No. A19A0076

In the Court of Appeals of Georgia

INSTITUTE FOR JUSTICE,

Plaintiff-Appellant,

v.

WILLIAM L. REILLY, in his official capacity as Clerk of the Georgia House of Representatives; DAVID A. COOK, in his official capacity as Secretary of the Georgia State Senate; MARTHA WIGTON, in her official capacity as Director of the Budget and Research Office of the Georgia House of Representatives; MELODY DEBUSSEY, in her official capacity as Director of the Budget and Evaluation Office of the Georgia State Senate; ELIZABETH HOLCOMB, in her official capacity as Director of the Research Office of the Georgia State Senate; and RICHARD C. RUSKELL, in his official capacity as Legislative Counsel,

Defendants-Appellees.

On Appeal from the Superior Court of Fulton County, State of Georgia
(Civil Action File No. 2016CV281578)

Brief of *Amicus Curiae* Cause of Action Institute

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STATEMENT OF INTEREST

Amicus curiae Cause of Action Institute ("CoA Institute") is a nonprofit, non-partisan, government-oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[1] As part of its mission, CoA Institute often appears as *amicus curiae* in courts of law to provide its expert analysis on pressing legal issues.

CoA Institute frequently requests access to government records at both the federal and state levels, and its staff has particular expertise in public records statutes. The decision below, if allowed to stand, would result in less transparent government and improperly restrict the ability of Georgia citizens, and other interested persons, to access records detailing the operation of the state legislature and their elected officials. This case is, therefore, of great interest to CoA Institute, the wider transparency community, and the general public.[2]

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[1] *About*, Cause of Action Inst., https://coainst.org/2Qqncqq.

[2] No counsel for a party authored this brief in whole or in part, and neither any parties nor their counsel, nor anyone except *amicus curiae* and its counsel, financially contributed to preparing this brief.

SUMMARY OF ARGUMENT

This case presents a novel and important question: Is the General Assembly subject to the Georgia Open Records Act? Or, put differently, does Georgia law provide the public with a right to inspect records created or controlled by the state legislature? The Open Records Act itself does not provide an explicit answer to this question. But traditional methods of statutory interpretation favor an affirmative response. The language defining the entities subject to the Open Records Act is expansive and should be read with an eye toward disclosure. Georgia law also provides a limited exemption for a legislative office, which would be superfluous if the General Assembly were not covered by the Act. Appellant Institute for Justice has proposed an interpretation of the Open Records Act that is grounded in Georgia law, precedent, and sound legal reasoning. As outlined in this brief, Appellant's interpretation also is consistent with nationwide trends.

Based on a comprehensive survey of state open records laws that it conducted while preparing this brief, CoA Institute has discovered that only a small minority of states—eleven, to be precise—exclude their legislatures from the ambit of public-disclosure laws. And nearly all

these states exclude the legislature with express statutory language. By contrast, thirty-eight states provide the public with access to legislative records. Most do so on explicit terms, but in a notable number of jurisdictions, public access depends on the interpretation of statutory language that impliedly recognizes that the legislature is covered. Such language may refer broadly to "departments" and "authorities" or enumerate exemptions tailored to specific legislative records or offices. Both types of language are at issue here and counsel in favor of recognizing that legislative records must be accessible.

The Georgia Open Records Act is more akin to other state statutes that impliedly cover the legislature than it is to statutes that disallow access to legislative-branch records. If the Court were to uphold the decision below, Georgia would be an unfortunate outlier among its sister states. The clear trend in the interpretation and construction of open records laws across the United States strongly favors Appellant's position. CoA Institute respectfully urges the Court to rule accordingly.

ARGUMENT

I. Most states' open records laws provide the public with access to records of the legislature.

Thirty-eight states have adopted public record disclosure regimes that permit requesters to access legislative materials. In some states, this access is unrestricted; in other states, it is limited to certain legislative offices or the correspondence of individual legislators. Yet no matter the exact scope of disclosure from state to state, there are several recognizable trends that reveal how lawmakers deal with the legislative branch—typically with explicit language—and how executive officers, such as state attorneys general, and courts interpret more ambiguous statutory terms. These trends can meaningfully inform the Court's consideration of the questions presented on appeal in this case.

A. Almost half of all state legislatures are covered under explicit statutory terms.

Twenty-four states provide access to public records in the possession or control of the legislature, or certain legislative offices, by explicitly including the legislative branch in the state's open records law or, in the case of Florida, by enshrining that access in the state

constitution.[3] *See* Table 1, *infra* at pp. 7–10. Nine of these twenty-four states cover the entire legislative branch by its inclusion in the statutory definition of an "agency." *See, e.g.*, Conn. Gen. Stat. Ann. § 1-200(1)(A) (In Connecticut, a "public agency or agency means any executive, administrative or legislative office of the state[.]");[4] Mont. Code Ann. § 2-6-1002(10) (In Montana, a "public agency means the executive, legislative, and judicial branches of Montana state government."); N.J. Stat. Ann. § 47:1A-1.1 (In New Jersey, a "public agency or agency means . . . the Legislature . . . and any office, board, bureau, or commission within or created by the Legislative Branch[.]");[5] Ohio Rev. Code Ann.

[3] *See* Fla. Const. art. I, § 24(a) ("Every person has the right to inspect or copy any public record . . . . This specifically includes the legislative, executive, and judicial branches of government[.]").

[4] For ease of reading, the capitalization of language in statutory citations has been changed throughout the brief (including all tables), and internal quotation marks and references have been omitted.

[5] Although the New Jersey Open Public Records Act explicitly covers the legislature, the law provides a broad exclusion for certain records belonging to individual legislators. *See* N.J. Stat. Ann. § 47:1A-1.1 ("A government record shall not include [constituent correspondence and related records or] . . . any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties[.]"). The New Jersey Senate is currently considering a proposal to broaden this exemption. *See* S.B. 187, 218th Leg., Reg. Sess. (N.J. 2018).

§ 149.011(B) (In Ohio, a "state agency includes . . . the general assembly [and] any legislative agency[.]").

Twelve states cover their legislatures by referring to legislative "departments," "bodies," "committees," or "entities" when defining the "public" or "governmental bodies" and "entities" whose records are subject to disclosure.[6] *See, e.g.*, N.H. Rev. Stat. Ann. § 91-A:1-a (VI)(d) (In New Hampshire, a "public body means any . . . legislative body, governing body, . . . or authority[.]"); Nev. Rev. Stat. Ann. § 239.005(5)(a) (In Nevada, a "governmental entity means an elected or appointed officer of this State[.]").

Finally, two states define the term "public record" to include records made or received by elected officials. *See, e.g.*, N.C. Gen. Stat. Ann. § 132-1(a) (In North Carolina, a "public record . . . shall mean all documents . . . made or received . . . by any agency . . . includ[ing] every public office, public officer or official (State or local, elected or appointed)[.]").

[6] The Michigan Freedom of Information Act expressly covers any "agency, board, commission, or council in the legislative branch." *See* Mich. Comp. Laws Ann. § 15.232(h)(ii). The state Attorney General, however, has relied on legislative history to interpret this provision as excluding individual legislators. *See* Mich. Att'y Gen. Op. No. 6390 (Sept. 26, 1986).

Table 1: States that expressly cover the legislature

Alabama
"Governmental bod[ies] [include] all boards, bodies, and commissions of the . . . legislative departments . . . ; multimember . . . instrumentalities of the . . . legislative departments . . . ; all quasi-judicial bodies of the . . . legislative departments . . . ; and all standing, special, or advisory committees or subcommittees of, or appointed by, the body[.]" Ala. Code § 36-25A-2.
Colorado
"Public records includes the correspondence of elected officials," subject to four statutory exemptions. Colo. Rev. Stat. Ann. § 24-72-202(6)(a)(II).
Connecticut
"Public agency . . . means: Any executive, administrative or legislative office of the state[.]" Conn. Gen. Stat. Ann. § 1-200(1)(A).
Delaware
"Public body means . . . any regulatory, administrative, advisory, executive, appointive or legislative body of the State[.]" Del. Code Ann. tit. 29, § 10002(h).
Florida
"Every person has the right to inspect or copy any public record . . . . This . . . specifically includes the legislative . . . branch[] of government[.]" Fla. Const. art. I, § 24(a).
Idaho
"State agency means every state [entity] . . . including those in the legislative . . . branch[.]" Idaho Code Ann. § 74-101(15).
Illinois
"Public body means all legislative, executive, administrative, or advisory bodies of the State[.]" 5 Ill. Comp. Stat. Ann. 140/2 § 2(a).

Indiana
"Public agency . . . means . . . [a]ny [entity] exercising any part of the executive, administrative, judicial, or legislative power of the state." Ind. Code Ann. § 5-14-3-2(q)(1).
Kentucky
"Public agency means . . . [e]very state or local legislative board, commission, committee, and officer[.]" Ky. Rev. Stat. Ann. § 61.870(1)(c).
Michigan
"Public body means . . . an agency, board, commission, or council in the legislative branch[.]" Mich. Comp. Laws Ann. § 15.232(h)(ii).
Missouri
"Public governmental body [includes] any legislative, administrative or governmental entity created by the Constitution or statutes of this state[.]" Mo. Ann. Stat. § 610.010(4).
Montana
"Public agency means the executive, legislative, and judicial branches of Montana state government." Mont. Code Ann. § 2-6-1002(10).
Nevada
"Governmental entity means an elected or appointed officer of this State[.]" Nev. Rev. Stat. Ann. § 239.005(5)(a).
New Hampshire
"Public body means any . . . legislative body, governing body, . . . or authority[.]" N.H. Rev. Stat. Ann. § 91-A:1-a (VI)(d).
New Jersey
"Public agency or agency means . . . the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch[.]" N.J. Stat. Ann. § 47:1A-1.1.

New Mexico
"Public body means the executive, legislative and judicial branches of state and local governments[.]" N.M. Stat. Ann. § 14-2-6(F).
North Carolina
"Public record . . . shall mean all documents . . . made or received . . . by any agency of North Carolina, [which shall] . . . include every public office, public officer or official (State or local, elected or appointed)[.]" N.C. Gen. Stat. Ann. § 132-1(a).
Ohio
"State agency includes . . . the general assembly, [and] any legislative agency[.]" Ohio Rev. Code Ann. § 149.011(B).
Pennsylvania
"Agency [includes] . . . a legislative agency . . . [which includes, among other entities,] [t]he Senate . . . [and] [t]he House of Representatives[.]" 65 Pa. Stat. and Cons. Stat. Ann. § 67.102.
Rhode Island
"Agency . . . means any executive, legislative, judicial, regulatory, or administrative body of the state[.]" 38 R.I. Gen. Laws Ann. § 38-2-2(1).
Texas
"Governmental body means a board, commission, department, committee, institution, agency, or office that is within or is created by the . . . legislative branch . . . and that is directed by one or more elected or appointed members[.]" Tex. Gov't Code Ann. § 552.003(1)(A)(i).
Utah
"Governmental entity means . . . the Legislature, and legislative committees[.]" Utah Code Ann. § 63G-2-103(11)(a)(ii).
Virginia
"Public body means any legislative body, authority, board, bureau, commission, district or agency[.]" Va. Code Ann. § 2.2-3701.

West Virginia
"Public body . . . include[s] the executive, legislative and judicial departments[.]" W. Va. Code Ann. § 29B-1-2(4).

B. Nine states cover the legislature based on the interpretation of statutory terms defining the entities subject to an open records law.

In addition to states that have promulgated open records laws that *explicitly* reference the legislature, another nine states cover the legislature, or certain legislative offices, based on an interpretation of statutory terms that define the types of government entities whose records are subject to disclosure. *See* Table 2, *infra* at pp. 16–18.

Six of these states have open records laws that cover the legislature by use of the term "branch" (*i.e.*, the legislative branch of government). Although the term "branch" can be ambiguous on its own, in each of these six states, executive officials or the courts have construed the term in favor of including the legislature.

In Arizona, for example, public records "in the custody of any officer shall be open to inspection by any person[.]" Ariz. Rev. Stat. Ann. § 39-121. The term "officer," in turn, covers "any person elected or appointed to hold any elective or appointive office of any public body[.]" *Id.* § 39-121.01(A)(1). And the term "public body" covers the "state, any county,

city, [etc.] . . . . in this state, [and] any *branch*, department, [etc.] . . . of the foregoing[.]" *Id.* § 39-121.01(A)(2) (emphasis added). The Arizona Attorney General has read these definitions in concert and concluded "that every legislator is an 'officer' and that the Legislature and the houses therefore constitute a branch or department of State Government, and, therefore, is a 'public body' under the public records statutes." Ariz. Att'y Gen. Op. 78-76 at 2 (Apr. 18, 1978).

Other states employing the term "branch" have reached a similar conclusion. In Vermont, a "public agency or agency means any agency, . . . branch, . . . or authority of the State[.]" Vt. Stat. Ann. tit. 1, § 317(a)(2). The Vermont Supreme Court has determined that this definition applies to the Governor with reasoning that is equally applicable to the legislature: In *Herald Ass'n, Inc. v. Dean*, the court wrote that it "is hardly disputable that the Office of the Governor of the State of Vermont is a 'branch, instrumentality or authority of the state.'" 816 A.2d 469, 473 (Vt. 2002) (citing, *inter alia*, Vt. Const. ch. II, § 1). "Because the Governor is an 'agency' under the Act, any paper or document 'produced or acquired' during the course of the Governor's business is a public record subject to disclosure[.]" *Id.* The remaining

four states that cover the legislature by using the term "branch" include Iowa, Louisiana, Nebraska,[7] and South Dakota.[8]

Three states—North Dakota, Washington, and Wisconsin—cover their legislatures based on the interpretation of other statutory terms. In North Dakota, "all records of a public entity are public records" open to inspection. N.D. Cent. Code Ann. § 44-04-18(1). The code defines a "public entity" as "public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order[.]" *Id.* § 44-04-17.1(13)(a). As an entity created by the state constitution, the legislature is a qualifying "public entity." This conclusion is supported by explicit exemptions for certain legislative records. For example, records of the "legislative council, the legislative

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[7] The interpretation of the term "branch" in the Nebraska Public Records Law to cover the legislature is supported by an explicit exemption for certain records belonging to individual legislators. *See* Neb. Rev. Stat. Ann. § 84-712.05(12). Moreover, a pending bill in the Nebraska legislature, which would exempt audio and video recordings of legislative proceedings, similarly illustrates the proper interpretation of "branch" to include the legislature. *See* L.B. 1018, 105th Leg., 2d Sess. (Neb. 2018).

[8] In South Dakota, the legislature has explicitly excluded the judicial branch from the state's Sunshine Law. S.D. Codified Laws § 1-27-1.12 (exempting the "Unified Judicial System.").

management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly" are exempt, if they are purely personal, legislative council work product, or if they reveal private communications of a member of the assembly. *Id.* § 44-04-18.6. Such an exemption would not make sense if the legislature, as a whole, were not covered. Indeed, the North Dakota Attorney General's Office has adopted that understanding. *See* State & Local Gov't Div., Office of Att'y Gen., N.D., Open Records Manual at 37 (2017), *available at* http://bit.ly/2zIV9e4 (affirming application of open records law to legislature and discussing exemptions). The North Dakota statute also details that a "record" subject to disclosure "does not include records in the possession of a court," a carve-out that does not extend to the legislature. N.D. Cent. Code Ann. § 44-04-17.1(16); *cf. supra* at p. 12 n.8 (discussing similar provision in South Dakota).

Under the Washington Public Records Act, each "state agency" must provide the public with access to records. The Act defines a "state agency [to] include[] every state office, department, division, bureau, board, commission, or other state agency." Wash. Rev. Code Ann. § 42.56.010(1). Although this language does not explicitly include or

exclude the legislature, an examination of other statutory definitions, including some outside the Public Records Act, reveals that at least *some* legislative offices must be covered. For example, a "state office," which is part of the definition of a "state agency," includes a "state legislative office," *id.* § 42.17A.005(44), and that, in turn, includes the "office of a member" of the legislature. *Id.* § 42.17A.005(29). One state court recently accepted this exact reading when it held that "the plain meaning of the Public Records Act defines the offices of *all* state senators and representatives to be 'agencies' subject to the customary disclosure requirements of the . . . Act." *Associated Press v. Wash. State Legislature*, No. 17-2-04986-34, slip op. at 10 (Wash. Thurston Cty. Sup. Ct. Jan. 19, 2018) (emphasis added).[9] The court also explained that the Public Records Act covered certain records from two non-member legislative offices—the Secretary of the Senate and the Office of the Chief Clerk for

[9] This case is currently on appeal to the Washington Supreme Court, but it has not been docketed for the Fall 2018 term. *See Accepted Cases*, Wash. Sup. Ct., http://bit.ly/2oZfB5Q (last visited Oct. 22, 2018). Recent legislative efforts to revise the Washington Public Records Act have failed. *See, e.g.*, S.B. 6617, 65th Leg., Reg. Sess. (Wash. 2018); *see also* Joseph O'Sullivan, *Gov. Inslee vetoes Legislature's controversial public-records bill*, Seattle Times, Mar. 1, 2018, http://bit.ly/2QnpZAK.

the House of Representatives—based on the Act's definition of a "public record." *Id.* at 11–12; *see* Wash. Rev. Code Ann. § 45.26.010(3).

Finally, in Wisconsin, a "requester has a right to inspect any record." Wis. Stat. Ann. § 19.35(1). A "record" is defined as "any material . . . that has been created or is being kept by an authority." *Id.* § 19.32(2). An "authority," in turn, is defined as anyone "having custody of a record [including,] [an] elective official[.]" *Id.* § 19.32(1). The legislature is covered because it is made up of "elective officials." Wisconsin courts have reached the same conclusion. For example, while requiring a state senator to disclose emails, the Wisconsin Court of Appeals "observe[d] that the legislature wrote the open records law to apply to 'elected official[s]' generally, without any special exception for individual state legislators or houses of the legislature[.]" *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 848 N.W.2d 862, 866 (Wis. Ct. App. 2014).

Table 2: States that cover the legislature based on the interpretation of terms defining the entities subject to an open records law

Arizona
"Officer means any person elected or appointed to hold any elective or appointive office of any public body[.]" Ariz. Rev. Stat. Ann. § 39-121.01(A)(1). "Public body means this state . . . [and] any branch, department, board, bureau, commission, council or committee of the foregoing[.]" *Id.* § 39-121.01(A)(2).
Iowa
"Government body means this state . . . or any branch, department, board, bureau, commission, council, committee, official, or office[.]" Iowa Code Ann. § 22.1(1).
Louisiana
"Public body means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, [or] any other instrumentality of state . . . government[.]" La. Stat. Ann. § 44:1(A)(1). "Custodian means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized . . . to respond to requests to inspect any such public records." *Id.* § 44:1(A)(3).
Nebraska
Granting access to public records of "any agency, branch, department, board, bureau, commission, council, subunit, or committee[.]" Neb. Rev. Stat. Ann. § 84-712.01(1). Exempting "correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature[.]" *Id.* § 84-712.05(12).

North Dakota
"Public entity means all public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota . . . to exercise public authority or perform a governmental function[.]" N.D. Cent. Code Ann. § 44-04-17.1(13)(a). "The following records . . . of or relating to the legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to [the Open Records Statute]: a record of a purely personal or private nature, a record that is legislative council work product or is legislative council-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved." *Id.* § 44-04-18.6. "Record means recorded information of any kind . . . [but] does not include records in the possession of a court[.]" *Id.* § 44-04-17.1(16).
South Dakota
"Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." S.D. Codified Laws § 1-27-1.1. "The provisions of this chapter do not apply to records and documents of the Unified Judicial System." *Id.* § 1-27-1.12.
Vermont
"Public agency or agency means any agency, board, department, commission, committee, branch, instrumentality, or authority of the State[.]" Vt. Stat. Ann. tit. 1, § 317(a)(2).

Washington
"State agency includes every state office, department, division, bureau, board, commission, or other state agency." Wash. Rev. Code Ann. § 42.56.010(1).
Wisconsin
"Authority means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order[.]" Wis. Stat. Ann. § 19.32(1).

C. Two states cover the legislature based on an interpretation of the definition of a "public record."

In two states, the relevant analysis turns on the type of record at issue, rather than the entities covered by the open records law. *See* Table 3, *infra* at p. 20. The Maryland Public Information Act, for example, provides access to "public records," including "any documentary material that is made [or received] by a unit or an instrumentality of the State . . . in connection with the transaction of public business[.]" Md. Code Ann., Gen. Provis. § 4-101(j)(1)(i). The Maryland Court of Appeals has held that the "Act applies to 'public records,' not 'agency records.'" *Office of Governor v. Wash. Post Co.*, 759 A.2d 249, 257 (Md. 2000). Thus, "[t]he coverage of the Act is dependent upon the scope of the term 'public records,' and not upon whether the governmental entity holding the

records is an 'agency' rather than some other type of governmental entity." *Id.* The Maryland Attorney General also has determined that the Act "covers virtually all public agencies or officials in the State. It includes all branches of State government – legislative, judicial, and executive. . . . [although] [t]he Maryland courts have not definitively addressed the status of records of individual legislators, many of which are covered by constitutional privileges." Office of the Att'y Gen., Md., Maryland Public Information Act Manual at 1-2, 1-4 (2015), *available at* http://bit.ly/2ietGta.

Similarly, the Tennessee Public Records Act provides access to "all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]" Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). Because the statute does not provide a definition of "governmental entity," cases considering the issue have focused on whether the information was made or received while transacting "official business." *See Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991) (holding that a state representative's handwritten notes were public records because they "were received by the Knoxville Police

Department in connection with the transaction of official business"). The Tennessee Office of the Attorney General, for its part, has advised that "[a]ny [state legislator's] e-mail that meets this definition, therefore, would be a public record subject to public inspection under the statute, unless otherwise provided by state law." Tenn. Att'y Gen. Op. No. 05-099 (June 20, 2005), *available at* http://bit.ly/2Mm5XU8. And, like the Georgia Open Records Act, the Tennessee statute includes specific exemptions for certain legislative records. *See* Tenn. Code Ann. § 3-10-108 (providing exemptions for legislative computer systems).

Table 3: States that cover the legislature based on an interpretation of the statutory definition of a "public record"

Maryland
"Public record means the original or any copy of any documentary material that is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business[.]" Md. Code. Ann., Gen. Provis. § 4-101(j)(1)(i).
Tennessee
"Public record or records or state record or records . . . [m]eans all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]" Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). Providing exemptions for access to legislative computer systems. *Id.* § 3-10-108.

D. The presence of exemptions for certain legislative records meaningfully informs whether the legislature is covered under at least six state open records laws.

Perhaps most tellingly for this case, in states where an open records law does not explicitly cover the legislature, references to other statutory sections can provide helpful guidance in interpreting the law. *See* Table 4, *infra* at pp. 24–25. In at least six states, the presence of exemptions for certain legislative records counsels in favor of determining that the legislature is covered by the open records law.

In South Carolina, for example, any "person has a right to inspect, copy, or receive . . . any public record of a public body." S.C. Code Ann. § 30-4-30(A)(1). A "public body" includes "any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body, . . . or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds[.]" *Id.* § 30-4-20(a). By itself, this language does not explicitly include or exclude the legislature. But the available exemptions set forth in the law indicate that the legislature is covered. *Id.* § 30-4-40(a)(8) (exempting "memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their

immediate staffs[.]"). This exemption would be superfluous if the legislature—or, at least, the offices of individual legislators—were not considered a "public body." Relatedly, the South Carolina Attorney General's Office has "concluded that Legislative Delegations are 'public bodies' for purposes of the FOIA and, thus, the provisions of the Act apply to such entities." Letter from Paul Koch, Assistant Att'y Gen., Office of the Att'y Gen., S.C., to Hon. Ronald P. Townsend, Chairman, Anderson Cty. Legislative Delegation, at 2 (Oct. 7, 1998) (citing S.C. Att'y Gen. Op. (Sept. 6, 1984)), *available at* http://bit.ly/2mnPWFm. The Attorney General "also concluded that the possession of public records by a Legislative Delegation triggers the applicability of the FOIA and causes . . . records to be disclosed insofar as is possible." *Id.* (citing S.C. Att'y Gen. Op. (Oct. 6, 1993)).

In Wyoming, the public is given access to "any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]" Wyo. Stat. Ann. § 16-4-201(a)(v). The legislature is included in the foregoing definition because the public is disallowed access "to audits or investigations of state

agencies performed by or on behalf of the legislature or legislative committees." *Id.* § 28-8-113(a).

The definition of a "public record" under the Maine Freedom of Access Act provides two "exemptions" that demonstrate why the legislature must be covered. First, the Act provides a special condition for the release of "legislative papers and reports," which are to be "signed and publicly distributed in accordance with legislative rules." Me. Rev. Stat. Ann. tit. 1, § 402(3)(C). Second, the law exempts "records, working papers, drafts and interoffice and intraoffice memoranda used or maintained . . . to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees" during the current legislation session, the session in which the records are "prepared or considered," or the session into which they are "carried over." *Id.*

Finally, as discussed above, three other states' statutory exemptions—Nebraska, *supra* at p. 12 n.7; North Dakota, *supra* at pp. 12–13; and Tennessee, *supra* at pp. 19–20—provide clarity on whether the legislature is covered.

Table 4: States in which the legislature is impliedly covered by the inclusion of exemptions specific to the legislature[10]

Maine
Exempting "legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over[.]" Me. Rev. Stat., tit. 1, § 402(3)(C).
South Carolina
"Public body means any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, . . . or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body[.]" S.C. Code Ann. § 30-4-20(a). "A public body may but is not required to exempt from disclosure the following information . . . Memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions of this chapter." *Id.* § 30-4-40(a)(8).

[10] North Dakota and Tennessee are not included in this table; relevant statutory citations for these states can be found in Table 2, *supra* at pp. 16–18, and Table 3, *supra* at p. 20, respectively.

Wyoming
"Public records . . . includes any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]" Wyo. Stat. Ann. § 16-4-201(a)(v). "The provisions of W.S. 16-4-201 through 16-4-205 [*i.e.*, the Open Records Act] do not apply to audits or investigations of state agencies performed by or on behalf of the legislature or legislative committees." *Id.* § 28-8-113(a).

II. When a state categorically excludes its legislature, it almost always does so in explicit statutory terms.

Only eleven states categorically exclude their legislature from their open records laws. *See* Table 5, *infra* at pp. 28–29. Eight of those states do so in explicit terms. *See, e.g.*, Haw. Rev. Stat. Ann. § 91-1, (In Hawaii, an "agency means each state or county board, commission, department, or officer . . . except those in the legislative or judicial branches."); Okla. Stat. tit. 51, § 24A.3(2) (In Oklahoma, a "public body . . . does not mean . . . the Legislature, or legislators[.]").

Three additional states—Alaska, Massachusetts, and Minnesota—do not expressly exclude the legislature, but it is instead excluded by implication or subsequent judicial decision. For example, under the Alaska Public Records Act, an "agency . . . means . . . [any entity] created under the executive branch of the state government[.]" Alaska Stat. Ann.

§ 40.21.150. It is axiomatic that the legislature is not a creature of the "executive branch."

In Minnesota, state law provides that "long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof, are public data." Minn. Stat. Ann. § 10.46. This provision is the exception that proves the rule, namely, that the legislature is not subject to the Minnesota Data Practices Act. If there were any doubt as to matter, there are efforts underway to expand the reach of Minnesota's open records law to include the legislature. *See* H.B. 1065, 90th Sess. (Minn. 2018); H.B. 2954, 90th Sess. (Minn. 2018); S.B. 1393, 90th Sess. (Minn. 2017).

Massachusetts appears to be the only state—other than Georgia, in the case before this Court—that has relied on judicial interpretation of the term "agency" to categorically exclude the legislature. But even in the case of Massachusetts, other statutory sections that are not present here provided the dispositive support for the exclusion.

Specifically, the Massachusetts Public Records Act requires access if a "public record is within the possession, custody or control of [an] agency or municipality[.]" Mass. Gen. Laws Ann. ch. 66, § 10(a)(ii). In

Westinghouse Broadcasting Co. v. Sergeant-At-Arms of the General Court of Massachusetts, the Supreme Judicial Court held that the "Legislature is not one of the instrumentalities enumerated . . . whose records are subject to public disclosure. It is not an 'agency, executive office, department, [etc.] . . . ' within the meaning of [the statute]." 375 N.E.2d 1205, 1208 (Mass. 1978). The court wrote that, although the legislature could be conceived of as a "department" of the state government, the use of that term, in context, "has a much more restricted meaning." *Id.* This holding, however, did not hinge on whether the Massachusetts General Court—that is, the state legislature—was an "agency" or a "department," but rather on the fact that the Public Records Act "specifically exempts the *records* of the" legislature *in toto*. *Id.* (emphasis added). In other words, the Act simply did "not apply to the records of the general court[.]" Mass. Gen. Laws Ann. ch. 66, § 18. Thus, even in the case of Massachusetts, a standalone interpretation of the term "agency" was not a sufficient basis for excluding the legislature.

Table 5: States expressly or impliedly excluding the legislature

Alaska
"Agency . . . means . . . [an entity] created under the executive branch of the state government[.]" Alaska Stat. Ann. § 40.21.150.
Arkansas
"The following shall not be deemed to be made open to the public . . . [u]npublished memoranda, working papers, and correspondence of . . . members of the General Assembly[.]" Ark. Code Ann. § 25-19-105(b)(7).
California
"State agency means every state office . . . except those agencies provided for in Article IV [legislature] . . . or Article VI [judiciary] of the California Constitution." Cal. Gov't Code § 6252(f)(1).
Hawaii
"Agency means each state or county board, commission, department, or officer . . . except those in the legislative or judicial branches." Haw. Rev. Stat. Ann. § 91-1.
Kansas
"Public record[s] shall not include . . . records which are made, maintained or kept by an individual who is a member of the legislature[.]" Kan. Stat. Ann. § 45-217(g)(3)(B).
Massachusetts
"A records access officer . . . shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record . . . within the possession, custody or control of the agency or municipality that the records access officer serves[.]" Mass. Gen. Laws Ann. ch. 66, § 10(a)(ii).

Minnesota
"Government entity means a state agency, statewide system, or political subdivision." Minn. Stat. Ann. § 13.02, subdiv. 7a. "Long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof, are public data." Minn. Stat. Ann. § 10.46.
Mississippi
"Within the meaning of [the Mississippi Public Records Act], . . . [an] entity shall not be construed to include . . . any appointed or elected public official." Miss. Code Ann. § 25-61-3.
New York[11]
"Agency means any state or municipal . . . governmental entity . . . except the judiciary or the state legislature." N.Y. Pub. Off. Law § 86(3) *But see* N.Y. Pub. Off. Law § 88(1)-(2) (Legislative leadership "shall promulgate rules and regulations. . . pertaining to the availability, location and nature of [ten enumerated categories of] records[.]").
Oklahoma
"Public body . . . does not mean . . . the Legislature, or legislators[.]" Okla. Stat. tit. 51, § 24A.3(2).
Oregon
"State agency . . . does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under . . . the Oregon Constitution." Or. Rev. Stat. Ann. § 192.311.

[11] There are several bills under consideration that would repeal the mandatory disclosure regime under N.Y. Pub. Off. Law § 88 and expand the definition of an "agency" under the New York Freedom of Information Law to include the state legislature in explicit terms. *See* S.B. 7510, 202d Leg., Reg. Sess. (N.Y. 2018); A.B. 9510, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 4584, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 2010, 202d Leg., Reg. Sess. (N.Y. 2017); A.B. 3010, 202d Leg., Reg. Sess. (N.Y. 2017).

III. The Georgia Open Records Act more closely resembles state statutes that cover legislatures or legislative offices than those that do not.

As the foregoing discussion demonstrates, CoA Institute's nationwide survey of state open records laws reveals at least three important trends that should inform the Court's consideration of the instant appeal. *First*, when a state chooses not to extend its open records law to cover the legislature, it usually does so in explicit statutory terms. *Second*, in the absence of an express exclusion, broad terms are commonly interpreted to include the legislature, either in whole or in part. *Third*, when there is any remaining ambiguity, the presence of statutory exemptions concerning specific legislative offices or records implies that the legislature, as a whole, must be covered by the open records law. As applied to the Georgia Open Records Act, these three trends all militate in favor of Appellant's reading of the law.

A. The Open Records Act does not explicitly exclude the General Assembly.

When a state chooses to exclude its legislature from its open records law, that exclusion is usually expressed with explicit statutory language. *See supra* at p. 25. The Georgia Open Records Act, however, contains no express provision that places the General Assembly outside its scope. If

the General Assembly had intended to exclude the legislature, it would have been a simple task to include that exclusion when it drafted or subsequently amended the Act.

B. The Open Records Act contains broad language that, on a natural reading, includes the legislature.

The Open Records Act provides access to "public records" that are prepared, maintained, or received by an "agency." Ga. Code Ann. §§ 50-18-71(a), 50-18-70(b)(2). An "agency," in relevant part, includes "every state department, agency, board, bureau, office, commission, public corporation, and authority[.]" *Id.* § 50-14-1(a)(1)(A). Interpreting these broad terms to include the General Assembly is entirely consistent with the overarching purpose of the Act, which is to foster "open government," *id.* § 50-18-70, and to limit the withholding of records only on strict, enumerated terms. *Id.* § 50-18-71(a). Further, the Open Records Act itself demands that its terms "be broadly construed to allow the inspection of governmental records." *Id.* § 50-18-70(a).

At least nine states have adopted open records laws that use expansive terms like those found in Georgia's definition of an "agency." *See supra* at pp. 10–15; *see also* Table 2, *id.* at 16–18. Such terms include "department," "agency," "board," "bureau," "office," and "authority."

Wisconsin proves an especially helpful corollary. There, a requester may seek records created or maintained by any state "authority." *See id.* at 15. The Wisconsin Court of Appeals has determined that elected members of the state legislature fit the bill as political authorities. *Id.* And, in adopting this interpretation, the court looked to the presence of statutory exemptions unique to the legislature. *Id.*

Similar reasoning can be applied to the Georgia Open Records Act. The General Assembly, its elected members, and its legislative agencies, all exercise political "authority," and thus qualify as "agencies." There is no explicit indication in the statutory text or the legislative history to counsel against this interpretation, and the presence of exemptions for certain legislative entities, as discussed below, *see infra* at pp. 33–34, only reinforces the point.

Massachusetts is the only example of a state that has interpreted the term "agency" to exclude the legislature, and it would be strange indeed if Georgia were to follow the same course. As discussed above, the Massachusetts Supreme Judicial Court interpreted "agency" to have a "more restricted meaning" in the context of that state's Public Records Act. *See supra* at pp. 26–27. But the court's holding relied heavily on the

Act's categorical exemption for "records" of the state legislature. *Id.* If this Court were to uphold the decision below, Georgia would be the *only* state to exclude the legislature from its open records law based on a stand-alone interpretation of the term "agency."

C. Narrowly-tailored exemptions for certain legislative records would be superfluous if the General Assembly were not covered by the Open Records Act.

At the time Appellant filed its requests and the court below issued its order, the Georgia Open Records Act included two "exceptions" for legislative records. The first of these provisions exempted records from a series of legislative offices, including the Legislative and Congressional Reapportionment Office, the Senate Research Office, and the House Budget and Research Office. *See* Ga. Code Ann. § 50-18-72(a)(12) (2017). The second provision, which is still in force, exempts certain records from the Office of Legislative Counsel. *Id.* § 28-4-3.1; *cf.* Ga. Code Ann. § 50-18-75 (2016). These offices are all contained within the legislative branch. Neither exemption would make any sense if the General Assembly were not, by default, covered by the Open Records Act. To accept the interpretation advanced by Appellees, and adopted by the court below, would render the Act's explicit, narrowly-tailored

exemptions mere surplusage, violating a core canon of statutory construction. *See United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."); Antonin Scalia & Bryan A. Garner, Reading Law at 174–79 (2012) (discussing canon).

Moreover, based on CoA Institute's extensive research, *not a single state*, apart from Georgia, has every interpreted its open records law to exclude the legislature when the law provides exemptions specific to legislative offices or records. To the contrary, in each of the six states that provide such exemptions—*viz.*, Maine, Nebraska, North Dakota, South Carolina, Tennessee, and Wyoming—the state's open records law has been interpreted by executive officials or the courts to cover the legislature. *See supra* at pp. at 21–23.[12]

[12] The General Assembly's recent elimination of Code Section 50-18-72(a)(12) leaves undisturbed the exemption for certain records of the Office of Legislative Counsel. *See* Ga. Code Ann. § 28.4-3.1.

Table 6: Relevant statutory provisions from the Georgia Code

Ga. Code Ann. § 50-14-1(a)(1)(A)
"Agency means: Every state department, agency, board, bureau, office, commission, public corporation, and authority[.]"
Ga. Code Ann. § 50-18-72(a)(12) (2017)
"Public disclosure shall not be required for records that are . . . related to the provision of staff services to individual members of the General Assembly by the Legislative and Congressional Reapportionment Office, the Senate Research Office, or the House Budget and Research Office, provided that this exception shall not have any application to records related to the provision of staff services to any committee or subcommittee or to any records which are or have been previously publicly disclosed by or pursuant to the direction of an individual member of the General Assembly[.]"
Ga. Code Ann. § 28-4-3.1
"Communications between the Office of Legislative Counsel and the following persons shall be privileged and confidential: members of the General Assembly, the Lieutenant Governor, and persons acting on behalf of such public officers; and such communications, and records and work product relating to such communications, shall not be subject to inspection or disclosure under Article 4 of Chapter 18 of Title 50[.]"

CONCLUSION

The available data on the interpretation of state open records laws regarding coverage of the legislature is both interesting and illuminating. As CoA Institute has argued, there are clear trends that, while not controlling, should prove useful to the Court's consideration of the questions on appeal. Those trends—from the typical exclusion of the

legislature from the scope of disclosure in explicit terms, to the accepted understanding of the implication of statutory exemptions specific to the legislature—counsel in favor of reversing the decision below and remanding for further proceedings. CoA Institute respectfully requests that the Court rule accordingly.

This submission does not exceed the word count limit imposed by Rule 24.

October 23, 2018

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CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of the foregoing Brief of *Amicus Curiae* Cause of Action Institute was filed with the Clerk of the Court of Appeals using the Court's eFast system, and .pdf copies of the brief have been served via email on counsel of record, as follows:

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In addition, I certify that there is a prior agreement with the parties to allow documents in a .pdf format sent via email to suffice for service.

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