law enforcement, and it's something we've been dealing with ever since.

Q. And the OAG report also contains the details of – of those facts?

A. It does.

Q. And that's been public?

A. Yes.

Q. On the attorney general's website?

A. Yes.

MR. HILTON: You can take that down, Mr. Arroyo.

Q. (BY MR. HILTON) Let's move on to discussing Article VIII a little bit. Article VIII deals with the settlement of the Brickman versus Office of Attorney General litigation.

Are you generally aware of that litigation and that settlement?

A. Yes, I am.

Q. As part of the agreed settlement terms in that case, are there any contingencies that must be satisfied before the settlement is fully effective?

A. Well, the biggest contingency would be funding for the settlement itself. I think there may have been some nonmonetary considerations as well, but I think maybe the one you're asking about is – is the contingency of – of the Legislature funding, the requested amount.

Q. That is the one I'm asking about.

Why is that legislative appropriation of funding contingency necessary for this settlement?

A. Like other State agencies, the Office of the Attorney General is prohibited in the General Appropriations Act from settling a case for more than \$250,000, without seeking additional funds to do that.

Q. Does State law set out a process for seeking funding for such a settlement?

A. It does.

Q. Did the Office of the Attorney General follow that process?

A. Yes, we did.

Q. Do you know whether funding was appropriated?

A. It has not been appropriated to this – to this date.

Q. Has the Office of the Attorney General paid out a single dime on this settlement?

A. It has not.

Q. As far as you're aware, has a single dime of taxpayer money been spent funding that settlement?

A. It has not.

Q. Who decides whether that will ever happen?

A. At this point ultimately the Legislature will.

Q. The House and the Senate?

A. Correct.

Q. It's up to them whether to fund it?

A. That's right.

Q. The attorney general can't force them to do that, can he?

A. He can only ask.

MR. HILTON: Let's pull up Texas Government Code Section 554.010.

Your Honor, this is just a statute. I'm not offering it as an exhibit. It's going to be up on all of the screens.

Mr. Arroyo, if you can zoom in on that.

And I have paper copies for the witness and the Court and opposing counsel, if that will be helpful.

THE WITNESS: Yeah, this will work.

Q. (BY MR. HILTON) Are you familiar with this provision in the Whistleblower Act?

A. Yes, I am.

Q. Can you explain in English what the statute means?

A. So this is essentially a reporting requirement. It's – it kind of – there's two parts to this. When you – when you pay out on a settlement or a judgment, a Whistleblower Act case, the agency is required to essentially put together a report on that case. And following that report, the state auditor's office may initiate an audit or an investigation of basically what – what went into what happened with the Whistleblower Act complaint.

And if the SAO initiates that investigation, then they must follow up with a report to several entities on improvements that can be made, things that can be changed to prevent this from happening again.

Q. So let's – let's break that down and let's go piece by piece.

If the settlement is consummated, the attorney general's office has to do what?

A. It has to put together a brief memorandum describing the facts and the disposition of the suit. And it has to provide that to the state auditor's office.

Q. Okay. The attorney general's office has to prepare a memorandum describing the lawsuit and send it to the state auditor's office. What happens after that? What does the state auditor's office do with it?

A. The state auditor's office will review the report, and not later than the 90th day of that report is submitted, the SAO has the option to investigate the governmental entity or conduct an audit –

Q. And let's just – and let's just pause right there.

They have the option. Has the attorney general's office been contacted by the state auditor's office regarding this provision in connection with the Brickman versus OAG matter?

A. Yes.

Q. And what's your understanding of that contact from the state auditor's office regarding this statutory audit?

A. We were made aware of the existence of the statute, and – and they just wanted to bring it to our attention in light of the settlement road that we were on to make sure that we were aware of this requirement.

Q. The audit is coming?

A. Yes, sir.

Q. And under the statutory audit, who would have received the state auditor's report?

A. The legislative budget board and the legislative audit committee, and the governing board of the chief executive officer of the entity involved.

Q. What would that report contain pursuant to the terms of the statute?

A. The SAO's report would include recommendation on changes that would be necessary to create – correct the problems that gave rise to the whistleblower suit.

MR. HILTON: Mr. Arroyo, could you pull up the text of Article VIII, please.

Q. (BY MR. HILTON) If I'm understanding your testimony correctly, the OAG has been notified of the statutory audit by the state auditor's office, and those findings and recommendations will be given to the Legislature under the terms of the statute, correct?

A. That's right.

Q. Are audits and cover-ups the same thing?

A. I'm sorry, could you repeat that?

Q. Is an audit the same thing as a cover-up?

A. Did you say "cover-up"?

Q. A cover-up.

A. No, it is not. It's kind of the opposite.

Q. If someone is trying to, oh, I don't know, conceal their wrongful acts, should they subject themselves to an audit, in your opinion, as general counsel of the attorney general's office?

A. No.

Q. Do you know whether the state auditor's office likes to conceal facts when it conducts an audit?

A. I do not believe that is the way they are wired.

Q. I don't believe so either.

And, of course, we talked earlier. Your testimony is that the allegations underlying the facts at issue in this impeachment have been reported since they happened. That's your understanding?

A. Correct.

Q. You've seen reports in the media frequently about going – you know, goings on at the attorney general's office?

A. That's right.

Q. *Texas Tribune* seems to have a story every other day about the attorney general's office, don't they?

A. There's a lot of coverage.

Q. Do you have any personal knowledge of Ken Paxton ever forming or agreeing – forming an agreement with Nate Paul on accepting a bribe?

A. I have no personal knowledge of that.

Q. And do you have personal knowledge of anything to do with Laura Olson?

A. I do not.

Q. Okay. Do you have any personal knowledge of any vast criminal conspiracies involving misuse of OAG resources?

A. I have no such knowledge.

Q. If there were such a conspiracy, would you still be working at the attorney general's office?

A. No, I would not. I accepted promotion in this agency at a very critical time, and I assured myself and assured my wife if there were ever anything that I saw that were illegal or unethical, I would step away. And I'm still here. I'm proud of the work we do. I'm proud to serve General Paxton. I'm proud to be a part of this agency.

MR. HILTON: Thank you, Austin.

Pass the witness.

PRESIDING OFFICER: Ms. Epley, your witness.

MS. EPLEY: Thank you, Mr. President.

### CROSS-EXAMINATION

BY MS. EPLEY:

Q. Hi, Mr. Kinghorn.

A. Good afternoon.

Q. Have you and I spoken before?

A. We are old friends now.



Q. That's right.

Is it fair to say that you have been my contact to get documents from the Office of the Attorney General?

A. That's right.

Q. And that our first conversation went well, but subsequent ones got a little chillier?

A. That's fair.

Q. Now, we played respectfully with one another, right? No one was rude?

A. That's right.

Q. Okay. Is it also accurate, though, that right after I would have private conversations with you, as an officer of the Office of the Attorney General, particular details of our conversation would show up in Ken Paxton's filings?

MR. HILTON: Objection, Your Honor. Relevance. Hearsay. Has nothing to do with these proceedings.

PRESIDING OFFICER: Sustained.

MS. EPLEY: Mr. President, I don't know that I've ever seen a lawyer open up a bigger door in regards to the credibility and bias of a particular witness, and I would ask for a little latitude.

MR. HILTON: Your Honor, this has nothing to do with credibility and bias. She's asking about litigation and discovery. That has nothing to do with it.

PRESIDING OFFICER: I sustained the question.

Try your question a different way.

Q. (BY MS. EPLEY) Did you receive pressure from Chris Hilton or Judd Stone to provide you information in regards to our conversations?

A. Not at all. And I can answer your question more pointedly.

Q. I am certain he will do that. So I don't want to be rude, but I want to make sure we move forward.

Did you receive pressure in coming without a conversation?

A. Not at all.

Q. Did you receive directives in regards to what position you should take?

A. No.

Q. So the fact that you and I would have a conversation and it would show up in their filing the next day is completely and totally made up?

MR. HILTON: Objection, Your Honor. This is totally improper. All parties, all witnesses, were free to speak to both sides. That was in the Senate rules that were adopted. And it is only fair that people producing discovery talk to both sides.

They certainly talked to people we were talking to. We talked to people they were talking to. That's how the entire litigation of this impeachment has gone. This is completely improper. Nothing improper happened here. And she's not only attacking the witness' character but my character and my colleagues' character. This is completely improper.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) To clarify, then, maybe it was the subjective use of a word.

As opposed to pressure, did you receive incoming communications that inquired about our conversations?

MR. HILTON: Objection, Your Honor. Same objection. And this is hearsay.

PRESIDING OFFICER: Sustained.

MS. EPLEY: Okay.

Q. (BY MS. EPLEY) You talked some about – about Mitte; is that correct?

A. About you?

Q. About Mitte, I'm sorry. M-I-T-T-E.

A. Mitte, yes.

Q. Yes, sir.

A. Yes.

Q. You were not directly involved in that litigation?

A. I was not.

Q. So mostly what you offered for us was the use of the EAM or people's signatures to validate a contract or an action, correct?

MR. HILTON: Objection, Your Honor. Mischaracterizes his testimony. His testimony speaks for itself.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) What is the purpose of the EAM?

A. The purpose of an EAM is to solicit and obtain executive approval of an action that's being proposed to be taken – or an engagement that's being proposed within the agency.

Q. Thank you, Mr. Kinghorn.

And when you personally sign an EAM, are you signing to say, I believe this is a good idea, we should proceed? Or are you signing to confer as general counsel there is legal authority?

A. You're asking about me personally?

Q. Yes, sir.

A. In – I would be signing generally as to legal authority.

Q. Okay. So when Mr. Hilton asked you and you said you were giving approval, it means consistent with your job, that's an available option that we can justify, not this is my idea. I suggest we do it?

MR. HILTON: Objection. Misstates testimony.

MS. EPLEY: He can answer, Your Honor, if it's within his scope of knowledge.

PRESIDING OFFICER: Overruled.

MS. EPLEY: Thank you.

THE WITNESS: I think that everyone's – depending on their role, their – their reasons for going into their signature is a little different. For my role as general counsel, I'm primarily focused on whether the agency has legal authority to take the action proposed.

Q. (BY MS. EPLEY) And to draw an analogy, then, Ryan Vassar, for example, signing Brandon Cammack's contract is approval, but it's a legal justified position, not that it's the right one?

MR. HILTON: Objection, Your Honor. Assumes facts not in evidence with this witness.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) But your approval is about legal authority? Yes or no.

A. Yes.

Q. Okay. I'm going to turn your attention for a moment to the PIA. Are you aware of incoming public information requests as to Ken Paxton's e-mail: Signal, or Proton?

A. Typically, no. If – if a PIA request you're referring to is directed exclusively toward the attorney general, that's probably not a request that would – would come across my desk.

Q. I think I want to be more specific.

Are you personally aware of any PIA requests ever for the text messages, Signal account or Proton, of Ken Paxton?

MR. HILTON: Objection, Your Honor. Relevance.

PRESIDING OFFICER: Overruled.

A. There's been a great number of PIA requests concerning –

Q. (BY MS. EPLEY) Mr. –

A. – the attorney general's personal communication devices. I don't remember with specificity as to the specific types of communication you're referring to.

Q. So you're telling the Senate you do not know if a PIA has ever been requested for his texts?

A. If you phrase it that way, then, yes, I am aware that there have been PIA requests for his texts.

Q. Are you aware of PIA requests for his Proton e-mail?

A. I'm – I'm not personally aware of them, or at least do not recollect.

Q. Are you personally aware of PIA requests for his Signal?

A. I'm not personally aware or don't recollect at this point.

Q. Are you personally aware that he has those accounts?

MR. HILTON: Again, objection, Your Honor, to the relevance of this. It has nothing to do with anything this witness has testified about. It has nothing to do with anything in his personal knowledge, and nothing to do with any of the Articles of Impeachment.

PRESIDING OFFICER: Overruled.

A. I do not have any personal knowledge on the use of a Signal account. In terms of – as I have reviewed the documents in terms of producing them to you through subpoena requests, I have seen that there was a Proton e-mail account that wasn't included, I believe.

Q. (BY MS. EPLEY) Are you familiar with the fact that either the Proton or the Signal was set up by the Office of the Attorney General IT staff?

A. I'm not familiar with that.

Q. Do you think that you should be, if it's true?

A. Not necessarily.

Q. Okay. Are you aware of the fact either through a PIA request or the subpoena authority of this Senate we were not provided any documentation related to Signal or to Proton e-mail for business conducted on behalf of the State of Texas by Ken Paxton?

MR. HILTON: Objection, Your Honor. Lacks foundation. Lacks personal knowledge. The witness has testified that this is not within his scope and that he doesn't know anything about it at least. This is an argumentative question with no foundation.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) Did you personally respond to our discovery requests?

A. Yes, I did.

Q. Did you personally have a conversation with me about Proton e-mail?

MR. HILTON: Objection, Your Honor. Hearsay.

MS. EPLEY: I – I don't know what to say to that, Your Honor. We're both here.

PRESIDING OFFICER: I'm going to overrule.

You can answer the question.

MS. EPLEY: Thank you.

A. Can you restate the question for me? I'm sorry.

Q. (BY MS. EPLEY) Did you personally have a conversation with me about Ken Paxton's Proton e-mail?

A. I do remember that conversation, yes.

Q. Do you remember telling me that you knew it existed but couldn't provide me any of those documents?

A. I did not say that.

Q. You didn't tell me that you knew that there was a Proton e-mail account, but you didn't know anything about it?

MR. HILTON: Objection, Your Honor. Asked and answered. She's attempting to impeach the witness with a conversation that she thinks she recollects. This is improper.

MS. EPLEY: I'm certain I recollect it, if that helps.

PRESIDING OFFICER: Overruled. He did – you did ask. He did answer. But overruled.

Q. (BY MS. EPLEY) Okay. So let's try this one last time.

Will you tell the ladies and gentlemen of the Senate if you provided us any Proton or Signal documentation for Ken Paxton?

A. Can you ask it just a little bit more slowly, just the echo is –

Q. That's fair. I speak quickly.

Will you tell the ladies and gentlemen of the Senate whether you did or did not provide us any document in regards to Ken Paxton's Proton or Signal account?

A. We did not provide any documents related to a Proton or Signal account.

Q. At one point during the questioning, I think what you had said was the Office of the Attorney General is Ken Paxton's law firm. Did I get that right?

MR. HILTON: Objection. Misstates prior testimony.

MS. EPLEY: It was in court today and a moment ago on the subject of cross.

PRESIDING OFFICER: Overruled.

MS. EPLEY: Thank you.

A. It's – it's – I'm analogizing, but, yes, I did say that.

Q. (BY MS. EPLEY) But, of course, that kind of brings me to my next point.

As a prosecutor, your job is to zealously advocate for the – I mean, I'm sorry – your job is to seek a true and fair – I've forgotten my oath.

As a defense attorney, your job is to zealously advocate. But as a civil attorney who works on behalf of the Office of the Attorney General, what is your oath? What are you supposed to do? What's the most important part of being a lawyer for the State of Texas?

MR. HILTON: Objection, Your Honor. Compound question.

PRESIDING OFFICER: Overruled.

A. I would say the most important part of my job as a public servant is to faithfully serve my principal and the – the people of Texas.

Q. (BY MS. EPLEY) Do you believe your principal and the people of Texas to be different?

Who do you think your client is, Mr. Kinghorn?

A. Who is my what?

Q. Who is your client?

A. My client?

Q. Yes.

A. Is the attorney general.

Q. Would you believe me if I told you that when you work for the Office of the Attorney General, you work under his authority and for him, but your client is, and only ever is, the State of Texas?

MR. HILTON: Objection, Your Honor. Argumentative. Contains a legal conclusion.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) Do you believe me when I say that, or do you agree with it now as you sit here?

MR. HILTON: Objection, Your Honor. Same.

PRESIDING OFFICER: Yeah. Same question.  
Sustained.

Q. (BY MS. EPLEY) You were asked questions about Brandon Cammack, and you relayed a conversation in which he called to find out about payment. Do you recall that?

A. I do.

Q. And can you tell us what month and year that was?

A. Not with any greater specificity than what I indicated earlier.

Q. I didn't hear you, so would you tell me again.

A. Sure. I believe it was after I was promoted general counsel, which would have been sometime during the month of November, but it wasn't necessarily during November. It – it could have been December. I – I don't remember exactly when it happened.

Q. Okay. So Ryan Vassar was part of bringing you into the Office of the Attorney General; is that correct?

A. He was.

Q. And Ryan Vassar was a friend of yours, correct?

A. Yes.

Q. And is it fair to say that you liked and respected Ryan Vassar?

A. Yes.

Q. And when he was summarily dismissed from the Office of the Attorney General, you rose to his position somewhere around November, correct?

MR. HILTON: Objection, Your Honor. Argumentative and assumes facts not in evidence before this witness.

Moreover, I don't know what this line of questioning is intended to do other than improperly bolster the character of some witness who is not here. The door has not been open to that, so that aspect of this questioning is also improper.

PRESIDING OFFICER: Overruled.

A. I'm sorry. Could you give me the question again?

Q. (BY MS. EPLEY) Were you promoted after Ryan Vassar was fired?

A. Eventually.

Q. Yes or no?

A. Yes.

Q. Thank you. And it was after that, that you had a conversation with Brandon Cammack. And Brandon Cammack is asking your office about payment because despite the fact that he's been employed since September, he's never been paid; is that right?

A. That's right.

Q. And as of November, there was no contract in place, right?

A. There was a valid contract –

Q. Then why was he never paid?

A. – at one time.

By the time Mr. Cammack reached out, I believe the contract had been closed at that time. I'm just trying to be specific.

Q. So – so what I'm asking you is, there's a secret private contract signed only by Ken Paxton not kept in the Office of the Attorney General at some point in this storyline, correct?

MR. HILTON: Objection, Your Honor. Argumentative. Assumes facts not in evidence before this witness.

PRESIDING OFFICER: Sustained.

MS. EPLEY: I don't know how else to do that. The defense's entire position is that Ken Paxton signed a contract with Brandon Cammack, correct?

MR. HILTON: Objection. This witness has been subject to the Rule and doesn't necessarily – you know, doesn't speak for the defense. It's the same question. It's argumentative. It's a sidebar. You just sustained the objection.

MS. EPLEY: If – if I may. He was questioned at length in regards to the OAG report. Any person who's read it once or skimmed through knows that this is their position. It's not a violation of the Rule. It's a question he opened.

MR. HILTON: Objection. Argumentative and lacks foundation. She hasn't laid that he knows anything about that aspect of the OAG report. And she – if she wants to ask that question, she can do it, but she has to lay the foundation for it and do it properly.

MS. EPLEY: I'm happy to do that.

PRESIDING OFFICER: Sustained.  
Go ahead.

Q. (BY MS. EPLEY) Did you read the Office of the Attorney General report?

A. I have read it, yes.

Q. Okay. So on page 5, it reads, Position taken by the attorney general in this litigation was adverse to Nate Paul and in support of a higher settlement amount to be paid by Nate Paul.

Do you recall that being their position?

MR. HILTON: Objection, Your Honor. If she's reading from a document, I don't understand what it is, and I don't have it.

MS. EPLEY: He's testified that he's read the Office of the Attorney General report.

MR. HILTON: I didn't understand that.

MS. EPLEY: It's a question in regards to its veracity. I intend to take him through a list of false and misleading statements to get his position and then challenge him with the testimony of the whistleblowers as allowed by the rules.

PRESIDING OFFICER: Objection overruled.

Q. (BY MS. EPLEY) In regards to the Mitte Foundation on page 5, it says, The position taken by the attorney general in this litigation was adverse to Nate Paul.

You understand that's his, his being Ken Paxton's, position, correct?

MR. HILTON: Objection, Your Honor. There's been no testimony about Ken Paxton's position, and there's no – are we talking about the report, or are we talking about Ken Paxton? I'm still confused as to what we're doing here.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) Is the Office of the Attorney General report in question published on the AG's website?

A. I'm sorry. Say that again.

Q. Is the Office of the Attorney General report published on the AG website?

A. Yes, it is.

Q. And do you have to have either title status, meaning Ken Paxton or the first assistant, in order to publish it?

A. Yes. That's a fair statement.

Q. And, therefore, every statement put onto that website is adopted and made on behalf of Ken Paxton, correct?



A. I believe that the – that the report is issued by the Office of the Attorney General. You know, whether that extrapolates to a legal position that Ken Paxton holds pursuant to this proceeding, I'm just – I'm not going to go there.

Q. So as an officer of the Court and a government agent, you're not going to honestly say that anything published on the Office of the Attorney General website is the responsibility of Ken Paxton and something he should be held accountable for? That's your position?

MR. HILTON: Objection, Your Honor. Argumentative. She's demanding that this witness make a legal conclusion that he's justified – that he just testified that he cannot make.

PRESIDING OFFICER: Overruled.

MS. EPLEY: He is the general – thank you.

Q. (BY MS. EPLEY) Is your position that he cannot be held accountable for what he posts on the website?

A. My position is that I can't speak to the attorney general's legal positions as –

Q. Isn't that your entire job duty?

MR. HILTON: Objection.

PRESIDING OFFICER: Let him answer. Let him finish his answer.

MR. HILTON: Thank you.

A. No, it is not. My job is to provide advice and counsel to my client, the Attorney General of Texas.

Q. (BY MS. EPLEY) Okay. So if you had to choose between the State of Texas' interest and the attorney general's interest, whose do you choose?

A. I do not see them in conflict.

Q. Okay. Then back to this point: Do you or do you not, as attorney for Ken Paxton, think that he is held accountable for the items that he posts on his website?

A. I don't know what you mean by "held accountable." That's a very vague –

Q. Are you –

A. – question.

Q. I'll help.

Are you familiar with the Texas Rules of Evidence?

A. Somewhat. I am general counsel. I'm not a litigator.

Q. Do you understand what an admission by adoption is, or an admission because it's made by a representative, or an admission because it's made by an employee?

A. I'm aware of those rules.

Q. Do you believe that those things would apply in appropriate context to Ken Paxton?

A. That's not something that I've researched specific to this proceeding. I don't have an answer for you on that.

Q. I think we're all clear on you not wanting to answer this question, so I'll move along.

I'm going to give you a series of statements then, and I would like for you and I to discuss them.

This investigation revealed the OAG's intervention worked to the foundation's advantage on mediation. If I was telling you – or if that statement is about Mitte, and you have Ryan Bangert, Josh Godbey, Darren McCarty, and Ray Chester all disagreeing with this statement, would even them disagreeing change your opinion as to it being valid?

MR. HILTON: Objection, Your Honor. Assumes facts not in evidence before this witness as to those other folks' positions.

I don't have an objection to her questioning the witness about a document that I believe is in evidence, but I think in fairness, he should be provided with a copy of it.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) So earlier when Mr. Hilton asked you if you believed in the OAG report, you're not actually saying anything in it is true or not true or that any of us should really entertain your opinion on it, right?

MR. HILTON: Objection. Argumentative. Misstates testimony.

PRESIDING OFFICER: Overruled.

A. Can you restate the question?

Q. (BY MS. EPLEY) Your opinion on the Office of the Attorney General report being truthful is irrelevant to this proceeding because you will not address the statements within it; is that accurate?

A. I don't agree with the question as you phrased it.

Q. Okay. Then let's talk about – let's talk about the foreclosure letter. You went into great detail in regards to the distinctions. You relied on 418.

Is it accurate to say that applies to mayors in local subdivisions but not Senator Hughes?

A. That's correct.

Q. And so Senator Hughes' authority or name wouldn't be necessary if that was the basis of that letter, correct?

A. I do not believe it was necessary, that's correct.

Q. That's a different question.

If the attorney general was relying on 418, Senator Hughes' approval would not be necessary, correct?

A. If I understand your – yes, that's correct.

Q. In regards to 402.042, that, you do need an official requestor for, correct?

A. That's right.

Q. And if it was an informal guidance, then no requestor is needed at all, correct?

A. That would be my position personally.

Q. So in regards to Items 1 and 2, you wouldn't need to involve Senator Hughes at all, let alone use his name to put forth an opinion that he certainly would never have approved of, right?

MR. HILTON: Objection. Assumes facts not in evidence. Moreover, she's stating a juror's opinion without following the rules.

PRESIDING OFFICER: Sustained.

Q. (BY MS. EPLEY) Okay. Last, in regards to your credibility and the attorney general's reliance on you, is it fair to say that you represented him in a bar grievance relying on a government filing – or a court filing? And you took the position that the attorney general was not subject to the bar rules or the State of Texas' ethics rules?

MR. HILTON: Objection, Your Honor. Assumes facts not in evidence.

MS. EPLEY: I'm asking him. He's on the stand. It was his position.

MR. HILTON: And you're characterizing that grievance and that litigation. You're mischaracterizing it. You haven't established that any of those things are true with this witness.

MS. EPLEY: That's the purpose of the questioning.

PRESIDING OFFICER: Overruled.

Q. (BY MS. EPLEY) Did you or did you not take the position that the Attorney General of the State of Texas is not – is not beholden to State Bar ethics rules?

MR. HILTON: Objection. Relevance. That doesn't have anything to do with the Article of Impeachment.

PRESIDING OFFICER: Overruled.

A. Ms. Epley, I'm not sure which – can you be more specific about what complaint you're referring to? I – I don't have a recollection as I sit here as to specific–

Q. (BY MS. EPLEY) Does it feel appropriate to you that you would ever, for any reason, for any purpose, indicate that the Attorney General of the State of Texas was not beholden to bar ethics rules?

A. I don't think that's what we said at any point.

MS. EPLEY: Pass the witness.

### **REDIRECT EXAMINATION**

BY MR. HILTON:

Q. Mr. Kinghorn, do you know if any Proton mail or Signal documents that would be responsive to their subpoena exists?

A. I do not.

Q. Did you conduct a diligent search for those documents on behalf of the Office of the Attorney General?

A. I conducted a diligent search of – of all documents that we had in our custody and control.

Q. Do you have an obligation to produce documents that don't exist and that aren't in your possession, custody, or control?

A. I do not.

MR. HILTON: If I may have one moment, Your Honor.

PRESIDING OFFICER: Pardon?

MR. HILTON: Just one moment. I just want to confer with counsel. I pass the witness, Your Honor.

PRESIDING OFFICER: Ms. Epley, are you coming back?

MS. EPLEY: No. I have no further questions for Mr. Kinghorn. Thank you.

PRESIDING OFFICER: May he be excused?

MS. EPLEY: May we approach on a quick housekeeping matter? It's just the admission of some records I left at the podium frankly.

PRESIDING OFFICER: May I excuse the witness?

MR. HILTON: Yes. That's fine with us, Your Honor.

PRESIDING OFFICER: Yes, you can approach.

(Witness left the Senate chamber)

(At the bench, off the record)

PRESIDING OFFICER: Members, we – we will take our lunch break now until 1:30, and there's a short meeting before that.

(Recess taken at 12:23 p.m.)

### **AFTER RECESS**

(1:53 p.m.)

THE BAILIFF: All rise. The Court of Impeachment of the Texas Senate is now in session.

PRESIDING OFFICER: You can all be seated. Thank you.

To the parties, sorry we were a little late. We had some business to take care of back there before coming out.

Would you please state your name for the record?

MS. HILTON: Yes, Your Honor. Amy Hilton for the attorney general.

PRESIDING OFFICER: Would you call your first witness.

MS. HILTON: Yes, Your Honor. The attorney general calls Henry De La Garza.

PRESIDING OFFICER: Will the bailiff bring in Henry De La Garza.

Amy, there are some documents still up here if you want to get those removed. Watch your step. I need to swear you in. Raise your right hand.

(Witness sworn by the Presiding Officer)

PRESIDING OFFICER: Please be seated, and speak closely to the microphone. Hold on. I understand we have a new court reporter I need to swear in also. Where is our new court reporter?

If you'll raise your right hand and step to the side. Hi.

(The oath was given to the court reporter.)

HENRY DE LA GARZA,

having been first duly sworn, testified as follows:

**DIRECT EXAMINATION**

BY MS. HILTON:

Q. Good afternoon, Mr. De La Garza. Could you please introduce yourself to the jury?

A. Yes. My name is Henry De La Garza.

PRESIDING OFFICER: Hold on. Henry, push that button right there. There you go. Yes, sir.

THE WITNESS: Sorry about that.

A. My name is Henry De La Garza.

Q. (BY MS. HILTON) And I'd like to just have you take a minute and a half or so and give us a little of your background, where you're employed, and – and what you do there?

A. I work at the Office of the Attorney General, an agency of the State of Texas, and I am the HR director, the chief employment counsel, and the ethics advisor.

Q. And how long have you held the position as HR director?

A. Of HR director, interim director, November 2nd of 2020, and then became permanent HR director December 1st of 2020.

Q. How long have you worked for the Office of Attorney General?

A. I started in 1995 as an Assistant Attorney General I and worked my way up.

Q. And what division did you start in? Have you always been in human resources?

A. No. I started in the Habeas Corpus Division and then went to transportation division and then human resources.

Q. How many attorneys general have you worked for at the agency?

A. Well, let's see. I guess it would have been Dan Morales; and then John Cornyn, now Senator Cornyn; Greg Abbott, now Governor Greg Abbott; and then Ken Paxton; and then also the provisional AG John Scott and provisional AG Angela Colmenero.

Q. How many years have you been working in human resources?

A. I started in May of 2008.

Q. You've testified that you've been at the agency for a couple of decades. How would you describe your experience working at the Office of Attorney General?

A. The agency is an outstanding state agency. It's a great place to work. This is a – as a – as a lawyer, it's an ideal place to practice law, whether you do civil, criminal, trial, appellate, transactional, plaintiff, defense, whatever, we – we have it. And, you know, as an agency, we are – we're number one in child support enforcement. This is an agency of lawyers, of child support officers, peace officers, and a lot of hard-working employees.

Q. And as the HR director, how many employees of the Office of Attorney General are you responsible for, you know, enforcing agency policy and procedure?

A. Well, the – approximately 4,000 employees that we have throughout the State of Texas. We also handle human resources work for the State Office of Risk Management, SORM.

Q. And just generally, you know, what – what are your responsibilities as both the ethics advisor, the HR director, and the chief employment counsel?

A. Well, that's quite a bit. As HR director, I – I oversee the HR operations for our state agency, 4,000 employees throughout the State of Texas. I lead a team of – of 22 talented and dedicated employees. We handle all sorts of HR functions from hiring, posting, classifications, onboarding, benefits, leave, training, development. We have a wonderful wellness program, and we also have a robust law clerk program.

And as, you know, chief employment counsel, I, along with the other attorney in the division, an excellent deputy chief, we provide legal guidance to the managers and supervisors of the – of the agency, and we, you know, make sure – you know, EEO compliance, the rare EEOC charge of discrimination and workers' compensation and unemployment benefits.

And then as ethics advisor, I provide guidance to approximately 700 lawyers of our agency, mostly on the, you know, Texas Disciplinary Rules of Professional Conduct, other ethical issues, and then I oversee the agency's fraud waste and abuse prevention program. I think I have it all.

Q. I – I started as a law clerk at the office, and so I certainly appreciate everything that – that you do for the office.

Outside of working in HR, have you – do you have any other experience with employment law?

A. Yes. Before starting in HR, I worked in the transportation division where I managed the employment law matters for TxDOT, another outstanding state agency, and handled the, you know, trials, appeals, hearings for state and federal law, for all different types of – of employment law, Title VII, Chapter 21 of the labor code; FMLA, FLSA, ADA, you know, First Amendment retaliation, whistleblower retaliation, USERRA retaliation, workers' comp retaliation, all of that.

Q. And so you mentioned the Whistleblower Act. Have you ever taken a Whistleblower Act case to trial?

A. I actually have.

Q. And does the Whistleblower Act, does that have certain requirements in order to state a claim?

A. It does.

Q. And does it also provide specific remedies?

A. It does.

Q. Is one of those remedies removal from office?

A. It is not.

Q. And who is a proper defendant under the Texas Whistleblower Act?

A. The government entity.

Q. Is it – is an elected official a proper defendant under the Texas Whistleblower Act?

A. No.

Q. Where are Whistleblower Act claims usually adjudicated?

A. It's a – it's a state law claim, so it would be in state district court.

Q. Are you aware of a Whistleblower Act claim ever being litigated outside of the state district court?

A. Not under the Texas Whistleblower Act.

Q. Are you aware, Mr. De La Garza, that in 2020, a group of high-level staffers made reports to law enforcement about the attorney general?

A. I am.

Q. And are you aware that some of those staffers subsequently filed a Texas Whistleblower Act lawsuit against the Office of Attorney General?

A. I am.

Q. And to your knowledge, is that case still pending?

A. Yes, in Travis County.

Q. You mentioned that you've worked under a number of attorneys general, and so I just want to ask you a few brief questions about how the agency works. How do most employees of the Office of Attorney General obtain their positions?

A. Most employees – I mean, we're talking about, you know, just about everyone – would apply through a competitive posting and – and then the hiring manager would select the – the best qualified candidate.

Q. And how did the – the former staffers who made those complaints to law enforcement, how did they obtain their positions?

A. They were appointed by Attorney General Ken Paxton.

Q. And so – and typically, I think you said there are about 4,000 OAG employees?

A. Yes, about 4,000.

Q. And – and about how many are appointed?

A. We're talking about half of 1 percent, maybe .2 percent – or .02 percent.

Q. Is it – is it your understanding, Mr. De La Garza, that the attorney general has authority to appoint certain high-level policymakers?

A. Yes.

Q. And what is that understanding based on?

A. Well, it's a well-established concept and tradition in the United States of political patronage. This has been affirmed in Supreme Court law, U.S. Supreme Court law, federal law, state law, that elected officials, whether you are the Governor or the attorney general or the elected sheriff of a county, that you have the right to hand-select people who you are – who are going to help you reach the goals and the vision that you've presented to – to the electorate and who voted you in.

Q. And for those appointed officials at the Office of Attorney General, are those appointed officials still required to comply with agency policies, just like every other OAG employee?

A. Yes.

MS. HILTON: At this time, Your Honor, I'm going to move to admit attorney general Exhibit 431. Counsel and I discussed this during the break, and I understand that there is no objection.

MR. DUTKO: No objection.

PRESIDING OFFICER: Admit AG 431 into evidence.

(AG Exhibit 431 admitted)

MS. HILTON: Mr. Arroyo, could you please pull up AG 431. And could you turn to the second page, please, Mr. Arroyo.

Q. (BY MS. HILTON) Mr. De La Garza, is Exhibit 431 – do you recognize this as a copy of OAG policies and procedures?

A. On the screen, there's nothing on the screen.

Q. Oh.

PRESIDING OFFICER: Hold on one moment. We'll stop the clock for a moment.

(Brief pause.)

PRESIDING OFFICER: Members, return to your seats, please.

Hold on one second, Amy.

Restart the clock again. Proceed.

Q. (BY MS. HILTON) Mr. De La Garza, can you see attorney general Exhibit 431 on your screen?

A. Yes.

Q. And you recognize that as a copy of the attorney general – office – Office of the Attorney General policies and procedures?



A. Manual, yes.

Q. And what is your role, if any, with respect to drafting and creating policies for the office?

A. Well, since May 2008, I've been pretty active in making sure that our policies are up-to-date, revising policies with – with new – new laws. For example, I know that we've got the new CROWN Act and military performance and paid parental leave, things like that, so we make sure that we're always keeping up, and we – we made changes to the manual.

Q. Do these policies provide that Office of the Attorney General employees are at-will employees?

A. Yes.

Q. And can you just briefly explain what that means?

A. Well, the State of Texas is an at-will state since, I think, 1877 or something like that, and it just means that in – in Texas, you don't have a property right in your job and you can be fired for any reason.

Q. Mr. De La Garza, are members of the executive administration at-will employees?

A. Yes.

Q. Does OAG have an unacceptable conduct policy?

A. Yes.

MS. HILTON: Mr. Arroyo, could you please flip to page 43 of Exhibit 431. At the bottom, the Bates stamp should end in 535.

Q. (BY MS. HILTON) Mr. De La Garza, is this the unacceptable conduct policy we were just talking about?

A. Yes.

MS. HILTON: And, Mr. Arroyo, if you could just flip to the next page, please.

Q. (BY MS. HILTON) And about halfway down on those bullet points, Mr. De La Garza, one of the things that's listed as unacceptable conduct is: Use of an insubordinate or unprofessional tone towards management.

Do you see that?

A. Yes.

Q. Is that a policy that you wrote?

A. Yes.

Q. And when did you write that policy?

A. Based on the date that I saw, looked like it was in 2013.

Q. And can you explain for the jury why you included that policy in the office's policies and procedures handbook?

A. It just seems typical that most manuals for employers would include something about, you know, conduct and what's appropriate and what's not.

Q. What are the potential consequences for failing to comply with agency policies?

A. Well, it depends. We look at every situation individually. It could be corrective action, such as a counseling session, a reprimand, but if it's – depending on the situation, it could be disciplinary action, including involuntary separation.

Q. As the chief employment counsel, the ethics advisor, the director of human resources, do you provide advice to executive management on matters – on employment issues?

A. I do.

Q. And do you provide advice related to the application of the policies that are contained in AG Exhibit 431?

A. I do.

Q. I'd like to – to switch gears a little bit here, Mr. De La Garza, and talk about the ex-staffers, the former staffers, that left the Office of Attorney General in 2020.

Who is – who is Jeff Mateer?

A. Jeff Mateer was the first assistant attorney general.

Q. And how did his employment at the OAG conclude?

A. Jeff Mateer resigned on October 2nd, 2020.

Q. And who succeeded him as first assistant?

A. Because Jeff Mateer resigned and Attorney General Ken Paxton had, you know, a right to then appoint – select someone, and, you know, under the Texas Government Code, every state agency needs to have an executive head, and at the attorney general's office the executive head is the first assistant. And so they pretty much manage the – the division day-to-day, and so Attorney General Paxton appointed Brent Webster, and then he began that same Monday, I believe, October 5, 2020.

Q. At the time that Mr. Mateer resigned, were the other former staffers still employed at Office of Attorney General?

A. Yes.

Q. And so at that time, they reported to Mr. Webster; is that right?

A. Yes. Starting on October 5, 2020, they would have been reporting to First Assistant Brent Webster.

Q. And would those staffers be required to comport with OAG policies in their interactions and their work for First Assistant Webster?

A. Yes.

Q. And that would be a reasonable expectation that Mr. Webster would have of them?

A. Yes.

Q. Let's talk about Ryan Bangert. Do you recall what his title was?

A. Ryan Bangert was the deputy first assistant attorney general.

Q. And how did his employment at OAG conclude?

A. Mr. Bangert submitted a letter of resignation on approximately – I think it was October 28, 2020, and then left the agency, as identified in the letter, on November 4, 2020.

Q. And what about Darren McCarty? How did his employment at OAG conclude?

A. Darren – Darren McCarty was the deputy attorney general for civil litigation, and Mr. McCarty submitted a letter of resignation on, I believe, October 26, 2020, and then left the agency. Pursuant to the – the letter, he left on November 4, 2020.

Q. And what about Blake Brickman? Do you remember his title?

A. Mr. Brickman was deputy attorney general for policy and strategy.

Q. And how did his employment at the office conclude?

A. Mr. Brick – Brickman was involuntarily separated.

MS. HILTON: Mr. Arroyo, could you please pull up AG Exhibit 224?

And, Your Honor, I'm going to move to admit this exhibit. I understand from counsel during the break that there's no objection.

MR. DUTKO: No objection.

PRESIDING OFFICER: The exhibit shall be – what was the number again, Amy?

MS. HILTON: AG 224.

PRESIDING OFFICER: 224 admitted into evidence.

(AG Exhibit 224 admitted)

Q. (BY MS. HILTON) Mr. De La Garza, is this memo a memo that you drafted related to Mr. Brickman's employment with the attorney general's office?

A. Yes.

Q. And could you – does this memo reflect advice that you provided to the office related to Mr. Brickman's continued employment and ultimate termination?

A. Yes. It was advice about if we wanted to write a justification, this could be a draft of a justification.

Q. And is this justification, was this the result of an independent analysis that you made with respect to his employment at the office?

A. Yes.

Q. Were you instructed by anybody to – to come to any conclusions regarding his employment?

A. No.

Q. Could you please explain the conclusion of this memo for the jury?

A. I only see page 1. I'm not sure.

MS. HILTON: Your Honor, may I approach the witness, please, with a hard copy?

PRESIDING OFFICER: Yes, you may.

THE WITNESS: Thank you.

A. The conclusion was that – involuntary separation, that he could be allowed to resign.

Q. (BY MS. HILTON) Looking at the memo, at the bottom of page 1, you write that Mr. Brickman has engaged in the following misconduct as identified in the agency's unacceptable conduct policy.

Do you see that?

A. Yes.

Q. And you list a number of violations; is that correct?

A. Yes.

Q. And is it true that in this memo you indicate that regardless of Mr. Brickman's report to law enforcement, there are violations of agency policy that justify termination?

A. Yes. I mean, in many ways, it's just – it was just a situation of an employee with a new boss and having an insubordinate or unprofessional tone towards the new boss and not following orders, directives of the new boss.

Q. And based on the information that you were aware of at the time, was it your opinion that Mr. Brickman's – had some job performance issues in the workplace following his report to law enforcement?

A. Yes.

Q. And was part of that misconduct creating an atmosphere that was untenable for the agency?

A. Yes.

Q. And – and can you just describe a little bit what that is? I'm looking at page 2 of your memo talking about the working relationship being strained and inefficient. Could you describe what you were aware of at the time that you made this memo?

A. Yes, I mean, overall, it – it appeared that there were some pretty egregious violations of the – you know, kind of the insubordinate tone of that policy that you had mentioned earlier, and – the insubordinate tone, the demeanor, the language, the refusal to perform directives from the – Mr. Brickman's new – new boss, new supervisor.

Just overall, there were – those issues really stood out, and then, overall, just based on the, you know, everything applicable; state law, federal law, the facts presented. There was no reasonable expectation that he could – that he wanted to work for the new boss, the new first assistant, or – or no reasonable expectation in that–

MR. DUTKO: Objection. Narrative.

We just ask for question and answer, Your Honor.

PRESIDING OFFICER: Sustained.

Q. (BY MS. HILTON) Mr. De La Garza, you mentioned that Mr. Brickman's behavior was egregious. Did I hear that correctly?

A. Yes.

Q. And is it your understanding that part of the egregious nature of his behavior was his refusal to meet with his supervisors?

MR. DUTKO: Objection. Leading.

MS. HILTON: I'll rephrase.

PRESIDING OFFICER: Rephrase. Sustained.

Q. (BY MS. HILTON) Mr. De La Garza, what was egregious about Mr. Brickman's behavior?

A. I mean, based on the facts presented to me, that type of – of insubordinate tone and demeanor is – is pretty rare in – in our agency.

Q. Who did you provide this memo to?

A. I believe I would have probably sent it to my boss at the time, the human resource director at the time and – and probably Brent Webster, the new first assistant.

Q. Who – to your understanding, who made the decision to terminate Mr. Brickman's employment?

A. It would have been – you know, his supervisor was the first assistant.

Q. And did you support the decision to terminate Mr. Brickman's employment?

A. Based on – on the – the facts as presented to me and the applicable state law and federal law especially about, you know, political patronage, yes, there didn't seem to be a reasonable expectation that he could continue working with or for Brent Webster or continue serving as a high-level policymaker for the attorney general.

Q. And do you stand by the advice in this memo today?

A. I do.

Q. Okay. Let's talk about Mr. Ryan Vassar. Was he the deputy attorney general for legal counsel?

A. Yes.

Q. And his employment at the office was terminated; is that correct?

A. Yes, involuntary separation, yes.

Q. And who made that decision?

A. That also would have been the first assistant.

Q. Did you support the decision to terminate his employment with the office?

A. Based on all the facts presented to me and – and the applicable state and federal law, yes, there was – there was a variety of reasons. There was a lack of confidence in – in his –

MR. DUTKO: Objection, Your Honor. Hearsay. The witness just testified based on information he received.

PRESIDING OFFICER: Sustained.

Q. (BY MS. HILTON Mr. De La Garza, did you provide any recommendations concerning Mr. Vassar's – the involuntary separation?

A. Yes. I mean, as an HR director, I have to rely on information that is presented to me.

Q. Okay. And – and – sorry. I didn't mean to talk over you.

When you were providing those recommendations, were you – were you advised by management of some issues, some job performance issues that – that they were experiencing with Mr. Vassar?

MR. DUTKO: Objection. Hearsay. "Advised by management," out-of-court statement.

MS. HILTON: Your Honor, if I may, I'm asking about the facts that inform his recommendation. I'm not offering them for the truth of the – the truth of the matter, but, rather, just the things that he was aware of at the time he made his recommendation and why he made that recommendation.

PRESIDING OFFICER: I'm going to sustain your objection. Find another way to ask the question.

MS. HILTON: Thank you, Your Honor.

Q. (BY MS. HILTON) Did agency policy support the decision to terminate Mr. Vassar's employment with the agency?

A. Yes.

Q. And was it your understanding that Mr. Vassar had violated agency policy by sharing confidential grand jury subpoenas outside of the agency?

MR. DUTKO: Objection, Your Honor. I need to interrupt. This is knowledge gained through hearsay and leading.

PRESIDING OFFICER: Sustained.

Q. (BY MS. HILTON) Could you please describe what the violations of agency policy were that supported termination?

A. Well, just overall as far as the – the reasons presented to me for separating him were – there's a combination of –

MR. DUTKO: Objection, Your Honor. Reason stated to me is an out-of-court statement. Hearsay.

MS. HILTON: Your Honor, again, this goes to the basis for his recommendation. This is not a – he's not testifying as to the truth of it, but, rather, the information – his understanding of the information and what informed his advice to the agency.

PRESIDING OFFICER: I'll overrule your objection this time.

Q. (BY MS. HILTON) You can answer the question, Mr. De La Garza.

A. Yes. I mean, I have to rely on – on the facts presented to me. I mean, we have 4,000 employees, so with respect to Mr. Vassar, I had to rely on the facts presented to me on what he had done or had not done and so as far as the overall reasons, there was a variety of reasons, a lack of confidence. There were some issues about his performance, some issues about the handling of – of grants or mishandling of grants.

Overall, there was some insubordinate tone and demeanor, and, overall, there was – my understanding, there was one – one last meeting to see if there was any reasonable expectation that Mr. Vassar could or wanted to work with or for his new boss.

MR. DUTKO: Objection, Your Honor. I apologize for interrupting. Can we keep this question and answer? My objection is narrative.

PRESIDING OFFICER: Sustained.

Q. (BY MS. HILTON) Mr. De La Garza, let me ask you about that meeting. You mentioned that there was one last meeting before there was a decision made to separate Mr. Vassar from his employment at the office.

Were you present at that meeting?

A. No.

Q. Were you later requested to provide counsel as a result of what had happened in that meeting?

A. Yes, my –

Q. And, sorry, I'm going to stop you right there just because I want to make sure that we're keeping this question and answer.

A. I apologize.

Q. And – but I appreciate your – your – your testimony.

As – when you were asked for advice, did you ultimately recommend separation?

A. Yes.

Q. And do you agree with that decision today?

A. Yes.

Q. Let's talk about Mr. Maxwell. Was he the director for law enforcement?

A. Yes.

Q. And was he also – was his employment also terminated from the Office of Attorney General?

A. He was involuntary separated on – yes.

Q. And who made that decision?

A. First Assistant, Brent Webster.

Q. Did you advise Mr. Webster, with respect to that decision to terminate Mr. Maxwell's employment from the agency?

A. I recommended that it could be done, that it was reasonable based on the facts presented to me.

Q. And did you personally have prior experience with Mr. Maxwell and – and some violations of agency policy in the past?

A. Yes.

Q. And how – how would you recommend – or excuse me. How would you describe your experience working with Mr. Maxwell?

A. I mean, I – I admire all that he's done. But with respect to HR issues in – in HR, certainly, it was a developing pattern of not going to HR for guidance on some very sensitive HR matters.

Q. And did the failure to go to HR for guidance on very sensitive matters, did that ultimately expose the agency to liability?

A. It could have.

Q. And in about how many instances?

A. Well, there was – there was one case with a Hispanic peace officer, a female who had been subject to sexual harassment.

MR. DUTKO: Objection, Your Honor. This is knowledge gained through hearsay. Presumably, he did an interview with this woman who will not come in to testify. All of the information he gathered and he's relaying to us is hearsay.

MS. HILTON: Your Honor, I'll move on.

PRESIDING OFFICER: Sustained. Continue.

MS. HILTON: I'd like to offer what's going to be marked as AG Exhibit 1055. I understand Counsel does not have an objection to this either.

MR. DUTKO: No objection, Your Honor.

PRESIDING OFFICER: Admit 1055.

MS. HILTON: And, Your Honor, may I approach the witness with a hard copy?

PRESIDING OFFICER: Yes.

MS. HILTON: Thank you. Mr. Arroyo, could you please pull up AG Exhibit 1055.

Q. (BY MS. HILTON) Mr. De La Garza, do you recognize AG Exhibit 1055 as an email that you drafted to Brent Webster and Aaron Reitz?



A. Yes.

Q. And does this memo provide your legal advice regarding these – the continued employment of these staff members?

A. Yes.

Q. Could you – what prompted this email?

A. Mr. Maxwell and Mr. Penley – Mr. Maxwell and Mr. Penley had been on investigative leave, and they wanted to have a – like a – a meeting to see if there was any reasonable expectation that they could work with or for Brent Webster.

Q. And I'm sorry, Mr. De La Garza. Just for the record and for clarification, when you say "they wanted to have a meeting," who is "they"?

A. Well, primarily the first assistant, Brent Webster.

Q. Thank you. And I'm sorry to interrupt. Please go on.

A. And there was a – kind of a – sort of a last-ditch, let's see if there's any reasonable expectation that they could work with or for Brent Webster, the new first assistant, and whether there was any reasonable expectation that they – that they could continue as high-level policymakers with Attorney General Ken Paxton.

Q. And so is this email your suggestions of things to ask in those meetings?

A. Yes.

Q. Why did you pick these particular questions, like, Do you trust me, Do you trust the attorney general, Are you committed to the vision?

Why did those questions make it into this memo?

A. Well, based on the – you know, the – the – the case law, Elrod v. Burns, Branti v. Finkel and its progeny, that's what you focus on; the loyalty, trust, you know, can the – can the elected official, you know, trust the people that he's – or she has chosen to – to support their – their vision, their goals.

Q. Why would that be important to the agency?

A. Well, it's definitely a question about efficiency. I mean, you – you – you – you want the – everything to move along and if his – if his deputies aren't – if they're not seeing eye to eye, it's going to break down and then it eventually starts trickling down and we start losing, you know, efficiency, and there could be worse problems.

MS. HILTON: Mr. Arroyo, could you please pull up House Managers Exhibit 383. And, Your Honor, this is already in evidence. May I approach the witness with a hard copy?

PRESIDING OFFICER: Yes.

Q. (BY MS. HILTON) Mr. De La Garza, do you recognize this email that was sent by Greg Simpson, your former boss, to Brent Webster copying you related to the CID division?

A. Yes.

Q. And I just want – I don't want to go through this whole thing, but I just want to ask you on the second page, could you please read aloud the last two sentences on the last page of this document?

A. It reads: Overall, HRD has had difficulty getting CID to work with us on matters that are appropriately and exclusively within HRD's authority. Maxwell's actions have exposed the agency to potential liability.

Q. And what does HRD and CID – what does that mean?

A. HRD would be the human resources division and CID would be the criminal investigations division.

Q. And the criminal investigations division, that was the division that Mr. Maxwell was – was chief of, correct?

A. Yes. That's one of the primary divisions under law enforcement under his purview.

Q. And so does this email identify a number of issues with Mr. Maxwell's management of his division?

A. Yes. Mr. Simpson explained that there were some challenges that the – that HR had faced.

Q. Did you agree with the decision to terminate Mr. Maxwell's employment with the agency?

A. Yes. Based on the facts presented to me and the applicable law, it seemed reasonable.

Q. And – okay. You can set that – that aside. Thank you. Do you agree with that decision today, Mr. De La Garza?

A. I do.

Q. And who made that decision?

A. That would also have been the first assistant, Brent Webster.

Q. I'd like to talk to you about Mr. Penley. Do you recall that he was the deputy attorney general for criminal justice?

A. Yes.

Q. And he was also involuntarily separated?

A. Yes.

Q. Was he offered the option to resign?

A. Yes, he was.

Q. And, to your knowledge, before Mr. Penley was let go, did he meet with Brent Webster?

A. Yes.

Q. And did he have the meeting that you suggested – or that you mentioned earlier about whether there could be a reasonable expectation that Mr. Penley could work effectively with the new first assistant?

A. Yes, that meeting took place.

Q. And what was your understanding about the prospect of Mr. Penley being able to effectively work with Mr. Webster following that meeting?

A. My understanding from that meeting was that there was no reasonable expectation that Mr. Penley wanted to work with or for his new boss, First Assistant Brent Webster, that he could in the future and that he – he could serve as a high-level policymaker for Attorney General Ken Paxton.

Q. Did agency policy support Mr. Penley's involuntary separation?

A. Yes.

Q. How so?

A. Well, just based on the – the lack of confidence. There was – there was some evidence of, you know, questionable decision-making, the – you know, just the – the breakdown in the working relationship. There may have – also have been, from what I recall, some insubordinate tone or demeanor towards Brent Webster. And so just overall based on the – the applicable state and federal law and the facts presented to me, it seemed reasonable, and the policy supported that.

Q. Was it also your understanding at the time that Mr. Penley had omitted some material information in a court filing?

A. Yes. That had been also presented to me as far as some, you know, wrongdoing, whether it was just con –

MR. DUTKO: I apologize for interrupting. "This had been presented to me" is hearsay, out-of-court statement. We object to hearsay.

MS. HILTON: Your Honor, this is the same ruling that you made earlier to overrule the objection. This is the facts that were presented to him that informed his advice to the agency. And that was subsequently conveyed to Mr. Webster who determined what the employment decisions would be going forward.

MR. DUTKO: Your Honor, if I may –

PRESIDING OFFICER: Overruled.

Q. (BY MS. HILTON) You may continue.

A. Yes, I'm sorry. What was the question again? I'm sorry.

Q. Yes. The question was whether it was – you know what? I think you answered it.

A. Oh, thank you.

Q. Thank you, Mr. De La Garza.

I will ask you a follow-up question. You said it was your understanding that facts had been presented to you that Mr. Penley had omitted material information from a court filing; is that right?

A. Yes. That was the facts presented to me.

Q. And do you know whether that constitutes a violation of the agency's policy on handling confidential and privileged information?

A. Yes. We have a specific policy on that.

Q. And did you agree with Mr. Webster's decision to terminate Mr. Penley's employment?

A. Yes. Based on the law and the facts presented to me, it was a reasonable decision.

Q. And sitting here today, do you stand by that, that support, that recommendation?

A. I do.

MS. HILTON: Mr. Arroyo, could you please pull up AG Exhibit 120.

And, Your Honor, this is not in evidence, so I'm going to offer it now. I understand that Counsel does not have an objection.

MR. DUTKO: No objection.

PRESIDING OFFICER: Admit AG 120 into evidence.

(AG Exhibit 120 admitted)

MS. HILTON: And, Your Honor, may I also approach the witness with a hard copy?

PRESIDING OFFICER: Yes, you may.

MS. HILTON: Thank you.

Q. (BY MS. HILTON) Mr. De La Garza, do you recognize this email?

A. Yes.

Q. And does this email reflect some of the legal advice that you provided to the agency, including to Mr. Webster, about the application of the Whistleblower Act?

A. Yes. I provided some – what I considered privileged and confidential advice regarding the – the petition that had been filed.

Q. Understood. Mr. De La Garza, looking at the first paragraph of this email, you write, Here is my list of why Vassar, Maxwell, Penley, Brickman should be considered high-level policymakers who are exempt from whistleblower protection.

Do you see that?

A. I do.

Q. And I want to ask you about that term "high-level policymakers." What does that – why was that important?

A. That is the term used in, sort of, political patronage case law about, you know, that elected officials can – can appoint – they have to be high-level policymakers for them to be appointed.

Q. They – I'm sorry. I just want to be – they have to be high-level policymakers to be appointed. Is that what you said?

A. Yes.

Q. Thank you. And all of the former staffers who made reports to law enforcement, in your view, fell under the category of high-level policymakers?

MR. DUTKO: Objection. Leading.

MS. HILTON: Your Honor, I'm just clarifying his testimony, but can I restate.

PRESIDING OFFICER: Sustained. Just restate it.

Q. (BY MS. HILTON) Mr. De La Garza, is it your opinion that the former staffers who made reports to law enforcement were all high-level policymakers?

A. They were high-level policymakers.

Q. And could you just summarize for the jury some of the points that – that were important to you here that led you to your conclusion that they constitute high-level policymakers that are exempt from the Whistleblower Act?

A. Well, based on the – the list that I have here, and it was supported by case law, they – you know, they required more than simple ministerial competence. They create or implemented, you know, agency goals, policy. They – they controlled or exercised a role in the decision-making process as to the goals and general operating procedures of the agency. They ensured that policies which the electorate had sanctioned by electing the attorney general were effectively implemented. They all had access to confidential documents or other materials that embodied policymaking deliberations and determinations; you know, party affiliation was an appropriate requirement. They served as –

Q. Sorry, Mr. De La Garza, if I could, I just want to stop you there. At the bullet point about party affiliation, you write here that, Party affiliation was an appropriate requirement for effective performance of the public office involved. Is party affiliation something that the agency would look for in the – in the employees who apply for competitive jobs in regular postings?

A. No.

Q. Mr. De La Garza, do you stand by this advice in AG Exhibit 120 today?

A. I do.

Q. Thank you. You can set that aside.

Mr. De La Garza, did the Office of the Attorney General have legitimate, nonretaliatory reasons for terminating these staffers' employment?

A. In my opinion, yes.

Q. And under the Texas Whistleblower Act, can the Office of Attorney General, or any state agency, terminate a whistleblower based on information or evidence that is not related to their whistleblower report?

A. Yes.

Q. And do you agree that the age – that for the agency to be effective, that high-level policymakers need to be able to collaborate effectively with the first assistant and with the attorney general?

A. Yes.

Q. Did you believe that there was any reasonable possibility that any of these former staffers could do that?

A. Well, Darren McCarty resigned. There – there could have been Ryan Bangert, so, you know, I would say that there was possibly with them, but –

Q. For the ones that resigned. But for the ones that were terminated – for the ones that were terminated, was there a reasonable expectation that they could work with the first – the new first assistant and with the attorney general?

A. Yes. For the ones who were involuntarily separated, no. In my opinion, there was no reasonable expectation.

Q. Did Ken Paxton ever indicate, expressly or implicitly, that these former staffers needed to be fired because they made a report to law enforcement?

A. Not to my knowledge.

Q. Do you have any knowledge that Brent Webster ever indicated, expressly or implicitly, that these former staffers needed to be fired because they made a report to law enforcement?

A. Not to my knowledge.

Q. Did anyone at the Office of Attorney General determine what your recommendations would be with respect to the legal advice you provided for these former staffers who were involuntarily terminated?

A. Not to my knowledge.

Q. Was your analysis of whether the former staffers had violated agency policy, was – was your analysis an independent analysis?

A. Yes. I mean, at times, I consulted with the other lawyer, my – my boss before he – he left.

MS. HILTON: Mr. Arroyo, could you please pull up Article of Impeachment VI? And could you turn to the next paragraph of Article VI, please, Mr. Arroyo.

Q. (BY MS. HILTON) Mr. De La Garza, Article VI accuses the attorney general of: Terminating the employees without good cause or due process and in retaliation for reporting his illegal acts and improper conduct.

Do you see that?

A. I do.

Q. Is good cause required to terminate an employee in Texas?

A. No, it's not. But at the attorney general's office, we ensure that there are good reasons and that it's fair.

Q. And did good reasons and fair reasons exist for each of the former staffers that were involuntarily terminated?

A. In my opinion, yes.

Q. Is due process required to terminate an employee in Texas?

A. No. There's no property right to our – to our jobs since we're at-will, so due process, there's no constitutional right, and – but we ensure that it's fair.

Q. So – okay. Thank you.

And were any of the former executive administration staffers terminated in retaliation for making a report to law enforcement?

A. In my opinion, no.

MS. HILTON: Thank you, Mr. De La Garza. I pass the witness, Your Honor.

PRESIDING OFFICER: Thank you.

Your witness. Please state your name for the record.

MR. DUTKO: Yes, Your Honor. Daniel Dutko.

### CROSS-EXAMINATION

BY MR. DUTKO:

Q. Hi, Mr. De La Garza. How are you?

A. Fine. Thank you. How are you?

Q. Mr. De La Garza, you testified a moment ago that you were familiar with the Texas Whistleblower Act, correct?

A. Yes, I did.

Q. And you understand that the Texas Whistleblower Act affords protection to people that go to law enforcement so they can go to law enforcement without retribution, right?

A. Yes.

Q. And as part of the Texas Whistleblower Act, that protection only extends to people who still have their job?

A. Yes, they are – yes.

Q. Right. So what I mean is if you report someone to law enforcement and they still have their job and then they're retaliated against, they are protected by whistleblower, correct?

A. If they – yes, if they comply with the retaliatory – the requirements in the Texas Whistleblower Act, yes.

Q. But if they get fired before they go to law enforcement, they're not afforded the protection of the Whistleblower Act, correct?

A. Right. It has to be – right.

Q. Right. So before you go to law enforcement, you don't want to tell your boss: I'm going to law enforcement?

MS. HILTON: Objection. Speculation.

PRESIDING OFFICER: Sustained.

Q. (BY MR. DUTKO) Under the Whistleblower Act, if you tell your boss you're going to law enforcement, you get terminated, then you go to law enforcement, you're not entitled to the whistleblower protection, correct?

MS. HILTON: Objection. Speculation. It's the same question, Your Honor.

MR. DUTKO: He just said he knew this.

PRESIDING OFFICER: You can answer, if you know.

A. All right. Could you just repeat the question, please?

Q. (BY MR. DUTKO) Sure. Under the whistleblower statute that you said you're familiar with, if you tell your boss, I'm about to go to law enforcement, then you go to – before you go to law enforcement you get fired, then you go to law enforcement, you're not entitled to the protections of the whistleblower statute, are you?

A. I guess you could make the argument in court. I'm not sure how successful you'd be.

Q. But you agree with my statement, correct?

A. Probably wouldn't be the – the best way to do it.

Q. So if someone were to stand up here over and over –

PRESIDING OFFICER: Witness needs to speak up when you speak.

THE WITNESS: Excuse me.

Q. (BY MR. DUTKO) If someone were to stand up here over and over and say, Why didn't you just call your boss; before you went to law enforcement, why didn't you just call your boss, under the Whistleblower Act that wouldn't be a good idea, would it?

A. I mean, if your plan was to file a lawsuit, then, yes, you should – you shouldn't do that.

Q. You should not go to your boss first?

A. If you were planning to file a lawsuit. I mean, it depends on the situation.

Q. I'm not talking about a lawsuit. I'm talking about whistleblower protection. It would not be a good idea to call your boss first, right?

MS. HILTON: Objection. Asked and answered.

PRESIDING OFFICER: Overruled.

Q. (BY MR. DUTKO) Right?

A. You're asking me to speculate. I'm not sure what a plaintiff should or shouldn't do.

Q. You don't want to answer that, do you?



A. I – I'm – I'm – I'm not a – I'm not here to, you know, speculate as to what a potential plaintiff under the Whistleblower Act should do or could do.

Q. Just so we're clear, you're not here now. A moment ago you were okay with it, right?

MS. HILTON: Objection, Your Honor. It's argumentative.

PRESIDING OFFICER: Sustained.

MR. DUTKO: Let's put up AG 120, please.

Q. (BY MR. DUTKO) Can you see AG 120?

A. Yes.

Q. This is a document that you created an email, right?

A. Yes.

Q. And in this email, it says: Here are my lists of why Vassar, Maxwell, Penley, Brickman should be considered high-level policymakers who are exempt from whistleblower protection. Correct?

A. Yes.

Q. This is your analysis?

A. This was a privileged and confidential document that we were – we are brainstorming.

Q. I appreciate that, but I think I wrote down your words and what you said was, This is my analysis. You still stand by that?

A. Yes, sure.

Q. And you said, I stand by that today?

A. Yes.

Q. And you said to the senators here, This is the correct analysis, right?

A. At the time, I believed it was the correct analysis, sir.

Q. This argument, this exact argument that's in this document right here, was made in the court, right?

A. I'm not sure. I wasn't involved in that.

Q. You're not familiar with the Court of Appeals case, Office of the Attorney General versus Blake Brickman, Mark Penley, David Maxwell and Ryan Vassar? You're not familiar with that?

A. I'm familiar, but I wasn't involved. I didn't work on that appeal.

Q. Are you familiar with the decision that came out in that appeal?

A. I would have to read it and – and –

Q. You don't remember?

A. I – to be honest, I'm not sure if I carefully – that was not something that I needed to read.

Q. Well, if you had read it, you would know that the Court of Appeals said all of your analysis in AG 120 was wrong.

MS. HILTON: Objection. Argumentative.

MR. DUTKO: He knows.

PRESIDING OFFICER: Overruled.

Q. (BY MR. DUTKO) Right?

A. It – it happens as – as lawyers. You know, we make arguments and – and courts don't agree with them. And so, you know, there's always going to be a winning side and a losing side, and at the time, I was just coming up with potential arguments. That's what, you know, we do.

Q. Right. So when the senators are deciding whether or not this is a valid argument, they can disregard it because the Court of Appeals already decided it was not?

MS. HILTON: Objection. This misstates testimony, and it's going outside of direct. This also is talking about a document that is not in evidence, and there's been no testimony before this witness about.

PRESIDING OFFICER: Overruled.

Q. (BY MR. DUTKO) Right?

A. I defer to the Senate to do the right thing.

Q. You spent a lot of time telling us about how people were involuntarily separated. That means fired, right?

A. Yeah. We just like to use involuntary separation.

Q. Okay. I just want to make sure we're on the same page. That means fired?

A. It does.

Q. You also spent a lot of time using the phrase "based on facts presented to me," right?

A. Yes.

Q. And those facts were presented to you by Brent Webster?

A. For the most part, yes.

Q. Doesn't it seem like you had a Brent Webster problem?

A. Well, he was the – the new first assistant, and these employees were reporting to him.

Q. I mean, you've heard the term "garbage in, garbage out," right?

A. I've heard the expression.

Q. So if Brent Webster's giving you information that's not true, then your analysis is wrong, correct?

A. I – I have to rely on the information given to me.

Q. I appreciate that. My question is a little bit different.

If Brent Webster's not telling you accurate information, then all the analysis you gave on direct examination is all incorrect?

MS. HILTON: Objection. Speculation.

MR. DUTKO: He knows.

PRESIDING OFFICER: Overruled.

Q. (BY MR. DUTKO) Correct?

A. I have to rely on – on the facts presented to me, and so I –

Q. Is my question difficult?

A. It's – you're saying that if he presented a false – if somebody present – if he presented false information to me and I'm using that false – yes, it could affect my analysis.

Q. Well, let's talk about the real reason why these people got fired.

MR. DUTKO: Stacey, can you put the timeline up, please? I'm going to use this for demonstrative purposes, so –

MS. HILTON: Your Honor, I'm going to object. I've never seen whatever this is before. Counsel and I discussed exhibits during the break. This was not provided to me, so I would request that we get a copy of whatever this is to quickly review.

MR. DUTKO: Not an exhibit, Your Honor. Simply demonstrative purposes. Not going back based on dates that this witness provided on direct examination. If the dates are wrong, Counsel can correct me.

MS. HILTON: Well, Your Honor, I mean, we might have an objection to whatever – I mean, whatever he's going to put on this timeline. I don't know what it is, and I don't have an opportunity to verify it. And it's being published to this jury as if it's fact, so I'm going to object to displaying this to the jury.

MR. DUTKO: Your Honor, this – they're making evidentiary arguments. I'm not offering this into evidence. It's purely demonstrative.

MS. HILTON: Your Honor, this –

PRESIDING OFFICER: Hold on. Hold on. Don't talk over each other. I think you can provide Counsel with what you're about to show.

MR. DUTKO: May I go to Counsel?

PRESIDING OFFICER: Yes.

MS. HILTON: Thank you.

Your Honor, I might have objections as this goes along because I don't think there's any foundation that he's laid yet, at least to ask – to publish these as something that's within this witness' personal knowledge. But subject to that, I appreciate counsel providing this copy, and we can move along.

PRESIDING OFFICER: Move along.

Q. (BY MR. DUTKO) Mr. De La Garza, on September 30th – and just before we got started, I want to point out, this timeline is –

PRESIDING OFFICER: Stay at the microphone.

MR. DUTKO: Yes.

Q. (BY MR. DUTKO) I want to point out, Mr. De La Garza, that this timeline is roughly a month and a half, less than a month and a half.

Do you see that?

A. Yes.

Q. And as you are familiar with the whistleblower statute, as you testified on direct examination, I'm sure you're familiar with 554.004, right?

A. Is that – could you remind me?

Q. Sure. It says, In an adverse action if, within 90 days of reporting to law enforcement, there is a presumption of retaliatory contact.

A. There is a presumption that can be rebutted.

Q. And so the law says if within 90 days of reporting something to law enforcement you're terminated or have an adverse action, we are to presume that was retaliatory, right?

A. There's a presumption.

Q. So September 30th, the whistleblowers go to the FBI, right?

A. I'm not sure. I have no personal knowledge of what they did.

Q. The head of HR, you don't know?

A. I mean, I – that's what I heard. That's what they presented to – to my boss, a letter saying that they had gone there.

Q. Let's start over. You're the head of HR, right?

A. Now, yes.

Q. You know that they went to FBI on September 30th, right?

A. I – I have received information that they did. I have no reason to disbelieve that.

Q. You also know on October 1st the whistleblowers notified HR and the AG Paxton of the FBI report, correct?

A. Yes. I believe it was the 1st.

Q. The next day, Mark Penley and David Maxwell were placed on administrative leave?

A. That's correct.

Q. On October 13th, David Maxwell made his formal complaint against Ken Paxton?

A. I – I'm not aware of exactly when he did. Formal complaints go to the formal complaint officer, so if – if you say it was the 13th.

Q. You spent a lot of time telling us about David Maxwell. You reviewed all of the file. You're telling me you don't know when David Maxwell made his formal complaint?

A. I – I don't have personal knowledge of that because formal complaints go to the formal complaint officer. They don't go to HR.

Q. Well, we can assume by the fact that your lawyer hasn't stood up and objected that that's the day he made his formal complaint, okay?

A. That's – I have no reason to disbelieve that.

Q. October 15th, Brickman, Vassar, Bangert, McCarty and Penley all filed formal complaints. You know that as well, right?

A. I understood that they all filed formal complaints.

Q. October 20th, so 20 days after going to the FBI, 19 days after the whistleblowers notify of the fact that they went to the FBI, Blake Brickman was fired, right?

A. Yes.

Q. Lacey Mase was fired?

A. Yes.

Q. November 2nd, a month after going to the FBI, David Maxwell was fired?

A. Yes.

Q. November 2nd, a month after going to the FBI, Mark Penley was fired?

A. Yes.

Q. November 17th, six weeks after going to the FBI, Ryan Vassar is fired?

A. Yes.

Q. Have you ever heard of the expression, "there's no coincidences in Austin"?

A. (No verbal response.)

MR. DUTKO: Pass the witness.

PRESIDING OFFICER: Redirect.

MS. HILTON: Just briefly, Your Honor.

### **REDIRECT EXAMINATION**

BY MS. HILTON:

Q. Mr. De La Garza, were there – did agency policy support the termination of Lacey Mase?

A. Yes.

Q. And did you recommend that termination?

A. I did.

Q. Do you stand by that recommendation today?

A. I do.

MS. HILTON: No further questions, Your Honor.

PRESIDING OFFICER: Are you –

MR. DUTKO: No need for it.

PRESIDING OFFICER: Okay. We can exclude – excuse the witness?

MS. HILTON: Yes, Your Honor.

PRESIDING OFFICER: Yes. You may step down. Thank you.

A little housekeeping before the next witness. I said that after the break I would admit 702 into evidence. We did not do that, so 702 is admitted into evidence.

(AG Exhibit 702 admitted)

PRESIDING OFFICER: Mr. Donnelly, I think that was the correct number. Also, if both parties would like to come to the bench for a moment.

(At the bench, off the record.)

PRESIDING OFFICER: The court will come to order. Members of the jury, there was a motion filed yesterday by the House to amend the rules to collapse a vote into one vote. That motion has been withdrawn.

Will the defense call their next witness?

MR. OSSO: Defense calls Grant Dorfman to the witness stand.

PRESIDING OFFICER: Please bring in Grant Dorfman.

Mr. Dorfman, if you'd raise your right hand.

(Witness sworn by the Presiding Officer)

PRESIDING OFFICER: Please have a seat. Your witness.

MR. OSSO: May I proceed?

GRANT DORFMAN,

having been first duly sworn, testified as follows:

**DIRECT EXAMINATION**

BY MR. OSSO:

Q. It's Anthony Osso, O-S-S-O, on behalf of Attorney General Paxton. Sir, would you please state and spell your name for the record?

A. It's Grant Dorfman, G-R-A-N-T. Dorfman is D-O-R-, F as in Frank, M-A-N.

Q. Okay. And I understand you're a judge, but just to keep the record clear, I'm going to call you Mr. Dorfman, if that's all right.

A. I appreciate that.

Q. Okay. Mr. Dorfman, could you please tell these senators how you're currently employed?

A. I'm the deputy first assistant at the Office of the Attorney General.

Q. Okay. And I'm going to ask that you lean into that mic and speak loud and clear so that everybody in the courtroom can hear you. Now, before we talk about your role as the deputy first assistant, I want to talk to you a little about your background and who you are.

Can you tell us where you're from?

A. Grew up in Dallas, Texas.

Q. Okay. And where did you end up going to school?

A. Brown University in Providence, Rhode Island.

Q. Okay. And then was that for undergraduate?

A. Sorry?

Q. Undergraduate?

A. That was my undergraduate, yes.

Q. Did you go on to do law school?

A. I did.

Q. Okay. Can you tell us where you went?

A. Yale Law School.

Q. And what did you do after you completed your time at Yale?

A. I accepted a clerkship with a federal judge in Houston, Texas; brought me back to Texas after ten years on the east coast. I also had – took two years out before law school, got a graduate degree there, not – in England, as well, and then had a one-year clerkship opportunity in Houston. Thought I was going back to D.C. to join the Department of Justice for the second term of the George Herbert Walker Bush administration. That never materialized, so I ended up staying in Houston.

Q. Okay. So after that didn't work out, what did you end up doing next?

A. I went to work for a commercial litigation boutique and continued in that line, went to a second firm where I made partner in, I think, 1999.

Q. Okay. Which firm was that?

A. Ogden, Gibson, White & Broocks. And the first firm was Susman Godfrey.

Q. Okay. And while you were working as a partner, can you describe to us, kind of, what type of law you were practicing?

A. Commercial litigation generally, that's a big area, but civil trial work.

Q. Okay.

A. And appeals and a lot of energy work, a lot of employment cases, and just the – the things that Houston trial practice is made out of.

Q. Understandable. What did you do after you spent your time working as a partner of a law firm?

A. Well, I had a desire for government service. I'd never really set it out (sic) to be a partner at a law firm and continue that for the next – last 30 or 40 years of my career, so I'd applied to the Department of Justice when the George W. Bush administration came around, went up to interview for two vacancies in deputy AGs in the civil division.

I ended up withdrawing a – within one week of the interview because my daughter was on the autism spectrum disorder. She was then four or five years old, and it turns out to my surprise but after exhaustive research, the school she was in in Houston did not have any counterpart in comparable service in either the Washington or Baltimore metro area, so I had to withdraw from consideration for that. That lit a fire under me. Reminded me that's kind of what drew me to law in the first place. And so –

Q. Let me stop you real quick. So that's back to Houston, right?

A. I'm still in Houston.

Q. Okay.

A. Never left. But then I put in for an application to Governor Perry's office for two district court vacancies in 2002.

Q. Okay. And can you tell us what happened with that application?

A. Successful. I was appointed to the 129th District Court in Harris County, it's a civil district court, in May of 2002.

Q. Okay. And can you tell us what happened after that term and further on in your career?

A. I'm sorry. I didn't catch that last part.

Q. After you served as a judge, a civil court judge in Houston, what did you do next in your career?

A. Well, involuntarily, the voters decided in 2008, that the – they liked President Obama better than the rest of the ticket. I went in-house with Nabors Drilling as an independent oil and gas contractor – an oil and gas contractor, I should say, with worldwide operations, based out of Houston, with about 25,000 employees and managed their civil – all their litigation.

Q. Okay. And then at any point, did you serve another term as a judge in Houston?

A. Got remarried in 2013, wanted to do something different and reapplied to Governor Perry for a district court bench and was appointed in November of 2013 to the 334th District Court, also in Harris County, same kind of court I presided over before.

Q. Okay. And so in total, about how long did you serve as a judge?

A. I think altogether ten years.

Q. Okay.

A. Not including visiting judge service afterwards.



Q. Okay. And then at some point, you become deputy first assistant at the attorney general's office. Can you talk to us about what took you from Houston to Austin for that job?

A. Yeah. Not to dwell on bad news, but in 2016, I along with most of my Republican colleagues on the bench in Henderson County lost, and – and I went back in private practice for a couple of years. My father passed in that time frame, and I stepped into a family business that needed more care than I could give it as a full-time litigator, so I juggled that with having left the law firm being in – a mediator, an arbitrator, available to parties to resolve their disputes and also a visiting judge when the administrative presiding judge in Houston appointed me to service in that capacity.

Q. Okay. So what brings you to the attorney general's office then? How does that – how do you go about applying for that job?

A. Well, it came, sort of, out of the blue. I had a call from my friend Austin Kinghorn, who I'd known for several years as a law clerk to one of the justices on the Supreme Court before that on the Court of Appeals, and he asked if I knew anyone who might be interested in working for the attorney general, and I said, yeah, me.

Q. Okay. I want to talk to you about that. Obviously, it's no surprise we're here because there have been a lot of allegations made against Attorney General Paxton. You're aware of this, I assume?

A. Sure.

Q. So when you get that call from Austin Kinghorn, you're interested in the job, were you aware of all these allegations at the time?

A. Yes.

Q. Okay. And can you talk to us a little bit about – a little bit about how you became aware of what was going on?

A. News reports –

Q. Okay.

A. – as probably most others did.

Q. Was that concerning for you?

A. Yes, it was.

Q. Can you talk to us a little bit about the concerns that you had after reading the news reports?

A. Well, I knew the reason they were calling and looking for people was because they had openings, and that was the good news. The bad news was these were serious allegations, serious charges that concerned me. And when I – I did – go up to interview in Austin. And for that reason, probably unlike any other interview I've had, I took special time to press, in this case, First Assistant Brent Webster on these charges.

Q. Okay. What were – what were your –

A. Normally, the interviewee is the one trying to sell –

Q. Right.

A. – him or herself.

Q. You got to cross your T's and dot your I's.

Can you talk to us about what your main concerns were coming into the Office of Attorney General?

A. Well, less – you might be less interested in this, but I have – I had kids at the time in high school and in junior high, so commuting back and forth to work was a concern, where to live in Austin – it's not cheap – was a concern, as well. So those were – I think you're asking something else.

Q. Well, that's a fair concern.

But I'm also interested, like, legally speaking. You're walking into an office where the attorney general himself is – there have been allegations made to the FBI?

A. Right.

Q. And so what about that was specifically concerning to you in that situation?

A. Well, as I said, I spoke with Brent Webster when I interviewed. And I was much more pointed and brusque than I would normally be when I'm trying to get the job. And I knew he was a prosecutor and, by all counts, a good one. So I pulled no punches. I pressed him, asked what I thought were fairly pointed, direct questions as to, okay, this is the allegations I'm seeing in the paper. What's the answer to that?

Q. Kind of like a cross-examination a little bit?

A. A little bit. And it had an evidentiary quality to it as well because he – very patiently, I thought, given the busy nature of the office, the constraints he was under, took the time with me to walk me through the documents he'd assembled at that point.

Q. Okay. Now, after leaving that conversation, can you talk to us about what your opinion was with regard to taking the job as deputy first assistant attorney general?

A. Well, I satisfied myself that these charges were, in my opinion then, not well founded. I knew, as part of my job, there were a number of interesting things going on in the office, but I also knew, as part of that, like the Google AdTech lawsuit was coming. In addition to that, I'd be in charge of defending – I think it was then pending – the Whistleblower Act lawsuit involving these charges. So that was also a concern.

Q. Right. So I assume you take the job because we're here right now?

A. I did.

Q. Okay. And I want to talk to you about – well, when exactly was it that you started as the deputy first assistant?

A. December 3, 2020.

Q. Okay. So that's after everything kind of went down with regard to October and the reports to the FBI, right?

A. Yes.

Q. You mentioned that you were a part of, ultimately, the whistleblower suit. Are you aware of reports that were drafted within the office?

A. Yes.

Q. How many reports were there?

A. Two.

Q. Can you distinguish the two different reports that were drafted on behalf of the Office of Attorney General?

A. Yes. The first one started almost from the time I was there. First, I remember seeing a draft was – sometime in January, I think early January, because I was still working from home right after the holiday. I remember that – going through edits of 2021. And that was released by our office in August of 2021, publicly on our website.

Q. Okay.

A. The – and that detailed the main whistleblower allegations and what our office, after forensically collecting documents, emails, exhaustively compiling everything was able to put together to address these allegations.

Q. And can you tell us who actually authored or published that report?

A. The Office of the Attorney General.

Q. Okay. Now, is it safe to call that the internal report?

A. Yes.

Q. Was there a secondary report that was drafted?

A. Yes. And if you have a copy, that would help me be clear and precise. But I believe it is on Lewis Brisbois' letterhead or in the format of a memo to the Office of the Attorney General.

MR. DUTKO: Objection, Your Honor. Testifying from a document not in evidence. Testifying about a document not in evidence and hearsay.

PRESIDING OFFICER: Sustained.

Q. (BY MR. OSSO) There is a report in existence, correct?

MR. DUTKO: Same objection, Your Honor.

A. There are two reports.

MR. OSSO: He's not testifying with regard to what is stated in the document.

PRESIDING OFFICER: I'll overrule that. Go ahead.

Q. (BY MR. OSSO) Okay. There is an existence of a Lewis Brisbois' report, correct?

A. Yes.

Q. All right. We'll get there, but before we do, I want to be very clear. You started in December of 2020, right?

A. Yes.

Q. Your – you've looked at both of these reports, the internal report and the Lewis Brisbois' report, right?

MR. DUTKO: Objection. Leading, Your Honor.

MR. OSSO: It's only in the way of foundation, Judge.

PRESIDING OFFICER: I'm going to sustain.

MR. OSSO: Yes, Judge.

PRESIDING OFFICER: Just, you know, ask the questions one at a time.

MR. OSSO: Certainly.

THE WITNESS: It's hard for me not to rule, by the way.

MR. OSSO: It's in their allegation, so I'll talk about it.

Q. (BY MR. OSSO) Are you aware of the two reports?

A. Yes.

Q. Have you read the two reports?

A. Yes.

Q. Now, were you present at the Office of Attorney General during any of the subject matter involved in those reports?

A. I want to answer no, and I think that's right. But I would have to look at the reports to absolutely confirm, but I think everything that was detailed in both reports –

Q. Okay.

A. – predates December of 2020.

Q. Sure. Well, let me be more specific. Are you aware that the Office of Attorney General was involved in an open records request involving Nate Paul?

A. From – historically, I'm aware. I wasn't there at the time.

Q. Okay. Are you aware that they were involved in litigation with the Mitte Foundation?

A. Yes, again, historically.

Q. And are you aware that there was a non – or an informal guidance letter with regard to nonjudicial foreclosures?

A. Yes.

Q. Now, were you present at the office during any of those events?

A. No.

Q. Were you present at the office during the hiring of Brandon Cammack?

A. No.

Q. So is it safe to say that you don't have personal knowledge of any of those events that are authored in the reports?

A. Yes.

Q. All right.

MR. OSSO: Give me one second, Judge. I intend to get an exhibit for the witness. Copy for the Court. Copy for Counsel.

Q. (BY MR. OSSO) Mr. Dorfman, would you take a second to look at the copy of – my exhibit numbers got off – attorney general Exhibit 23, and let me know whether you recognize the document.

A. I have looked at it, and I do recognize it.

Q. What is this document?

A. This is what you're referring to as the – or referred to as the Lewis Brisbois' report, the second report in time that our office released on these matters. Well, I say "our office." This was outside counsel sending it to the office.

Q. Okay. And is this a fair and accurate copy of the report issued by Lewis Brisbois on behalf of the attorney general?

A. Near as I can tell.

MR. OSSO: Okay. At this time, Judge, I would offer attorney general Exhibit 23.

MR. DUTKO: Your Honor, this is – there's so much hearsay in there I don't know where to begin. This is – the document itself is hearsay. Within this document are conversations between people that are out-of-court statements that are hearsay. It relies on documents that are out-of-court statements that are hearsay. It also relies on people talking to other people who talk to other people, which is three layers of hearsay.

So my objection, Your Honor, is hearsay squared.

PRESIDING OFFICER: Sustained.

MR. OSSO: May I respond briefly? My understanding – and, Mr. Arroyo, if you would pull up Article VII, please. My understanding is that the House Board of Managers' allegation in this case is that Ken Paxton and the Office of Attorney General issued a report that basically alleged false and misleading facts. This is a legally operative document in this case.

MR. DUTKO: Your Honor, may I respond?

MR. OSSO: And the House doesn't want it in evidence. I don't understand how they can argue it's a lie if it's not even in evidence before the jury.

MR. DUTKO: Your Honor, I hope Counsel is not trying to mislead this Court because this Article of Impeachment is based on the internal AG report. This report, the Lewis Brisbois' report, came out after the Article of Impeachment, and so I'm sure Counsel would like to retract his statement and not mislead this Court. Regardless, this is so much levels of hearsay, and this thing up on the screen doesn't get around that.

MR. OSSO: I don't wish to retract my statement at all. I don't think that the allegation is necessarily clear, and I'm going to continue to argue that this is an – this is a legally operative fact.

MR. DUTKO: I would suggest, as an officer of the court, that he retract it because this report has nothing to do with this article.

PRESIDING OFFICER: Come forward, gentlemen.

(At the bench, off the record.)

PRESIDING OFFICER: For the record, I sustained that objection and it stands. Go ahead.

MR. OSSO: May I proceed, Judge?

PRESIDING OFFICER: Pardon?

MR. OSSO: May I proceed?

PRESIDING OFFICER: You may proceed.

MR. OSSO: Okay.

PRESIDING OFFICER: Hold on one second. Our jurors left the building for a moment. I did not notice. Give a Senator a minute and they're gone. We will be taking a break shortly, members, okay? We've just been back 90 minutes, and we normally take a break between 90 minutes and a little bit more. I think we're still missing a few. That was a short meeting at the bench compared to other ones, so they were basing their exit on their experience here in the last two weeks.

MR. OSSO: I could tell where it was going so . . .

PRESIDING OFFICER: Good news is the cricket also left the chamber.

MR. OSSO: I just think we're more entertaining, Mr. Dorfman and I, so the cricket's out of here.

PRESIDING OFFICER: I believe all are present and accounted for. You may proceed.

MR. OSSO: Thank you, Judge.

Q. (BY MR. OSSO) Before we talk about the internal report, I want to talk to you about your time at the Office of Attorney General in December of 2020.

Can you talk to us about what was going on as far as it relates to the productivity in the office at that time?

A. It was a very busy time. I think I mentioned the Google AdTech lawsuit. That had been years, as I understood it, in the making. We were about to release the complaint at long last in federal court. It was a huge and extraordinarily complex case. You're taking on Google. So I was told if I took the job, I would have front-line responsibility for at least overseeing that, and we intended to hire outside counsel so that was a big part of that.

At the time, of course, the election was still going on. There were still election challenges. And I know people were talking to the office about that. That ended up resulting in the Texas versus Pennsylvania lawsuit. So my first week on the job – I think my first day on the job, we went to –

Q. I'm going to slow you down. I'm going to break that up, Mr. Dorfman.

A. Sorry.

Q. So you're talking about the election. I assume it's the presidential election, correct?

A. Yes.

Q. And can you talk about the affect that that had on the workload of the Office of Attorney General at the very beginning of 2021?

A. Well, I had nothing to gauge it by, but it was an extraordinarily busy time.

Q. And did it appear that the morale – that people were working hard at the Office of the attorney general?

A. Oh, absolutely.

Q. And despite the allegations that were made against Attorney General Paxton, people were still working at the office?

A. Yes. In my first two weeks there, I don't think I made it home before 8:00 p.m. certainly.

Q. Did you have any –

A. I –

Q. Sorry to cut you off. But did you have any concerns about the work pace and work flow at the office?

A. No, it was fun. I mean, if that had been for the next two years, I would have had concerns.

Q. Okay. As far as burnout goes or things like that, were there any concerns about anything like that?

A. Specifically, December 2020?

Q. More into 2021.

A. Yes. As 2021 went on, obviously, the Biden administration came into office. Day one, people may remember this, a list, a raft of executive orders – we were the first – and I'm proud of this. We were the first attorney general – state attorney general's office to obtain a preliminary injunction against one of those executive orders.

It was the day one immigration order that imposed a hundred-day moratorium on deportations even where congressional statute dictated that removal must take place of a deportable alien within 90 days. And so we challenged that in court – federal court here in Texas and won. And, of course, there were other executive orders that we were challenging and filing lawsuits against.

I was the voice in the office from the beginning then. But throughout this time, and as we continued to do the work that, look, it's great to be in court. It's great for our lawyers to go into court in the daytime and spend the whole day and file briefs at night, but you can only do that pace for so long. So I wanted us to be careful, husband our resources, use them wisely, pick the right cases, prioritize appropriately.

Q. Utilize your resources?

A. To maximize the good work we were doing.

Q. During that time in fall of 2020, winter 2020 and into spring of 2021, are you guys working in the office, or are you working at home at this point?

A. Where I was, everyone was in the office. Now, some of the attorneys in the divisions, the litigation divisions, did a combination.

Q. Okay.

A. In a lot of the cases, the courts were shutdown due to COVID, still, in many cases. So even though we had cases all over the state, you might have a hearing in San Antonio –

Q. Right.

A. – on this computer in your office, and then you turn and have a Zoom hearing in Midland or El Paso 30 minutes later.

Q. Understood. And –

A. Which helps. Less travel.

Q. Right. You said that you were deputy first assistant attorney general. Are you aware of who your predecessor in that position was?

A. I believe it was Ryan Bangert.

Q. Okay. Can you talk to us about your role, at the time, as the deputy first assistant attorney general?

A. The core responsibility I had is to oversee the litigation divisions, both criminal and civil. As I'm not a criminal lawyer, never have been, never was a criminal judge for that matter, I rely very heavily on my criminal division deputy, that's Josh Reno, and – to manage those responsibility (sic) and report up to me and – as needed. But the civil litigation divisions, I feel very comfortable overseeing them.

In addition to that, I have overall responsibility at the executive level for policies, procedures. From time to time, I've also had direct report responsibility over human resources, as I do currently, and also over the communications team.

Q. So a wide array of divisions?

A. Yes.

Q. Now, are you familiar with whether, at any point, special litigation was under the oversight of your position, deputy first assistant attorney general?

A. I don't think it has been since I've been there. I think it was at one time. Again, I don't know this personally.

Q. And can you tell us now who oversees the special litigation division?

A. Ralph Molina.

Q. Okay. And then under Ralph Molina, or at any point in time, was it a Patrick Sweeten?

A. Yes.

Q. Is he still working in that position, moved to a different position?



A. He's currently our lead counsel in the buoys – the buoys case in the Rio Grande River, but that's on loan from the Governor's office.

Q. Did you have the occasion of working at the Office of Attorney General while he was in charge of special litigation?

A. Absolutely, yeah. I mean, until, I think, earlier this year, he joined the Governor's office. Up till that point, he was there the entire time I was there.

Q. Okay. Did you feel like you had to help him with his job, or did he appear to be qualified in handling his business in that position?

A. Patrick?

Q. Patrick.

A. Very talented lawyer.

Q. Okay.

A. Very experienced. Very capable. If I had one criticism of him, it's that he's in court more and managing less. We wanted him to clone Patrick Sweeten, so we had a team of Patrick Sweetens. But Patrick is so good and so natural in the courtroom, I think he – he longed to be there.

Q. Okay. Does it feel – do you feel that Patrick is the kind of guy that takes pressure off you if you didn't have to watch the special litigation division?

A. Certainly. Those are – they're the special litigation division for a reason. I think that was a creation of Attorney General Abbott to have the tip of the spear. We have a lot of litigating divisions. We have our general litigation division, which are outstanding. All our divisions are very good, do different things.

And special litigation is the – you know, you need to be at the courthouse in 30 minutes; we just found out the Obama administration has filed – is doing this. They've issued that executive order. No time. Let's go.

Q. Okay.

A. And so if I had to oversee that as well as everything else, you're right. It would put more pressure on me.

Q. I want to fast-forward and talk to you about the internal investigation report. You said you had no personal knowledge of the contents of the subject matter of that report, right?

A. Say that again, please.

Q. You had no personal knowledge. You weren't personally there for the subject matter that is in the internal report authored by the Office of Attorney General?

A. I wasn't there at the time these events happened.

Q. Were you present at the Office of Attorney General when the report was being drafted?

A. Yes.

Q. Can you talk to us about who was responsible for that and, if you know, what process went into drafting that report?

A. I think in the first instance, we relied on an office-wide forensic compilation of documents, emails, et cetera, that were relevant. Brent Webster took the lead in compiling that, and then we had a team. And again, as early as January I was editing drafts with others, Josh Reno; later Murtaza Sutarwalla, a deputy for legal counsel – legal policy; Austin Kinghorn, Enrique Varela. There were others, but I may have left them out.

Q. Okay. And can you talk to us about what your role was with regard to the publishing of that report, or at least getting the report ready to be published?

A. Well, I don't think we published it until August of 2021, and that probably is a reflection, one, of just how busy the office was and how much other stuff there was to attend to. But I'm sure I revised and edited and redlined, at least five or six times, the entire document front to back.

Q. Okay. Now, understand –

A. And others did as well.

Q. Right. Understandably, you weren't present for these events that the document summarizes. Did you play a hand in trying to find documentation to support the positions taken in that report?

A. More oversight that process.

Q. Can you talk to us about your oversight of that process?

A. Yeah. I felt very strongly this had to be – it was going out as a report of the office. I believe the attorney general had said that these allegations are baseless, and I will investigate and present the facts and let the voters decide, words to that effect.

Q. Sure.

A. I wasn't there. And so this was a fulfillment of that commitment. I took it as our charge to lay it out there, and I think it's fair to say that the document – my emphasis throughout this process of editing was, Look, this needs to be the voice of the agency. It's not any one person. It's all of us, and it's objective; it's factual both in tone and substance. If we make a conclusion or – from the facts that we presented from the documents that isn't supported by the document, let's not make that conclusion. Let's take that out and let the – let the people reading it make their own decisions.

Q. And so, really, you were just trying to make sure that they weren't making allegations that they can't back up?

MR. DUTKO: Objection. Leading.

PRESIDING OFFICER: Sustained.

Q. (BY MR. OSSO) Would you agree that your job was to make sure that the claims were verified?

MR. DUTKO: Same objection, Your Honor.

PRESIDING OFFICER: Restate.

MR. OSSO: Sure.

Q. (BY MR. OSSO) Was it your job to make sure that there was evidence or at least something to corroborate statements that were made?

PRESIDING OFFICER: Was there an objection there?

MR. DUTKO: Not to that, Your Honor.

PRESIDING OFFICER: I didn't think so, okay.

A. I certainly viewed that as my job, yes.

Q. (BY MR. OSSO) All right. Now, you mentioned earlier that, at some point, you get involved into the lawsuit in this case, and I want to talk to you about the lawsuit, okay.

Can you tell us your understanding of when the whistleblower lawsuit was first filed against the Office of Attorney General?

A. I think it was November of 2020.

Q. Can you tell us who the named parties within that lawsuit are?

A. I'm going to struggle on their first names.

Q. No problem.

A. Ryan Vassar.

Q. Okay.

A. Mr. Maxwell's first name is –

Q. David Maxwell?

A. David Maxwell. Thank you.

Q. All right. Mark Penley ring a bell?

A. Mark Penley and Blake Brickman. Sorry.

Q. Okay. And more focused on who is the named party or the named defendant in that lawsuit?

A. There's just one defendant. The Office of the Attorney General.

Q. Okay. Was Ken Paxton specifically named as the party to the lawsuit?

A. No.

Q. All right. So it's the Office of Attorney General on the filing?

A. Yes.

Q. And what is the first thing that you-all do – who all's working on the lawsuit with you at this time?

A. About the same time I was interviewing, I think they were interviewing for outside counsel, so I knew Lewis Brisbois had been hired. And either the first or second week, we might have had a phone conference or meeting with them. At that

point, I think the lawsuit had been amended at least once. There was later a second amended, and so I was working on it. Austin Kinghorn was working on it. The first assistant would have been involved.

Q. How about Chris Hilton? Was he working on it?

A. I think that's right. I think Chris Hilton was also from the start there. He certainly was later.

Q. Sure.

A. Enrique Varela, as well, who worked with Austin Kinghorn.

Q. And I'm going to cut you off. You mentioned Lewis Brisbois. Can you explain to us what Lewis Brisbois' job was with regard to the whistleblower lawsuit against the Office of Attorney General?

A. To be outside counsel. Bill Helfand is an attorney I'd known in Houston for at least 20 years. Very good lawyer specializing in government work, especially defense like Section 1983 federal court lawsuits; many of which, if not most, have an employment quality to them, the sheriff being sued by his deputy, something like that.

Q. And just without getting into the contents of the document that I showed you earlier, the Lewis Brisbois' report, was that authored by the attorneys that were outside counsel for the Office of Attorney General?

A. Yes, Mr. Helfand and others.

Q. Okay. Now, in that litigation, did you-all file a plea to the jurisdiction?

A. Yes, we did.

Q. Okay. Can you explain to us what a plea to jurisdiction is?

A. A plea to the jurisdiction is a document that says to the court, every court must first assess whether it has –

Q. Speak into the microphone.

A. Every court must first assess – that was too loud – whether it has jurisdiction to entertain a lawsuit. And the State of Texas cannot be sued for money damages without its consent, and this body and the House are the ones that must expressly waive, by statute, the immunity from lawsuit, the sovereign immunity of the State of Texas, in order for plaintiff to recover money damages. They argued the plaintiffs in this case that the whistle –

Q. I'm going to – I'm going to stop you, and I'm going to break that down.

A. Sure.

Q. You know, I didn't go to Yale, so you got to make it slow for me.

MR. OSSO: Mr. Arroyo, would you please put up Article VIII onto the overhead screen.

Q. (BY MR. OSSO) So essentially, plea to jurisdiction – well, let me ask you this: Is that something that is commonly filed in lawsuits in your experience as a civil litigator? Or at least with regard to Office of the Attorney General?

A. I was going to say at the Office of the Attorney General, I'd say probably 90 percent of our defensive cases, at least the ones I'm most familiar with, we file plea to the jurisdiction in almost every case challenging the most recent enactments of the Legislature arising out of the last session, which have been all those legal challenges that have been brought in the last few months. We filed pleas of jurisdiction, I think, in every one of those, saying this suit – this suit can't go forward. The Court has no jurisdiction. The state is immune.

Q. Okay.

MR. OSSO: Now, Erick, if you could just blow up the second paragraph, specifically all the way down to – well, this part's fine right here, if you could blow that up.

Q. (BY MR. OSSO) Okay. So I'm just going to read the article, Article VIII to you, Mr. Dorfman, which states that, Specifically, Paxton entered into a settlement agreement with whistleblowers that provides for payment of the settlement from public funds. The settlement agreement stayed the wrongful termination suit and conspicuously delayed the discovery of the facts.

The next page goes on to say, And testimony at trial to Paxton's advantage – sorry.

PRESIDING OFFICER: Let me get it up on the screen.

MR. OSSO: Yep.

PRESIDING OFFICER: Okay. Continue.

Q. (BY MR. OSSO) To Paxton's advantage which deprived the electorate of its opportunity to make an informed decision when voting for attorney general.

So at what time did you – we know that the lawsuit was filed in November of 2020. When was it that the Office of Attorney General actually files the plea to jurisdiction?

A. Not exactly sure, but I believe it was January of 2021.

Q. Okay. And when did the Office of Attorney General engage in settlement agreements with the whistleblower plaintiffs in this case?

A. Almost exactly two years later.

Q. Okay. So when we're talking about the plea to jurisdiction, we are two years before settlement discussions even come into play, right?

A. Right.

Q. Now, what was – I think in your motion for plea to jurisdiction it was in two parts, correct?

A. I'd have to see it.

Q. Well, did you talk about sovereign immunity?

A. Absolutely.

Q. Can you explain to us how sovereign immunity comes into play in your plea to jurisdiction?

A. Well, I think I covered that. The suit – the State is immune from suit unless there's an express statutory waiver from the Legislature.

Q. Okay. And then the second part of that was that you talked about separation of powers?

A. Yes.

Q. Can you talk about that to us?

A. Well, let me go back and cover the first one, if you don't mind.

THE WITNESS: May I, Your Honor?

Q. (BY MR. OSSO) If you'd please go back and –

A. I need to qualify my comments. What you're describing is – you've reminded me and refreshed my memory that the – yes, the Whistleblower Act is exactly the type of express statutory waiver of sovereign immunity that allows one to sue the state, in this case for money damages. But the case law has been clear, and we argued it, that unless you meet all the elements of a Whistleblower Act claim, there is no waiver of sovereign immunity. There's no jurisdiction for the court to proceed, and we alleged that they – the plaintiffs in the case had not met their burden of establishing all the elements of the whistleblower claim, and therefore sovereign immunity still applied.

Q. Okay. And was that file in the plea of jurisdiction – plea to jurisdiction, was that made in good faith and based on your legal research?

A. Yes.

Q. All right. Now, I want to focus back onto the article that states specifically –

MR. OSSO: If you would go back to the other page, Erick. It talks about – I need you to zoom in.

Q. (BY MR. OSSO) The settlement agreement stayed the wrongful termination case. I just want to be clear, when you-all filed the plea to jurisdiction, that had nothing to do with the settlement agreement, right?

A. We weren't even discussing settlement at that time, no.

Q. Okay. Now, what is the result of a plea to jurisdiction with regard to discovery in a lawsuit?

A. The plea to jurisdiction – again, every court must first assess whether it has jurisdiction. If it doesn't, its powerless to order discovery or proceed any further. And the – this – the Legislature has passed an interlocutory appeal so that even if we lose the plea to the jurisdiction – if we win, the case is over and dismissed. If we lose the plea to the jurisdiction, we have the right to immediately appeal, when normally you would have to wait till the end of a case to file your appeals.

Q. And –

A. And the immediate appeal stays the – the Court's jurisdiction. It can't proceed further in any capacity until the appeal is resolved.

Q. Okay. Now, was that plea to jurisdiction filed to stop the discovery getting out to the public in this case?

A. I don't understand your question.

Q. You just said that a plea to jurisdiction essentially stops the discovery from occurring in a lawsuit, right?

A. It stops anything from occurring in the trial court.

Q. Okay. So my question to you is: When you-all filed the plea to jurisdiction, did you do so because you felt that the law applied in that situation, or did you do so because you wanted to stop discovery from getting out to the public?

A. We did it because we thought the State had sovereign immunity, and it was our duty to assert that as we do in so many of our cases. That does have the effect of stopping discovery from going forward and saving the taxpayers the expense of that discovery and our lawyers the time. You know, discovery is really where the time gets taken in trial cases.

Q. Okay. I want to talk to you about the procedural posture of the plea to jurisdiction. Can you talk to us about the first court that ultimately ruled on you-all's plea to jurisdiction in the whistleblower lawsuit?

A. The first court.

Q. Yes.

A. That was the Third Court of Appeals here in Austin.

Q. Well, did it – did it go to the district court prior to – prior to that filing?

A. Oh, I'm sorry. Yes, you're right.

Q. Can you talk to us about that?

A. We had some discussions back and forth. I don't know how much detail you want to go into, but with the plaintiffs' attorneys about scheduling a hearing on two things; they wanted to have a temporary injunction hearing. I think initially they said they needed four days. The only purpose of a temporary injunction hearing in this context would be to – for Mr. Maxwell and Mr. Vassar to seek reinstatement under the Whistleblower Act. So to be reinstated to their position with the Office of the Attorney General.

Q. So are you saying that Mr. Maxwell and Mr. Vassar actually wanted to come back to the Office of the Attorney General?

A. Yes. And I think that's still in their live pleading.

Q. Okay.

A. Well, their pleading. I shouldn't say live.

Q. Now, what was the ultimate decision by the district court with regard to that plea to jurisdiction?

A. Well – so we were trying to schedule the plea to the jurisdiction before, one week before, something, one day, whatever, because the Court can't have a temporary injunction hearing until it's heard and ruled on the plea to jurisdiction.

The plaintiffs requested and the court agreed to set them on the same day, but that had the effect of – meaning before the Judge ruled, we were set to a temporary injunction hearing, which got underway and started. And there was even testimony taken I think from Mr. Mateer for some time before we got the Court of Appeals to agree that by proceeding with the temporary injunction, she had implicitly ruled, the Judge, and implicitly ruled that she had jurisdiction.

Q. So ultimately – and I'm going to cut you off. Ultimately, the case goes up to the Third Court of Appeals?

A. Yes.

Q. Okay. So the district court didn't rule on the plea to jurisdiction necessarily?

A. I'd have to go back and check. I think she may have written an order expressly denying it, but – but not until after we're already gone up to the third court and said we need an intervention.

Q. Okay. And can you talk to us about what happened at the Third Court of Appeals?

A. They set oral argument and I can't remember exactly when that was, but I believe it was in October of 2021 when they issued their opinion, maybe 30 pages.

Q. So almost a year later while that plea to jurisdiction is still pending, right?

A. Well, the plea would have been filed in January, I think, and so you're talking nine months later.

Q. Okay. And can you tell us how the Court ruled, the Third Court of Appeals ruled?

A. Third Court of Appeals agreed with the plaintiffs that the trial court had jurisdiction that our reading of the Whistleblower Act on the two prongs you mentioned was not – was wrong. Well, they – they disagreed with it.

Q. Okay. And in response to the Third Court of Appeals ruling in that case, what did you-all do on behalf of the Office of attorney general?

A. We appealed that to the Supreme Court of Texas by filing a petition for review, asking them to take the case and reverse the third court's ruling.

Q. Okay. Now, do you recall when the appeal to the Supreme Court of Texas was filed?

A. Not exactly. It would have been within 30 days, maybe 45, of that October, I think, '21, 2021 opinion from the third court.

Q. Okay. And at this point in time, what is going on with the litigation in the whistleblower lawsuit?

A. Only the appeals process.

PRESIDING OFFICER: Counsel, excuse me. I promised a break about 15 minutes ago for the jurors. They've been in a two-hour sit down.

MR. OSSO: Now's an okay time to stop.



PRESIDING OFFICER: I don't want to interrupt but is this a good time? Members, it's five minutes to 4:00. Come back at 4:15. 20-minute break.

(Recess taken from 3:55 p.m. to 4:23 p.m.)

#### AFTER RECESS

PRESIDING OFFICER: Bailiff can bring in the witness, please. Do we all have the jurors? Mr. Osso is the correct pronunciation? I want to be sure I have that right.

MR. OSSO: Thank you, Judge.

Q. (BY MR. OSSO) Mr. Dorfman, we were just talking about the effect that a plea to jurisdiction actually has on the discovery in the case. Now, I want to focus –

MR. OSSO: Erick, if you wouldn't mind focusing on the next page, top paragraph, which is the bottom paragraph of Article – excuse me, bottom paragraph of Article VIII.

Q. (BY MR. OSSO) I want to read that to you. Testimony at trial to Paxton's advantage, which deprived the electorate of its opportunity to make an informed decision when voting for attorney general.

Now, throughout the course of the lawsuit that the whistleblowers filed, are you aware of whether specific facts or allegations became public?

A. Yes.

Q. And could you turn your mic on, sir?

PRESIDING OFFICER: Hit that white button.

MR. OSSO: Better. Okay. I'm going to reask that question.

THE WITNESS: Please.

Q. (BY MR. OSSO) Were you aware of whether the specific facts or allegations with regard to the whistleblower suit became public?

A. Yes.

Q. Can you tell us about in which ways, if you know, they became public?

A. Well, we talked about that earlier. Before I came to interview at the office, there were news stories that contained allegations made by the whistleblowers. It was about that same time, maybe a little later, that the lawsuit was filed. That was a news story and a very detailed state court petition, that's public record, public filing, covered in press accounts. And then I think they amended that petition twice between the original filing and early February.

So there was a first amended maybe in December and then in February, just before the plea to jurisdiction hearing and the temporary injunction hearing, they filed a second amended petition which I think is the last one, but that's 63 pages, very detailed allegations.

Q. I'm going to stop you real quick just to clarify. When you say "they filed and amended petitions," can you talk to us a little bit about – well, who filed those petitions?

A. The four plaintiffs through their lawyers.

Q. So David Maxwell, Mark Penley, Ryan Vassar, and Blake Brickman?

A. Yes.

Q. And did those petitions include specific facts that they were alleging –

A. Yes.

Q. – Attorney General Paxton and the Office of Attorney General committed?

A. Yes.

Q. Okay. And those pleadings were actually available to the public, correct?

A. Yes.

Q. You can look them up online?

A. Yes.

MR. OSSO: So, Erick, if you don't mind going back one page to the bottom paragraph, bottom clause.

Q. (BY MR. OSSO) Article VIII alleges that, Paxton entered into a settlement agreement with whistleblowers that provides for payment of the settlement from public funds. This settlement agreement stayed the wrongful termination suit and conspicuously delayed the discovery of facts.

Is that allegation true?

A. No. Can I explain?

Q. Please do.

A. The settlement agreement didn't stay the wrongful termination suit. It was on appeal. And our petition for review was pending with the Supreme Court of Texas. That court doesn't have to take any case it doesn't want to, so you have to convince it to take the case. We had made a case. We'd made – filed two briefs to do that.

Q. I'm going to stop you, because we're going to get there. And I want to break that down.

A. All righty.

Q. But with regard to conspicuously delaying the discovery of facts –

A. The settlement agreement didn't do that.

Q. And weren't the facts available to the public at this point anyway?

A. More than we discussed. Obviously the petitions I mentioned, but the Court of Appeals' decision is 30 pages and has bullet point, block-paragraph recitals from the pleadings. So it was restated. The most serious allegations that the complaints – the petitions made were restated in the Court of Appeals' decision which also garnered news attention when it came out.

Q. Right. And you had talked about – I think opposing counsel actually held up a document that was the Third Court of Appeals' decision against the Office of Attorney General in this case, correct?

A. I'm sorry. What was your question?

Q. Essentially that the Third Court of Appeals ruled against the Office of Attorney General?

A. Correct.

Q. So you filed what with the Supreme Court?

A. Petition for review. An appeal, notice of appeal at the Third Court's decision with a petition for review, asking the Supreme Court to take the case.

Q. Can you explain to us – I deal predominantly with criminal law. Can you deal – can you explain to us kind of how the process works when you file a petition for review with the Supreme Court of Texas?

A. It's in the form of a brief and very much like what we would call a merits brief, but it's not. It is simply an argument for why this case is sufficiently important to be one of the 100 or 110 cases that the Supreme Court can take from the entire state and rule on. They only hear so many oral arguments or take so many cases so you have to convince them this is worthy of their attention. We tried to do just that.

Q. Okay.

A. And our opponents filed a brief between our initial and reply brief, explained to the Court they should not and they should let the Third Court of Appeals case stand in which case the case would have then gone back to the trial court.

Q. Okay. And so the Third Court of Appeals' ruling was actually up for appeal, right?

A. Yes.

Q. Was that ultimately ruled on, that appeal?

A. Not to this day, no.

Q. Okay. Can you talk to us – are there certain sessions or time periods where the Supreme Court tends to hear cases?

A. I think that's right. I would defer to people – bless you – who – who argue in front of the Supreme Court for a living, but yes.

Q. Okay. Do you feel that – I guess at any time the Supreme Court can pull your case out of a hat to hear it, right?

A. I think that's right.

Q. Is that –

A. They usually confer as a body, I think, in person, although maybe by remote sometimes, too –

Q. Right.

A. – especially during COVID.

Q. Okay. Does that have an affect on your ability to negotiate or work out a settlement with another party, or does it affect the other party's, maybe, goal or them wanting to settle?

A. I don't know what the "what" is in your sentence.

Q. The potential for the Supreme Court to pull your issue out of a hat and have it come before them?

A. Absolutely. It's a significant moment in a case. If they take it, I think the common – with conventional wisdom would be, they're not taking the third court's case if they decide to take it to affirm it because they could just do that by denying the petition for review, save themselves time.

Q. So what does that mean to you in the event that they might decide to take your case for –

A. It would have altered our assessment of the case and made it – we would have felt very good about our chances for winning the appeal and dismissing the case outright.

Q. Would that give you the upper hand potentially in settlement negotiations?

A. So much so that it might make settlement impossible.

Q. Okay. Do you think, if you know, that that had any effect on this case coming to a settlement or at least settlement discussions starting in this whistleblower lawsuit?

A. I think that's why settlement negotiations started.

Q. Okay. About what time did settlement negotiations actually begin in this case?

A. I'm not sure whether it was the very end of December or the first week or so in January of 2021. About – somewhere in that time.

Q. 2021 or 2022?

A. Sorry. 2023.

Q. 2023?

A. December 2022 and January 2023. Thank you.

Q. Now, just to clarify for the Senators, the petition for review probably sat with the Supreme Court for quite a while, did it not?

A. Yes, I think we filed our initial petition, our – yeah, initial brief in July of 2022.

Q. Okay. Who reached out to who to discuss settling the whistleblower lawsuit?

A. They reached out to us, my recollection.

Q. And when you say "they," you mean the whistleblowers' attorneys?

A. Yes.

Q. Okay. And can you talk to us about when – if you know, when that occurred?

A. Same time, late December, early January of 2023.

Q. And what did you do in response to them reaching out?

A. We discussed internally whether we wanted to – as they were requesting, go to mediation with a professional mediator in the Austin area.

Q. Did – what kinds of things were you discussing within your office as to why or why not settle a case?

A. We certainly wanted to discuss the pending petition for review and when it might be ruled on and what that might do to the parties' willingness to mediate at that point if it happened, whether we could get a professional mediator worth his or her salt on that short of notice because I think the plaintiffs wanted to mediate in the next 7 to 10 days maybe 14 at the out set at the latest, because they were concerned that the Supreme Court might rule and either way it ruled, the other side would feel good and the other side would feel bad and maybe couldn't – risk creates settlement –

Q. Okay.

A. – potential, so that would take out some of the risk.

Q. Risk for the plaintiffs, right?

A. Risk to the plaintiffs that the Court would grant it and that might indicate their case was going to be dismissed maybe in a year, maybe in nine months. They may have assessed it differently. That's how I would have seen it. And risk for us that if the Court declined to accept our petition for review, the third court ruling stands and we're back in trial court and we have years perhaps of lawsuits and appeals, litigation and appeals and the accompanying expense and time.

Q. Who found the mediators?

A. The plaintiffs' lawyers did that. I remember clearly because I was very skeptical that on that short of notice we would get any good mediators and they told us in response to that, I think, that not only they had two or three who had available dates in the next week or two, which indicated to me – I told people at the office that's a good sign that they're eager to mediate because they must have called 10 or 12 people if they could find two or three available on that short of notice.

Q. Okay. So it appeared to you that they intended to reach a settlement?

A. I think they were highly motivated to settle.

Q. Okay. And that's based on your years of commercial litigation experience, I assume?

A. And as a mediator and trying to get a mediator on short notice.

Q. Fair enough.

A. In fact, that was kind of my speciality as I didn't mediate full-time, so if parties couldn't get one of the regular mediators they knew I was probably available.

Q. Now, I want to zoom out a little bit. Just generally speaking in your years of experience as both a mediator, a judge and a litigator, does a party's willingness to settle a case indicate that maybe they think they're liable or that they think that the other party is correct? Can you talk to me about that?

A. Sure. In my experience, especially mediating and representing parties who mediate their cases, both sides at least will say they like their case and they may. They frequently do. Mediation takes place when there's risk and uncertainty and the only

way to control the outcome is for the parties to reach an agreement and take it out of a jury's hands. You never know what a jury's going to do. You don't know who the jurors are.

Q. Right.

A. And maybe two years from now, it may be – again, 12 people pulled off the street. That's – if you want to subordinate your control of your affairs to those people, that's your choice, but that's expensive and risky.

Q. Okay. And I want to –

A. I'm not sure I answered your – did I answer your question?

Q. You did answer my question. I appreciate it, and I want to bring your answer and apply it to the fact of this case. Did you have a conversation without getting into specifics with other OAG employees about settling – or at least going to a mediation with the plaintiffs in this case?

A. Oh, yes.

Q. Okay. Now, when you entered those discussions, did you have a viewpoint on the strength of your case for the defense, the Office of Attorney General in this case?

A. Yes.

Q. And what was your viewpoint?

A. Well, we hadn't probably looked at it in sometime since filing the briefing so we reconvened, revisited, reminded everybody where things were and what the arguments were, so we could assess that. I remember being a voice as I am generally and maybe professionally, look, let's go to mediation, compared to years of trial and discovery and outside counsel on both sides, the expenses – the time is short. We can do it in a day, maybe two, and the expense is a rounding-error in the budget. It's the responsible thing to do, especially in this case. It's one thing if you're a private plaintiff or a defendant. It's another when you are dealing with the state's money. I think you're – I felt and articulated that we kind of have a duty to explore settlement. Maybe it can't happen, but we should – we should give it a try.

Q. Right.

MR. OSSO: Your Honor, at this time, may I approach the witness and the court and opposing counsel?

Q. (BY MR. OSSO) Mr. Dorfman, I'm showing you what's been premarked as attorney general Exhibit 335. Do you recognize this document?

A. Yes.

Q. And what do you recognize this document to be?

A. This is an internal memo prepared by Chris Hilton, the chief of our general litigation division, assessing after we'd received settlement statements from, I think, three of the plaintiffs in the Whistleblower Act case, explaining why they thought their case was strong and what they thought they would recover at trial.

Q. And let's not talk about the contents of the document, but could you tell me when this document was authored?

A. This, on its face, it says February 1, 2023. I don't have any reason to doubt that's the date. That's the date, by the way, we mediated the case.

Q. Okay.

A. So whether it was circulated before that date in draft form – I think it was, my recollection. We certainly discussed the contents of it internally before it was put into final form.

Q. Okay. And did the findings without getting into what the findings were or the subject matter of what the document is, did this have an effect on your mindset going into the negotiations?

A. I don't know if it – it certainly informed me and I relied upon it and had – I think it summarized the state of play well.

Q. Okay. And is – is – AG Exhibit 335 is that a fair and accurate copy of the memo that you received from Chris Hilton?

A. Give me one second.

Q. Sure.

A. Yes.

MR. OSSO: Your Honor, at this time, I would offer AG Exhibit 335 into evidence.

PRESIDING OFFICER: Any objection?

MR. DUTKO: I just want to make sure I have the right document. Is this the one with the OAG seal but with Ken Paxton's name removed?

MR. OSSO: Yep, that's it.

MR. DUTKO: Then no objection.

PRESIDING OFFICER: Admit.

MR. OSSO: May I proceed?

PRESIDING OFFICER: 335 AG Exhibit into evidence. You may continue.

(AG Exhibit 335 admitted)

MR. OSSO: Thank you, Judge.

Q. (BY MR. OSSO) Now, I don't want to go line by line in this report, but would you mind just summarizing the – kind of what this document is and what you and Mr. Hilton's thought process was with regard to the financial aspect of this mediation in the case.

A. Sure. It's important to realize the mediation – we were told in no uncertain terms Blake Brickman would not participate in mediation. He would not come to mediation. He would not be there. He was going to trial come hell or high water, so the opportunity was to settle with three, not all four of the whistleblower plaintiffs, and this – so we received settlement statements from demands basically, this is what

we're going to present the week before – maybe a few days before the mediation date and this was kind of a summary. I think collectively they were – their attorneys argued for over \$5 million in damages if they settled today. Of course, prejudgement interest and attorneys' fees, as they said, would go up if the case continued, et cetera. But – so for three of them, that was the – and we didn't to want take their word for it so we asked one of our top attorneys to read those carefully, review the case law and report back on what a more – what we would consider a more realistic assessment of the case's value was.

Q. And just a brief question: This is just an inner office memorandum, right?

A. Yes.

MR. DUTKO: Objection. Leading.

Q. (BY MR. OSSO) Was this –

PRESIDING OFFICER: Overruled.

MR. OSSO: I'm going to ask the question again.

Q. (BY MR. OSSO) Was this an inner office memorandum?

A. Yes.

Q. Did you send this out to anybody outside of the attorney general's office?

A. No, we would not have done that.

Q. Did you represent that you were the attorney general, or that you had the authority to act without Ken Paxton's, I don't know, authority in this document?

A. By this memo?

Q. Yeah, by this memo.

A. No.

Q. No, okay. So can you tell us whether or not you felt that there was an ability to potentially save the State of Texas, the public of Texas, money by engaging in a mediation and potentially a settlement?

A. Well, I certainly thought that was the case. Otherwise, it wouldn't have been advisable to go to mediation.

Q. Okay. Now, which specific plaintiffs in the whistleblower lawsuit were involved in the initial willingness to settle or request to settle the case?

A. Ryan Vassar, Mark Penley, and David Maxwell through their attorneys. I don't think we ever talked directly to them during this process.

Q. What about Blake Brickman?

A. Well, as I said, Mr. Brickman's attorney told us – and the – actually the attorneys for the other three plaintiffs told us Blake Brickman will not come to Austin. He will not participate in the mediation. He doesn't care. He – he wants his day in court.

Q. Did you have a reason or idea as to why Mr. Brickman wanted his day in court?



A. Yeah. Well, this is secondhand, so I understand Mr. Brickman is financially secure.

MR. DUTKO: Objection. Hearsay. This is secondhand.

PRESIDING OFFICER: Sustained.

MR. OSSO: Your Honor, I'd actually argue that it goes towards settlement agreements in this case, and under 408(b), it should come into play.

MR. DUTKO: And my objection is 408. This goes to settlement and it's also hearsay.

MR. OSSO: Which is an – which is – 408(b) is the exception to the rule and –

PRESIDING OFFICER: We've had this discussion I think yesterday or the day before, so I sustain the objection.

MR. OSSO: Yes, Judge.

Q. (BY MR. OSSO) Needless to say, Brickman's not there, is he?

A. Wasn't there. Wasn't going to be there. Well, and I say wasn't there. It – we didn't anticipate this or plan this, but February 1st, the date we set for the mediation, it ended up being the winter freeze.

Q. Did Mr. Brickman's attorneys come to you with additional demands – well, we'll get there.

Talk to us how the mediation went. What day do you recall you started mediation?

A. I believe it was a Wednesday, February 1st. And – and I – we had planned to be in Austin in person at Patrick – the mediator Patrick Keel's, former Judge, office. As it happened when the freeze set in, I stayed in Houston and we were all on a Zoom.

Q. And, Mr. Dorfman, it's been a few years. Is it possible that the dates may be . . .

A. Might not have been a Wednesday.

Q. Fair enough.

MR. OSSO: Judge, may I approach Mr. Dorfman?

THE WITNESS: I think it was a Wednesday.

Q. (BY MR. OSSO) Was this a one-day mediation or a two-day mediation?

A. Ended up being – initially, planned to be one day, February 1st. We ended up, I think, on February 8th having a second day by agreement –

Q. Okay.

A. – with the party – the plaintiffs' attorneys.

Q. Okay. Can you talk to us – and we'll get to the document in a second, but can you talk to us about how the first day of mediation went?

A. It went long. I think we broke sometime around midnight. I want to give Patrick Keel all the credit in the world. We didn't know until it started turning dark that he didn't have power in his house. And at some point he was on his laptop and lost that power, couldn't recharge, so he's now on his phone on the Zoom call.

Q. All – this is all happening online, right?

A. All happening online till midnight and I think his juice gave out at some point.

Q. Was it a – was it a good day of mediation, or was it a bad day of mediation?

A. I didn't have a whole lot of expectations that this would settle. It didn't obviously on that first day, but we got real close and again we came in with the expectation that we – the option today is to settle with three plaintiffs. Sometime between 5:00 and 6:00 p.m., Mr. Brickman showed up again remotely, so I don't know if he was physically present.

Q. Sure. I'm going to stop you real quick. Was this the first day that it got real close and Mr. Brickman showed up or the second day of mediation?

A. First day.

Q. All right. So you guys are making headway. You said Mr. Brickman showed up. Can you talk to us about any effect that only three of the four plaintiffs were present that it had on you and then what happens when Mr. Brickman shows up?

A. Well, I think Mr. Hilton's memo, Exhibit 335, speaks of the fact that it's more valuable to us to settle the entire case.

Q. Okay. And why is that?

A. Because if we're settling with three of them, we're paying money out. Yet, we still have to pay our lawyers and outside counsel on top of that to go to trial, to go to discovery, all the expense, maybe less time, maybe less discovery because it's just one plaintiff, but still time, resources that we would like to save ideally by getting rid of the whole case at once.

Q. Because what is the point of settling this case to you guys?

A. We have to be good stewards of the taxpayers' money, the state fisc. And so we viewed this as any other case. One, that's why I argued for mediation is we should at least try if it's cheap and inexpensive to try and settle this and save that money and time and resources. And then settling with three, I think that's – it would be less valuable, but by the same token, we would offer less money and I think Mr. Hilton says it in the reverse way in his memo that if they're – if Mr. Brickman would come to the table and we could make sure we don't have to expend any money after a settlement, that would – I think his word is a pre – that would be worth a premium.

Q. Okay. Talk to us about what happens when Brickman joins the negotiation table. How did that go down? Did you – did you-all reach out to Mr. Brickman, or did somebody else reach out to Mr. Brickman? What is your understanding?

A. I don't recall real clearly. I think it was a surprise to us.

Q. And how did you take that surprise?

A. Good and bad.

Q. Can you tell us about that?

A. The good is, look, we've all along preferred to settle with all four rather than piecemeal. It's more valuable. It's worth the premium for the reasons Mr. Hilton stated in the memo, in the exhibit. So that was good.

Bad is, wait a second. You told us all along all week, maybe two weeks now, Blake Brickman is not interested in settlement. Blake Brickman is not going to participate in the mediation. He's not available. He's going to trial. And now – now that we're talking real dollars and it looks good that we might actually settle, now he's interested. All that – was that posturing? Were we being sold a bill of goods? That suspicion crossed my mind.

Q. Did you-all reach a settlement that night?

A. No. We got real close, but no.

Q. Now, I want to talk to you about AG Exhibit 423. Do you recognize this document?

PRESIDING OFFICER: Mr. Osso, make sure you speak up and stay on that microphone.

MR. OSSO: Yes, Judge.

Q. (BY MR. OSSO) Do you recognize AG Exhibit 423?

A. Yes, I do.

Q. What do you recognize that document to be?

A. This is General Paxton conferring on –

MR. DUTKO: Objection, Your Honor. Testifying from a document not in evidence.

MR. OSSO: I'm going to lay the predicate right now, Judge, and I'll instruct the witness.

PRESIDING OFFICER: Overruled.

Q. (BY MR. OSSO) Without getting into the contents of the document, what do you recognize this document to be?

A. It's a memo from Attorney General Paxton to me and to Chris Hilton. Subject line: Settlement Authority, dated February 8.

Q. Okay. And did this email have an effect on your abilities and your thought process when going into the mediation on day two?

A. It confirmed what we had discussed internally, yes.

Q. Okay. Did it grant you any form of authority?

A. Yes.

Q. All right. Is this email that you see in AG 423 a fair and accurate copy of the email that you received from Ken Paxton on February 8th of 2023?

A. Yes.

MR. OSSO: At this time, Judge, I would offer AG Exhibit 423 into evidence.

PRESIDING OFFICER: Any objection?

MR. DUTKO: Yes, Your Honor. I have three objections. First, it was never produced. Second, it was listed on their privilege log, so it was never produced, and three it's hearsay. So it is inadmissible.

MR. OSSO: I can address the objections.

I didn't hear your second objection. Could you repeat that?

MR. DUTKO: Yes. This document was identified on your privilege log, so you never gave it to us and now you're bringing it to the Court for the first time and showing it to us for the first time.

MR. OSSO: Let me address the privilege log first. As an attorney for Ken Paxton, I think at this time we'd be willing to waive any privilege.

MR. DUTKO: I appreciate that. But the fact is –

MR. OSSO: I'm not done. And if I could just finish my response, then I'd be happy to be quiet and let opposing counsel go.

So first and foremost, as Ken Paxton's attorney, I'll waive the privilege. With regard to hearsay, it's not offered for the truth of the matter asserted. It goes towards the effect on the listener and the mediation the next day. We heard Mr. Dorfman just state that on the record. And his first objection with regard to it being – not being on the witness list – or excuse me – the exhibit list, Judge, this is a rebuttal case at this point and arguably we don't even have to put a case on. Most of our exhibits are rebuttal exhibits, but we did give them the list. I am arguing that this is a rebuttal exhibit, and for that reason it is not covered by the witness – the exhibit list rule and it should come into evidence.

MR. DUTKO: Your Honor, may I respond?

PRESIDING OFFICER: Yes, you may.

MR. DUTKO: Just so we're clear, the process that occurred was they produced a privilege log, never gave us this document, and now for the first time they're sandbagging us with this document without giving it to us. As the Court is aware, you've ruled several times the documents that we did not produce would not come into evidence. They never gave this document to us. This is the first time we're ever seeing it. If they want to take every document off their privilege log and put it into the record, we're good with it. Otherwise, we have a valid objection.

Second, Your Honor, it is clear hearsay. There is no business record. The predicate laid was – was not the standard for hearsay, and so it is inadmissible on all of those grounds.

MR. OSSO: If I – and just briefly, yes, Judge.

PRESIDING OFFICER: Go ahead.

MR. OSSO: Well – and I'm not aware of a privilege log that we came up with or provided to the House Board of Managers first and foremost. This was on our fourth supplemental notice of the exhibit list. I think the Court is aware that the managers have given us plenty of exhibits throughout the course of this trial. I mean, if I remember correctly, Mr. Bangert dumped phone exhibit – text messages between him and the attorney general during the middle of trial. So to say that I'm sandbagging them, it's just simply not an accurate reflection of what's going on throughout this case or with regard to this exhibit.

PRESIDING OFFICER: Okay. I've heard both arguments. Give us a moment.

(Brief pause.)

PRESIDING OFFICER: Jurors, please take your seat.

After consultation with my team here, we will sustain the objection on hearsay. Continue.

MR. OSSO: Yes, Your Honor.

Q. (BY MR. OSSO) Did General Paxton delegate you the authority to engage in a settlement agreement with the whistleblowers?

A. Yes.

Q. Okay. Did he do so on February 8th of 2023?

A. On or about that date.

Q. Where was Ken Paxton while the settlement agreement was going on?

A. I don't recall. I know he wasn't in Austin. And I believe he was traveling, which is in part why we needed to formalize my authority and the scope in case we weren't able to reach him on short notice if it appeared that we had an agreement subject again to his confirmation.

Q. But to be clear, you guys formalized that delegation of duty, right?

A. Yes.

Q. All right. So then you go into the second day of mediation, right?

A. Yes.

Q. Will talk to us about the second day of mediation?

A. I believe it was also remote by Zoom even though the weather had cleared up. And I can't remember exactly when it was, we agreed we had a deal. But the same dynamic had played out the – Mr. Brickman was participating from the start on the second day at least, and so we were now dealing with four plaintiffs rather than a settlement for three as we had most of the first day of mediation.

Q. And did you-all reach a settlement agreement?

A. We did.

Q. What was the settlement agreement that you-all came to?

A. And to be certain, I can't – I think we reached it that day. It may have been the next morning –

Q. Okay.

A. – before it was finalized.

Q. Fair enough. What was the settlement agreement?

A. It was in the form of a mediated settlement agreement, a payment of \$3.3 million to the four plaintiffs in exchange for full and complete releases of liability against the Office of the Attorney General. There was other components. We had agreed to – and if you have a copy of it, that might help me, but we had agreed to attempt with ERS to reinstate Mr. Vassar in his retirement plan. I think that was the only fringe benefit that was addressed, but I recall that.

And then Mr. Maxwell had an – separate F5 administration hearing case in SOAH, State Office of Administrative Hearings, which was abated pending the – in pendency of the whistleblower case. So that stayed – their filing stayed that proceeding which was an attempt to reclassify him from a plain discharge to an honorable discharge without which his employment as a – according to them as a law enforcement officer in Texas was problematic.

Q. Okay. How did you feel about this agreement on behalf of the Office of Attorney General and the public of Texas?

A. I felt overall especially now that it was a settlement of all four plaintiffs and the case would not go forward, it was a good assessment of our risk. It's – to be honest, it's more than we would have liked to have settled for. I'm sure it's less than the – certainly it was less than the plaintiffs' lawyers were telling us they should settle for, so that's probably – again, 90, 95 percent of mediation settlements fall under that category.

Q. Now, after this case comes to an agreement, you still have this petition for review in the Supreme Court, right?

A. It's still pending, yes.

Q. And did you-all file any motions with the plaintiffs' attorneys in regard to that petition for review?

A. I think the next day.

Q. Can you tell us what motion you filed with the plaintiffs' attorneys in regard to that petition for review?

A. I believe it was styled as a joint motion to abate in the Supreme Court.

Q. Can you tell us what the joint motion to abate did in this case?

A. Very short motion. It was simply telling the Court, look, we've reached a settlement agreement that's binding and disposes of the case. If the Supreme Court went ahead and conferred and spent time deciding whether to take our case or not and made a decision, they'd be very peeved if they found out later that that was wasted energy on their part, so we didn't want to – we didn't want to upset the Court, so we let them know, Hey, we reached a settlement. We're going to paper it up and finalize a larger document. That's all the bells and whistles, dot some I's, cross some T's, but you don't need to do anything now and the parties are jointly asking you to – to put it aside for now.

Q. Okay. Now, I want you to focus your attention on the Article of Impeachment that is on the screen right now. And it states, The settlement agreement stayed the wrongful termination suit and conspicuously delayed the discovery of facts; is that true?

A. No.

Q. Why is that not true?

A. Well, the plea to the jurisdiction stayed the termination suit pending the Supreme Court – at that point the Supreme Court's consideration. It didn't – whether it was conspicuous or not, it didn't delay the discovery of facts by settling. There was no discovery ongoing at that time. And, you know, the way this is written, it's sort of passive voice. But who's doing the delaying is the suggestion here that the whistleblowers by filing a motion to abate with the Supreme Court are trying to delay the discovery effects?

Q. Mr. Dorfman, I don't know. I didn't – I didn't draft the Articles of Impeachment.

Okay. So I want to move on to who pays this lawsuit. Who pays this lawsuit? Who pays the settlement?

A. Well, the defendant is the Office of Attorney General. That's the party that would be liable and would pay any settlement. Obviously, the Legislature has to fund that. So those –

Q. And why is that? Why does the Legislature have to fund that settlement?

A. Goes back to our discussion about sovereign immunity. You can't sue the state without its consent. And if – even if you have a waiver of sovereign immunity like the Texas Tort Claims Act or the Whistleblower Act and you go get a judgment from a court, jury, verdict, all the way hold it up to appeal, you have a final unappealable judgment that entitles you to, let's say, \$2 million against any state entity, this Legislature, this body can still decline to pay it. They have to agree.

Q. Okay. And are you aware of whether that lawsuit has been paid?

A. No, it has not been paid. Not been funded.

Q. Now, did you engage without getting into specific conversations of what was said, did you engage in discussions with the plaintiffs' attorneys about getting the Legislature to pay for this lawsuit?

A. Yes.

Q. Were they for or against that?

A. For it. Excuse me. For it.

Q. Now, were you a part of any specific discussions with any legislators about getting this lawsuit funded?

A. Yes, I was.

Q. Okay. Can you talk to us without getting into the specific conversations you had, can you talk to us about who – who it was that you met with to talk about the settlement?

A. I think there were two separate meetings that I participated in. Other people in our office had more. Both on the House side and the Senate side. I recall meeting with Senator Hughes where we discussed it and with Senator Huffman.

Q. And so you also mentioned that other people were meeting – or were other people meeting with other legislators about getting the settlement paid?

A. I believe our head of government relations at the time Ryan Fisher and his deputy Colleen Tran were having such meetings, formal or informal, and Mr. Hilton, I think, too, had some.

Q. And if you know, were the plaintiffs' attorneys in this case aware of these conversations happening with legislators?

A. Absolutely. They were adamant. There's email traffic where they're saying we're not doing enough. We need to do more. This person wants to meet with you. That person wants to meet with you and we said we're doing our best. We agree we have an obligation to act in good faith and make reasonable efforts, but to really – you should be highly motivated to do what you can and have the meetings you need to have as well and we'll – we'll show up with you.

Q. Okay.

A. But let us know.

Q. And just because they haven't agreed to pay yet doesn't mean they can't at a later date, right?

A. Of course.

Q. Do you – and you still believe that – that it is the State of Texas, the public funds that should fund this settlement agreement, right?

A. I believe that initially. I – you know, I believe it now if the case goes back to trial, which I think it settled but others may feel differently. All the reasons that were there before, again, we'll go back to the Supreme Court presumably. So – but the risk return of time – the certainty of time, litigation, resources, lawyers being devoted to this when they could be doing Biden administration lawsuits or something.

Q. Let me stop you real quick. And just to be clear, you said "if the case went back to trial." If the case had gone to trial and there was a judgment entered against the Office of Attorney General, would it still be – should that still be paid from public funds?

A. That would be up to the Legislature to decide.

Q. Okay.

A. No one can make them.

Q. Would Ken Paxton ever be personally liable for that lawsuit?

A. No, he's not a defendant.



Q. Okay. You were at the Office of Attorney General – you're currently still working there, right?

A. Yes.

Q. My understanding is you took leave for a little bit of time.

A. Yes.

Q. Okay. About how long were you gone from the office?

A. From roughly early May – I – I returned to work remotely probably around the July 4th holiday.

Q. So just recently, right?

A. Just recently.

Q. Okay. I want to talk to you about the time period from where when you started at the Office of the Attorney General in December of 2020 up until you took leave in May of 2023, okay?

A. Okay.

Q. Can you talk to us about some of the accomplishments made by the attorney general's office under the leadership of Ken Paxton while you were there?

A. Well, I've referenced the Google AdTech lawsuit, one of the biggest antitrust cases not just in the country, but in decades. That's still ongoing.

MR. DUTKO: Objection. I apologize for interrupting. Anything after this lawsuit is irrelevant.

MR. OSSO: Actually, Judge, if I may be heard on the matter. Yesterday, the House Board of Managers elicited testimony from Blake Brickman. I have a transcript here and I'd be happy to show the Court, but they've opened the door to the Office of the Attorney General's productivity after this whistleblower's lawsuit, after these terminations occurred. They talked about the fact that there was not productivity and that the office wasn't functioning well. As a result, they've opened the door. That would leave a misimpression on the jury, and as a result, Mr. Dorfman should be able to talk about how the office is functioning.

PRESIDING OFFICER: Overruled.

Q. (BY MR. OSSO) Okay. So you talked to us about one of the lawsuits. Would you please continue to talk about the other accomplishments and the functioning of the Office of Attorney General?

A. I should have started with our immigration cases which I'm probably the most proud of.

Q. Would you please tell us about your immigration cases?

A. Day one – I mentioned this maybe earlier – of the Biden administration, all the executive orders that came out, one was the hundred-day moratorium. We were the first to get a nationwide injunction requiring the Biden administration to abide by congressional directive that, no, if you have a deportable alien, they must be deported within 90 days, no exceptions.

And that – we continued to file and challenge and try to hold the Biden administration to the letter of the law and the rule of law on our border. Title 42 is one of those cases. DACA is a continuation of the case that attorney general Abbott brought years ago against the Obama administration. We just won, I think, in the last week a ruling out of a federal court in Houston that the revised Biden administration DACA policy is just as illegal – unlawful, I should say, as that in our favor.

Q. Okay. I'm going to bring – you talked about AdTech already. You talked about the Google case.

A. That's one of the Google cases. Another Google case we settled before I took leave. We broke away from a multi-state – all the states suing in one location. We broke out of that, filed our own lawsuit in Texas State court. We settled with Google for \$8 million when all the other states put together settled for \$9 million over the Google pixel phones and that was to the relief of Texas consumers who were deceived by misleading advertisements.

Q. Any litigation with regards to opioids?

A. This is mostly before my time. The money has come in since I've been at the agency –

Q. Okay.

A. – but I can't claim credit.

General Paxton himself led the nationwide negotiations on that, worked very hard on that, deserves the credit for that. And it's been billions in money from those manufacturers, distributors, marketers, consultants, pharmacies that were responsible for the opioid crisis that was so devastating.

Q. And so based on what you've seen at the office during your time there, have they been successful in their efforts in their litigation under the leadership of Attorney General Ken Paxton?

A. I think so. I've been amazed at what we've accomplished. It's – we – we've worked our lawyers very hard, and they've done very well. They deserve the credit. They're the ones going to court, making the winning arguments and filing the winning briefs, not me. So I don't want to seem like I'm tooting my own horn when I say CNN, no great fan of Attorney General Paxton or our office had to concede in a news article that Texas had become the legal graveyard for Biden administration policies and executive orders.

MR. OSSO: Well, thank you, Mr. Dorfman. I'll pass the witness, Your Honor.

PRESIDING OFFICER: Your witness.

That sound you're hearing you have not heard in a long time. It's called rain.

### **CROSS-EXAMINATION**

BY MR. DUTKO:

Q. Hi, Mr. Dorfman. How are you?

A. I'm very good. Thank you.

Q. I was –

PRESIDING OFFICER: The mic's not on, Mr. Dutko.

MR. DUTKO: Can you hear me?

PRESIDING OFFICER: Yes, sir.

Q. (BY MR. DUTKO) Mr. Dorfman, we were looking at Exhibit 335 that was introduced by your counsel or counsel for Mr. Paxton.

MR. DUTKO: Can you pull that up for me, Stacey?

PRESIDING OFFICER: Check your mic one more time. It doesn't sound –

MR. DUTKO: Is it not working?

THE COURT: No. It is now, but you're tall enough that you're going to have to bend down a little bit.

MR. DUTKO: Yes, Mr. President.

Q. (BY MR. DUTKO) Is this the memo you were talking about on 335 with the counsel a moment ago?

A. It's one of them, yes.

Q. And this memo was created by Chris Hilton?

A. I believe so, yes.

Q. And one of the lawyers standing over there – sitting over there?

A. Sitting, yes.

Q. Sitting, yes.

When you got this memo, were you shocked?

A. By what?

Q. By the fact that Mr. Hilton was attempting to usurp the power of Ken Paxton by removing his name from the letterhead.

A. No.

Q. Did it appall you?

A. No.

Q. Was it simply a matter of Mr. Hilton picking out this letterhead that is available to every employee of the AG's office?

A. I think you'd have to ask Mr. Hilton about that. I – I don't know.

Q. You talked about the internal investigation that was conducted by the attorney general's office, correct?

A. Yes.

Q. And you talked about the fact that it needed to be fair?

A. Yes.

Q. It needed to be unbiased?

A. Well, it needed to be objective, I think is the word I used.

Q. And the subject of that investigation was Ken Paxton?

A. One of the subjects of that investigation.

Q. It certainly was a big part of it, right?

A. The allegations against him were a big part of it.

MR. DUTKO: Your Honor, may I approach the witness?

PRESIDING OFFICER: You may.

Q. (BY MR. DUTKO) Mr. Dorfman, I am showing you what has been marked as 524, Exhibit 524. Do you recognize this document?

A. Give me one minute to read it quickly.

Can you restate your question, please?

Q. Yes, maybe I can make it easier. You see your email address right there halfway down the page?

A. I do.

Q. This is an email exchange that you received, you were on?

A. Yes.

Q. And so as a result, you recognize this document?

A. Yes.

Q. And, you know, to use a predicate that's being laid by your counsel, this fairly and accurately represents the email as well as the attachment?

A. I think that's right.

MR. DUTKO: Your Honor, at this time we offer Exhibit 524.

PRESIDING OFFICER: Any objection?

MR. OSSO: Yes, Judge. I'd object to hearsay, and they haven't provided a proper foundation for this witness to sponsor this document.

MR. DUTKO: Your Honor, we have a business record affidavit that overcomes hearsay. That gets by that, and the predicate is this witness was part of this email exchange, is a proper sponsoring witness, testified it fairly and accurately represents the email exchange that he was a part of.

MR. OSSO: Judge, I'm just confused. I don't have a copy of a business record affidavit.

MR. DUTKO: You do have a copy of the business record affidavit. I didn't hand it to you but if you want I can get it for you.

MR. OSSO: Well, that would be great. I think part of the rule is it's got to be provided to counsel so that would be good.

MR. DUTKO: I will –

PRESIDING OFFICER: Would you provide him a copy?

MR. DUTKO: Yes.

MR. OSSO: Judge, if I could just have a moment to look at business record affidavit.

PRESIDING OFFICER: Take a moment.

MR. OSSO: Thank you.

MR. DUTKO: Your Honor, I assume we're stopping the clock respectfully?

MR. OSSO: Judge, I mean, I don't see why it should. They – they're offering it.

PRESIDING OFFICER: If it's a minute, we're not stopping the clock. But if it's longer than that, I'll stop it.

MR. OSSO: Judge, I have to – I have to reurge my objection. This business record affidavit is not the correct affidavit for these documents. It references Office of Attorney General numbers that are just not contained on the documents that counsel has provided me, and so I can't verify that it's the document that he's purporting it to be.

PRESIDING OFFICER: And we don't have a copy either of the business affidavit.

MR. DUTKO: I can get you a copy.

PRESIDING OFFICER: That would be good. It's supposed to be attached so that we know.

MR. DUTKO: I appreciate that, Your Honor. It was attached to a bigger swathe of documents. This is just one of the documents that's part of it.

PRESIDING OFFICER: We will stop the clock and give you credit for a couple minutes here.

Mr. Dutko, I will say I stopped the clock, but when either side has not been ready to present us what is needed, we have not stopped the clock previously so I'm giving you two minutes here, but I don't know how long you're going to take.

MR. DUTKO: Yes, Your Honor.

PRESIDING OFFICER: It does not seem you have your paperwork together.

MR. DUTKO: Yes.

PRESIDING OFFICER: So can we continue and get the clock running and come back to that, if you'd like?

MR. DUTKO: Yes.

PRESIDING OFFICER: All right. Resume the clock. Resume your questioning.

MR. DUTKO: May I proceed?

PRESIDING OFFICER: You may.

Q. (BY MR. DUTKO) Mr. Dorfman, when you were on direct examination, you spent a lot of time talking about the fact that – the quality of attorney that is currently at the attorney general's office. Do you remember that?

A. Yeah, I think so.

Q. And you said how you were proud to walk through the halls and the lawyers and the high caliber of lawyers?

A. I don't recall saying that. It's certainly true, but I don't recall saying it.

Q. And you were talking about how good the lawyers are and how hard they work. Do you remember that?

A. Yes.

Q. Yet, despite the fact that there's the high quality of lawyer that currently exists at the attorney general's office, you had to – Ken Paxton had to hire Lewis Brisbois as outside counsel?

A. Didn't have to. He did.

Q. And it was certainly something that could have been handled internally?

A. I'm not going to agree with you on that. Now, I have an explanation why.

Q. Okay. Are you aware of the fact that Lewis Brisbois has billed the Texas taxpayers \$524,000 for the work that was done?

A. Yes, I am.

Q. And that doesn't bother you?

A. I think I've been very clear that I view the Texas fisc is a sacred calling for us. It's very important for us to preserve it and spend it wisely. Again, I had a reason why I supported the hiring of Lewis Brisbois as outside counsel, but part of the motivation for settlement was to stop paying Lewis Brisbois as outside counsel.

MR. DUTKO: Your Honor, we have a business record affidavit that we were going to present to opposing counsel.

PRESIDING OFFICER: Okay.

MR. OSSO: Is this for this document?

MR. DUTKO: Yes.

MR. OSSO: Just got extra copies of BRAs. Again, Judge, I got to reurge the – the objection. The – the document that they've handed me doesn't have a single Bates label on it, and this business record affidavit talks about Bates-labeled documents. No way for me to verify the validity of these documents.

MR. DUTKO: Your Honor, just so we're clear, these are documents that –

PRESIDING OFFICER: Could I have a copy of that?

MR. DUTKO: Yes.

PRESIDING OFFICER: And before you answer his objection, let us look at this.

(Brief pause.)

PRESIDING OFFICER: We're ready to resume. I'm going to sustain the objection because we don't find a way to identify this affidavit with the document.

MR. DUTKO: Yes, Your Honor.

Q. (BY MR. DUTKO) Remember when you talked about the plea with the jurisdiction a while ago?

A. Yes.

Q. One thing is clear, a plea to the jurisdiction stays the case?

A. Once it's denied or granted.

Q. Right. And so when you filed that plea to the jurisdiction, you, as the attorney general's office knew that the case would be stayed?

A. Yes.

Q. That meant there would be no written discovery?

A. Yes.

Q. That meant there would be no deposition discovery?

A. Right.

Q. That means that Ken Paxton did not have to testify under oath for the entire time that that plea to the jurisdiction was being determined?

A. No one had to testify, yes.

Q. Right. But Ken Paxton didn't as well, right?

A. Yes.

Q. And so when you filed it, you knew that was going to happen?

A. Once a ruling was made, yes.

Q. Right. And even though you lost at the trial court, instead of going back to the case and conducting discovery, you appealed it to the Court of Appeals?

A. Well, we didn't lose the case at the trial court. We lost the plea.

Q. Right. You lost the plea to the jurisdiction?

A. We disagreed with that and we appealed it, yes.

Q. Which means that when you lost that case, that plea to the jurisdiction, that meant if you did not appeal it, you could go back to the trial court and take discovery?

A. If we chose not to appeal it?

Q. Right.

A. I supposed that's true.

Q. And then you appealed it?

A. We did.

Q. And lost?

A. We lost in the third court.

Q. So then instead of going back to the trial court to conduct discovery where Mr. Paxton would have to give his deposition, you took a flyer and took it to the Supreme Court?

A. I disagree with you that we took a flyer. We urged the constitutional separation of powers, which is a pretty important constitutional doctrine and we also relied on the sovereign immunity of the state which this body thinks pretty importantly of as well.

Q. Right. And then while the case was pending at the Supreme Court, there was an appeal – I mean, a election, right?

A. Yes.

Q. And after the election, before the Supreme Court where you say you had a good-faith basis to go, immediately after that's when you guys settled, right?

A. Not immediately, no.

Q. Shortly thereafter?

A. We settled three months later, a little more than three months later.

MR. DUTKO: Your Honor, I was told that the document that was printed for everybody had the Bates label that ran off the bottom and so now I have a version that has the Bates label that identifies it as a document within the range on the attorney general's – I mean, on the business record affidavit. Since it was on short notice, I have one copy. I would like to show it to opposing counsel and then bring it to the Court if that is okay.

PRESIDING OFFICER: Can I see it first?

MR. DUTKO: Yes, Your Honor.

PRESIDING OFFICER: You can come forward if you'd like. Come forward if you'd like.

Y'all can take a stand-up break, but don't leave because we're moving forward.

(At the bench, off the record.)

PRESIDING OFFICER: Members, please take your seats. Give them a second to settle down here for a moment.

You may continue.

Q. (BY MR. DUTKO) Mr. Dorfman, I'm going to make this short because everyone is ready to be done. You started in December of 2020?

A. Yes, sir.

I went off.

That's a yes.

Q. And when you started, all of the whistleblowers had already been fired or resigned, correct?

A. Yes.

Q. You didn't interview Mr. Vassar?

A. No, I did not.

Q. You didn't interview Mr. Bangert?

A. No.



Q. You didn't determine the veracity of what their testimony is in front of this Senate?

A. I hadn't been allowed to watch their testimony, so I – I don't know.

Q. Right. But you didn't determine the truthfulness of what they were saying?

A. To the Senate?

Q. No, as far as whistle blowing allegations.

A. We took their pleadings at face value and addressed those in the report.

Q. I appreciate that. But you didn't make a determination yourself?

A. I never interviewed them, but the – the report is the – I don't know if you call it a determination. It's a report of our office.

Q. Right. But when it comes to determining personal knowledge about the allegations that are made here in the Senate –

A. Yeah.

Q. – the allegations that are made before you got there, your testimony would not be helpful as far as personal knowledge goes?

A. I have no personal knowledge of what happened. I didn't hear any conversations in September or October or prior to that at the agency. That's true.

MR. DUTKO: Pass the witness, Your Honor.

MR. OSSO: No redirect, Your Honor.

PRESIDING OFFICER: Can we excuse the witness, both sides?

MR. OSSO: Yes, Judge.

THE WITNESS: Thank you, Judge.

PRESIDING OFFICER: Mr. Buzbee, who is the next witness?

MR. BUZBEE: Your Honor, Attorney General Ken Paxton rests.

PRESIDING OFFICER: Would the parties approach the bench.

(At the bench, off the record.)

PRESIDING OFFICER: You can still stand. I just need a little quiet. Both parties come back.

(At the bench, off the record.)

PRESIDING OFFICER: Parties can come back.

(At the bench, off the record.)

PRESIDING OFFICER: Parties, I need someone from each side to announce that you're going to have closing arguments in the morning before I adjourn for the day.

MR. MURR: Mr. President –

PRESIDING OFFICER: Do you close tomorrow?

MR. MURR: Yes, Mr. President, the House will – will have closing argument.

PRESIDING OFFICER: On the record.

MR. BUZBEE: Yes, Your Honor, the attorney general will close tomorrow, closing argument.

PRESIDING OFFICER: For the record. 9:00 a.m. As always, 9:00 a.m. We are adjourned for today.

(Off the record at 6:18 p.m.)

(Proceedings adjourned at 6:18 p.m.)