

**No. 21-0542**

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**In the Supreme Court of Texas**

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ZACHOR LEGAL INSTITUTE,

*Petitioner,*

v.

QATAR FOUNDATION FOR EDUCATION, SCIENCE AND  
COMMUNITY DEVELOPMENT,

*Respondent.*

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On Petition for Review from the  
Third Court of Appeals at Austin, Texas  
No. 03-20-00129-CV

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**PETITION FOR REVIEW**

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## **STATEMENT REGARDING RECORD REFERENCES**

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Where the Clerk's Record has included four pages of transcripts on a single page, the citation will include a parenthetical designating which transcript page is being cited. *Example:* "CRPage# (Transcript Page#:Lines)."

The Reporter's Record is cited as "RR Page#."

## **TERMS AND PARTY REFERENCES**

TAMUQ	Campus of Texas A&M University located in Education City, Qatar
TAMU or University	Texas A&M University
TPIA	Texas Public Information Act, Chapter 552 of the Texas Government Code <sup>1</sup>
TOMA	Texas Open Meetings Act
Qatar Foundation or Qatar	Respondent, Qatar Foundation for Education, Science and Community Development
Zachor	Petitioner, Zachor Legal Institute

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Texas Public Information Act in the Texas Government Code.

## STATEMENT OF THE CASE

*Nature of the Case:* This is a Texas Public Information Act case.

*Agency Proceeding:* Zachor submitted two requests under the TPIA for information on the funding and donors from the government of Qatar and its subdivisions to TAMU, related to the Qatar campus of the University. TAMU opposed disclosure only of the identities of the donors, but not the required disclosure relating to the gifts, grants, and donations. Responding to the second request, Qatar Foundation, a private entity, submitted objections to the disclosure based on an alleged competitive advantage. (CR63.) However, only the first request for information is at issue in this appeal.

*Agency's Disposition:* In the only letter ruling at issue in the underlying lawsuit, which relates to the first request for information, the Texas Attorney General opined that Texas A&M could withhold only the donors' identifying information but must release the other requested information. (CR112–113, Tex. Att'y Gen OR2018-20240 (August 14, 2018) (**App. A.**) Texas A&M did not file suit to challenge that opinion.

*Trial Court Proceeding:* Qatar Foundation filed this suit challenging the Attorney General's opinion that the majority of the requested public information must be released. TAMU did not file suit or participate in the lawsuit, and Qatar did not name Texas A&M as a party. (CR4-8.) Zachor intervened in the suit. (CR27–81.) Zachor and Qatar Foundation filed motions for summary judgment on the merits and Zachor also filed a plea to the jurisdiction challenging the subject matter jurisdiction of the trial court because the TPIA does not provide a waiver of sovereign immunity for Qatar Foundation's lawsuit. (CR28–29, 445–452, 459–469.)

Although the Attorney General agrees that Zachor is entitled to much of the public information at issue, the Attorney General disagrees on the jurisdictional question at issue in this appeal.

*Trial Court's  
Disposition:*

The Honorable Karin Crump, Presiding Judge of the 200th Judicial District Court of Travis County, Texas granted Zachor's plea to the jurisdiction and dismissed plaintiff's claims, leaving the Attorney General's opinions intact. (CR472) (**App. B.**)

*Court of Appeals  
Proceeding:*

The Qatar Foundation appealed the Court's Order Granting Plea to the Jurisdiction under the Texas Public Information Act to the Texas Court of Appeals, Third District, at Austin, Texas.

*Court of Appeals'  
Disposition:*

The Honorable Chief Justice Darlene Byrne, joined by Justices Thomas J. Baker and Edward Smith of the Texas Court of Appeals, Third District, at Austin, Texas, reversed the district court's order and remanded the case to the district court for further proceedings. (**App. C.**) The court concluded, based on this Court's decision in *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015) and the procedures in the TPIA, that §552.325 of the TPIA waives sovereign immunity for Qatar Foundation's suit against the Attorney General.

## **STATEMENT OF JURISDICTION**

This case presents a question of law that is important to the jurisprudence of the state. TEX. GOV'T CODE §22.001(a). At issue is the proper interpretation of the TPIA, an important statute governing the public's right to access public information. The specific questions presented are issues of first impression —whether §552.325 waives the Attorney General's sovereign immunity from a suit brought not by a governmental body seeking to withhold information but by a private entity wishing to have public information kept secret, and whether the governmental body that holds the information and has the duty to release it is an indispensable party to such a lawsuit. Importantly, this Court's decision in *Boeing* addressed only the *standing* of the private entity to bring such suit, not the *immunity* of the Attorney General to avoid being sued.

The court of appeals erred in holding that this Court's standing decision in *Boeing* controlled the distinct sovereign immunity issue raised here. The court also erred in concluding that the text of §552.325 effectuates a clear and unambiguous waiver of sovereign immunity allowing a private entity to sue the Attorney General to have its information withheld by a governmental body when the governmental body itself has not filed suit. This Court should address and correct these errors, which, if left undisturbed, will

encourage such suits by private entities, increase the litigation burden of the State, and subvert the state's robust public policy of transparency by chilling the free flow of public information.

## ISSUES PRESENTED

Qatar Foundation, a private entity, filed suit against the Attorney General seeking to overrule the Attorney General’s decision that certain public information must be disclosed to the requestor. However, TAMU, a governmental body and the custodian of the information, did not sue the Attorney General and was not otherwise made party to the lawsuit. TPIA §552.324 expressly waives the Attorney General’s sovereign immunity from a suit brought by a “governmental body” seeking to withhold public information from the requestor.<sup>2</sup>

1. Does §552.325 (Tab E in the Appendix) clearly and unambiguously waive the Attorney General’s immunity from a lawsuit brought by a private entity seeking to withhold public information?
2. In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), this Court addressed a private party’s *standing* to assert a TPIA exception from disclosure of public information. Does this Court’s opinion in *Boeing* control the distinct *sovereign immunity* issue here, particularly when neither the Court’s opinion nor any of the parties’ merits briefs in the *Boeing* appeal in this Court mention the term “immunity”?
3. Only TAMU—not the Attorney General—holds the requested public information and must disclose it or be permitted to withhold it. Even if §552.325 waives sovereign immunity for the Qatar Foundation to sue the Attorney General, would a judgment against only the Attorney General be advisory and void for lack of jurisdiction?

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<sup>2</sup> Although §552.324 is in Tab D of the Appendix, for convenience its text is also included here.

### Sec. 552.324. SUIT BY GOVERNMENTAL BODY.

(a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:

- (1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and
- (2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.

## INTRODUCTION

The court of appeals recognized that any legislative waiver of sovereign immunity must be made with unmistakable clarity, and that TPIA §552.325 “is no model of clarity.” (Op. at 7.) (**App. C.**) The court nonetheless concluded that the text of §552.325 waives not only the Attorney General’s immunity from suits brought by governmental bodies to whom a TPIA request has been directed, but also waives its immunity from suits brought by private entities seeking to have public information withheld. That was error, and it dramatically impacts the entire TPIA scheme created by the legislature to guarantee that Texans have access to information about the public entities created to serve them.

Section 552.325 does not clearly and unambiguously waive the Attorney General’s sovereign immunity for any suit, and certainly not for suits brought by private entities. Instead, §552.324 (entitled “Suit by Governmental Body”) is the provision that waives the Attorney General’s immunity from suit, and it only does so for suits brought by governmental bodies.

In addition to misconstruing the text of the statute, the court of appeals expressly concluded without legal basis that this Court held in *Boeing* that §552.325 waives immunity from suit for a private entity to sue the Attorney

General. It therefore found a clear and unambiguous waiver of immunity from suit for Qatar Foundation's lawsuit. This too was error because *Boeing's* *standing* analysis does not address, much less control, the outcome of the *immunity* issue here. In *Boeing*, this Court only analyzed whether a private third party had standing to assert one of the exceptions to disclosure listed in the TPIA. 466 S.W.3d at 838 (noting that the "central question" was "Boeing's standing or right to raise the exception").

Throughout the Court's extensive jurisprudence on immunity from suit, we are unaware of any opinion in which it inferred a waiver of sovereign immunity when the opinion did not address the doctrine.

In this case, TAMU did not sue the Attorney General, was never a party in this litigation, and thereby forfeited the only basis the legislature permits, under §552.324, for suit against the Attorney General in this context.

In *Boeing*, unlike this case, neither the text of §552.325 nor the sovereign immunity of the Attorney General were at issue. This case presents this Court with the opportunity to clarify the jurisprudence for waiver of immunity under the TPIA and close the door to a dramatic increase of TPIA lawsuits by private entities without governmental body participation, in this context, which the legislature never intended to allow.

## STATEMENT OF FACTS

### **I. TAMU, A Public University, Receives Funding From Qatar Foundation.**

The underlying merits of this case concern public access to public information about a private, foreign entity's financial influence on TAMU, a public university, through undisclosed funding.

TAMU was created by the Texas Legislature in 1971. TEX. CONST. art. 7, §13. TAMUQ is a degree-conferring academic branch of TAMU located in Education City, Qatar. (CR175–176.) TAMUQ was established not by statute, but by a contract or contracts between TAMU and Qatar Foundation. (CR212.) According to Qatar Foundation, its grants “support TAMU’s Qatar campus.” (CR126.)<sup>3</sup>

The Qatar Foundation acknowledges that it donates to TAMU “based on the value of the campus’s research programs to QF’s mission.” (CR136.) The public has a substantial interest in knowing what the Qatar Foundation paid for TAMU programs here and abroad in order to establish Qatar's own degree-conferring TAMU campus, what contractual “strings” are attached to such payments, who owns the results of research and new technology at

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<sup>3</sup> The Qatar Foundation was founded by the Sheikh and Sheikha of Qatar and is at least partially funded by the Qatar government. (CR 245.) Nevertheless, the Foundation is not a governmental body under the TPIA, and no party contends that it is. *See* §552.003 (defining “governmental body”).

TAMU in Qatar, whether the same academic standards apply to degrees conferred there, and whether the same religious, political, and anti-discrimination freedoms apply at the TAMU campus in Qatar as would apply in Texas.

The Qatari government has been identified as a vocal purveyor of anti-Semitism and promoter of extremist terrorist groups. (CR166 (Congressional Research Service).) The merits of this case ask whether the Qatar Foundation (a private entity) will be allowed to use the TPIA to preclude public scrutiny of its involvement with and influence on a public university.

## **II. Zachor Requested Information About Funding Received By Or On Behalf Of TAMU From Qatar.**

Zachor Legal Institute is a legal think tank and advocacy organization that fights discrimination (anti-Semitism) and the delegitimization of Israel. ZACHOR LEGAL INSTITUTE, <http://www.zachorlegal.org> (last visited Aug. 5, 2021). Under the TPIA, Zachor requested information from TAMU about funding and donations received by TAMU from Qatar. (CR106–109.)

TAMU sought an open records decision from the Texas Attorney General about whether certain portions of the requested information that identified donors are excepted from public disclosure under §552.1235, which protects the identity of private donors who wish to remain anonymous. (CR110–111.) The Attorney General ruled “the University

[TAMU] must withhold the donor’s identifying information,” however, the “University must release the remaining information.” TEX. ATTY. GEN. OR2018-20240 (Aug. 14, 2018). (CR112–113.) (**App. A.**)

TAMU did not challenge the Attorney General’s opinion.

### **III. Qatar Foundation Sued The Attorney General To Prevent Disclosure Of The Requested Information.**

Qatar Foundation filed suit against the Attorney General, claiming that almost all the information concerning Qatar and foreign government funding to TAMU was excepted from disclosure under the TPIA. (CR7.) The Attorney General asserted a general denial. (CR24–26.) Zachor intervened. (CR27–81.) TAMU did not sue the Attorney General.

Zachor filed a plea to the jurisdiction, arguing that no provision in the TPIA waives immunity to allow a private party to file a lawsuit challenging a decision of the Attorney General. (CR445–453.) Zachor argued that the governmental body, TAMU, could avail itself of an immunity waiver in §552.324 to challenge the decision; but sovereign immunity barred a private party’s lawsuit against the Attorney General seeking a judgment overturning his opinion; and without the information’s custodian as a party in the case, a decision would be advisory. The trial court therefore lacked jurisdiction over the case. (CR449.)

The Attorney General responded that §552.325 of the TPIA grants *standing* to third parties whose information has been requested and that *Boeing* so held. (CR455–456.)

The trial court granted Zachor’s plea to the jurisdiction and dismissed the case. (CR471–472.) Qatar Foundation appealed. (CR479.) The Court of Appeals reversed, holding that §552.325 waives sovereign immunity for suits by private third parties against the Attorney General.

### **SUMMARY OF THE ARGUMENT**

Qatar and the Attorney General agree with Zachor that 1) TAMU could have filed suit challenging the Attorney General’s opinion on disclosure of the public information at issue,<sup>4</sup> and 2) §552.324 is a waiver of immunity that would have permitted a suit by the University (a governmental body) to proceed. However, only the Qatar Foundation, a private entity under the TPIA, filed suit and the trial court correctly dismissed the suit for lack of subject-matter jurisdiction because the TPIA does not waive immunity for that suit or due to the absence of an indispensable party.

This Court has never addressed whether §552.325 waives the Attorney General’s sovereign immunity from suits brought by private parties under

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<sup>4</sup> It is not disputed that the information at issue is defined to be “public information” under the TPIA.

the TPIA. The *Boeing* opinion concerned only the analysis of standing of a private party to assert an exception to disclosure enumerated in the TPIA, not the waiver of immunity of a governmental defendant.

The court of appeals, feeling constrained by *Boeing*, stretched to find a clear and unmistakable waiver of sovereign immunity in the text of §552.325 even though it does not contain any such language. Indeed, §552.325 does not provide *any* waiver of immunity. Another TPIA section—§552.324—does so, but only for governmental bodies. No section of the TPIA expressly waives the Attorney General’s immunity from suit by a private third party wishing to prevent disclosure of public information.

However, this legislative decision does not leave such a party without remedies. The TPIA provides a third party whose privacy or property interests are at stake, such as Qatar Foundation, the opportunity to participate in the procedure for obtaining an attorney general opinion to protect its interests.

Texas needs this Court to answer the question that *Boeing* did not answer.

## **ARGUMENT**

### **I. Standard Of Review.**

Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits against the state unless the legislature has expressly waived

immunity through a clear and unambiguous statute. *Engelman Irrigation Dist. v. Shields Bros.*, 514 S.W.3d 746, 755 (Tex. 2017); *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Whether a court has subject matter jurisdiction is a question of law this Court reviews de novo. *Wilson v. Cmty. Health Choice Tex., Inc.*, 607 S.W.3d 843, 851 (Tex. 2020). And construing §552.325 is a question of law which courts review de novo. Whether the Attorney General’s sovereign immunity has been waived is a pure question of law based on statutory interpretation.

**II. Unless Clearly And Unambiguously Waived By Statute, Sovereign Immunity Bars Lawsuits Against Governmental Entities.**

The doctrine of sovereign immunity prohibits suits against the state unless the state consents and waives its immunity. *See Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). The bar is so strong it even precludes suits by the state of Texas against local governmental entities in the absence of an unmistakable waiver. *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Sovereign immunity from suit “implicates a court’s subject-matter jurisdiction” and “is a jurisdictional bar” to suit. *Engelman*, 514 S.W.3d at 750.

Courts defer to the legislature to waive immunity from suit “to allow[] the legislature to protect its policymaking function” and manage the impact

of litigation on the public fisc. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). The question here is whether §552.325 evinces clear legislative intent to waive the State’s immunity from suit by a private third party seeking to withhold information from disclosure.

To waive sovereign immunity, a statute must use “clear and unambiguous language” expressing that intent. *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 360 (Tex. 2019); *see also* TEX. GOV’T CODE §311.034. The statutory language must waive immunity “beyond doubt.” *Wichita Falls St. Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). But if a statute merely “contemplates a government entity’s involvement in litigation,” it “does not ‘clearly and unambiguously waive’ the entity’s immunity from suit.” *Kirby Lake Dev. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 837 (Tex. 2010).

**III. Before The Lower Court Opinion In This Case, No Texas Court Had Ever Held That Section 552.325 Of The TPIA Waives Sovereign Immunity.**

***A. Boeing did not address or analyze immunity from suit.***

The court of appeals concluded that the *Boeing* decision compelled its holding that §552.325 waives sovereign immunity from suit by a private third party. *See* Op. at 10 (“We would also have to ignore the Texas Supreme Court’s conclusion that section 552.325 authorizes third-party suits seeking to withhold information.”) (citing *Boeing*, 466 S.W.3d at 833, 838).) (**App.**

**C.)**

But *Boeing* is not controlling because it addressed only the standing of a private third party to sue, not the immunity of the Attorney General to avoid being sued. *See Tex. Dep't Protective Reg. Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (analyzing statutory grant of standing based on characteristics of *plaintiff*); *see also Bacon v. Tex. Historical Com'n*, 411 S.W.3d 161, 171–172 (Tex. App.—Austin 2013, no pet.) (holding that plaintiff suing the government must independently establish both standing and waiver of sovereign immunity).

In *Boeing*, a former Boeing employee submitted a TPIA request to the San Antonio Port Authority, a governmental body. *Boeing*, 466 S.W.3d at 834. After the Attorney General ruled that information related to Boeing must be disclosed, Boeing sued the Port Authority and the Attorney General to prevent disclosure. *Id.* at 834–835. Boeing argued that §552.104 (excepting from disclosure “information that, if released, would give advantage to a competitor or bidder”) applied, but the Attorney General argued that only a governmental entity had “standing” to claim this exception—not a private third party. *Id.* Holding that Boeing did have standing, this Court reasoned that no language “bars private *standing* to prevent public disclosure generally and nothing in section 552.104

specifically limits its application to the government.” *Id.* at 836 (emphasis added).

In the *Boeing* appeal, neither the parties nor this Court addressed the sovereign immunity question. The word “immunity” does not appear in the opinion nor in any of the parties’ briefs filed in this Court. *See Boeing Co. v. Paxton*, No. 12-1007, in the Supreme Court of Texas, docket available at <https://search.txcourts.gov/Case.aspx?cn=12-1007&coa=cossup>. Instead, this Court’s focus in *Boeing* was on the plaintiff’s standing to assert an exception to TPIA disclosure, and this Court’s textual analysis was on the language of the statutory exceptions to disclosure, §552.104. *Id.* at 838–839.(“we hold that section 552.104’s exception applies”).

The Court then simply concluded, without examining the text of §552.325, that “because section 552.104’s exception applies to both the government and to private parties, Boeing has the right to protect its own privacy and property interest through the judicial remedy section 552.325 provides.” *Id.* at 842. This case gives the Court the chance to examine the language of §552.325 to determine if the legislature intended to provide a private party the right to file suit against the state. If not, a private party may still protect its privacy and property interests by participating in the attorney general’s consideration of the TPIA request as authorized by §552.305.

In sum, the Court in *Boeing* did not (because it was not asked to) conduct the necessary analysis of the language and context of §552.325, such as that conducted in cases like *Tooke*, to address sovereign immunity. Because no party addressed sovereign immunity, the issue was not before the Court. See *Engelman*, 514 S.W.3d at 751 (“[W]hile a court is obligated to examine its subject-matter jurisdiction on its own in every case, we have never suggested that a court should raise immunity on its own whenever the government is sued.”).

**B. *Because Boeing did not address sovereign immunity, it does not control the outcome here.***

This Court’s decision in *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 555 (Tex. 2019), addressing whether TOMA, TEX. GOV’T CODE §551.001 *et seq.*, waives sovereign immunity, is instructive. In prior cases, the Court had affirmed or rendered declaratory judgment premised on violations of TOMA. See *Smith Cty. v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1986) (affirming the part of the court of appeals’ judgment declaring commissioners court orders to be of no force or effect); *Cox Enters. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986) (declaring that AISD violated TOMA).

The Court recognized in *Shady Shores* that it had not directly addressed sovereign immunity in any of the prior cases:

While *Thornton* and *Cox Enterprises* in effect conclude that declaratory relief is available under [TOMA], in those cases we simply were not presented with, and did not address, the specific question of whether the Act waives immunity from suit for such relief. We therefore do not view those opinions as dispositive of the issue.

590 S.W.3d at 555 (footnote omitted). This Court then proceeded to analyze the immunity question based on whether the applicable statute with unmistakable clarity authorized the suit.

Likewise, here, *Boeing* concluded the private party had standing to pursue relief that may be available under the TPIA, but, as in *Shady Shores*, the Court was “simply not presented with, and did not address, the specific question of whether the [TPIA] waives immunity from suit for such relief.” *See id.*<sup>5</sup>

In the six years since *Boeing*, no court has suggested that it addresses sovereign immunity—until the court of appeals so held in this case. Only one case both cites to *Boeing* and discusses sovereign immunity, but it does not rely on *Boeing* in its immunity analysis. *See Hous. Cmty. College v. Hall Law Grp.*, No. 01-20-00673-CV, 2021 WL 2369505 (Tex. App.—Houston [1st Dist.] Jun. 10, 2021, no pet. h.) The court found a waiver of immunity under

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<sup>5</sup> *Cf. Hinojosa v. State Farm Lloyds*, 619 S.W.3d 651, 662 n.2 (Tex. 2021) (“unstated, implied holdings on legal issues the Court’s opinion did not squarely address” are not binding on the Court).

an entirely different statute, §552.321, and cited *Boeing* only as authority that unambiguous statutory language in the TPIA controls over the Attorney General's interpretation. *Id.* at \*13.

In short, nothing in the *Boeing* opinion suggests that it addressed whether §552.325 waives sovereign immunity to allow a private third party to sue the Attorney General to prevent disclosure of its information. This Court should do so now to resolve this matter of first impression.

#### **IV. Section 552.325 Does Not Waive Immunity From Suit.**

Qatar Foundation and the court of appeals rely solely on §552.325 as a waiver of sovereign immunity:

(a) A governmental body, officer for public information, or *other person or entity that files a suit seeking to withhold information from a requestor* may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

§552.325 (emphasis added). The court of appeals held that this provision waives immunity because: 1) it “requires that a suit seeking to withhold information be filed against the Attorney General,” 2) the statute provides limits on the government's potential liability because it permits only a declaratory judgment, and 3) the phrase “other person or entity” would otherwise be rendered meaningless. (*See Op.* at 10.) (**App. C.**) None of the reasons cited by the court of appeals withstand scrutiny.

**A. Section 552.325 does not contain clear and unambiguous language waiving immunity from suit.**

Section 552.325 does not waive sovereign immunity because it does not clearly and unambiguously do so by its plain text. *See Galveston*, 217 S.W.3d at 469. This provision does not *authorize* an “other person or entity” to file suit—it explicitly *prohibits* them from filing suit against a requestor. The overriding purpose of §552.325 is to avoid deterring Texas citizens from obtaining information about the governmental entities that serve them by being haled into expensive litigation. *See* Bill Analysis, H. Research Org., HB 1718, 74th Leg., R.S. (May 8, 1995) at 1–3.

In *Tooke*, the Court reiterated that “no state can be sued in her own courts without her consent, and then only in the manner indicated in that consent.” 197 S.W.3d at 331 (quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)). In *Tooke*, plaintiffs relied on language in §51.075 of the Local Government Code that the city may “plead and be impleaded.” *Id.* at 342. In a landmark decision, the Court held that such clauses, like “sue and be sued,” do not waive immunity because immunity is waived only by clear and unambiguous language. *Id.* at 328–329.

Similarly, in *Clear Lake*, the Court analyzed two statutes that residential developers relied on for jurisdiction to sue the water authority. 320 S.W.3d at 837–840. The first, §49.066 of the Texas Water Code,

contained “sue and be sued” language and stated that “[a] suit for contract damages may be brought against a district only on a written contract....” *Id.* at 837 (quoting TEX. WATER CODE §49.066(a)). The Court found that this language was not a clear and unambiguous waiver of immunity. *Id.* at 838. Rather, it was a condition precedent *if* a lawsuit for contract damages was otherwise authorized. *Id.* at 837.

This contrasts with the second statute in *Clear Lake*, which stated that certain local governmental entities “waive[] sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract.” *Id.* at 838 (quoting TEX. LOC. GOV’T CODE §271.152). The Court found this language to be a clear and unambiguous waiver of sovereign immunity. *Id.* at 840. There is no similar language in §552.325.

The language at issue here, “other person or entity that files a suit,” is as unclear regarding immunity as the “sue and be sued” language in *Tooke* and the condition precedent language at issue in *Clear Lake*. Section 552.325 describes when lawsuits may not be brought—they cannot be brought against the requestor, and the plaintiff must provide notice to the requestor.

**B. *Section 552.324 waives immunity, but only for suits by governmental bodies.***

In contrast to §552.325, §552.324 expressly authorizes suit against the Attorney General, but only for suits by governmental bodies. It provides:

## SUIT BY GOVERNMENTAL BODY.

(a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:

- (1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and
- (2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.

Comparing the language of these two provisions makes clear that the former is not a waiver of sovereign immunity. Section 552.324 unambiguously identifies who may sue—a “governmental body”—and instructs that suit is authorized “against the attorney general.” §552.324(a). Further confirming clarity of authorization, the legislature identified in which court the governmental body may sue the Attorney General—Travis County district court—and specifies that the governmental body may only seek a declaratory judgment. *Id.*

Unlike the clear authorization-to-sue language in §552.324, §552.325 *precludes* actions against requestors. §552.325(a). Subsection (b) requires the plaintiff to provide the requestor with certain information about the suit, and the final two subsections (dealing with settlements and the requestor’s opportunity to intervene) are irrelevant to this analysis. At best, §552.325 merely “contemplates a government entity’s involvement in litigation.” *See Clear Lake*, 320 S.W.3d at 837. It is silent as to any authorization to sue. This

silence cannot meet the elevated standard of unmistakable clarity to waive immunity.

Section 552.325 does not waive immunity even for governmental bodies to sue the Attorney General. The factors the court of appeals found persuasive in §552.325 providing a waiver of immunity are, in fact, present only in §552.324. Section 552.325 does not require that suit be filed against the Attorney General, state where suit must be filed, or limit the remedies available or otherwise limit the scope of liability.

***C. No part of Section 552.325 is superfluous.***

Qatar Foundation argued, and the court of appeals accepted, that if §552.325 does not constitute a waiver of immunity, the phrase “other party or entity” would serve no purpose. This contention is incorrect. Section 552.325 prohibits any party filing a suit to withhold information from suing the requestor and allows the requestor to intervene in such a suit. The phrase “other party or entity” makes this prohibition applicable to any plaintiff that is not a government body or officer for public information—but such a plaintiff must still meet all jurisdictional requirements, including establishing that sovereign immunity does not bar the lawsuit. *See* OFFICE ATT’Y GEN. TEX, PUBLIC INFORMATION ACT HANDBOOK 2020 46 (suggesting party whose privacy interests are implicated “must still meet jurisdictional

requirements for standing before it may file suit over a ruling that orders information to be disclosed.”)<sup>6</sup>

The legislature is presumed to know the law, and therefore recognized that pursuant to §552.325 an “other party or entity” may sue the government to protect constitutional privacy interests without an express waiver of immunity. This is because “sovereign immunity does not bar a suit to vindicate constitutional rights.” *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)).<sup>7</sup>

Similarly, suits by an “other person or entity” are authorized to obtain prospective injunctive relief for ultra vires acts of the government. *Heinrich*, 284 S.W.3d at 371.<sup>8</sup>

Both in cases involving constitutional rights and in cases asserting ultra vires acts, no waiver of sovereign immunity would be necessary. In such

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<sup>6</sup> As with any suit, a plaintiff suing the State must meet jurisdictional requirements—standing is one, but a lack of sovereign immunity (by abrogation or waiver) is another.

<sup>7</sup> Individuals may have a constitutional right of “disclosural privacy” to prevent disclosure of one’s personal information related to matters falling within certain “zones of privacy.” See *Indus. Found. of S. Tex. v. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976).

<sup>8</sup> Although Qatar Foundation’s Petition includes the ultra vires exception to sovereign immunity as a basis for jurisdiction, it does not allege any ultra vires acts. (CR 4–8.) The only “act” alleged is the issuance of the Open Records Letting Ruling (CR 4–8), which is an action expressly permitted—in fact mandated—by statute. See §552.306. The trial court does not have jurisdiction on the basis of ultra vires acts.

suits, §552.325 has the legitimate purpose of protecting the requestor from expensive litigation. Section 552.325's phrase "other person or entity" is not rendered meaningless as contended by Qatar.

**V. Because TAMU is not a party to the litigation, Qatar Foundation's lawsuit seeks an impermissible advisory opinion.**

Should this Court determine that §552.325 is a waiver of immunity, the Court must nonetheless determine whether the governmental body that holds the requested information is an indispensable party to a TPIA lawsuit, without which the requested declaratory judgment would be an advisory opinion.<sup>9</sup> This Court has not addressed that important question under the TPIA. In *Boeing*, the San Antonio Port Authority, the governmental body that held the information at issue, was a party.

TAMU is an indispensable party because a declaratory judgment requires that "the declaration sought must actually resolve the controversy." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163-64 (Tex. 2004). Failure to join a party necessary to meet this requirement deprives the court of jurisdiction and results in dismissal. *See id.*

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<sup>9</sup> Zachor raised both sovereign immunity and indispensable parties in its plea to the jurisdiction. (CR448–449, 467.) The trial court did not specify the grounds upon which it granted the plea. (CR471.)

Qatar Foundation seeks a declaratory judgment that the requested records “should not be disclosed.” (CR8.) A decision against the Attorney General is not binding on TAMU, the custodian of the records and the only party with the obligation to disclose the records. *See* §552.3035 (prohibiting attorney general from releasing information submitted to it for review). The court lacks jurisdiction because without TAMU as a party, any declarations that the requested records must or must not be disclosed would be advisory. *See id.*

### **PRAYER**

Petitioner Zachor Legal Institute respectfully requests that the Court grant this Petition for Review and render judgment that Qatar Foundation’s lawsuit is jurisdictionally barred. Petitioner also prays for such further relief, at law or at equity, to which it may be justly entitled.

Respectfully submitted,

RIGGS & RAY, P.C.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 4,490 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Dale Wainwright*

\_\_\_\_\_  
Dale Wainwright

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served on counsel of record by using the Court's e-filing system on the 5<sup>th</sup> day of August, 2021, addressed as follows:

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**APPENDIX**

Tab A	Tex. Att’y Gen OR2018-20240
Tab B	Order Granting Plea to the Jurisdiction
Tab C	Opinion of the Third Court of Appeals at Austin, Texas
Tab D	TPIA §552.324
Tab E	TPIA §552.325

**TAB A**



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS



August 14, 2018

Ms. Julie A. Masek  
Assistant General Counsel  
The Texas A&M University System  
301 Tarrow Street, 6th Floor  
College Station, Texas 77840-7896

OR2018-20240

Dear Ms. Masek:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 723308 (B001108-052318).

Texas A&M University (the "university") received a request for information pertaining to certain funding or donations received for a period of time.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under section 552.1235 of the Government Code. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.1235 of the Government Code excepts from disclosure “[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]” Gov’t Code § 552.1235(a). For purposes of this exception, “institution of higher education” is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an “institution of higher education” as meaning “any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.” Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of “person,” we look to the definition provided in the Code Construction Act. *See* Gov’t Code § 311.005. “Person” includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). You state the information you marked in the submitted information identifies donors to the university. Thus, the university must withhold the donors’ identifying information, which you marked, under section 552.1235 of the Government Code. The university must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



D. Michelle Case  
Assistant Attorney General  
Open Records Division

DMC/gw

Ref: ID# 723308

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

**TAB B**

JAN 21 2020

FA

At 10:00 A.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-18-006240

QATAR FOUNDATION FOR  
EDUCATION, SCIENCE AND  
COMMUNITY DEVELOPMENT,  
*Plaintiff,*

§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT  
OF

v.

200th JUDICIAL DISTRICT

KEN PAXTON, TEXAS  
ATTORNEY GENERAL,  
*Defendant,*

TRAVIS COUNTY, TEXAS

**ORDER GRANTING PLEA TO THE JURISDICTION**

On December 17, 2019, the Court heard Intervenor Zachor Legal Institute's Motion for Summary Judgment and alternative Plea to the Jurisdiction and the Plaintiff Qatar Foundation's Cross Motion for Summary Judgment in the above styled and numbered cause of action. The Court afforded the Plaintiff Qatar Foundation and the Defendant Attorney General the opportunity to submit responses to Zachor's Plea to the Jurisdiction after the hearing. After consideration of the pleadings, the cross motions for summary judgment, the competent summary judgment evidence, the plea to the jurisdiction, the arguments of all parties, and the applicable law, the Court has determined that it does not have jurisdiction over Plaintiff's claims.

IT IS, THEREFORE, ORDERED that Intervenor Zachor's Plea to the Jurisdiction shall be and is hereby GRANTED and that this case shall be and is hereby dismissed for lack of jurisdiction.

Signed this 17<sup>th</sup> day of January, 2020.

  
The Honorable Karin Crump,  
Judge Presiding

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**TAB C**

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00129-CV**

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**Qatar Foundation for Education, Science and Community Development and  
Ken Paxton, Texas Attorney General, Appellants**

**v.**

**Zachor Legal Institute, Appellee**

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**FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-GN-18-006240, THE HONORABLE KARIN CRUMP, JUDGE PRESIDING**

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**OPINION**

This is an appeal from the district court’s order sustaining Zachor Legal Institute’s plea to the jurisdiction in Qatar Foundation’s suit under the Texas Public Information Act (TPIA). Qatar Foundation filed suit against the Attorney General to prevent the disclosure of information in response to a request for public information that Zachor Legal Institute had submitted to Texas A&M University. Based on our conclusion that the TPIA waives sovereign immunity for Qatar Foundation’s suit, we reverse the district court’s order and remand the case for further proceedings.

**BACKGROUND**

Qatar Foundation is a private, non-profit organization headquartered in Doha, Qatar. Its self-described mission is “to lead human, social, and economic development in Qatar

through investment in education, science, and research.” As part of that mission, Qatar Foundation partners with universities around the world, including Texas A&M, to open and operate branch campuses at its “Education City” in Qatar.

In May 2018, Zachor Legal Institute submitted a request for public information to Texas A&M for a “summary of all amounts of funding or donations received by or on behalf of [Texas A&M] from the government of Qatar and/or agencies or subdivision of the government of Qatar between January 1, 2013 and May 22, 2018.”<sup>1</sup> *See* Tex. Gov’t Code § 552.021 (requiring that public information be made available to public). Texas A&M, which did not notify Qatar Foundation about the request, asked the Attorney General for a decision about whether it had to release information that “identifies donors to the university.” *See id.* §§ 552.1235(a) (excepting from disclosure information disclosing the identity of person, other than governmental body, making a gift, grant, or donation of money to institution of higher learning), .301 (directing governmental body seeking to withhold information to request Attorney General opinion), .305(d) (directing governmental body to make good-faith effort to notify third party of request involving privacy or property interests). The Attorney General’s subsequent letter ruling, issued in August 2018, concluded that Texas A&M “must withhold the donors’ identifying information” under section 552.1235 but directed it to “release the remaining information,” which included information related to contractual payments Qatar Foundation had made to Texas A&M. *See* Tex. Att’y Gen. OR2018-20240. Texas A&M did not challenge the letter ruling.

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<sup>1</sup> The request characterized Qatar Foundation as an agency or subdivision of the Qatari government. Qatar Foundation disputes this characterization.

Qatar Foundation, which maintains that it was not aware of Zachor Legal Institute's request until two months after the Attorney General's letter ruling issued, filed the underlying suit for declaratory judgment against the Attorney General in October 2018. In its suit, Qatar Foundation asserted and sought declarations that information responsive to the request is protected from disclosure under the TPIA because the information constitutes trade secrets and confidential commercial or financial information and because it reveals the amount of the grant or donation and the identity of the donor. *See id.* §§ 552.110(a)–(b) (excepting trade secrets and certain commercial and financial information from disclosure), .1235(a). Qatar Foundation relied on section 552.325 as the asserted basis for jurisdiction over its suit. *See id.* § 552.325(a) (“A governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information.”); *Boeing Co. v. Paxton*, 466 S.W.3d 831, 833, 839 (Tex. 2015) (recognizing that section 552.325 provides judicial remedy to third party seeking to withhold requested information). Zachor Legal Institute intervened in the suit. *See* Tex. Gov't Code § 552.325(a).

Soon after Qatar Foundation filed its suit, Zachor Legal Institute submitted a second TPIA request, this time asking for “[a]ll correspondence and communications between [Texas A&M] and third parties relating to [the first request for information]” and “[a]ll communications relating to [Texas A&M] funding, programs and activities between [Texas A&M] and the parties listed in [the first request for information] between 2013 and the current date.” Texas A&M notified Qatar Foundation and asked the Attorney General for an opinion about whether the requested information is excepted from disclosure under TPIA sections 552.104, 552.110, and 552.1235. *See id.* §§ 552.104 (excepting from disclosure information

related to competition or bidding), .110, .1235. Qatar Foundation sent the Attorney General a detailed letter explaining why its negotiations and agreements with partner universities, including Texas A&M, and information regarding the amounts and types of funding are exempt from disclosure under sections 552.104, 552.110, and 552.1235. *See id.* § 552.305(b) (allowing person whose privacy or property interests are involved in TPIA request to submit to Attorney General reasons why the information should be withheld or released).

In a second letter ruling, the Attorney General concluded that Qatar Foundation had established that release of the requested information “would give an advantage to a competitor or bidder,” *see id.* § 552.104(a), and directed Texas A&M to withhold the information. *See Tex. Att’y Gen. OR2019-01288.* The Attorney General also noted that because some of the information responsive to Zachor Legal Institute’s request may be affected by his first letter ruling, he would defer to the trial court to make its own independent determination regarding disclosure: “[The Attorney General] will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public.” *Id.*

Zachor Legal Institute filed a plea to the jurisdiction in the underlying case, arguing that the district court lacks jurisdiction over Qatar Foundation’s suit because “[n]o provision of the TPIA authorizes a third party that asserts privacy or property interests to file a lawsuit to challenge a decision of the Attorney General.” Both Qatar Foundation and the Attorney General filed briefs opposing Zachor Legal Institute’s jurisdictional argument, but the district court sustained Zachor Legal Institute’s plea to the jurisdiction and dismissed Qatar Foundation’s case. Qatar Foundation appeals.

## ANALYSIS

In a single issue, Qatar Foundation asserts, and the Attorney General agrees, that the district court erred in sustaining Zachor Legal Institute's plea to the jurisdiction because the district court has jurisdiction over an action brought against the Attorney General by a third party who seeks to withhold protected information from disclosure under the TPIA. Zachor Legal Institute contends that the district court did not err because the TPIA does not waive sovereign immunity for Qatar Foundation's suit against the Attorney General. Based on the text of the TPIA and Texas Supreme Court precedent, we agree with Qatar Foundation and the Attorney General that the district court has jurisdiction over Qatar Foundation's suit, and thus erred in sustaining Zachor Legal Institute's plea to the jurisdiction.

Sovereign immunity protects the State of Texas and its agencies from suit and liability. *Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). The Legislature may waive immunity by statute, but it must do so by clear and unambiguous language. Tex. Gov't Code § 311.034; *Hillman v. Nueces County*, 579 S.W.3d 354, 360 (Tex. 2019) ("To waive governmental immunity, a statute must use 'clear and unambiguous language' expressing that intent." (citing *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006))). Whether the TPIA waives sovereign immunity is a matter of statutory construction, which is a question of law that we review de novo. See *Texas W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). Procedurally, the assertion of sovereign immunity implicates the trial court's jurisdiction and is properly asserted in a plea to the jurisdiction. *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016); *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 91 (Tex. 2012). Where, as here, the material jurisdictional facts are undisputed and the analysis of the jurisdictional plea turns on an issue of statutory construction, the trial

court rules on the plea to the jurisdiction as a matter of law. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004). We review a trial court's ruling on a plea to the jurisdiction de novo. *Id.* at 228.

The TPIA “guarantees access to public information, subject to certain exceptions.” *Texas Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011). Public information includes information that is collected, assembled, or maintained by or for a governmental body. Tex. Gov't Code § 552.002(a). Such information is available by request unless an exception applies. *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001) (orig. proceeding).

A request for public information typically involves two parties, the governmental body holding the information and the person requesting it. The governmental body must promptly ask the Attorney General for a ruling if it seeks to withhold the information. *Boeing*, 466 S.W.3d at 833 (citing Tex. Gov't Code § 522.301). Because the government gathers information from people and companies doing business in Texas, some requests may also implicate privacy or property interests of third parties. *Id.* When a request involves this type of information, the Texas Supreme Court has explained that the TPIA “permits the third party to raise the issue and any applicable exception to the information's disclosure with the Attorney General, *or in district court*, or both.” *Id.* (emphasis added) (citing Tex. Gov't Code §§ 552.305(b), .325). Qatar Foundation, alleging that the request at issue here involves information that implicated its privacy and property interests, filed this suit against the Attorney General under section 552.325. Zachor Legal Institute contends that the TPIA does not clearly and unambiguously waive sovereign immunity for Qatar Foundation's suit, and thus the district court lacks jurisdiction. *See Miranda*, 133 S.W.3d at 224 (“In Texas, sovereign immunity

deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit.”).

When deciding whether a statute clearly and unambiguously waives sovereign immunity, we:

- (1) consider “whether the statutory provisions, even if not a model of clarity, waive immunity without doubt;”
- (2) resolve any “ambiguity as to waiver . . . in favor of retaining immunity;”
- (3) generally find waiver “if the Legislature requires that the [governmental] entity be joined in a lawsuit even though the entity would otherwise be immune from suit;”
- (4) consider whether the legislature “provided an objective limitation on the governmental entity’s potential liability”; and
- (5) consider “whether the statutory provisions would serve any purpose absent a waiver of immunity.”

*Hillman*, 579 S.W.3d at 360 (citing *Harris Cnty. Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 844 (Tex. 2009)). Although section 552.325 is no model of clarity, it waives immunity for Qatar Foundation’s suit by recognizing, as the supreme court explained in *Boeing*, that a party other than a governmental body may file a suit seeking to withhold information requested under the TPIA:

**552.325 Parties to Suit Seeking to Withhold Information**

- (a) A governmental body, officer for public information, *or other person or entity that files a suit seeking to withhold information from a requestor* may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.
- (b) The governmental body, officer for public information, *or other person or entity that files the suit* shall demonstrate to the court that the

governmental body, officer for public information, or other person or entity made a timely good faith effort to inform the requestor . . . of:

- (1) the existence of the suit, including the subject matter and . . . ;
- (2) the requestor’s right to intervene in the suit or to choose to not participate in the suit;
- (3) the fact that the suit is against the attorney general in Travis County district court; and
- (4) the address and phone number of the office of the attorney general.

Tex. Gov’t Code § 552.325 (emphases added); *see also Boeing*, 466 S.W.3d at 838 (concluding “Legislature intended private parties . . . to have . . . the right to protect their interest in the information protected by section 552.104 through the judicial remedy provided by section 552.325” (citations omitted)). Further, the fact that the provision requires that a suit seeking to withhold information be filed against the Attorney General makes clear that the Legislature intended to waive immunity for such suits. *See Hillman*, 579 S.W.3d at 360 (noting that courts generally find waiver if the Legislature requires that governmental entity be joined in a lawsuit even though it would otherwise be immune); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697–698 (Tex. 2003) (“[I]f the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State’s sovereign immunity.”). Also, because the remedy for a suit under this provision is a declaration that the requested information is not subject to disclosure and because the TPIA does not authorize attorney fees for this type of suit, there is an objective limitation on the governmental entity’s potential liability. *See Tex. Gov’t Code § 552.323* (authorizing attorney fees for two types of suits under the TPIA, but not for suit under section 552.325); *Hillman*, 579 S.W.3d at 360 (in deciding whether immunity has been waived, court must consider whether legislature “provided an objective limitation on government’s potential liability”). Finally, if section 552.325 does not waive immunity for third-party suits seeking to withhold information, the

language referencing “other person or entity” filing a suit would serve no purpose. *See Hillman*, 579 S.W.3d at 360 (in determining waiver, courts must “consider whether the statutory provisions would serve any purpose absent a waiver of immunity”); *see also Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 134 (Tex. 2019) (“Every word in a statute is presumed to have a purpose and should be given effect if reasonable and possible.”).

Zachor Legal Institute concedes that section 552.325 waives sovereign immunity but insists that it does so only for suits brought by a governmental body, not by a third party. In support of this argument, Zachor Legal Institute contends that section 552.325 merely describes how the waiver of immunity in section 552.324 is to be exercised. Section 552.324, titled “Suit by Governmental Body,” specifies that a suit by a governmental body seeking to withhold information may only seek declaratory relief from compliance with an Attorney General opinion, that it must be filed against the Attorney General in Travis County district court within thirty days of the Attorney General’s decision, and that if the governmental body does not file such a suit, it must comply with the Attorney General’s decision. *See* Tex. Gov’t Code § 552.324. Section 552.325, on the other hand, recognizes that persons or entities other than a governmental body may file a suit seeking to withhold information from a requestor, prohibits filing such a suit against a requestor, directs that these suits be filed against the Attorney General, and describes how requestors are to be notified and treated in these types of suits. *See id.* § 552.325. In sum, although the two provisions might overlap, section 552.324 addresses only suits by governmental bodies seeking to withhold information, while section 552.325 addresses all suits seeking to withhold information from a requestor and, most important here, recognizes that parties other than a governmental body may file such suits. For that reason, we would impermissibly have to decide that section 552.325’s reference to “other person or entity” has no purpose if we were to

accept Zachor Legal Institute’s interpretation. *See Creative Oil & Gas*, 591 S.W.3d at 134 (“Every word in a statute is presumed to have a purpose and should be given effect if reasonable and possible.”). We would also have to ignore the Texas Supreme Court’s conclusion that section 552.325 authorizes third-party suits seeking to withhold protected information. *Boeing*, 466 S.W.3d at 833, 838.<sup>2</sup>

Zachor Legal Institute argues that the only available relief for a third party seeking to withhold protected information from a requestor is to submit comments to the Attorney General in response to a governmental body’s request for an Attorney General opinion, *see* Tex. Gov’t Code § 552.305(b) (allowing person whose interests may be involved, to submit to Attorney General “reasons why the information should be withheld or released”), or to file suit for declaratory or injunctive relief against the governmental body under section 552.3215, *see id.* § 552.3215 (allowing victim of TPIA violation to complain to appropriate district or county attorney or to Attorney General and authorizing district or county attorney or Attorney General to file suit against governmental body in response to complaint). Nothing in the text of the TPIA, however, suggests that these are the exclusive remedies for such parties and, as discussed above, the Texas Supreme Court has explained to the contrary that the TPIA allows third parties to raise privacy and property issues “with the Attorney General, or in district court, or both.”

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<sup>2</sup> Zachor Legal Institute maintains that the Texas Supreme Court’s statements regarding section 552.325 and third-party rights in *Boeing* are dicta, and thus do not control our analysis here, because jurisdiction was not an issue in that case. We disagree that the statements are dicta. In holding that *Boeing* could invoke section 552.104’s exception, the supreme court explicitly relied on *Boeing*’s being able to protect its privacy and property interests through the “judicial remedy provided in section 552.325.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015). We cannot disregard as dicta the supreme court’s discussion of an issue that supports its ultimate conclusion. *See Texas Farm Bureau Mut. Ins. v. Sturrock*, 146 S.W.3d 123, 127–28 (Tex. 2004) (holding that its discussion of an issue that supports ultimate conclusion is not dicta).

*Boeing*, 466 S.W.3d at 833 (citing Tex. Gov't Code §§ 552.305(b), .325). We also note that section 552.3215 does not offer a meaningful remedy to a party seeking to withhold information because it addresses a “victim of a violation of [the TPIA]” by a governmental body. *See id.* § 552.3215. A party seeking to withhold protected information is not yet, and may never be, a victim of a TPIA violation involving the release of that information. Only when the governmental body improperly releases the information would a party seeking to withhold information potentially fall under section 552.3215, but at that point the damage would have been done.

In conflict with its argument that the TPIA waives sovereign immunity only for suits by a governmental body, Zachor Legal Institute also suggests that Qatar Foundation could have overcome the sovereign-immunity barrier by including Texas A&M in its suit. But section 552.325's only party-specific requirements are that the suit be brought against the Attorney General and that the requestor may not be named as a party. *See Tex. Gov't Code § 552.325.* Nor is there any requirement that the governmental body be named party to the suit because the core issue in such a suit, and thus the subject of any resulting judgment, is whether the requested information can be withheld. *See id.; see also id.* §§ 552.104 (exempting from disclosure information that provides advantage to competitor or bidder), .110 (exempting from disclosure trade secrets and confidential or financial information). “[W]hether information is subject to the [TPIA] and whether an exception to disclosure applies to the information are questions of law.” *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000).

In a final argument, Zachor Legal Institute contends that the district court lacks subject-matter jurisdiction over Qatar Foundation's suit because Texas A&M, as the governmental body holding the requested information, is an indispensable party to the suit, and

as a result, the district court could not give adequate relief without Texas A&M's joinder. *See* Tex. R. Civ. P. 39(a) (governing joinder of persons needed for just adjudication). The trial court cannot give complete relief without Texas A&M as a party, Zachor Legal Institute argues, because Texas A&M, not the Attorney General, has the duty to produce public information and because Texas A&M is now under a mandatory duty to disclose the requested information given that it did not file a lawsuit challenging the Attorney General's decision. *See* Tex. Gov't Code 552.324(b). However, even assuming Zachor Legal Institute's assertions are correct, the Texas Supreme Court has indicated that the failure to join a necessary party does not deprive the trial court of subject-matter jurisdiction; instead, it raises the prudential question of whether the trial court should have refused to proceed in the necessary party's absence. *See Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162–63 (Tex. 2004); *see also id.* at 163 (holding that party had waived Rule 39 issue by failing to raise it before trial court); *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (noting that subject-matter jurisdiction "is never presumed and cannot be waived"); *Barrera v. Chererco, LLC*, No. 04-16-00235-CV, 2017 WL 943436, at \*3 (Tex. App.—San Antonio Mar. 8, 2017, no pet.) ("The failure to join a person whose interests could be affected by the trial court's judgment or declaration does not deprive a trial court of jurisdiction."); *Mining v. Hays Cnty Bail Bond Bd.*, No. 03-05-00448-CV, 2006 WL 952402, at \*5 (Tex. App.—Austin Apr. 14, 2006, no pet.) (noting that in *Brooks* "the supreme court has more recently held that subject matter jurisdiction is rarely implicated by the failure to join a party required under section 37.006(a) of the declaratory judgment act or rule of civil procedure 39"). Here, because we are remanding, Zachor Legal Institute can raise the Rule 39 issue with the trial court to allow it to determine whether it should refuse to enter a judgment or declaration in Texas A&M's absence. *See Brooks*, 141 S.W.3d at 163.

Based on the text of the TPIA and the supreme court's decision in *Boeing*, we hold that the TPIA waives sovereign immunity for Qatar Foundation's suit against the Attorney General. Because immunity has been waived, the district court has jurisdiction over Qatar Foundation's suit and, thus, erred in dismissing Qatar Foundation's suit. Accordingly, we sustain Qatar Foundation's sole issue on appeal.

### **CONCLUSION**

Having sustained Qatar Foundation's issue, we reverse the district court's judgment and remand the case to the district court for further proceedings.

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Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Baker and Smith

Reversed and Remanded

Filed: April 15, 2021

**TAB D**

Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 5. Open Government; Ethics (Refs & Annos)  
Subtitle A. Open Government  
Chapter 552. Public Information (Refs & Annos)  
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.324

## § 552.324. Suit by Governmental Body

Effective: September 1, 2009

Currentness

(a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:

(1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and

(2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.<sup>1</sup>

(b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3).

### Credits

Added by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 1319, § 30, eff. Sept. 1, 1999; Acts 2009, 81st Leg., ch. 1377, § 10, eff. Sept. 1, 2009.

### Footnotes

<sup>1</sup> V.T.C.A., Government Code § 552.301 et seq.

V. T. C. A., Government Code § 552.324, TX GOVT § 552.324

Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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# TAB E

Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 5. Open Government; Ethics (Refs & Annos)  
Subtitle A. Open Government  
Chapter 552. Public Information (Refs & Annos)  
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.325

## § 552.325. Parties to Suit Seeking to Withhold Information

Effective: September 1, 2009  
Currentness

(a) A governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

(b) The governmental body, officer for public information, or other person or entity that files the suit shall demonstrate to the court that the governmental body, officer for public information, or other person or entity made a timely good faith effort to inform the requestor, by certified mail or by another written method of notice that requires the return of a receipt, of:

- (1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
- (2) the requestor's right to intervene in the suit or to choose to not participate in the suit;
- (3) the fact that the suit is against the attorney general in Travis County district court; and
- (4) the address and phone number of the office of the attorney general.

(c) If the attorney general enters into a proposed settlement that all or part of the information that is the subject of the suit should be withheld, the attorney general shall notify the requestor of that decision and, if the requestor has not intervened in the suit, of the requestor's right to intervene to contest the withholding. The attorney general shall notify the requestor:

- (1) in the manner required by the Texas Rules of Civil Procedure, if the requestor has intervened in the suit; or
- (2) by certified mail or by another written method of notice that requires the return of a receipt, if the requestor has not intervened in the suit.

(d) The court shall allow the requestor a reasonable period to intervene after the attorney general attempts to give notice under Subsection (c)(2).

**Credits**

Added by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995. Amended by Acts 2009, 81st Leg., ch. 1377, § 11, eff. Sept. 1, 2009.

V. T. C. A., Government Code § 552.325, TX GOVT § 552.325

Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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