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 OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Foundation for Individual Rights and Expression (FIRE) requested public records from Tarleton State University in October 2021 to learn more about the possibility that Tarleton administrators had censored a student newspaper, not to obtain students' private information. Rather than disclose the records as required by law, Tarleton continues to withhold information about the student newspaper's editorial independence under the guise of the Texas Public Information Act's (the TPIA's) student-records exception.

Tarleton's Motion for Summary Judgment fails for multiple reasons:

First, Tarleton did not fulfill its duty to seek a decision from the Attorney General's Office (OAG) prior to withholding information, did not establish that the university can withhold the information without seeking an Attorney General ruling, and has not demonstrated a compelling reason for continuing to withhold the information.

Second, the TPIA student-records exception does not apply here. Tarleton makes no attempt to explain why an exception designed to prohibit the disclosure of students' personally identifiable information should preclude disclosure of documents lacking that information.

Third, both the TPIA and Texas Attorney General opinions instruct Tarleton to redact information protected by the Family Educational Rights and Privacy Act (FERPA) only to the extent necessary to avoid identifying a student. Thus, Tarleton cannot withhold, in their entireties, records that include public information.

Fourth, FERPA does not excuse Tarleton from complying with its obligations to disclose records under the TPIA. Nor does it strip this Court of jurisdiction. Tarleton's argument that this Court—or any other court—is bound by Tarleton's own FERPA determinations not only misinterprets existing law but would also grant universities unfettered discretion to misuse a narrow TPIA exception and evade judicial review.

For these reasons, this Court should deny Tarleton's Motion for Summary Judgment. The Court should also grant FIRE's Motion for Traditional Summary Judgment, order the university to comply with its duty under the TPIA, and award FIRE its costs and attorney's fees.

STATEMENT OF FACTS

On October 5, 2021, FIRE issued two Public Information Act requests to Tarleton. (Decl. of Lindsie Rank, Student Press Couns. at FIRE (Rank Decl.), Dec. 15, 2022 ¶ 3.) The first request sought documents related to former Tarleton professor

Michael Landis, his time at the university, Tarleton's investigation into his behavior, and his eventual departure, as well as records related to the *Texan News Service*. (*See id.* ¶ 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 of the *Texan News Service* for *The Chronicle of Higher Education*. (*Id.* ¶ 3, Ex. B.)

Despite the TPIA's strong presumption favoring disclosure of public records, Tarleton withheld responsive public records from FIRE that are not subject to the TPIA's exceptions. (*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 sent by 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 and 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 TPIA'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 5th requests, but this time clarifying that FIRE did not consent to withholding any information subject to an exception under the TPIA 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 did not seek an Attorney General opinion and, instead, claimed that any information still withheld is subject to Texas Government Code Section 552.114, which excepts student records from disclosure. (*Id.* ¶ 10, Ex. H.) Tarleton, however, also continued to withhold information not subject to the student records exception, proved by information that FIRE obtained from other sources. (*Id.* ¶¶ 4–6, Exs. C, D.)

PROCEDURAL HISTORY

FIRE filed an Original Petition for a Writ of Mandamus under Texas Government Code Section 552.321(a) to compel Tarleton to release the requested information, or, alternatively, to compel Tarleton to release all requested information redacting any information Tarleton proves falls within the student records exception. (Pet. Writ of Mandamus ¶ 52.) FIRE also seeks its costs of litigation and reasonable attorney's fees. (*Id.* ¶ 53 (citing Tex. Gov't Code § 552.323).)

Tarleton answered, generally denying the allegations and raising sovereign immunity as an affirmative defense. (Answer at 1.) Tarleton also claimed FIRE's request for litigation costs and attorney's 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.)

FIRE filed a Motion for Traditional Summary Judgment on August 12, 2022, arguing that Tarleton had not established, as required by the TPIA, that the withheld information is subject to one of the Act's exceptions. (Pet'r's Mot. Summ. J. 6–9.) FIRE further argued Tarleton had failed to take reasonable steps to segregate and release non-exempt information, as required by state and federal case law and the Texas Attorney General. (*Id.* 9–13.) Tarleton filed its cross Motion for Summary Judgment on October 19, 2022, asserting the records FIRE seeks are student records precluded from disclosure under the TPIA and FERPA. (Resp't's Mot. Summ. J.13–19.)

ARGUMENT

I. Tarleton Did Not Seek an OAG Opinion and Has Not Met Its Burden of Proving a "Compelling Reason" to Withhold Information.

The TPIA requires that a governmental body seeking to withhold information it considers to be within one of the Act's exceptions must first seek a "decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions." Tex. Gov't. Code § 552.301(a). If a governmental body fails to seek a decision from the Attorney General, the information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302. Where a governmental body does not meet its burden to demonstrate a compelling reason for withholding information, "the requesting party is entitled to summary judgment and the information must be disclosed." *Univ. of Tex. Austin v. Gatehouse Media Tex. Holdings, II, Inc.*, --- S.W.3d

---, No. 08-20-00157-CV, 2022 WL 17330377, at *6 (Tex. App.—El Paso Nov. 29, 2022, no pet. h.).

Tarleton attempts to absolve itself of this duty by pointing to Section 552.114(d) of the TPIA, which allows educational institutions to *redact* information subject to FERPA protections from otherwise public information without seeking an Attorney General opinion, and on prior Attorney General opinions that reiterate Section 552.114(d). Resp't's Resp. Opp'n Pet'r's Mot. Summ. J. 8–11.

The El Paso Court of Appeals recently rejected this same argument, holding that Section 552.114(d) does not "relieve a public, educational institution from its duty to seek a decision from the OAG when it wishes to withhold *all* information requested." *Gatehouse Media Tex. Holdings*, 2022 WL 17330377, at *8. The court held that the plain meaning of the term "redact" within the context of the TPIA requires universities to remove or obscure only personally identifiable information, covered by FERPA, before submitting records to the OAG: "This meaning [of 'redact'] differs from a complete refusal to release information at all." *Id.* The court rightly construed subsection (d) "as removing the requirement of seeking an OAG decision in the simple and narrow event where an educational institution must redact certain confidential data . . . that would otherwise be included within information that is required to be disclosed." *Id.*

Tarleton did not redact FERPA-protected personally identifiable information, nor did it seek an Attorney General opinion to withhold, in their entireties, records that contain information required by the TPIA to be disclosed. For that reason, FIRE

has met its burden of proving a violation of the TPIA, and the burden shifts to Tarleton to prove a "compelling reason" for keeping the records withheld. Tex. Gov't Code § 552.302; *Gatehouse Media Tex. Holdings*, 2022 WL 17330377, at *5–7; *Vandiver v. Star-Telegram, Inc.*, 756 S.W.2d 103, 106 (Tex. App.—Austin 1988, no writ) (holding that TPIA requester met its summary judgment burden where agency did not seek an Attorney General opinion before denying the TPIA request).

Tarleton has offered no legitimate reason—compelling or otherwise—for its wholesale withholding of public records. "[A] reason to withhold information will be 'compelling' only when it is of such a pressing nature (e.g., urgent, forceful, or demanding) that it outweighs the interests favoring public access to the information and overcomes section 552.302's presumption that disclosure is required." *Paxton v. City of Dallas*, 509 S.W.3d 247, 259 (Tex. 2017) (holding that the attorney-client privilege provides a compelling reason to withhold information from TPIA disclosure). And as the appeals court held in *Gatehouse Media*, the TPIA's student-records exception applied to the requested information was insufficient, by itself, to meet the compelling-reason standard. 2022 WL 17330377, at *8 ("Aside from relying on the proffered exceptions, [the university] offered no reason—compelling or otherwise—for withholding" the requested information.).

Here, too, Tarleton has merely reiterated that the student-records exception applies to entire records it continues to withhold. But it does not. The Court should follow the sound reasoning of the *Gatehouse Media* decision and refuse Tarleton's attempt to force FIRE to "shoulder[] the burden to establish the University lacked

such compelling reason—a burden of proof which would effectively require [the petitioner] to prove a negative." *Id.* Because Tarleton cannot carry its twin burdens under the TPIA and summary judgment, the Court should find for FIRE as a matter of law and compel disclosure of the requested records.

II. The Student Records Exception Does Not Apply to Records Tarleton Withholds.

The TPIA's student records exception, which prevents only the disclosure of FERPA-protected information, is narrow. Yet Tarleton attempts to wield this narrow exception to prevent the disclosure of records lacking private student information.

A. The student records exception only prohibits disclosure of personally identifiable information.

Tarleton argues that "the term 'education records' is not restricted." (Resp't's Mot. Summ. J. 14.) At the same time, it relies on cases and regulations that *limit* the scope of information prohibited from disclosure under FERPA. For example, Tarleton cites *State ex rel. ESPN v. Ohio State University,* 970 N.E.2d 939 (Ohio 1997). (Resp't's Mot. Summ. J. 14.) There, the Supreme Court of Ohio held that FERPA no longer protected records concerning university coaches and administrators' compliance with athletic association regulations once student-athletes' personally identifiable information was redacted. *State ex rel. ESPN*, 970 N.E. at 947–48. Tarleton also cites 34 C.F.R § 99.3, which defines statutorily-prohibited "disclosure" as "the release, transfer, or other communication of *personally identifiable information contained in education records* . . . ." (Resp't's Mot. Summ. J. 14.)

Thus, Tarleton's arguments effectively concede that the student records exception only prohibits disclosure of personally identifiable information, and

therefore highlight that it is defying the TPIA by withholding public records in their entireties.

B. Tarleton continues to withhold documents that do not contain personally identifiable information.

Tarleton's assertion that all the records it continues to withhold contain personally identifiable information belies reason and is not credible in light of records FIRE obtained from other sources, filed with its summary judgment motion. The university argues that the withheld records contain "information that allows a person to identify a student or information requested by a person who the institution reasonably believes knows the identity of the student." (Resp't's Mot. Summ. J. 15–16 (citing the definition of "personally identifiable information" in 34 C.F.R. § 99.3(f), (g) and guidance issued by the U.S. Department of Education)). Yet Tarleton failed to disclose the September 30, 2021 letter from its Provost discussing the editorial independence of *Texan News Service*. (Rank Decl. ¶ 6, Ex. D.) The letter does not mention or refer to *any* student in *any* way. Tarleton cannot reasonably believe that a member of the university community or FIRE could identify a student to whom the record relates when the record simply does not to relate to any student at all.

Tarleton's withholding of information related to the administrative oversight of a student newspaper is antithetical to the TPIA's express purpose. Indeed, the statute instructs that Tarleton must construe the Act "liberally . . . in favor of granting a request for information." Tex. Gov't Code § 552.001(b); *see also Gatehouse Media Tex. Holdings*, 2022 WL 17330377, at *5 ("[T]he PIA makes virtually all information held by a governmental entity presumably open and subject to

mandatory disclosure unless an express exception applies."). To that end, Tarleton bears a heavy burden of showing the information it wishes to withhold falls within one of the Act's narrow exceptions. *Arlington Indep. Sch. Dist. v. Tex. Att'y Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.). In misconstruing the student records exception to encompass records lacking personally identifiable information, Tarleton fails to meet its burden.

The argument that FERPA prevents the disclosure of already-public information proves equally baffling. Tarleton claims it must withhold Exhibit C—the memorandum written by Tarleton's Associate Vice President of Academic Affairs relating to the Landis investigation—in its entirety because it believes FIRE knows the identity of the student or students to whom it relates. (Resp't's Mot. Summ. J. 16–17.) Yet, FIRE only knows information that has already been made public: *Texan News Service* published the memorandum in a March 2018 story about the Landis investigation. (Rank Decl. ¶ 5, Ex. K.) The student paper obtained the memo from two of the students to whom it relates and identifies one of them in its story. (*Id.* Ex. K.)

Withholding records for the sake of protecting the identity of a student is not necessary where that student has already identified themselves publicly. In *Central Dauphin School District v. Hawkins*, 253 A.3d 820 (Pa. Cmwlth. Ct. 2021), *aff'd,* 88 MAP 2021 (Pa. 2022), a school district argued that it could not release school bus video footage capturing an incident between a parent and student—even if it blurred the faces of the individuals in the video—even though the student's identity had

already been made public via news coverage and court filings. *Id.* at 833–34. The court found the district's argument "circular." *Id.* at 834. "[T]he purpose of the protective provisions of FERPA is to allow access by parents to the student records and to provide a measure of privacy in those records," it wrote. But where "the student involved has already been publicly identified . . . then withholding the video would not serve the purposes of protecting the privacy of the student under FERPA." *Id.* Tarleton's rationale for withholding Exhibit C suffers the same logical fallacy. Tarleton cannot stretch the definition of personally identifiable information beyond its legal—or logical—limits and must disclose the records it withholds after making necessary redactions.

III. Tarleton May Redact Only the Information Reasonable and Necessary to Protect Student Identities.

Tarleton claims that it is withholding records in their entireties because the records cannot be redacted without revealing the identity of the student or students at issue. The university ignores—and makes no effort to distinguish—guidance from Texas Attorney General opinions ordering *limited* redaction. *See* 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."); Tex. Att'y Gen. ORD-332 (1982) at 3 (permitting governmental bodies to withhold "only information which identifies students or parents" under the student records exception); Tex. Att'y Gen. ORD-206 (1978), at 2 (allowing redactions only to the extent "reasonable and necessary to avoid personally identifying a particular student"). FIRE does not seek students' personally

identifiable information and welcomes Tarleton to redact any such information before disclosing records. However, Tarleton's assertion that *every* document it continues to withhold cannot be redacted, and therefore, must be withheld in its entirety is unreasonable. For example, Exhibit D, the Provost's letter discussing the editorial independence of *Texan News Service*, does not contain any personally identifiable information, yet is still being withheld in its entirety. Tarleton has not even told FIRE—or the Court—how many records it continues to withhold, how many pages they contain, their general subject matter, from whom or to whom they were sent, or any other information that would allow an adverse party or this Court to assess its claim that the withheld documents cannot be meaningfully redacted. That lack of information underscores why the Court should reject Tarleton's argument and instead require it to produce redacted records as the law requires.

IV. The TPIA Grants the Court Authority to Enforce Its Provisions.

Finally, Tarleton argues that because the U.S. Department of Education (ED) has charged educational institutions with determining what information is protected by FERPA, this Court "should defer to any reasonable and permissible interpretation made by the University." (Resp't's Mot. Summ. J. 19–20). But the Court is not bound by an institution's unreasonable and impermissible FERPA determinations.

Tarleton suggests that this Court is precluded from examining information for the purpose of determining whether it qualifies as personally identifiable information excepted from disclosure. Yet, neither the Texas case law nor the ED guidance Tarleton relies on support this proposition. In *Franklin Center for Government v. University of Texas System*, No. 03-19-00362-cv, 2020 WL 7640146, at *7 (Tex. App.

—Austin Dec. 22, 2020, pet. granted), the Third Court of Appeals ultimately declined to decide whether the University of Texas was required to disclose the information it withheld under FERPA. Tarleton points to language within the opinion that states "'neither this Court, nor the trial court, nor the Office of the Attorney General of Texas is the proper entity' to interpret FERPA's application to an educational institution's records." (Resp't's Mot. Summ. J. 18 (citing *Franklin Ctr. for Gov't*, 2020 WL 7640146, at *7).) However, the *Franklin* court borrowed this language from another case concerning a father's attempt to argue that he possessed a right under FERPA to examine his daughter's student records. *See B.W.B v. Eanes Independent School District,* No. 03-16-00710-CV, 2018 WL 454783, at *8 (Tex. App.—Austin Jan. 10, 2018, no pet.) (mem. op.). In *B.W.B.*, the Court of Appeals used the language to explain that FERPA did not grant the father a private right of action, and therefore, he could not petition the court for redress of a FERPA violation.

The case at hand is distinguishable, as the TPIA *does* grant petitioners the right to seek mandamus when public information is improperly withheld under FERPA. *See* Tex. Gov't Code § 552.321(a) (authorizing suit for writ of mandamus); § 552.021 (requiring governmental bodies to make public information available to the public). Tarleton attempts to rely on another distinguishable case, *IDEA Public Schools v. Socorro Independent School District*, No. 13-18-00422-CV, 2020 WL 103853 (Tex. App.—Corpus Christi Jan. 9, 2020, pet. denied) (mem. op.), to strip this Court of its authority to enforce the TPIA in any instance where a record-holder withholds information under the student records exception. *See* Resp't's Resp. Opp'n Pet'r's Mot.

Summ. J. 7–8. While the petitioner in *IDEA* sought, almost entirely, personally identifiable information such as names and addresses, 2020 WL 103853 at *1, FIRE does not. FIRE invites Tarleton to redact personally identifiable information and seeks only the disclosure of information not subject to FERPA's protections. *See Gatehouse Media Tex. Holdings*, 2022 WL 17330377, at *12 (distinguishing *B.W.B.* from cases where requestors seek information not explicitly protected by FERPA).

In addition to being factually distinguishable, *IDEA* is an outlier. Indeed, courts have properly determined whether information is properly withheld pursuant to FERPA in public records cases. *See, e.g.*, *State ex rel. ESPN*, 970 N.E.2d at 947–48 (Ohio 1997) (after reviewing sealed records, court determined university should provide access to records after redacting personally identifiable information); *Unincorporated Operating Div. of Ind. Newspapers, Inc., v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 909 (Ind. Ct. App. 2003) (instructing trial court to review requested documents on remand and redact only information subject to FERPA). The Corpus Christi Court of Appeals did not provide a rationale for departing from these holdings, declining to explain *why* FERPA's lack of a cause of action for enforcing individual rights should necessarily preclude courts from reviewing whether a school is improperly withholding public information under the TPIA. *See IDEA,* 2020 WL 103853 at *2–3 (citing *B.W.B.*, No. 03-16-00710-CV, 2018 WL 454783, at *8). As Justice Benavides notes in her *IDEA* dissent, the majority's reading of FERPA is "clearly overbroad" and "erroneously allows" public schools "to withhold public records . . . that [they] may not properly withhold." *Id.* at *3–5 (Benavides, J.,

dissenting). FIRE is not asking this Court to redress a violation of FERPA; it is merely asking this Court to enforce the TPIA. The Court obviously has jurisdiction to interpret and enforce the TPIA, and to determine whether a government agency's claimed exceptions are accurately applied. As the El Paso Court of Appeals held in *Gatehouse Media*—where the University of Texas attempted to rely on FERPA to avoid segregating and disclosing public information: "The issue in this case is not about FERPA, but whether the requested information was excepted from mandatory disclosure by the PIA." 2022 WL 17330377, at *12. Just like the University of Texas in *Gatehouse Media*, Tarleton may not play the FERPA card to get out of judicial review free.

Similarly, guidance from the ED does not preclude this Court from determining whether an educational body improperly withheld information not subject to the student records exception. The guidance merely states that the Office of the Attorney General cannot review unredacted, personally identifiable information contained in student records. *See* Tex. Att'y Gen. Op. OR2015-00433 at 2 ("[S]tate and local educational authorities that receive a request for education records . . . must not submit education records to [the Office of the Attorney General] in unredacted form . . . ."). FIRE is invoking the jurisdiction of this Court to mandate disclosure of segregable material that is not protected by FERPA.

If courts were prohibited from reviewing institutions' FERPA determinations, these institutions would have unfettered discretion to withhold information under irrelevant exceptions. The result would be a direct affront to the TPIA. After all, "[t]he

people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what it not good for them to know." Tex. Gov't Code § 552.001(a).

Finally, FIRE is also entitled to attorney's fees. Tarleton could not possibly have reasonably relied on any of the cases or Attorney General opinions it cites to determine that it must withhold anything other than personally identifiable information from disclosure under the student records exception. See *Gatehouse Media Tex. Holdings*, 2022 WL 17330377, at *12 (granting petitioner attorney's fees where university improperly withhold public information under the student records exception and rejecting the OAG's reliance on the exact sources of law it cites here).

CONCLUSION

For the reasons stated herein, FIRE respectfully requests the Court deny Tarleton State University's Motion for Summary Judgment.

Dated: December 29, 2022

Respectfully submitted,

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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 December 29, 2022:

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