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Susan Culpepper
Clerk of the 266th District Court
Erath County, Texas

No. CV37178

FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION,	§	IN THE DISTRICT COURT OF
	§	
Petitioner,	§	
	§	
v.	§	ERATH COUNTY, TEXAS
	§	
TARLETON STATE UNIVERSITY,	§	
	§	
Respondent.	§	266th Judicial District

PETITIONER'S MOTION FOR TRADITIONAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

Under Tex. R. Civ. P. 166a(a), Petitioner, the Foundation for Individual Rights and Expression (FIRE),[1] moves for summary judgment.

INTRODUCTION

Did Tarleton State University attempt to cover up a former professor's inappropriate behavior towards female students by censoring and seizing editorial control over a student newspaper? FIRE filed this public records lawsuit against Tarleton to uncover the answer after the university improperly withheld records under Texas's Public Information Act (the Act).

In 2018, Tarleton quietly paid professor Michael Landis more than $61,000 to leave the university after an investigation found that he had acted inappropriately towards female students. Three years later, Landis threatened to sue an independent

[1] Formerly known as the Foundation for Individual Rights in Education, FIRE changed its name on June 6, 2022, to reflect its expanded mission of protecting free expression beyond colleges and universities.

student newspaper, the *Texan News Service*, for defamation over stories it published about his misconduct and departure. Landis's threat was toothless—any defamation suit was too late under the statute of limitations and the paper's reporting was accurate and truthful—but that did not stop Tarleton administrators from pressuring the students to take down the articles. After FIRE wrote to the university in August 2021 to defend the student publication, Tarleton falsely claimed the paper was never editorially independent—contrary to the *Texan News Service*'s former policy handbook and history.

Alarmed by Tarleton's blatant censorship, FIRE filed several public records requests with the university, seeking information related to the student paper's editorial independence and Landis's threat of a lawsuit. Instead of disclosing the information as required by law, Tarleton invoked an inapplicable exception for "student records" and withheld responsive records.

On February 10, 2022, FIRE filed an Original Petition for a Writ of Mandamus to compel Tarleton to disclose the records. Tarleton answered the Petition by generally denying the allegations and raising sovereign immunity as an affirmative defense. The evidence establishes that there are no genuine issues of material fact and FIRE is entitled to judgment as a matter of law. This Court must vindicate the public's right to know and order Tarleton to disclose the public information it continues to withhold.

SUMMARY JUDGMENT EVIDENCE

FIRE relies on the following summary judgment evidence, true and correct

copies of which are filed with this Motion and fully incorporated into it:

(1) The Declaration of Lindsie Rank, Student Press Counsel at FIRE, July 22, 2022 (Rank Decl.) and accompanying Exhibits A–J, enumerated below:

Exhibit A: FIRE's first October 5, 2021 Public Records Request;

Exhibit B: FIRE's second October 5, 2021 Public Records Request;

Exhibit C: March 28, 2018 Memorandum from Tarleton's Associate Vice President of Academic Affairs regarding the Landis investigation;

Exhibit D: September 30, 2021 Letter from Tarleton's Provost to the Dean of the College of Liberal & Fine Arts discussing editorial independence of the *Texan News Service*;

Exhibit E: November 19, 2021 Letter from FIRE to the Texas A&M University System's Deputy General Counsel;

Exhibit F: December 1, 2021 Response from the Texas A&M University System's Deputy General Counsel;

Exhibit G: FIRE's December 3, 2021 Public Records Request;

Exhibit H: Tarleton's Response to FIRE's December 3, 2021 Public Records Request;

Exhibit I: Tarleton's Response to FIRE's First October 5, 2021 Public Records Request; and

Exhibit J: Tarleton's Response to FIRE's Second October 5, 2021 Public Records Request.

The parties have not conducted discovery because it is largely unnecessary in this case. The facts are indisputable and FIRE is entitled to summary judgment as a matter of law.

STATEMENT OF FACTS

On October 5, 2021, FIRE issued two Public Information Act requests to Tarleton. The first request sought documents related to a former Tarleton professor, Michael Landis, his time at the university, the investigation into his behavior, and his eventual departure, as well as records related to the *Texan News Service*. Rank Decl. ¶ 3, Ex. A. The second request sought documents and communications from Landis's attorney and those relating to a request for comment from journalist Nell Gluckman, who authored a piece about Tarleton's censorship for *The Chronicle of Higher Education*. *Id.* ¶ 3, Ex. B.

Tarleton improperly withheld public records in response to FIRE's October 5, 2021 requests. *Id.* ¶ 4, Exs. I, J. For example, the *Texan News Service* reported on and published a March 2018 memorandum written by Tarleton's Associate Vice President of Academic Affairs relating to the Landis investigation. *Id.* ¶ 5, Ex. C. Tarleton, however, did not produce this responsive and non-exempt memorandum in response to FIRE's public information request. *Id.* ¶ 5. Tarleton also failed to produce a letter that was sent from the university's Provost to the Dean of the College of Liberal & Fine Arts discussing the editorial independence of the *Texan News Service*. *Id.* ¶ 6, Ex. D. FIRE received a copy of this responsive but non-exempt letter directly from a faculty member, rather than in response to its public information request. *Id.*

On November 19, 2021, FIRE wrote to the Texas A&M University System's Deputy General Counsel explaining that Tarleton had not fully complied with FIRE's public information requests. *Id.* ¶ 7, Ex. E. In response, the Deputy General Counsel

asserted that FIRE had waived the Public Information Act's requirement that the university must first obtain a decision from the Office of the Attorney General before withholding responsive information under one of the Act's mandatory exceptions. *Id.* ¶ 8, Ex. F.

On December 3, 2021, FIRE submitted another public information request to Tarleton, substantively the same as its October 5 requests, but this time clarifying that FIRE did not consent to withholding any information subject to an exception under the Public Information Act without Tarleton first obtaining an opinion from the Office of the Attorney General. *Id.* ¶ 9, Ex. G. In response to this public information request, Tarleton claimed that any information still withheld is subject to Texas Government Code § 552.114, which excepts student records from disclosure. *Id.* ¶ 10, Ex. H.

Tarleton, however, continued to withhold information not subject to the student-records exception. *Id.* ¶¶ 4–6, Exs. C, D. On February 10, 2022, FIRE filed an Original Petition for a Writ of Mandamus under Texas Government Code § 552.321(a) to compel Tarleton to release the requested information or, in the alternative, to compel Tarleton to release all requested information redacted so as to remove only such information as Tarleton proves falls within the student records exception. (Pet. Writ of Mandamus ¶ 52.) FIRE also seeks its costs of litigation and reasonable attorneys' fees. (*Id.* ¶ 53 (citing Tex. Gov't Code § 552.323)).

Tarleton answered FIRE's Petition on March 15, 2022, generally denying the allegations and raising sovereign immunity as an affirmative offense. (Answer at 1.)

Additionally, Tarleton claimed FIRE's request for litigation costs and attorneys' fees is barred because Tarleton reasonably relied on a prior decision of a binding court or a written decision of the attorney general. (*Id.* at 2.)

ARGUMENT

Summary judgment is proper where a movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017). FIRE is entitled to summary judgment and the Court should issue a Writ of Mandamus because Tarleton continues to withhold responsive information in violation of the Public Information Act.

I. The Public Information Act Must Be Liberally Construed and the Government Bears the Burden of Showing Information Falls Within One of the Act's Narrow Exceptions.

The Public Information Act requires governmental bodies to disclose "public information." Tex. Gov't Code § 552.021. Public Information includes any "information that is written, produced, collected, assembled, or maintained . . . in connection with the transaction of official business: (1) by a governmental body; [or] . . . (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body." *Id.* § 552.002(a). The Act must be "liberally construed in favor of granting a request for information." *Id.* § 552.001(b). Governmental bodies are required to produce public records for inspection upon request unless the Act specifically excepts the requested information from disclosure. *Id.* §§ 552.021(a), 552.101–552.162 (enumerating the Act's exceptions); *see also City of Garland v. Dall.*

Morning News, 22 S.W.3d 351, 356 (Tex. 2000) (plurality) (explaining that public information remains subject to disclosure if not exempt under the Act). The Act's exceptions must be construed narrowly in order to facilitate public access. *See Dall. Morning News*, S.W.3d at 364. In a mandamus proceeding, the governmental body bears the burden of showing information is not public or falls within an exception. *Id.* at 356; *see also Arlington Indep. Sch. Dist. v. Tex. Att'y Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.) (same).

II. Tarleton Failed to Fulfill Its Duty Under the Public Information Act to Produce Public Records.

Tarleton has not established and cannot establish that the responsive information it continues to withhold falls within the Public Information Act's student records exception. To fulfill its legal duty under the Act, Tarleton must produce all responsive non-exempt information. To the extent any responsive public records contain students' personally identifying information, state and federal case law and Texas Attorney General opinions dictate that Tarleton must redact the exempt information and produce the records.

A. The requested information related to Professor Landis and the *Texan News Service* is subject to public inspection.

The records FIRE requested are public information under the Act because they constitute information that is written, produced, collected, assembled, or maintained in connection with the transaction of official business by Tarleton, a governmental body, or by an individual employee of Tarleton in the employee's official capacity. *See* Tex. Gov't Code § 552.003(2-a) ("'Official business' means any matter over which a governmental body has any authority, administrative duties, or advisory duties.").

The information FIRE requested—records related to a former professor and a student newspaper's editorial independence—certainly pertains to the official business of Tarleton. Rank Decl. Exs. A, B. Therefore, Tarleton must produce all responsive information not subject to one of the Act's narrow exceptions.

B. Tarleton cannot use the student-records exception to withhold information not directly related to students.

Tarleton cannot establish that all of the public information it continues to withhold falls within the Public Information Act's student-records exception. The Act states that information shall be "confidential and excepted" from disclosure "if it is information in a student record at an educational institution funded wholly or partly by state revenue." Tex. Gov't Code § 552.114(b). The Act defines a "student record" as "(1) information that constitutes education records as that term is defined by the Family Educational Rights and Privacy Act of 1974 . . . or (2) information in a record of an applicant for admission to an educational institution . . . ." *Id.* § 552.114(a) (citing 20 U.S.C. § 1232g(a)(4)). The Family Educational Rights and Privacy Act (FERPA) defines "education records" as "those records, files, documents, and other materials which . . . contain information directly related to a student." 20 U.S.C. § 1232g(a)(4)(A)(i). The definition of education records excludes records related to "persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution," where those records are "made and maintained in the normal course of business," and "relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose," among other exclusions not relevant here. 20 U.S.C.

§ 1232g(a)(4)(B)(iii).

FIRE does not seek records related to students. Rather, it requests information related to a former employee and administrative oversight of a student newspaper. Tarleton failed to disclose *at least* two records not subject to the student-records exception. The March 28, 2018 memorandum from Tarleton's Associate Vice President of Academic Affairs regarding the investigation into Landis's behavior concerned his non-academic capacity as an employee. *See* Rank Decl. Ex. C. The September 30, 2021, letter from Tarleton's Provost discussing the editorial independence of the *Texan News Service* did not include any information directly related to any student, but rather information related to administrative control of a previously student-run newspaper. *See id.* Ex. D. Tarleton cannot invoke an irrelevant exception to obscure potentially controversial information. The university's unfaithful application of this narrow exception betrays the principles of transparency and accountability embodied in the Public Information Act.

C. Tarleton refused to take reasonable steps to segregate and release non-exempt information, as required by state and federal case law and the Texas Attorney General.

While the Public Information Act excepts information directly related to students from mandatory disclosure, it does not permit governmental bodies to withhold documents that contain public information *in their entirety* merely because they also include information directly related to students. Instead, the statute indicates that information directly related to students should be redacted and the remainder of the record disclosed. *See* Tex. Gov't Code § 552.114(d) (allowing educational institutions to *redact* FERPA-protected information from otherwise

public information without requesting an attorney general's decision to do so). Texas Government Code § 552.114(d) provides no basis to withhold such documents in their entireties.[2]

The Supreme Court of Texas has held that where a record contains both public information and information excepted from disclosure, a governmental body must redact the exempt information from the record and produce the public information. *Jackson v. State Off. of Admin. Hearings*, 351 S.W.3d 290, 292, 295–97 (Tex. 2011). In *Jackson*, the State Office of Administrative Hearings sought to withhold "decisions and orders in license suspension cases related to delinquent child support" in their entirety. *Id.* at 291–92. The Court decided that while some information contained in the decisions and orders may be confidential under a provision of the Texas Family Code and the Public Information Act's borrowing provision, the Office of Administrative Hearings could not withhold the records in their entirety. *Id.* at 295–96. Instead, the Court instructed the Office to redact confidential information from the orders and decisions and then disclose them to the requestor. *Id.* The Court wrote, "Considering the overarching principle of open government that has long been the public policy of this State, requiring release of [the Office's] Orders after redaction of

[2] FERPA regulations themselves permit educational institutions to release "education records or information from education records . . . after the removal of all personally identifiable information" where the educational institution "has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." 34 C.F.R. § 99.31(b)(1). FERPA provisions that prohibit disclosure apply *only* to "personally identifiable information contained in education records" and not the records in their entirety. *Id.* § 99.3

such information is more faithful to the language of the statute and Texas public policy than a blanket withholding of the Orders all together." *Id.* at 296 (citing Tex. Gov't Code § 552.001).

Texas Attorney General Opinions further instruct public educational institutions to disclose public records after redacting personally identifying information. Interpreting the Act and its borrowing of FERPA's privacy protections, the Office of the Attorney General has repeatedly ruled that the law does not cover information other than that which personally identifies students or parents. Therefore, a governmental body may withhold "only information which identifies students or parents" under the student records exception and must produce the remaining non-exempt information. Tex. Att'y Gen. ORD-332 (1982) at 3; *see also* Tex. Att'y Gen. ORD-634 (1995) at 7 ("[A]n educational agency or institution avoids the requirement of section 552.301(a) and the presumption of openness in section 552.302 only as to information that is in fact protected by FERPA."). An educational institution should redact information within an education record only to the extent "reasonable and necessary to avoid personally identifying a particular student . . . ." Tex. Att'y Gen. ORD-332 at 3 (quoting Tex. Att'y Gen. ORD-206 (1978)).

The Texas Attorney General opinions comport with federal law related to the intersection of FERPA and open records acts. In *United States v. Miami University*, the U.S. Court of Appeals for the Sixth Circuit held that unredacted student disciplinary records constituted education records within the meaning of FERPA and were therefore not subject to disclosure under Ohio's public information act. 294 F.3d

797, 804, 815 (6th Cir. 2002). However, the Court determined that FERPA did not preclude *The Chronicle of Higher Education,* which had requested the disciplinary records, from access to the information entirely. "The Chronicle may still request student disciplinary records that do not contain personally identifiable information. Nothing in the FERPA would prevent . . . Universities from releasing properly redacted records." *Id.* at 824.

Other states with public records acts that contain provisions similar to Texas's student-records exception also require governmental bodies to redact personally identifying information from otherwise public documents, rather than withhold the documents altogether. In *Easton Area School District v. Miller*, 232 A.3d 716, 731 (Pa. 2020), the Supreme Court of Pennsylvania ordered school district officials to disclose video footage of a teacher physically disciplining a student on a school bus after redacting students' images—i.e., personally identifying information. The Supreme Court of Ohio compelled the University of Miami to release student disciplinary records for public inspection where the university redacted personally identifying information from the records in compliance with FERPA. *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959–60 (Ohio 1997). The Court of Appeals of Indiana relied on the Sixth Circuit's *Miami* decision to determine that documents related to the investigation of an Indiana University basketball coach did not constitute exempt education records, as defined by FERPA, once personally identifying student information was redacted. *An Unincorporated Operating Div. of Ind. Newspapers, Inc., v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 907–09, 922 (Ind. Ct.

App. 2003).

Therefore, Tarleton must disclose the public information it is still withholding after redacting any information that personally identifies students or parents.

III. Tarleton Is Not Entitled to Sovereign Immunity Under the Public Information Act.

In response to FIRE's Original Petition for Writ of Mandamus, Tarleton raised sovereign immunity to suit as an affirmative defense and contends that this Court lacks jurisdiction. (Answer at 1.) Tarleton improperly raised immunity to suit in its Answer instead of in a plea to the jurisdiction.[3] Nevertheless, this Court has jurisdiction to decide this matter because the Public Information Act waives sovereign immunity in mandamus actions where a governmental body has failed to disclose public records.

Under the Act, "[a] requestor . . . may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body . . . refuses to supply public information . . . ." Tex. Gov't Code 552.321(a).

[3] In Texas, sovereign immunity implicates two principles: immunity from suit and immunity from liability. Immunity from suit is jurisdictional and is properly raised in a plea to the jurisdiction. *See, e.g.*, *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Immunity from liability is an affirmative defense that must be raised in a responsive pleading or else is waived, and does not deprive the court of jurisdiction. *See, e.g.*, *Jones*, 8 S.W.3d at 638; *Miranda*, 133 S.W.3d at 224. Tarleton should have filed a plea to the jurisdiction if its theory of sovereign immunity sounds in immunity from suit so as to deprive this Court of jurisdiction to hear the case. Instead, it answered FIRE's Original Petition.

The Courts of Appeals have recognized that this provision waives sovereign immunity in mandamus actions where a governmental body has refused to supply public information for inspection. *See City of El Paso v. Abbott*, 444 S.W.3d 315, 322 (Tex. App.—Austin 2014, pet. denied); *see also City of Odessa v. AIM Media Tex., LLC*, No. 11-20-00229-CV, 2021 WL 1918968, at *2 (Tex. App.—Eastland May 13, 2021, no pet.) (mem. op.). "In this context, 'refuse' means 'show or express a positive unwillingness to do or comply with.'" *City of Galveston v. CDM Smith, Inc.*, 470 S.W.3d 558, 572 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *Abbott*, 444 S.W.3d at 324). "Thus, under the plain language of section 552.321's waiver of immunity, a requestor must show that the governmental body is 'unwilling' to supply public information." *Id.* (citation omitted).

Whether a requestor files suit against the governmental body itself, as FIRE did here, or the institution's public information officer is irrelevant, as neither is entitled to immunity under the Act. *City of Houston v. Kallinen*, 516 S.W.3d 617, 625 (Tex. App.—Houston [1st Dist.] 2017, no pet.).[4]

FIRE sought records related to Tarleton's investigation of then-professor Michael Landis and its subsequent administrative takeover of the formerly student-

[4] Petitioners often file mandamus petitions against public universities themselves, rather than against the university's public information officer. *See, e.g.*, *Tex. Tech. Univ. v. Dolcefino Comm'ns, LLC*, 565 S.W.3d 442, 444 (Tex. App.—Amarillo 2018, no pet.); *Univ. of Tex. L. Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Houston Cmty. Coll. v. Hall L. Grp. PLLC*, No. 01-20-00673, 2021 WL 4097106, at * 1 (Tex. App.—Houston [1st Dist.] June 10, 2021, pet. denied) (mem. op.); *Univ. of Tex. Rio Grande Valley v. Hernandez*, No. 13-19-00180-CV, 2021 WL 375429, at * 1 (Tex. App.–Corpus Christi Feb. 4, 2021, no pet.) (mem. op).

run and editorially independent *Texan News Service*. Rank Decl. ¶¶ 3, 9 Exs. A, B, G. Tarleton refused to provide such information to FIRE, relying on FERPA. *See id.* ¶ 10, Ex. H. Furthermore, FIRE identified two records containing information responsive to its requests, obtained elsewhere, that Tarleton has refused to provide. *Id.* ¶¶ 5, 6, Exs. C, D. The existence, responsiveness, and non-exempt nature of these two records call into serious doubt both the adequacy of Tarleton's search for records and the lawfulness of its continued withholding of information. Therefore, FIRE has alleged sufficient factual material to establish the court's jurisdiction under § 552.321(a) of the Public Information Act and Tarleton is not immune from suit for a writ of mandamus.

Conclusion

Tarleton State University violated the Public Information Act by withholding public information. As established above, there are no genuine issues as to any material facts and FIRE is entitled to judgment as a matter of law against Tarleton. FIRE requests the Court grant its Motion for Traditional Summary Judgment and issue a Writ of Mandamus to compel Tarleton to produce the withheld records, after redacting any information that personally identifies a student or parent. FIRE requests the Court award it litigation costs and attorneys' fees under Tex. Gov't Code § 552.323(a).

Dated: August 12, 2022

Respectfully submitted,

By: */s/ JT Morris*

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Local Rule 6.2 Certification

No conference was held with opposing counsel on the merits of this motion because this is a case dispositive motion.

/s/ JT Morris
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CERTIFICATE OF SERVICE

Pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing was served on all counsel listed below by Texas e-file service on August 12, 2022:

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/s/ JT Morris
JT Morris

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